

11/94. Ovrld. in Turner v. Watkins, 31/442.

CRITTENDEN vs. JOHNSON.

Under our Territorial Statute (of 1817) the widow is entitled to dower in lands aliened by her husband in his life-time, in which she did not join, though his estate be insolvent, as held in *Crittenden vs. Woodruff, ante*.

The case of the *State, usc. &c. vs. Lawson et al*, 1 Eng. 269, held not to be good law, because it obliterates the well defined lines between deeds of Trust and Mortgages—breaks down their partition wall.

In deeds of Trust, the trustee has title coupled with power; this title descends to his heirs, although the power annexed dies with him. When he sells, he communicates a good title, discharged from all equity of redemption. The *cestui que trust* is the owner of the equitable estate: the grantor has no estate but a mere possessory right, which after breach is at will.

In Mortgages, on the contrary, the estate remains with the grantor. The grantee has but a security for the payment of his debt; his wife has no dower.

Therefore, under the Statute above referred to, a conveyance on the part of the husband by trust deed in his lifetime, is such an alienation of the land as will entitle the widow to dower therein, notwithstanding the insolvency of his estate.

*Appeal from the Chancery side of the Pulaski Circuit Court.*

Bill for dower filed by Ann J. Crittenden against Benj. Johnson, determined on the chancery side of the Pulaski Circuit Court, in June, 1847, before the Hon. WM. H. SUTTON, Chancellor.

The material facts of record are, that Robert Crittenden, the husband of complainant, died December 18th, 1834, being then a resident of Little Rock. In his lifetime, on the 2d of February, 1833, he conveyed in trust to Trustees, with power of sale, Blocks 27 and 42 in Little Rock, except one lot, to secure debts owing by him to John Morris of Kentucky. The trust deed was duly executed, proved and recorded. The complainant was his wife at the time the deed was made, but did not join therein.

The lands were sold by the Trustees on the 2d Monday of January, 1836, bought by Morris, and by him conveyed to the defendant for the consideration of \$3,500. Crittenden died in

solvent, his property not more than paying his privileged debts. The defendant has been in possession ever since he purchased.

The complainant had possession, or received of defendant rent for the premises, for two years after her husband died, and received from his administrators \$150 worth of personal property.

The answer denied the title of Crittenden, but this part was struck out on exceptions.

The court below decreed against complainant and she appealed.

PIKE & BALDWIN, for appellant. We contend that the exceptions to the answer were properly sustained. It is so expressly decided and held in *Dashiel vs. Collier*, 2 *J. J. Marsh.* 602. *Hitchcock vs. Harrington*, 6 *J. R.* 290. *Bancroft and wife vs. White*, 1 *Caines* 185. *Collins vs. Torry*, 7 *J. R.* 278. *Embree vs. Ellis*, 2 *J. R.* 119.

Was the widow entitled to dower? At common law the widow was entitled to dower in lands mortgaged by her husband, when she did not join in the mortgage. *Titus vs. Neilson*, 5 *J. C. R.* 452. *Hall vs. James*, 6 *id.* 258. *Heth vs. Cocke*, 1 *Rand.* 344.

Where the Statute provides that the widow shall be endowed of all lands of which the husband was seized *during coverture*, his conveyance or mortgage, in which she does not join, will not bar her dower. 4 *Kent*, 50. *Avergaveney's Case*, 6 *Co.* 79. *Stewart vs. Stewart*, 3 *J. J. Marsh.* 48.

The law is otherwise, where she is only dowable of lands of which he *died seized*. 1 *Hilliard*, 78.

By act of Missouri Territory of January 21, 1815, the same law was recognized. It gave the widow dower of all lands of which her husband was seized or possessed *during coverture*, except lands sold on execution, or where they had been mortgaged and sold under decree, in his lifetime. (*Territorial Dig.*, 210, 211, 212.) And it provided that she might convey her interest by joining her husband in a conveyance. (*Id.* 224.) The act of June 25, 1817, made her dower subject to debts. *Id.* 212, 213.

Thus the law stood until November 2d, 1825, when it was again changed, and the old law restored, by a provision that no

sale of lands by the administrator, for payment of debts should in any manner affect the widow's right of dower. (*Id.* 57.) It appears to have been the intention of the Legislature at that time, to make the whole personal estate liable for the debts, but to give dower in the real estate, despite the debts.

As the land could only be subjected to payment of debts, by means of such sale, the provision that the sale shall not affect the widow's right of dower, is by implication a repeal of the law of 1817. As this construction restores the old law, the court will incline to give it, even if it were doubtful—for the law favors three things—life, liberty and dower. It simply sustains the widow's lien, created by marriage, against subsequent incumbrances. *Co. Litt.* 124, b.

