No. 8654

Supreme Court of Illinois

Samuel W.Lessly et al

vs.

Mary Lessly

71641 7

~~Walker~~ This was a bill in chancery filed by defendant in error in the Randolph circuit court, against plaintiff in error. The bill alleges, that defendant in error is the widow of Mathew Lesley deceased; that he died in April 1864, having no children or a descendant or descendants of children, or father or mother surviving him, but left a brother and the descendants of his deceased sisters, surviving him. That he left both real and personal property, which the bill describes. That he made a last will, by which he made sundry bequests and legacies, among others, he gave ~~his lands~~ to defendant in error, ~~his lands~~ to hold during her life, with a remainder over in fee to Mathew Lesley. That she renounced the provisions made in her favor, and elected to take her dower and legal share of the estate of her husband. That subsequently, she under her hand and seal elected in lieu of dower and the provisions of the will in her favor one half of the real estate, and dower in the other half, and the whole of his personal property after payment of debts. She prays for partition, and assignment of her dower, and the establishment of her title to the property.

The answer admits that defendant in

error is the widow of Matthew Sepby deceased. That he left no children or the descendants of children. Admits the will is correctly stated; that defendant in error relinquished the provisions of the will as stated in the bill, but denies that she is entitled to one half of the real estate, or to dower in the other half of the lands, or is entitled to the personal property of deceased, inasmuch as the whole of it was bequeathed by the will and is charged with the payment of such bequests. On the hearing the Circuit Court granted the prayer of the bill and decreed the relief sought. The cause is brought to this Court to reverse that decree.

In the case of Lyman vs Pastelthwait 13 Ill. 727, it was held that a widow of an intestate husband, under the forty sixth section of our statute of Wills inherits as heir to an intestate husband, one half of his real, and the whole of the personal property of which he died seized, after the payment of the debts of the estate and also to be endowed in the remainder of his real estate. It was also held that this section was not repealed by the 15th section of the dower act of 1845, and that these sections were not repugnant. Again in the case Sturgis vs Irving 18 Ill 176, the same rule was recognized and a construction was given to the fifteenth section of the

dower act. And in this latter case it was held that the widow of a testator leaving no children or decendants of children, may, if she elect have in lieu of her dower, in the estate of which her husband died seized one half of all of his real estate. That this section in its provisions applied to testate estates. Whilst the forty sixth applies to intestate estates.

(39)

Haley

By the latter of these cases, the rule is announced, that the widow of a testator leaving no children or decendants of children may elect to renounce the provisions of the will made in her favor and elect to take one half of the real estate of which he died seized. And as heir to her husband she thereby becomes invested with the title in fee to that portion. Again in the case of Pitney vs Brown (decided at the June term 1866) the same rule was announced, and the widow permitted to elect to take one half of the land in fee, of which her husband died seized of an estate of inheritance either at law or in equity. Under these authorities, the widow in this case was entitled to the dower for one half of the real estate named in her bill and which was decreed to her by the Court below.

This right of election proceeds upon the grounds, that the wife has an interest in the estate of the husband, of which he cannot deprive her by will or otherwise, without her consent. And when he attempts to do so, she has the right to elect whether she will take the provision made for her by the will or renounce it and hold such rights in his estate as the law gives to her. She cannot claim a portion of the provisions of the will and reject others, and claim under the statute. She must claim alone under the will or altogether independent of its provisions. When however she ~~it~~ has renounced ~~under~~ the provisions of the will she is restored to her rights under the statute. And such cases are provided for by the fifteenth section of the dower act. It declares that if a husband dies leaving a widow but no children or descendents of children the widow may if she elect have in lieu of her dower in the estate of which her husband died seized, whether it shall, or shall not have been assigned her, one half of the real estate in fee simple, in her sole right which shall remain after the payment of the debts and claims against his estate. And she may make an election within two months

after being notified of the payment of such debts.

By this provision, the widow by renouncing the provisions of the will waives her dower in her husbands real estate, but gets in lieu of it, one half of the lands after payment of the debts.

This section in the case of Sturgis vs Corning 18 Ill. 176, was held to apply alone to testate estates. And the case of Lyons vs Pastelthwait 13 Ill. 724, holds that the forty sixth section of the statute of wills applies to intestate estates, and was the most liberal of the two in its provisions. It is not more liberal and beneficial to the widow, unless it is because it gives dower in the remaining half of the real estate ~~and all of~~ or the personal property which remains after the payment of the debts, whilst the fifteenth section of the dower act only gives one half of the real estate, as it ~~which~~ ~~it~~ declares that if the widow elects to take one half of the lands of which her husband died seized, that it shall be in lieu of dower. This language is comprehensive enough to to embrace dower in all of the lands. ~~and personalty~~. It will not reasonably bear any other construction.

The sixth section of the act of February

11th 1847, (Sess Laws. p 169) defines the word dower as employed in the forty sixth section of the Chapter entitled Wills, to embrace a saving to the widow of one third of the personal estate of intestate estates forever, after the payment of debts. If this is taken as the definition of the word, then all of the personal property remaining after the payment of debts, cannot be claimed where there has been such an election by the widow. The law is taken in lieu of that, as well as dower, in the other half of the real estate. A different rule prevails ~~where~~ under these two sections. The first section of the act of 1847, however, gives to the widow in all cases the specific articles of personal property enumerated in the act. It makes no distinction between testate or intestate estates. The right is the same in all cases, if the widow resides in ~~this state~~ and administration is had in this state. We therefore have no hesitation in believing that deceased in error, is entitled to ~~A~~ one half of the real estate of her deceased husband, and the specific articles ~~spe~~ enumerated in the statute. But the court below erred in decreasing that she was entitled to dower in the remaining half of the real estate, and the personal ~~pro~~ estate after payment of

all

[9454-6]

203

Ashts. The decree must therefore be reversed and the case remanded.

