

Mayburry Vs. Brien

Mayburry Vs. Brien

SooperKanoon Citation : sooperkanoon.com/79734

Court : US Supreme Court

Decided On : 1841

Appeal No. : 40 U.S. 21

Appellant : Mayburry

Respondent : Brien

Judgement :

Mayburry v. Brien - 40 U.S. 21 (1841)

U.S. Supreme Court Mayburry v. Brien, 40 U.S. 15 Pet. 21 21 (1841)

Mayburry v. Brien

40 U.S. (15 Pet.) 21

APPEAL FROM THE CIRCUIT

COURT OF MARYLAND

The case was presented to the Court on a printed statement, and a printed argument, by Mayer for the appellant, and was argued by Meredith and Nelson, for the appellees.

A bill was filed in this cause by the appellant, as widow of Willoughby Mayburry, claiming dower from John Brien, purchaser of the estate, in real estate, in Frederick County, designated as "The Catoctin Furnace, and all the lands [described by the names of tracts] annexed or appropriated to it," and also claiming rents and profits from the death of Willoughby Mayburry. The real estate in question was conveyed by Catharine Johnson, Baker Johnson and William Ross, as executors of Baker Johnson, to Willoughby Mayburry and Thomas Mayburry, by deed, dated 5 March 1812. By deed

Page 40 U. S. 22

dated 9 May, 1813, Thomas Mayburry conveyed to Willoughby his undivided moiety in the estate, and by deed of the same date, Willoughby mortgaged to Thomas, all his (Willoughby's) interest in the Catoctin Furnace and the lands attached to it to secure payment of certain obligations from Willoughby to Thomas.

The answer admitted the marriage of the appellant, and the death of Willoughby, and that she was married to him when the deed to Willoughby and Thomas was executed, but it insisted that, simultaneously with the delivery of the deed, a mortgage was executed by Willoughby and Thomas to the grantors in the deed to secure a part of the purchase money, payable by them for the estate. The answer further stated that the mortgage was foreclosed and that, under the decree, the respondent, John Brien, became purchaser of the estate, and the answer insisted that the plaintiff was not entitled to dower in the property.

The mortgage, which the answer referred to, was dated 19 March, 1812, fourteen days after the date of the deed to Willoughby and Thomas. The only testimony taken in the case was William Ross', which was taken subject to all exceptions to its admissibility and effect. His testimony was, in substance, that the estate was sold by him and his coexecutors, to the Mayburrys, for \$32,000; that part was paid in hand, and that, for the residue, a credit was stipulated, to be secured by mortgage; that the deed to the Mayburrys was prepared and executed and acknowledged on 5 March, 1812, by himself and the other executors, and that he then retained it, to be delivered on receiving payment of the cash part of the

purchase money, and receiving from the Mayburrys their mortgage; that the mortgage was executed by them on 19 March, 1812, and that when executed the deed was delivered to them, and the mortgage was received from them, and that, as witness said, "the delivery of the deed and the mortgage were simultaneous acts." The deposition also stated that the deed of Thomas to Willoughby and the mortgage from Willoughby to Thomas were simultaneous acts. The transcript of record of the foreclosure of the mortgage was exhibited in evidence subject to all exceptions.

During the cause, the original defendant, John Brien, died, and his heirs were made parties by bill of revivor. A decree *pro*

Page 40 U. S. 23

forma was passed dismissing the bill. The mortgage of the Mayburrys to the executors of Baker Johnson had a covenant on the part of the Mayburrys that after default in payment of the mortgage debt, the property should remain to the mortgagees, free and clear of all mortgages, judgments, charges or encumbrances whatsoever, and also a covenant of the mortgagees that until default in payment of the mortgage debt, the Mayburrys "are to continue in full possession of the premises aforesaid, enjoying all the rents and profits thereof, to their own particular use and benefit."

Page 40 U. S. 35

Mc LEAN, JUSTICE, delivered the opinion of the Court.

This is a suit in chancery which is brought before this Court by an appeal from the decree of the Circuit Court of Maryland. The complainant is the widow of Willoughby Mayburry, and claims dower from John Brien, who purchased an estate, designated the Catoctin Furnace, and all the lands annexed or appropriated to it. She also claims rents and profits from the death of her husband. This estate was conveyed by Catharine Johnson, Baker Johnson, and William Ross, as executors of Baker Johnson, to Willoughby and Thomas Mayburry, by

deed dated 5 March, 1812, and they executed a mortgage on the same, to secure the principal part of the purchase money. 9 March 1813, Thomas Mayburry conveyed to Willoughby his undivided moiety in the estate, and at the same

Page 40 U. S. 36

time, the grantee executed a mortgage on the estate to secure the payment of the purchase money. The answer admits the marriage of the complainant prior to the execution of the conveyance and mortgage in 1812 and the death of the husband, which occurred subsequently. Brien having died, his heirs were made parties to the suit.

The circuit court dismissed the bill, and the counsel for the defendants ask the affirmance of that decree on two grounds: 1. because the estate vested in Willoughby and Thomas Mayburry was a joint tenancy, and not subject to dower; 2. that the mortgage was executed by Willoughby Mayburry to Thomas, simultaneously with the delivery of the deed from Thomas to Willoughby, and that dower does not attach to a momentary seizin. The counsel for the complainant insists that the deed of the executors of Johnson to the Mayburrys created a tenancy in common, and not a joint tenancy.

