

No. 8696

# Supreme Court of Illinois

Cain Hoots

---

vs.

<sup>S</sup>  
~~L~~erena Graham

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71641  7

At the October Special Term of the Circuit Court of Washington  
County, State of Illinois A. D. 1838

The following proceedings were had and following judgment  
Entered in the following cause to wit

Appeal

Syrena Graham

v

Carroll Hoops

Comes the Plaintiff by Walter her attorney  
and the Defendant by Horner his attorney  
and issue being joined, there comes a Jury  
to wit George W Phillips Miriam McCracken John Reid  
W. S. Hall William Patterson Jackson Lindsay Lewis T  
Craim William H Henry B Kimbro John M Rountree Leroy  
F Blankenship Henry Buttman Twelve good and lawful  
men of said County, who after hearing the evidence and  
arguments of of Counsel retire to consider of their verdict, and  
the said Jury returned into Court the following verdict  
We the Jury find the Defendant guilty and assess the Plaintiff  
damages at \$25.<sup>00</sup> Motion for a new trial Motion over ruled  
to which ruling of the Court Defendant at the <sup>time</sup> excepts Motion  
by Defendant to serve costs. Motion allowed Judgment  
on verdict for Plaintiff for twentyfive Dollars; and that  
Defendant pay all the costs of Plaintiff except the amount of five  
Dollars & execution is awarded therefor & Defendant prays an appeal  
appeal granted upon his entering into bond within 30 days  
from the date hereof with Hugh McLaughlin Security in the  
sum of \$200<sup>00</sup> Bill of exceptions to be presented by next Term

Copy of Bond for Costs

State of Illinois  
Washington County

Syrena Graham } Demand \$100.<sup>00</sup>  
do }  
Cain Hoots } for trespass to  
Real Estate before  
J. N. Verner J. P.

I John Ricard do enter myself Security for all costs  
that may accrue in the above cases this 11<sup>th</sup> day of June 1858  
John Ricard

Summons

State of Illinois }  
Washington County } 88

The People of the State of Illinois  
to any Constable of said County greeting  
you are hereby commanded to Summon Cain Hoots to appear  
before me at my office in Nashville on the 21<sup>st</sup> day of June  
A. D. 1858 at 1 o'clock P. M. to answer the complaint of Syrena  
Graham for trespass to real Estate for a failure to pay her a  
certain demand not exceeding one hundred Dollars and hereof  
make due return as the law directs. Given under my hand and seal  
this 11 day of June A. D. 1858. John N. Verner J. P. Seal

Copy of Appeal Bond

Know all men by these presents that We Cain Hoots and Hugh  
McLaughlin are held and firmly bound unto Syrena Graham  
in the Penal sum of One hundred and thirty Dollars Lawful  
money of the United States for the payment of which well and  
truly to be made We bind ourselves our heirs and Administrators  
Severely and firmly by these presents Witness our hands and  
Seals this 21<sup>st</sup> day of June A. D. 1858

The Conditions of the above obligation is such that whereas  
the said Syrena Graham did on the 21<sup>st</sup> day of June 1858

Before John W. Vernon a Justice of the peace for said County Washington receive a Judgment against the above bounden Cain Hoots for the Sum of fifty Dollars from which Judgment the said Cain Hoots has taken an appeal to the Circuit Court of the County of Washington aforesaid and State of Illinois. Now if the said Cain Hoots shall prosecute his appeal with Effect and shall pay whatever Judgment may be rendered by the Court upon Dismissal or trial of said appeal then the above Obligation to be void otherwise to remain in full force and effect

Cain Hoots Seal  
 Hugh W. Laughlin Seal

Approved by me at my office  
 this 21<sup>st</sup> day of June A.D. 1858

John W. Vernon J.P.

Bill of Exceptions

~~That although the Lu~~

Syrena Graham, } In Washington Circuit Court October Special  
 v. } Term  
 Cain Hoots } Appeal

This case came on and was tried before H. H. S. Orneloey Judge with a Jury Plaintiff offered in Evidence a Patent from the United States conveying said land named in Plaintiff account in file in said case here insert said account to one William Weaver and proved by a Witness that said Weaver did Seize of said land & no other land leaving said Plaintiff his widow, that said land at said Weavers Decease was wholly unimproved and that said Weaver never lived in Ill. but lived at the time of his death about 2 Miles therefrom on Public