Decree reversed.

28654-B

Saml. W Lessley

8 vs 14

Mary Lessley

June 5. ~~1866~~
1867

Opinion by
Walker Ch. J.

Q/E

8654

State of Illinois } In the Circuit Court of Ran-
Randolph County } dolph County, April Term A. D. 1866.

Be it remembered that at the April Term A. D. 1866 of the Circuit Court of Randolph County, State of Illinois, before Silas L. Bryan, Judge of said Circuit Court, then and there presiding in open Court the following cause was tried & decided in said Court, sitting in Chancery, on Bill, answer, replication & proofs, viz:

Copy of Bill in Chancery.

State of Illinois } April term A D 1865
Randolph County } of Randolph Circuit Court

To the Hon Judge of the Randolph Circuit Court in Chancery sitting

Humbly Complaining Shews to your Honor your Oratrix, Mary Lefsly, a resident of said County. That in march A D 1826 your Oratrix was lawfully married to Mathew Lefsly in said County and they continued to reside in said County as husband and wife until the Eleventh day of April A D 1864, when the said Mathew Lefsly died leaving your oratrix his widow and no children or decendants or father or Mother Surviving him

Your oratrix further Shews to your Honor: That the said Mathew Lefsly had in his life time One brother Samuel W Lefsly who still Survives him and Ann Little his Sister who died Some fifteen years before leaving the

following Children to wit: Elizabeth Murry wife of George Murray deceased, Margaret Lee, John, Samuel, and James K. P. Little and Nancy wife of Isaac M James Said Margaret died six years ago leaving two Children to wit, Elizabeth King and Nettie Lee
Said John died nearly two years ago leaving the following Children to wit, James, John & Ann Little, The Said Ann Little also left the following Grand Children by her daughter Jane who died before Said Ann Little to wit: Ann Walker and Jeziah Walker.
Your Oratrix further shews to your Honor, That the said Mathew Lessly died Seized in fee Simple of the following lands lying in said County to wit, fifty acres of land bounded as follows to wit beginning at a post twenty Chains east of the quarter section Corner between sections nineteen and twenty township four South of range Six west from which post a pin oak twenty inches in diameter bears South eighty eight degrees west distant fifty links, and another pin Oak twenty inches in diameter bears north 56° East distant thirteen links running South twelve Chains and fifty links to a post from which a post Oak twenty inches in diameter bears South 60° West eight links, and pin Oak twelve inches in diameter bears north forty three and one half degrees east Seventy Six links distant then east forty Chains to a post from which a Cotton-wood Six inches in diameter bears north twenty five degrees west One hundred and twenty links

then north twelve chains and fifty links to a post in prairie, then west forty chains to the beginning. Also the South half of the North east quarter of section twenty in Township four South of range Six West and the South west quarter of the North West quarter of section twenty One in Same Township and range as will be shown by the United States patents and a deed to said Mathew Lesly which deed is duly recorded in the recorders office of said County in book O. pages 515 & 516 and which will be produced on the hearing of this Cause

Your Oratrix further shows to your Honor That the said Mathew Lesly left at the time of his death a last Will and testament which has been duly proved in the County Court of said County and a Copy whereof is marked "Exhibit A" and made a part of this bill. Your Oratrix further shows to your Honor That on the 12th day of September AD 1864, Your Oratrix Caused to be filed in the office of the County Court of said County a writing under her hand and seal of that date renouncing the provisions made for her benefit in said last Will and testament, and elected in lieu thereof to take her dower or legal share of the Estate of her husband

And afterwards to wit on the 13th day of September AD 1864 your Oratrix by another writing under her hand and seal of that date thereby in pursuance of the ~~date~~ laws of the State of Illinois did elect to

(8654-9)

take in lieu of dower & the provisions in said Will for her benefit one half of the real estate of which said Mathew Lefsly died seized & Dower in the other half and the whole of his personal property or estate which might be left after paying all the just debts and claims against the estate of her said deceased husband which paper writing was on the same day filed in the office of the Clerk of said County Court. Your Oratrix further states that the personal property of said deceased is more than sufficient to pay all the claims against and debts due by said estate together with the costs of administration thereon & that the said Samuel W Lefsly is executor under said last will and testament Your Oratrix therefore claims that she is entitled to the undivided half of all of said real estate of which her said husband died seized as a freehold and dower in the other half thereof, and that the said Samuel W Lefsly is entitled to 1/4 of said land subject to said dower; each of the said children of the said Ann Little is entitled to the undivided one Seventh of one half of said land subject to said dower and that the said descendants of deceased children of said Ann Little are entitled to the portion of the said deceased parent. In consideration of the premises Your Oratrix prays that the said Samuel W Lefsly, Elizabeth Murray (of Tamaroa) Samuel Little, James R. P. Little a minor Isaac M James & Nancy his wife Elizabeth King a minor (of Nashville) Nettie Lee

a minor (of Tamarora) James Little, a minor, John Little, a minor & Ann Little, a minor Ann Walker & Jeziah Walker a minor may be made defts to this bill & Summoned to answer the Same but on answer or oath is expressly waived, and that a guardian ad litem may be appointed for said Minors & that the respective rights of the parties hereto may be established & that Commissioners may be appointed to set of said Dower & the undivided half of said land to your Oratrix & that such other and further relief may be granted in the premises as the Case requires

And your Oratrix as in duty bound will ever pray

Attest C S Noelling
W H Underwood
Sol for Compt

Mary her X mark Lepsly

State of Illinois }
Randolph County }

Mary Lepsly Complainant being duly sworn says that said James K P. Little & Isaac M. James have gone out of the State of Illinois so that process cannot be served upon them and that the Statements and Charges in the foregoing bill are true according to the best of her knowledge information & belief