In the reign of Henry the II, a wife was endowed by her husband, *at the time of marriage*, of one-third of the lands which he then held. By the Charters of 1217 and 1224, it was established as one-third part of the lands held by him during coverture, unless a smaller portion had been assigned at the church door. 1 *Hilliard*, 58. 1 *Cruise*, 118.

A dowress is in the care of the law, and the favorite of the law. Dower is a legal, an equitable and moral right, favored in a high degree by law, and next to life and liberty held sacred. 1 *Story on Eq.* 583. 1 *Dallas*, 417. 1 *Hilliard*, 59.

No act of the husband, without her consent or misconduct could bar her dower. *Matthews vs. Matthews*, 1 *Ewd.* 565. *Powell vs. Munson & Brinfield Man. Co.*, 3 *Mason*, 347.

The presumption always is that the Legislature did not intend to make any innovation on the common law, further than the case absolutely required. The presumption is that it did *not* intend to make any allowance, *other* or *besides* what is plainly expressed. (*Dwarris*, 695. *Stowell vs. Zonah*, *Plowd.* 365. 1 *P. Wms.* 252. 1 *Saund.* 240.) The same principle carries the construction that the common law was intended to be revived.

The sale by the Trustees had the same effect as a sale under decree. *Jackson vs. Henry*, 10 *J. R.* 195.

WATKINS & CURRAN, for the Appellee.

S. H. HEMPSTEAD on the same side made the following points:

1. That an equity of redemption is similar in many respects to a trust estate, and for which reason a widow is not at the common law entitled to dower in it. 2 *Cruise Dig.* 113, 118. 1 *W. Black R.* 160. 1 *Bro. ch. R.* 326. 3 *P. Wms.* 229. 2 *Atk.* 256. 2 *Bro. C. R.* 630.

2. That even if there could be a right of dower in an equity of redemption, it was cut off in this case by the sale under the deed, which was equivalent to a judicial foreclosure and sale under process. *Ter. Dig. sec. 3*, p. 212. *Jackson vs. Henry*, 10 *J. R.* 195. *Jackson vs. Dominick*, 14 *J. R.* 441. *Reed vs. Morrison*, 12 *Serg. & R.* 18. 4 *Kent*, 42.

3. That the appellant waived her right to dower, if any she had, by receiving rent for the mansion house (*Ter. Dig. sec. 21*, p. 54, *sec. 5*, p. 213,) from the purchaser of the premises. *Smiley vs. Wright*, 2 *Ohio* 509. *Stotwell vs. Sedham*, 3 *Ohio* 12. 4 *Kent* 57.

4. The insolvency of the estate of Crittenden deprived his widow of dower, according to the provisions of the Statute. (*Ter. Dig. sec. 4, 5*, pages 212 and 213.) The right of dower was subject to the debts. (4 *Kent* 42.) And in *Outlaw vs. Yell*, (3 *Eng.* 352,) it was expressly decided that under the law governing this case, a widow could not be endowed, where an estate proved insolvent. Similar decisions have been made on the same act in Missouri. 2 *Mo. Rep.* 32, 163. *Kennerly vs. Mo. Ins. Co.* 11 *Mo. Rep.* 205.

Mr. Justice SCOTT, delivered the opinion of the Court.

The question first presented is, whether or not, (under the Territorial Statutes in force prior to the Revised Statutes of 1839,) when the estate was insolvent the widow could claim dower in real estate aliened by her husband in his life, in the conveyance of which she did not join

There would seem to be no ground of doubt but that the widow's right of dower, both in the personalty and the realty, was by the act of 1815 paramount to any rights of creditors

The language of the act fully authorizes this position and by the case of *Stokes vs. O'Fallon, &c.*, (2 *Missouri R.* 29,) it is sustained.

It will be sufficient for the question before us, however, that this be true as to the realty; of which we are of opinion there can be no doubt at all.

Then, of what realty was the widow dowable under that Statute? The Statute answers "of all such lands and tenements of which her husband was seized and possessed during coverture, either by virtue of a deed, patent, entry, warrant, or order of survey, to which she had not relinquished her right of dower, except such lands and tenements as shall have been sold by virtue of an execution, or shall have been mortgaged and sold by virtue of a decree of a court of justice." Here then her common law right of dower was not only affirmed, but was extended to other real estate besides such of which the husband was technically seized at any time during the coverture. But out of this extended provision in her favor, the two exceptions of land sold by execution or under a decree against the husband, were carved; so that beyond the operation of these exceptions, her dower rights were indestructible unless by her voluntary relinquishment of them in the mode provided by Statute; or else by some subsequent enactment of the Legislature before the time when her lien, which had commenced at the marriage and attached from time to time during the coverture as the husband had acquired realty, had become consummated by the death of her husband.