Lands. That after said Weaver died. Said Plaintiff with  
her own means put & built on said land a cabin or house  
and Smokehouse by one other Witness Plaintiff proved that  
Said Plaintiff after said Weavers death lived some time  
in said cabin or house and that house was of logs and worth  
when she lived there \$10 another Witness stated it was  
worth \$15 Plaintiff also proved that after she had lived there  
Sometime she removed away and went to Ashley or near Ashley  
and about October 1857 one Witness says another in the winter  
or Spring of 1857, <sup>leaving some of her furniture therein</sup> authorizing one of Weaver to have said house  
used as a school house. that some Stoves and other articles of  
Plaintiff was left in the house & that when no school was taught <sup>nails with the door</sup> the agents  
and that she lived in ashley until sometime in the winter of 1857 or 8  
when she came back into the neighborhood of this land and that  
she went one day to this house and was in it with hammer &  
nails fixing it up when said Defendant come and forbid her  
and ordered her away and kicked the door down or open and  
pulled out two of the of log so as to prevent her returning to or  
living at said house thereby rendering said house wholly unfit  
for Plaintiffs use & occupation & that she Plaintiff left & went away  
the same day Plaintiff also provide that quite a number of trees  
or Saplings had been cut on said land before the commencement  
of this and that Defendant was <sup>seen</sup> there when persons were cutting  
an cut some himself and some Witnesses testified that the  
Damage to house & cutting Saplings would all amount to \$25  
but they could not say that Hoops did all said cutting Plaintiff  
introduced as a witness a son in law of said plaintiff who  
stated that said Plaintiff removed from said land to Ashley

about 3 months before the Sale of Said land by order  
by order of Circuit Court of Said County in partition and  
come back into the neighborhood of Said land sometime  
in the winter after such Sale this was all the evidence on part of  
Plaintiff. Plaintiff asked the following instructions (here insert the)  
which were given

Defendant offered in evidence record of the Circuit Court of August  
Term 1857 of Said County in the case of Syrena Graham vs  
James Hoots & Estd Petition for Partition here insert the Said record  
and a Deed made by the Commissioner appointed to sell &  
who sold Said land to one James Hoots (here insert said Deed)

And offered to prove by said record and Deed that said James  
was owner in full of said land before and at the time the  
acts complained of were committed & offered to prove by said James  
that all that his father said Defendant did & complained of in  
this Suit was done by said Defendant for him said James  
& with his leave & Consent and approbation which Evidence  
Plaintiff objected to & the Court sustained said objection &  
Excluded said Evidence to which decision of the Court. ~~Excluding~~  
Said Evidence record & Deed and testimony of said James. Defendant  
Excepted at the time left proved by said James Hoots that he  
and many others had cut timber or saplings on said land  
before this Suit was commenced & by one D Kenyon who said  
he saw & Examined House after said logs were pulled out as  
aforesaid & that he thinks he could have put them back as you

as before for \$2.00 & did not notice w anything was wrong with  
the Deore and by one Stehison that after the institution of this  
Suit he saw said house about 150 yards off and would not  
have known anything was the matter with it if he had not  
been informed. Deft asked the following instructions (here  
vised it) which was refused

This was all the evidence Jury found for Plaintiff \$25.00 Deft  
moved for a new trial which motion was overruled to the decision  
overruling said motion Deft at the time excepted and prayed  
an Appeal and pray to have this his bill of exceptions signed  
and sealed & filed as a part of the record in said case

H. H. S. Melvany Judge & Seal

Account or Complaint

Syrena Graham, Tresspass

vs

Guin Wots

Plaintiff complains of defendant of a  
plea of tresspass for Entering on NW 1/4 NW

Section 15 T2 S R 4 W and cutting timber and

carrying the same away tearing down house and removing  
fence off the same to the damage of Plaintiffs Possessions \$100.

August Term Washington Circuit Court Wednesday August 26<sup>th</sup> 1857

Syrena Graham

vs

James Woot Tabitha

Petition for Partition

Pugh & Milo her husband

& Sarah J Graham

one Monday comes said Petitioner by  
her atty and it appearing that said defendant  
Hosmer, atty served with process T. B. Fiske had been duly

Served with process P. B. Jorke is appointed guardian ad litem  
for Minn Seftel and is ruled as also said Janet Seftel to answer  
by Tuesday Morning, and now on Tuesday I Admet Seftels  
having filed no answer to said Petition the Same is taken  
for confessed as to them and said Guardian ad litem  
having filed his answer interposing no objections Partition  
is ordered to be made of the lands mentioned in Plaintiffs  
Petition on file to wit the North East qr of North West qr of  
Section fifteen Township two South Range four West in  
said County of Washington according to the prayer of the  
Petition as to the rights of the Parties giving to said Serena  
Graham  $\frac{1}{4}$  of said land, and to said James Coats  $\frac{1}{2}$  of said  
land and to said Tabitha Pugh & Milo her husband  $\frac{1}{8}$  of said  
land, and to said Sarah J Graham  $\frac{1}{8}$  of said Land and  
William Wheeler Thomas Atchison & Alexander Chesney are  
appointed Commissioners to make such Partition, and now  
on Wednesday the report of said Commissioners is presented  
stating that said Land is not susceptible of division according  
to the order of the Court as to the rights of the Parties without  
material Prejudice of the owners thereof, and said report is  
approved & ordered to be filed & said land is ordered to be sold  
at Public Vendue at the court house door Nashville, 10 per cent  
of the Purchase Money down and the Balance on a credit of  
Six and twelve months, Purchaser to execute Note with approved  
Security & a Mortgage on the Premises to secure the payment  
of the Purchase Money & Protemy E Hosmer is appointed  
Commissioner to make such after giving four weeks Notice  
thereof by Posting up Notices thereof in four of the most