Mary her X mark Lepsly

Subscribed & Sworn to before me

Wm S Thomas, Clerk of St Clair Circuit Court this 21st Sept 1864 at my office in Belleville Ills, in witness whereof I have hereto affix my name and the seal of said Court

Seal

Wm S Thomas Clk

Filed September 23d 1864
S. St Vrain Clk

The following is a Copy of the Amended Bill

Mary Lesly
vs
Samuel W Lesly
et al

Bill in Chancery

And the said Complainant for Amendment to said bill hereby make the devizees of said bill parties deft to this bill to wit:
William W Lesly, Matthew Lesly Mary Amanda James Mary Elizabeth Lesly, Matthew Lesly James Lesly, Nancy James, Jane Burnett

Mary Lesly Complainant

Filed April 25th 1865
S. St Vrain Clerk

The following is a Copy of Answer & Exceptions thereto

State of Illinois
Randolph County Circuit Court April Term 1865

Mary Lessly Complainant
vs
Samuel W Lessly &
other Defendants
} Bill in Chancery

The Separate answer of Samuel W Lessly, for answer says that true it is Sd Complainant is the Widow of Said Mathew Lessly decd and respondent admits Sd deceased at his death left no Children or decendants of a Child or Children, or father or Mother, He admits that the Exhibit marked A in Complainants, bill is a true Copy of the last Will and testament of Sd Mathew Lessly decd Respondent admits also, that Sd Complainant as Stated in said bill made the relenquishment of all the provisions & bequests made to her in said Will, Respondent admits that lands are properly described in said bill, Respondent admits that the collateral heirs are properly described in the bill and Amendment.

But this respondent denies that Sd Plf is by law entitled to one half the real estate described, because he charges that; the Statute in such Case made and provided has reference to intestate estate only.

And this respondent further denies even if she the Sd Complt were entitled by law to one half of said Land, that she is so entitled in lieu of all dower, and he denies that she is entitled by law to dower in the residue or other half of said Land

And Respondent denies further, that Sd Complt is by law entitled to the personal estate of said deceased. For that the whole of said personal estate is bequeathed by said will and is thereby a charge upon said estate for payment, and because or your Respondent believes and charges that in case the said Complainant is entitled by law to one half the land in such case, she is entitled to nothing more, except the specific articles of property or money in Sec 1 Laws 1847 page 168

Respondent further charges that the Sd Complainant by her said election is cut of from all participation or right to any part of the personal estate

And having fully answered prays to be dismissed with his reasonable costs &c

Samuel W Seely

Resp

By H K S O'Melveny
Johnson & Hartzell
his Solts

Lesly
vs
Lesly et al } In Chancery

And the said Complainant Comes & excepts to so much of said answer as denies her legal & equitable rights under the admitted facts stated in said answer

Underwood & Northing
Solr for Compt

Filed April 25th 1865
S. S. Trovin Clk

The following is a Copy of Guardian Ad Litem Report

State of Illinois } In Randolph Circuit Court
Randolph County } of the April Term AD 1865

Mary Lessly
vs
Samuel N Lessly et al } In Chancery for Partition

The undersigned John Michan Guardian Ad Litem for the Minor Defendants in the above entitled Cause Would Respectfully Report that he has Examined the papers in said Cause, and finds that Service has been had on a part of said Minors and that the appearance of the remaining Minor defendants has been entered by Atty

And he would here distinctly deny the justice of

the Claim of the Said Complainant and believes that the prayer of Said Bill in Chancery ought in law and equity - to be refused
All of which is respectfully Submitted

John Meehan
Guardian Ad Litem

Filed April 25 1865
S. S. Vance Clerk

The following is a copy of last Will &c

I Mathew Lessly of the County of Randolph and State of Illinois, do make and publish this my last Will and Testament in Manner and form following, Viz:

1st It is my ~~last~~ will that my funeral expenses and all my just debts be fully paid

2d I give and devise to my beloved wife Mary all my Land to be for her use and benefit during her natural life

3d I give and bequeath to William W Lessly Three hundred Dollars at his Majority provided he live with my wife until that time, say twenty One years of age

4th I give and bequeath to Mathew Lessly at my wife death, all my Real Estate, and in Case he dies without heirs of his own Body, then

5th I give and bequeath to James Lessly and William W Lessly, the said Real Estate only they shall pay

to the heirs of Samuel W Lessly and Anna Little who may be alive, fifty Dollars a piece

6th I give and bequeath of my personal property to Isaac James daughter, Mary Amanda, and to James Lively's daughter and Son Mary Elizabeth and Matthew L I fifty Dollars a piece when they come of age

7th I give and bequeath to my beloved Wife Mary in addition to Articles 2, four hundred Dollars to be at her disposal wholly.

8th I give and bequeath to James Lessly William W Lessly, Nancy James, and Jane Burnett or their respective heirs out of the balance of my personal Estate equal Shares.

And, lastly, I Constitute and appoint Samuel W Lessly, my brother, Executor of this my last Will and testament, revoking and Annulling all former Wills by me made and ratifying this and no other to be my last Will and Testament.— In testimony whereof I have hereunto set my hand and Seal this Nineteenth day of June in the year of our Lord Eighteen hundred and Sixty two

his
Mathew x Lessly
mark

Signed, published and declared by the said Mathew Lessly as and for his last Will and testament in the presence of us who at his request have signed as Witnesses to the Same

R. W. Marshall
Joseph Lively

State of Illinois }
Randolph County } ss.

