
 Syllabus—Opinion of the court.

THOMAS GILCREEST

v.

ALEXANDER W. MAGILL.

PRACTICE IN CHANCERY—*writ of assistance*. A writ of assistance will not issue against a person in possession of premises sold under a decree rendered in a suit to which he was not a party, if his possession began before the commencement of the suit. Not being a party, nor coming in *pendente lite*, his rights are in no way affected by the suit, and will not be adjudicated in a summary manner upon motion for a writ.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was an application by a purchaser under a decree of foreclosure and sale, for a writ of assistance. The facts are stated in the opinion of the court.

Messrs. BUSHNELL & AVERY for appellant.

Mr. A. W. CAVARLY for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

One Robert Wade purchased a mortgage upon certain real estate, and at the sale under the decree, one Cleave became the purchaser. He afterwards assigned the certificate of purchase to Magill, the appellee. The latter filed an affidavit showing Gilcreest, the appellant, to be in possession of the mortgaged premises, and that he refused to surrender possession, and praying for a rule upon him to show cause. The rule was granted, and Gilcreest appeared and proved that he had taken possession of the premises under a five years' lease from Wade, before the commencement of the suit to foreclose, and had remained in possession from that time to the present. He was not a party to the bill of foreclosure. Thereupon the court made an order that he deliver the possession to Magill, from which order Gilcreest appealed.

37	300
121	83

37	300
193	207

Syllabus.

The order was erroneously made. This same point was before this court at the Ottawa term, 1864, in the case of *Brush v. Farlee*. It was there held that a writ of assistance could not issue against a person in possession of premises sold under a decree rendered in a suit to which he was not a party, if his possession began before the commencement of the suit. Not being a party nor coming in *pendente lite*, his rights are in no way affected by the suit, and cannot be adjudicated in this summary manner. The order for the delivery of possession will be set aside.

Decree reversed.

SALLIE DELTZER *et al.*

v.

OTTO SCHEUSTER.

1. WIDOW—*right of, to separate property.* The right of a widow to her separate personal property, under the 48th section of the statute of wills, is not affected by her failing to renounce the benefits of a will in which land was devised to her by her husband.

2. STATUTES—*construction of.* Section 10, of chapter 34, of the Revised Statutes, must be construed to apply to other "personal estate," than that set apart to her under the 48th section of the chapter of wills.

3. WIDOW—*how separate allowance to be raised.* Although the widow is to be considered a creditor of the estate to the extent of her separate allowance, and entitled to have the real estate sold for its payment, yet if the will of the husband devise separate parcels of real estate to her and to his children, the fund for the payment of her allowance should not be raised exclusively from the estate devised to the children, but should be apportioned between that and the estate devised to her, according to their respective values.

4. HOMESTEAD. In apportioning the burden between the widow and children, the homestead, being in the occupancy of the widow, but devised to the children, should not be taken into the account or ordered to be sold.

5. APPORTIONMENT OF BURDEN. Where there is a common fund, in the hands of different parties, liable to a common burden, the burden should be equally borne.

37	301
47a	199
37	301
e99a	1372
99a	1374