Thus stood the law when the act of the 25th June, 1817, was passed, which, in several particulars, changed the law of dower. Of these changes, we shall notice only such as touch, in any way, the question we are examining.

One section provided affirmatively that when the intestate left a child or children, the dower of his widow should be one-third part of the estate "after all just demands against the said estate are paid." Another section provided negatively that when there were "not sufficient goods and chattels, rights, credits, effects, lands and tenements form the sale and products of which his funeral charges, allowances of house-hold furniture and provis-

ions for the wife as herein before provided, being always paid first and excepted, and when there is not more than a sufficiency to pay and discharge his just debts, the widow shall not be entitled to any dower in the lands and tenements or real estate of her husband; but said widow shall be entitled to tarry in the mansion house of her deceased husband, and the plantation thereto belonging, of which he died seized and possessed rent free, for the term of two years next ensuing the death of her said husband, and no greater or further allowance of the personal estate than is in this act provided." And it appears, from *Geyer's Digest*, that the provisions of the statute in reference to the personal property here alluded to, was that, "In all cases when there is a widow, she shall be allowed to keep, as her absolute property, her husband's wearing apparel, her cards, wheels, looms, and all other implements of industry, all spun yarn, also the cloth and clothing made up in the family by the said widow and family for their own use, and all such property, goods wares and furniture, as the said widow may think proper, not to exceed the appraised value of one hundred and fifty dollars, and the executor or administrator shall deliver to the widow the articles aforesaid, and take her receipt therefor; and the amount thereof shall be allowed such executor or administrator in his accounts, and such amount shall be deducted from the amount to which such widow may be entitled as dower in the personal estate of the deceased, if any remain to her after the payment of the just debts of the deceased." And another section of the same act, (according to *Geyer's Digest*,) after providing for the sale of real estate for the payment of debts, in which numerous provisions for this purpose are made, concludes with a proviso, "That no sale made by virtue of this section shall in any manner affect the widow's right of dower."

From these several provisions, it is manifest—

1st. That the widow's dower in the estate of the husband which before was paramount to the rights of creditors by this act became subordinate to the rights of the creditors in general.

2d. That when the estate is insolvent, the specified articles,

and other personal property to the amount of \$150, at the appraised value, were in commutation and satisfaction of all dower rights in the personalty.

3d. And the two years tarrying in the mansion house, and the plantation thereunto belonging, of which the husband died seized and possessed, all rent free, was in commutation and satisfaction of all dower rights "in the lands and tenements or real estate of her husband."

4th. But when the estate was not insolvent, although lands might be sold for the payment of debts, her right of dower was not, in any manner, affected by such sale.

Now, what was the object in view by this change of the law? It is insisted that it was to remove the restraints from the alienation of real estate, and by this means enable the husband to realize the full value of real estate that he might sell without being joined by his wife in its conveyance; and that this would do her no injustice, as she would receive an equivalent in an increased amount of dower in that which the husband would receive as the purchase-money for the land sold by him.

This hypothesis seems altogether unsupported by anything in any way connected either intrinsic or extrinsic with the legislative provisions touching the change of rule. In the first place, had the mere removal of restraints upon alienation of the realty been the object, why did the Legislature not march boldly up to that object, and, in express terms, repeal so much of the law as allowed the widow dower in any other than such lands as the husband was seized and possessed of at the time of his death? Again: If this was the object, how could such an object be accomplished by legislating upon the widow's right in the personalty, and upon those rights in the "estate" of the "intestate," and in "lands and tenements or real estate of the husband;" and for the preservation of those rights in lands that were to be sold for the payment of debts, and no legislation at all, either in express terms, or by necessary implication, in reference to lands that were once the husband's, but no longer so after he had aliened them; and which alienation by him was no longer any

part of his estate? And if this was the object, why did the Legislature leave this work half-done by, in effect, removing the restraints only when the estate was insolvent? Such a policy looks much more to the interest of the vendor than the vendee, because the estate will rarely bring its value when encumbered in any way, or on any contingency; and it was doubtless for reasons touching this consideration, in connexion with reasons touching the policy of sustaining judicial sales and of encouraging bidders at such sales that that kind of alienation was, in the act of 1815, distinguished from private alienation by the husband, when not joined by his wife; and, therefore, it is that in general no injustice whatever is done to the alienee by allowing the widow dower in lands in his hands, because, in consequence of the contingent dower incumbrance, a corresponding abatement is usually made in the price paid for such lands.