I Joseph Schnepler Clerk of the County Court do hereby Certify that the foregoing and within is a true and Correct Copy of the last Will and Testament of Mathew Lepby deceased as appears on Record and file in my Office

Seal

In Witness whereof I have hereunto set my hand and Seal of Office at Chester this 24th day of August AD 1864

5 cents Revenue Stamp

Joseph Schnepler
Clk

Filed September 23d 1864
S. St Vrain Clk

The following is a Copy of the order of Court

Randolph County Circuit Court February Special Term A D 1865

Mary Lessly
vs
Samuel W Lessly et al } Petition for partition &c

The Cause is Continued to the next regular term of this Court &c

The following is a Copy of the order of Court

Randolph County Circuit Court April term A D 1865
April 25th 1865

Mary Lessly
vs } Bill for Partition &c
Samuel W Lessly, Elizabeth Mary
Samuel Little, Isaac M James
Nancy James, Ann Walker
James R Little, Elizabeth King
Nettie Lee James Little.
John Little Ann Little
Josiah Walker William W Lessly
Mathew Lessly, Mary Amanda James
Mary Elizabeth Lively Mathew Lively
James Lessly, Jane Burnett

And now on the first Tuesday of the term

Comes the said Complainant and leave is given her to amend her bill and said Amendment is thereupon filed making all the devisees of said Matthew Lessly deceased parties defendants & O'Melveny Solicitor for Defts enters the appearance of Matthew Lessly & James Lessly & Underwood Sol for Complainant pro forma enters the appearance of the Defts not Served and John Mickan Esq is appointed guardian ad litem for the Minor defendants and a rule is entered upon all the defendants to answer by 2 O'clock P.M. and on Thursday the Minor defendants by their guardian files their answer and also the said Samuel W Lessly files answer and said Complainant excepts to so much of said answer of Samuel W Lessly as claims that said Complainant is entitled to less interests in the Estate of her deceased husband Matthew Lessly than alleged in said bill which exception is sustained by the Court. And the Court being satisfied by evidence of the truth of the said bill and that Matthew Lessly died in April AD 1864 Seized in fee simple of the Lands described in said bill to wit fifty acres of land bounded as follows to wit beginning at a post twenty chains east of the quarter section Corner between section nineteen and twenty township four South of Range six west from which post a pine oak twenty inches in diameter bears South eighty-eight degrees West distant fifty links, and other pine oak twenty

inches in diameter bears north 56° East distant thirteen links running South twelve Chains and fifty links to a post from which a post oak twenty inches in diameter bears South 60° West eight links and a pin oak twelve inches in diameter bears north forty three and one half degrees east Seventy Six links distant then east forty Chains to a post from which a Cotton Wood six inches in diameter bears north twenty five degrees West One hundred and twenty links thence North twelve Chains and fifty links to a post in Prairie thence West forty Chains to the beginning. Also the South half of the North East quarter of section twenty in township four South of Range Six West and the South West quarter of the North West quarter of section twenty One in Same township and range and of personal property & that said deceased left a last will & testament & that Samuel N Lesly is Executor under said will that said Complainant is the Widow of said Matthew Lesly deceased and that he left no descendent or Child and that said Widow has renounced all Claim as devizee under said will as alleged in said bill and elected to treat the Estate of her said deceased husband as to her as intestate estate. It is therefore ordered & decreed that the said Samuel N Lesly as executor as aforesaid set off to said Complainant her Separate property as Widow or pay to her its equivalent in money and

[845H-13]

upon the final settlement of said estate pay over to said Complainant the surplus of the personal estate of said deceased as her inheritance. It is further determined ordered and decreed by the Court that said Complainant be entitled to the one undivided half of said land and dower in the other half and that the residue of said lands be disposed of according to the provisions of the said last will and testament of said deceased, It is further ordered that William Houston, James J Borden & James McMasters be appointed Commissioners to assign said dower and set off & partition to said Complainant her half of said lands by metes and bounds & this Cause is continued for report &c To all which Judgment of the Court in the rendition of said decree, the Defts by their Solicitors then and there excepted &c

Randolph County Circuit Court September term A.D. 1865

September 19th 1865

Mary Lesly
vs
Samuel W Lesly et al } Petition for Partition &c

And now on this day comes said Complainant by Wm H. Underwood and on his motion this Cause is continued generally &c

Randolph County Circuit Court April Term A D 1866

Mary Lessly
vs
Samuel W Lessly et al } Petition for partition &c

And now at this day to wit Friday April 27th 1866 Comes said Complainant by W. H. Underwood her Solicitor and on his motion this Cause is Continued &c

State of Illinois
Randolph County } ss

I Lavinia St Vrain Clerk of the Circuit Court within and for the County and State aforesaid do hereby certify the the annexed and foregoing pages contain a full true and correct Copy of the whole record in the Case wherein Mary Lessly is Complainant and Samuel W Lessly et al are defendants, beginning with the Orregonal Bill Amended Bill, Answer & Exceptions, Guardian ad litem Answer Copy of Will and all orders and decrees of said Cause by said Circuit Court

In testimony whereof I have hereunto subscribed my hand and affixed the seal of said Circuit Court at Chester Ills this 10th day of October in the year one thousand eight hundred and sixty six

Lavinia St Vrain Clerk

[G 1541-12]

And now comes the 1st plff in error by H K S O'Melveny their atty. & Op the foregoing record say there are manifest errors, & for such errors, assign for error

1st The court erred in decreeing dower to Mary Lively, in the half of said land not set a part to her,

2 The Court erred in decreeing that the separate property allowed to widows under the statute be set a part to Mary Lively.

3. The Court erred, in rendering said decree in manner and form as rendered in not definitively settling whether the specific legacies, were or were not to be paid by the Exr.

H K S O'Melveny

Joinder in error

Wm H Underwood Sol for Defts.

Elisabeth Ring, Mattie Lee, James Little, John Little, Isaac Little, Isaiah Walker, William W. Lively, Mathew Lively, Mary A. James, Mary E. Lively, Mathew Lively, James Lively and Jane Bennett, Plaintiff in Error

vs.

Mary Lively, Defendant in Error.