It is admitted that the terms of this deed import a joint tenancy, but it is insisted that the nature of the property and the circumstances of the parties show a tenancy in common. That real estate conveyed for partnership purposes constitutes an estate in common and that the conveyance of this furnace and the land incident to it was for manufacturing purposes and comes within this definition. No evidence being given on the subject, the counsel relies upon the above considerations as fixing the character of the estate. In the case of *Lake v. Craddock*, 3 P.Wms. 159, the court held that survivorship did not take place where several individuals had purchased an estate which was necessary to the accomplishment of an enterprise in which they were engaged. That the payment of the money created a trust for the parties advancing it, and that as the undertaking was upon the hazard of profit or loss, it was in the nature of merchandizing, when the *jus accrescendi* is never allowed. And in the case of *Coles' Administratrix v.*

Coles, 15 Johns. 159, it was decided that when real estate is held by partners for the purposes of the partnership, they hold it as tenants in common, and that on a sale of the land, one of the partners receiving the consideration

Page 40 U. S. 37

money, was liable to the action of the other for his moiety. *Thornton v. Dixon*, 3 Bro.C.C. 199; *Balmain v. Shore*, 9 Ves. 500. By a statute of Maryland in 1822, ch. 262, joint tenancy is abolished, and it is contended that this being the settled policy of the state, the courts should give a liberal construction to conveyances prior to that time to guard against the inconvenience and hardship, if not injustice, of that tenancy. Whether this estate was purchased by the Mayburrys for the purpose of manufacturing iron for speculation or for some other object is not shown by the evidence, and it would be dangerous for the court, without evidence, to give a construction to this deed different from its legal import. We must consider the property as conveyed in joint tenancy, and the question arises whether dower may be claimed in such an estate.

Dower is a legal right, and whether it be claimed by suit at law, or in equity, the principle is the same. On a joint tenancy at common law, dower does not attach. Co.Litt. lib. 1, ch. 5, 45.

"It is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death, and the reason of this diversity is for that the joint tenant which surviveth, claimeth the land by the feoffment and by survivorship, which is above the title of dower, and may plead the feoffment made to himself without naming of his companion that died."

In 3 Kent's Com. 37 it is laid down that the husband must have had seizin of the land in severalty at some time during the marriage to entitle the wife to dower. No title to dower attaches on a joint seizin. The mere possibility of the estate's being defeated by survivorship prevents dower. The same principle is in 1 Roll.Abr. 676; Fitz.N.B. 147; Park on Dower 37; 3 Prest.Abs. 367. If the husband, being a joint tenant, convey his interest to another, and thus at once destroy the right of

survivorship, and deprive himself of the property, his wife will not be entitled to dower. Burton on Real Property 53; Co.Litt. 31b. But it is insisted that the rule which denies dower in an estate of joint tenancy applies only in behalf of the survivor, and that

Page 40 U. S. 38

if, in this case, the deed created a joint estate, the plaintiff may claim after the deed of release to her husband.

At the time the deed to the Mayburrys for this property was executed by the executors, a mortgage on the property was given by the Mayburrys to secure the payment of a large part of the purchase money. The deed bears a date prior to that of the mortgage, but the proof is clear that both instruments were delivered, and consequently, took effect, at the same instant of time. The time of delivery may be proved by parol. And it also appears, that the deed to Willoughby Mayburry, and the mortgage from Thomas to him, were delivered at the same time.

And here two questions arise -- 1st, whether dower attaches where there has been only a momentary seizin in the husband; 2d, whether, in Maryland, dower may be claimed in an equity of redemption.

By the common law, dower does not attach to an equity of redemption. The fee is vested in the mortgagee, and the wife is not dowable of an equitable seizin. *Dixon v. Saville*, 1 Bro.C.C. 326; Co.Litt. 3b; [*Stelle v. Carroll*](#), 12 Pet. 205. This rule has been changed in Maryland, by the tenth section of the Act of 1818, ch. 193, which gives dower in an equitable title under certain restrictions, and in many of the states, a different rule obtains by statutory provision or by a judicial modification of the common law. As the right of the complainant depends on conveyances prior to 1818, the above statute can have no effect upon it.

As before stated, the mortgage was delivered by Willoughby Mayburry at the same instant he received the deed from Thomas, and the question is whether dower can be claimed by the wife on such a seizin of the husband. In his Commentaries,

Chancellor Kent says, vol. 4, p. 3839, that

"a transitory seizin, for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of the conusee of a fine, is not sufficient to give the wife dower; the same doctrine applies when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor

Page 40 U. S. 39

or to a third person to secure the purchase money, in whole or in part, dower cannot be claimed as against rights under that mortgage; the husband is not deemed sufficiently or beneficially seized by an instantaneous passage of the fee in and out of him to entitle his wife to dower as against the mortgagee."

Of a seizin for an instant a women shall not be endowed. Co.Litt. ch. 5, 36. This is the well established doctrine on the subject. *Holbrook v. Finney*, 4 Mass. 566; *Clark v. Munroe*, 14 *id.* 352; *Stow v. Tift*, 15 Johns. 485.

The plaintiff insists that the principle which excludes dower in a case of a momentary seizin applies only where the grantor acts in carrying out a naked trust. This position is not sustained by the authorities. In the case of *McCauley v. Grimes*, 2 Gill & Johns. 324, the court said, "Perhaps, there is no general rule, in strictness, that in cases of instantaneous seizin, the widow shall or shall not be entitled to dower." And it said, "where a man has the seizin of an estate beneficially for his own use, the widow shall be endowed." What may be a beneficial seizin in the husband, so as to entitle his widow to dower may be a matter of controversy, and must lead to some uncertainty. But in the language of Chancellor Kent, where a mortgage is given by the grantee, at the same time the conveyance of the land is executed to him, there is no such beneficial seizin in him as to give a right to dower. The encumbrances in this case exceed, it is believed, the value of the estate, and this being the case, the grantees could in no sense be said to be beneficially seized so as to sustain the claim of the complainant.

Upon the whole, the decree of the circuit court is

Affirmed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com