But, in our opinion, a very different object from that supposed was actually in view, and that was to provide a more ample fund for creditors in general: and this was to be accomplished at the expense of the widow's dower, by its curtailment. Under the act of 1815, she was endowed of one-half of the lands and slaves absolutely, (and the whole of such of the latter as came to the estate through her,) and also the whole of the other personal property after the payment of the debts. By the act of 1817, all these interests of the widow were greatly diminished in amount as well as made subordinate almost entirely to the rights of creditors, and thus a greatly increased fund for the payment of debts in general was made accessible to them; and this was done solely by taking this increased fund from the widow, as she had been provided for by the previous law. Now this fund clearly could not be enhanced in any degree by taking from the widow her right to dower in lands aliened by her husband, and such deprivation of the widow would enure alone to the benefit of the alienee, who, in general, as we have seen, has no equity as against the widow.

It is true that when the alienee holds under conveyance, with warrantee against all evictions, the effect of allowing the wife to



be endowed, would be to give him a claim against the estate for the value of the dower; and precisely to that extent he would have an equal claim, with the other creditors, upon the general fund to which they must all resort. But this is the result, not of the act of 1817, but of the act of 1815. Under the latter act, the alienee being in the predicament to be made a creditor, is provided for by the act of 1817, on the same footing with other creditors. This objection, then, amounts to nothing more than a complaint against the act of the Legislature itself; and that complaint is, either, that a part, and not the whole, of the creditors ought to have been allowed to resort to the enhanced fund, or else, that as the Legislature had taken upon itself to strip the widow of some of her dower rights, it ought not to have stopped short of stripping her of all such rights.

This objection, then, does not prove anything more against the proposition that we maintain, than is proven against it by the fact that the Legislature did, in tender mercy, so far regard the widow's helpless state, as to reserve for her a shelter for two years in the mansion house, and supply her for that term with a bare subsistence: because, by the deprivation of this remnant of a dower, the creditors' fund would have been increased correspondingly, and, by the deprivation of the dower right against the alienee, a corresponding diminution of the fund would be prevented. But, independent of the consideration that the deprivation of the widow of dower as against the alienee could not directly enhance the fund for the creditors, the effect of such a provision would have been, not to place him in a condition of equality with other creditors, but in a condition of superiority, because, under all circumstances, he would have been wholly secure, while the other creditors will have been wholly satisfied or not, as the fund might be greater or less. Then such a provision in favor of the alienee was not within the scope of the general object of the Legislature in providing for creditors in general.

The result is that we remain of the opinion expressed in the case of *Crittenden vs. Woodruff*, decided during the present term,

“that, to cut the widow off from dower as against the alienee of her husband, is neither within the letter or the spirit of the territorial laws.” We have seen that her common law right, as against the alienee, was in express terms affirmed by the act of 1815, and that the act of 1817 does not, in express terms, take away this right, and that if it does so at all, it is because the terms, “estates of persons dying intestate” and “lands and tenements or real estate of her husband,” are to be construed to mean not only such estates, lands and tenements, or real estate, as the testator or intestate was seized and possessed of at the time of his death, but also such as he might have been seized or possessed of at any time during the coverture. To authorize us to come to this conclusion, we must hold that the alienee was an especial favorite of the Legislature, and designed to be placed by the act of 1817 on higher ground than any other creditor. We must also lose sight of the rule that the law does not favor repeals of statutes by implication; and of the rule as to repeals of the common law, that the presumption is that the Legislature did not intend to make any alteration further than the case absolutely required; and finally hold for nought the principle, that is as old as the law itself, that dower is in the care of the law and its favorite: that it is a legal, an equitable, and a moral right, not only highly favored in law but next to life and liberty held sacred. (1 *Story Eq.* 583. 1 *Dallas* 417. 1 *Hilliard* 59.) But we cannot disregard these considerations, and giving them only their due weight, and looking at the spirit and meaning of the act of 1817, and by no means losing sight of its letter, its subject matter, the mischief, the remedy, and the provisions of all the other territorial statutes having any connexion with this act, we have deliberately arrived at the conclusion above announced.

With regard to the other position taken by counsel, that, in this case, there was no alienation, but a mere incumbrance by mortgage, under the doctrine of the case of *The State, use, &c. vs. Lawson et al.*, (1 *Eng.* 269.) that cannot be maintained. We do not regard the doctrine of the case cited as good law. It ob-

literates the well-defined lines between deeds in trust and mortgages—breaks down their partition wall.

In deeds in trust, the trustee has title coupled with power; this title descends to his heirs, although the power annexed dies with him; when he sells, he communicates a good title, discharged from all equity of redemption. The *cestui que trust* is the owner of the equitable estate: the grantor has no estate but a mere possessory right, which after breach is at will.

In mortgages, on the contrary, the estate remains with the grantor. The grantee has but a security for the payment of his debt; his wife has no dower.

The decree must be reversed, and the cause remanded.

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