Error to Randolph

Clerk will please issue Sci fa to Randolph Co. Court

H. K. S. O'Melveny

Clerk pro tem

Filed Oct. 17. 1866

M. Johnston Clk

Paid by H. M. Pace

$5.00

Samuel W. Lively, Elisabeth Lively, Mary James Little, Isaac M. James, Nancy James, Jane Walker Lively, Kate Little

(864-M-13)

H. K. S. O'MELVENY. LOUIS HOUCK.

O'MELVENY & HOUCK,

Attorneys at Law.

Cairo, Ill., Oct. 15, 1866

Maj. N. Johnson.

Mt. Vernon.

Dear Sir:

Please docket & issue sc. fa. to join Error to Randolph County, enclosing same in letter to Johnson & Hartgill, attys., with request from me that they see to it, that it is served at once, and without delay.

Respectfully
H. K. S. O'Melveny.

[8654-18]

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Randolph Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Randolph *county, before the Judge thereof between*

Mary Lessly *plaintiff and*

Samuel M. Lessly *cross petitioner*

defendant it is said manifest error hath intervened to the injury of the aforesaid Defendants

as we are informed by Their *complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon,** *in the County of Jefferson, on the* first Tuesday in the Month of November *next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Seventeenth *day of* October *in the year of our Lord one thousand eight hundred and* Sixty Six.

Noah G. Leaston
Clerk of the Supreme Court.

[8654-19]

8 SUPREME COURT. 25

First Grand Division.

Samuel N. Lesley
and others

Plaintiffs in Error,

VS.

Mary Lesley

Defendant in Error.

WRIT OF ERROR.

Issued & FILED. Oct
17 - 1866

N. Johnston Cl

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Randolph *County.*

Because, *In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of* Randolph *county, before the Judge thereof between*

Mary Lessly *plaintiff and*

Samuel N. Lessly and others

defendants it is said that manifest error hath intervened to the injury of said Defendants *as we are informed by* this *complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at* Mount Vernon, *before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said* Mary Lessly

that She *be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at* **Mount Vernon,** *in said State, on the first Tuesday* ~~after the second Monday~~ *in November next, to hear the records and proceedings aforesaid, and the errors assigned, if* She *shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said* Mary Lessly *notice together with this writ.*

WITNESS, *the Hon.* R. M. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Seventeenth *day of* October *in the year of our Lord one thousand eight hundred and* Sixty-Six.

Noah Johnston
Clerk of the Supreme Court.

[865W-30]

29 8

SUPREME COURT.

First Grand Division.

Samuel M. Sisely
and others

Plaintiffs in Error,

VS.

Mary Sisely

Defendant in Error.

SCIRE FACIAS.

FILED - Nov 5 1866.

N. Johnston Clk

I have served the within writ by reading the same to the within named Mary Sisely, on the 2d day of November A.D. 1866.

John S. McPike
Sheriff P. Co. Ill
By John R. Shannon
Deputy Sheriff

Sheriff's Fees. Service .75
Mileage 40 miles 8.00
Return .10
$2.85

Illinois Supreme Court.---First Grand Division.

LESSLY et. al.
vs.
LESSLY.
} Error to Randolph.

DEFENDANT'S BRIEF.

The complainant below, as widow of her deceased husband, who left no descendent, was unquestionably entitled to the usual articles of personal property, or their value. 2 Purp. Stat. 1201, Sec. 50. Detzler vs. Schuester, 37 Ill. R. 304. Also to one-half of the real estate in fee simple. Sharges vs. Ewing, 18 Ill. R. 180, &c.

2. Was she entitled to dower in the other half, and the surplus of the personal property, after paying the debts of the estate?

a. Where the husband dies *intestate*, leaving a widow and no descendent, it is very certain that she is so entitled. Tyson vs. Postlethwaite, 13 Ill. R. 728. Tyler vs. Tyler, 19 Id. 155, per Breese, Justice. Cruse, Admr., vs. Cruse, 21 Id. 49. Cross vs. Carey, 25 Id., 564.

b. By the statute of 1829, in the Revised Laws of 1833, page 624, under the proper title of "*Wills*," provision is made for widows renouncing under wills, and thereby taking as in cases of intestate estates, and abating legacies, if necessary, to that end. Mr. Gilman, in his revision of the statutes of 1845, under the title, "Dower," incorporated some of the sections and parts of sections of the prior law, and added the 15th section, which so puzzled this court in the case in 13 Ill. R.

That section was manifestly introduced to benefit, and not to injure, the widow. 13 Ill. R. 732. It does not provide that she shall have no more than is there indicated. Id. 733-6-7-8. Under our state constitution, which declares that members of the executive, legislative, and judicial departments of the government, shall receive certain sums, and "no more," it is settled by common consent that they may incidentally have additional compensation.

If there is an apparent conflict between the chapter entitled "Dower" and the chapter entitled "Wills," the latter must govern. 2 Purp. Stat., 1024, Sec. 23. 13 Ill. R., 739.

c. Even the chapter entitled "Dower" provides that by renouncing under the will she becomes entitled to "her dower in the lands, *or share* in the personal estate, of her husband. 1 Purp. Stat., 497, Sec. 11. Sec. 15 also gives her an undivided half of the real estate in fee simple.

d. The estate being *as to to her* intestate, she is entitled to dower in the other half of the lands, and the surplus of the personal estate after paying debts under Sec. 46 of the statute of Wills.

WM. H. UNDERWOOD, Sol. for Deft. in Error.

[24454-21]

8

Lepley et. al.
vs
Lepley
Defendants Brief

Filed June 6th 1867
Noah Johnston Clk

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

November Term, 1866.

SAMUEL W. LESSLY, *et. al.*, *Plaintiff in Error*, vs. MARY LESSLY, *Plaintiff in Error*. } ERROR TO RANDOLPH.

ABSTRACT.

PAGE 1 Bill in chancery for Relief filed for April Term., A. D., 1865, Mary Lessly complainant in the bill alleged, that she is the wife of Mathew Lessly, deceased, who died in April, 1864, leaving no children, descendants of children, father or mother surviving,
2 but left a brother and sister, children and other heirs; that he left both personal and
3 real estate, described in page two and three; that said Mathew Lessly left a last Will
10–11 and Testament, which has been proved, by which he makes sundry special bequests and legacies, among others the lands to his wife for life, with remainder *in fee* to Mathew
3 Lessly; that she, the complainant, on the 12th of September, 1864, renounced the provision made for her in said Will, and elected to take her dower or legal share of the estate of her husbands, also on the 13th of September 1864, again under her hand and
4 seal she electeted in *lieu* of dower and the provisions in said Will for her benefit, one half the real estate and *dower* in the other half, and the whole of his personal property, after paying all the just debts and claims against the estate of her said deceased husband; that the personal estate is more than sufficient to pay the debts of the deceased and administration expenses; and prays that she be invested with the title to half of the real estate and dower in the other half, and that the same be set apart to her, etc.

6 Dovisee's made party to the Will.

7 Answer to Bill. Admits that the said Mary is the widow of said Mathew Lessly, and that said Mathew left no child or descendants of children at his death; admits the will as set out in complainants bill to be correct; admits that said Mary relinquished provisions in the will, as set out in her bill of complainant, and that collateral heirs are correctly described therein, but denies that she is entitled to one half of the real estate, denies that if even she is entitled to one half of the land, she is entitled to
8 dower in the other half, and respondent denies further that complainant is entitled to the personal estate of the deceased, since the whole personal property is bequethed in said will, and is a charge upon the estate for the payment thereof; and if entitled to one half of the real estate, she is entitled to nothing more, except, unless it be her widow's pharaphanalia, and further charges that said Mary by her election, has no right to any part of the personal estate.

9 Exceptions to answer, wherein it denies complainants, legal and equitable rights, etc.

11 Answer of guardian *at litem*.

13 Final hearing of the cause.

14 Decree of Court, that the S. half, N. E. quarter of section 20, and the S. W. Qr.,
15 of N. W. quarter, township 4 N. R. 6 West, 3d principal meridian, and 50 acres adjoining, be divided, one half to be set apart to her and the other half according to the pro-
16 visions of the Will, and that she also be entitled to dower therein, and appoints commissioner to set off and make partition, to the rendition of which decree the said defendants at the time and after.

ERRORS.

1st. The Court erred in decreeing dower to Mary Lessly in the half of said land not set apart to her.

2d. The Court erred in decreeing, that the separate property allowed to widows under the statute be set apart to Mary Lessly.

3d, The Court erred in rendering said decree in manner and form as rendered, as it indefinite in settling whether the specific legacies were or were not to be paid

BRIEF OF PLAINTIFF IN ERROR.

This record involves no disagreement as to facts, but simply the construction of section 15, chapter 34, Purple's Stat., p. 497–8, to wit:

If a husband shall die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have *in lieu* of her *dower* in the estate of which her husband *died seized*, whether the same shall have been assigned or not, absolutely, and in her own right as if she were

sole one half of all her real estate, which shall remain after payment of debts *against the deceased husband.*

Provided, if dower in such estate shall have been assigned, she shall make such new election within two months, after being notified of the payment of such debts.

In this class of cases, whether deceased did testate or intestate, if this section was the only law, the words "in lieu of dower" exclude certainly dower in the other half of the land.

In Tyron vs. Postlewaite, 13 Ill., p. 727, it would seem to have been ruled otherwise. By that decision the foregoing section was left subject to the imputation that it was a dead letter.

Sturgis, *et. al.*, *vs.* Ewing, 18. Ill. 180.

2. This section 15, approved in 1845, does not go so far as the clause on the same subject-matter in the 46 section chapter Wills—*that* gives dower in all cases allowed by law, *this half* the land only, *in lieu of dower*, and if they are in conflict the last must prevail.

Purples Stat. 1024, § 22, 23 and 24.

But if the 15th section had been silent, and no other section of law in force on the subject from the very nature of such *election* in analogy with charges on realty, as a whole, her election of the half would discharge pro tanto at least.

White *vs.* White, 1 Harrison 202–211.
Litt. 222, Gibb. on Rents 152.
Adam *vs.* Hoffman, 9 Watts 530, 541.
Cord on Rights of married women, 321.

II.

1. Nothing but the question of the right of the widow to one half the land was before the Court for decision in the case of Sturgis *et. al. vs* Ewing, 18 Ill., p. 176. Her right to that is decided nothing more Dower in the other half of the land, or personal property, was not before the Court in that case.

2. Taking the 15th section (above) its subject matter, its association with section 10 and 11 in the same chapter, its reference to the *new* election, which shows the Legislature must had the 10th and 11th section in view, and a case of testate estate, it seems to us, its object was solely to legislate and provide a different right to that class of Widows whose husbands died *testate*, without children or descendants of such.

3. The two laws, section 46, chapter 109, and section 15, chapter 34, may thus stand, the one for intestate and the other for testate estate, but it is impossible to say those sections of law place the widows on the same footing. The one. section 46, gives half the land, *all* the personalty after payment of debts, *against such estate* are paid, and dower as provided by law. The other, section 15, gives one half the land after payment of debts against the deceased *husband in lieu of dower*, and no personal property, and dower as provided by law, or at least is silent on those points.

Blackwell Tax Titles, page 712–13 *et seq.*
On construction of statutes.

4. Such widow of testator, has the right to take the provision in the will, or if she *elect* she can take her rights of dower as provided by law, and when she so choses and relinquishes her rights under the Will, the law remits her back to all her rights of *dower*, but if her husband leaves mother, child, descendants of such, she may make a *new* election, one half the land after payment of *the husbands debts, in lieu of dower*, that is, she, by the new election surrenders all her rights of dower, which without that she would have had under her first election under section 10 and 11.

5. Is such widow entitled to dower in the other half of the land under this section? What language is there in section 15 to assume it? No personal property is given to her by section 15. (Dower is defined by the statute, as to intestates, to be one third part of personal estate after payment of debts. Purple's Stat., section 161, page 1224,) This, in her *new election*, she abandons. She agreed to take one half the land in fee in lieu of it. We think she cannot hold dower and personalty, when she elects to take half the land, in lieu of her dower, as that dower is defined under the 11th section; if she had made no new choice, she could have it, but having done so, she abandons it.

6. On this record, the widow by her election has no right, we think, to absorb the personal estate, and defeat the legatees, of the legacies bequeathed. Yet it will be insisted that those are not debts of the *husband*. That by this section of the law she is bound, cannot be denied, no other gives the right of such election. Before she can reach her rights under section 15, she abandons the provisions of the Will—and next, her rights of dower, as defined in section 11, chapter 34, and no part of the personal estate is given her by it. The section is a statutory *innovation* and subject to strict construction.

In Blackwell on Tax titles, page 712.

O'MELVENY & HOUCK.

Attorneys for Plaintiff in Error.

No 29

Leasly

vs.

Leasly

Error to Randolph.

Continued with

Cases

Filed Nov 7, 1866

Noah Johnston Clk

Illinois Supreme Court.---First Grand Division.

LESSLY et. al.
vs.
LESSLY.
} Error to Randolph.

DEFENDANT'S BRIEF.

The complainant below, as widow of her deceased husband, who left no descendent, was unquestionably entitled to the usual articles of personal property, or their value. 2 Purp. Stat. 1201, Sec. 50. Detzler vs. Schuester, 37 Ill. R. 304. Also to one-half of the real estate in fee simple. Sharges vs. Ewing, 18 Ill. R. 180, &c.

2. Was she entitled to dower in the other half, and the surplus of the personal property, after paying the debts of the estate?

a. Where the husband dies *intestate*, leaving a widow and no descendent, it is very certain that she is so entitled. Tyson vs. Postlethwaite, 13 Ill. R. 728. Tyler vs. Tyler, 10 Id. 155, per Breese, Justice. Cruse, Admr., vs. Cruse, 21 Id. 49. Cross vs. Carey, 25 Id., 564.

b. By the statute of 1829, in the Revised Laws of 1833, page 624, under the proper title of "*Wills*," provision is made for widows renouncing under wills, and thereby taking as in cases of intestate estates, and abating legacies, if necessary, to that end. Mr. Gilman, in his revision of the statutes of 1845, under the title, "Dower," incorporated some of the sections and parts of sections of the prior law, and added the 15th section, which so puzzled this court in the case in 13 Ill. R.

That section was manifestly introduced to benefit, and not to injure, the widow. 13 Ill. R. 732. It does not provide that she shall have no more than is there indicated. Id. 733-6-7-8. Under our state constitution, which declares that members of the executive, legislative, and judicial departments of the government, shall receive certain sums, and "no more," it is settled by common consent that they may incidentally have additional compensation.

If there is an apparent conflict between the chapter entitled "Dower" and the chapter entitled "Wills," the latter must govern. 2 Purp. Stat., 1024. Sec. 23. 13 Ill. R., 739.

c. Even the chapter entitled "Dower" provides that by renouncing under the will she becomes entitled to "her dower in the lands, *or share* in the personal estate, of her husband. 1 Purp. Stat., 497, Sec. 11. Sec. 15 also gives her an undivided half of the real estate in fee simple.

d. The estate being *as to to her* intestate, she is entitled to dower in the other half of the lands, and the surplus of the personal estate after paying debts under Sec. 46 of the statute of Wills.

WM. H. UNDERWOOD, Sol. for Deft. in Error.

[8454-24]

8

Lepley et. al.
vs
Lepley
Defendants Brief

Filed June 5th 1867
Noah Johnson Clk

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

November Term, 1866.

SAMUEL W. LESSLY, *et. al.*, *Plaintiff in Error*,
vs.
MARY LESSLY, *Plaintiff in Error*.
} ERROR TO RANDOLPH.

ABSTRACT.

PAGE 1 Bill in chancery for Relief filed for April Term., A. D., 1865, Mary Lessly complainant in the bill alleged, that she is the wife of Mathew Lessly, deceased, who died in April, 1864, leaving no children, descendants of children, father or mother surviving,
2 but left a brother and sister, children and other heirs; that he left both personal and
3 real estate, described in page two and three; that said Mathew Lessly left a last Will
10–11 and Testament, which has been proved, by which he makes sundry special bequests and legacies, among others the lands to his wife for life, with remainder *in fee* to Mathew
3 Lessly; that she, the complainant, on the 12th of September, 1864, renounced the provision made for her in said Will, and elected to take her dower or legal share of the estate of her husbands, also on the 13th of September 1864, again under her hand and
4 seal she electeted in *lieu* of dower and the provisions in said Will for her benefit, one half the real estate and *dower* in the other half, and the whole of his personal property, after paying all the just debts and claims against the estate of her said deceased husband; that the personal estate is more than sufficient to pay the debts of the deceased and administration expenses; and prays that she be invested with the title to half of the real estate and dower in the other half, and that the same be set apart to her, etc.

6 Dovisee's made party to the Will.

7 Answer to Bill. Admits that the said Mary is the widow of said Mathew Lessly, and that said Mathew left no child or descendants of children at his death; admits the will as set out in complainants bill to be correct; admits that said Mary relinquished provisions in the will, as set out in her bill of complainant, and that collateral heirs are correctly described therein, but denies that she is entitled to one half of the real estate, denies that if even she is entitled to one half of the land, she is entitled to
8 dower in the other half, and respondent denies further that complainant is entitled to the personal estate of the deceased, since the whole personal property is bequethed in said will, and is a charge upon the estate for the payment thereof; and if entitled to one half of the real estate, she is entitled to nothing more, except, unless it be her widow's pharaphanalia, and further charges that said Mary by her election, has no right to any part of the personal estate.

9 Exceptions to answer, wherein it denies complainants, legal and equitable rights, etc.

11 Answer of guardian *at litem*.

13 Final hearing of the cause.

14 Decree of Court, that the S. half, N. E. quarter of section 20, and the S. W. Qr.,
15 of N. W. quarter, township 4 N. R. 6 West, 3d principal meridian, and 50 acres adjoining, be divided, one half to be set apart to her and the other half according to the pro-
16 visions of the Will, and that she also be entitled to dower therein, and appoints commissioner to set off and make partition, to the rendition of which decree the said defendants at the time and after.

ERRORS.

1st. The Court erred in decreeing dower to Mary Lessly in the half of said land not set apart to her.

2d. The Court erred in decreeing, that the separate property allowed to widows under the statute be set apart to Mary Lessly.

3d, The Court erred in rendering said decree in manner and form as rendered, as it indefinite in settling whether the specific legacies were or were not to be paid

BRIEF OF PLAINTIFF IN ERROR.

This record involves no disagreement as to facts, but simply the construction of section 15, chapter 34, Purple's Stat., p. 497–8, to wit:

If a husband shall die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have *in lieu* of her *dower* in the estate of which her husband *died seized*, whether the same shall have been assigned or not, absolutely, and in her own right as if she were

sole one half of all her real estate, which shall remain after payment of debts *against the deceased husband.*

Provided, if dower in such estate shall have been assigned, she shall make such new election within two months, after being notified of the payment of such debts.

In this class of cases, whether deceased did testate or intestate, if this section was the only law, the words "in lieu of dower" exclude certainly dower in the other half of the land.

In Tyron vs. Postlewaite, 13 Ill., p. 727, it would seem to have been ruled otherwise. By that decision the foregoing section was left subject to the imputation that it was a dead letter.

Sturgis, *et. al.*, *vs.* Ewing, 18. Ill. 180.

2. This section 15, approved in 1845, does not go so far as the clause on the same subject-matter in the 46 section chapter Wills—*that* gives dower in all cases allowed by law, *this half* the land only, *in lieu of dower*, and if they are in conflict the last must prevail.

Purples Stat. 1024, § 22, 23 and 24.

But if the 15th section had been silent, and no other section of law in force on the subject from the very nature of such *election* in analogy with charges on realty, as a whole, her election of the half would discharge pro tanto at least.

White *vs.* White, 1 Harrison 202–211.
Litt. 222, Gibb. on Rents 152.
Adam *vs.* Hoffman, 9 Watts 530, 541.
Cord on Rights of married women, 321.

II.

1. Nothing but the question of the right of the widow to one half the land was before the Court for decision in the case of Sturgis *et. al. vs* Ewing, 18 Ill., p. 176. Her right to that is decided nothing more Dower in the other half of the land, or personal property, was not before the Court in that case.

2. Taking the 15th section (above) its subject matter, its association with section 10 and 11 in the same chapter, its reference to the *new* election, which shows the Legislature must had the 10th and 11th section in view, and a case of testate estate, it seems to us, its object was solely to legislate and provide a different right to that class of Widows whose husbands died *testate*, without children or descendants of such.

3. The two laws, section 46, chapter 109, and section 15, chapter 34, may thus stand, the one for intestate and the other for testate estate, but it is impossible to say those sections of law place the widows on the same footing. The one. section 46, gives half the land, *all* the personalty after payment of debts, *against such estate* are paid, and dower as provided by law. The other, section 15, gives one half the land after payment of debts against the deceased *husband in lieu of dower*, and no personal property, and dower as provided by law, or at least is silent on those points.

Blackwell Tax Titles, page 712–13 *et seq.*
On construction of statutes.

4. Such widow of testator, has the right to take the provision in the will, or if she *elect* she can take her rights of dower as provided by law, and when she so choses and relinquishes her rights under the Will, the law remits her back to all her rights of *dower*, but if her husband leaves mother, child, descendants of such, she may make a *new* election, one half the land after payment of *the husbands debts, in lieu of dower*, that is, she, by the new election surrenders all her rights of dower, which without that she would have had under her first election under section 10 and 11.

5. Is such widow entitled to dower in the other half of the land under this section? What language is there in section 15 to assume it? No personal property is given to her by section 15. (Dower is defined by the statute, as to intestates, to be one third part of personal estate after payment of debts. Purple's Stat., section 161, page 1224,) This, in her *new election*, she abandons. She agreed to take one half the land in fee in lieu of it. We think she cannot hold dower and personalty, when she elects to take half the land, in lieu of her dower, as that dower is defined under the 11th section; if she had made no new choice, she could have it, but having done so, she abandons it.

6. On this record, the widow by her election has no right, we think, to absorb the personal estate, and defeat the legatees, of the legacies bequeathed. Yet it will be insisted that those are not debts of the *husband*. That by this section of the law she is bound, cannot be denied, no other gives the right of such election. Before she can reach her rights under section 15, she abandons the provisions of the Will—and next, her rights of dower, as defined in section 11, chapter 34, and no part of the personal estate is given her by it. The section is a statutory *innovation* and subject to strict construction.

In Blackwell on Tax titles, page 712.

O'MELVENY & HOUCK.

Attorneys for Plaintiff in Error.

[PLSN-AL]

No 29

Essly
vs.
Essly

Errors to Randolph

Brief

Filed Nov 7. 1866
Noah Johnston Clk