Public Places in said County four weeks prior to the day of Sale Stating time place Terms of Sale and Description of Property to be sold Said Sale to be within the hours of 10 o'clock A.M. & 4 o'clock P.M. on day of Sale and it is ordered that said Commissioner execute Deeds to Purchasers of said Lands on day of Sale and after paying the costs of this Suit Pay over to the Parties or their Guardian their respective Shares according to their respective Interests as found above and report his Proceedings to this court at the next Term thereof for approval & this cause is continued for such report

Copy of Commissioners Deed

Know all men by these presents that at the August Term A.D. 1857 of the Circuit Court of Washington County Illinois the following proceedings were had & the following order made in the following case to wit

Serena Graham

vs

James Hoats Tabitha Pugh  
& Milo her husband & Sarah  
J. Graham

On Monday comes said  
Petitioner by Hoamer her Atty  
& It appearing that said Deedts  
had been duly served with  
Process P. B. Fouke is appointed

Guardian ad Litem for minor Deedts & is ruled as also said  
adult Deedts to answer by Tuesday Morning and now  
on Tuesday said adult Deedts having filed no answer  
to said Petition the same is taken for confessed as to them  
& said Guardian ad Litem having filed his answer inter-  
posing no objections Partition is ordered to be made of the  
lands mentioned in Plaintiffs Petition on file to wit

The North East 1/4 of North West 1/4 of Section fifteen Township  
two South Range four West in said County of Washington  
according to the prayer of the Petition as to the rights of the  
Parties giving to the said Leena Graham 1/4 of said land  
& to said James Hoots 1/2 of said land & to said Tabitha  
Pugh & Milo her husband's of said land & to said Sarah  
J. Graham's of said land & William Wheeler Thomas  
Atchison & Alexander Chesney are appointed commissioners  
to make such Partition. and now on Wednesday the  
report of said Commissioners is presented stating that said  
land is not susceptible of division according to the order  
of the court as to the rights of the Parties without material  
Prejudice to the owners thereof & said report is approved  
& ordered to be filed & said land is ordered to be sold at Public  
Vendue at the Court House Door in Nashville 10 per cent of the  
Purchase money down & the balance on a credit of Six &  
Twelve Months Purchaser to execute Note with approved  
Security & a Mortgage on the Premises to secure the payment  
of the Purchase money & Ottemy C. Hosmer is appointed  
Commissioner to make such sale after giving four weeks  
Notice thereof by Posting up Notices thereof in four of the most  
Public places in said County four weeks prior to the day of  
Sale stating time place Terms of sale & description of property  
to be sold said sale to be within the hours of 10 O'clock A.M.  
& 4 O'clock P.M. on day of sale & It is ordered that said Commissioner  
Execute Deeds to Purchaser of said lands on day of Sale  
& after paying the costs of this suit pay over to the Parties  
or their Execution their respective Shares according to their

respective Interest as found above & report his proceedings  
to this court at the next term thereof for approval & this  
cause is continued for such report" Agreeable to which  
order of Ptolemy E. Hosmer said Commissioner offered  
said land for sale at Public Vendue at the Court house  
then in Nashville in said County at 12 O'clock M on  
the 3<sup>d</sup> day of November 1857 after having advertised  
such sale by Posting up Notices thereof stating time place  
terms of sale & a description of the property to be sold in four  
of the most public places in said County four weeks  
prior to said day of sale and at such sale James  
Hoots bidding the sum of \$225<sup>00</sup> for said land the same  
the same was struck & sold to him he being the highest  
& best bidder. Now therefore in consideration of the  
Premises and in consideration of the sum of two hundred  
& twenty five Dollars to me paid I Ptolemy E. Hosmer said  
Commissioner do hereby sell transfer make over & convey  
unto him the said James Hoots his heirs & assigns forever  
the said land to wit North East 2 of North West 2 of Section  
15 Township two South Range four West in said County  
To have & to hold the said land together with all  
appertinances thereunto belonging or in anywise appertaining

In testimony whereof I as said Commissioner  
have hereunto set my hand and Seal this 3<sup>d</sup> day  
of November A. D. 1857

Ptolemy E. Hosmer Seal  
Commr to sell

State of Illinois }  
Washington County } I Henry H. Talbot Clk of the Circuit  
Court in and for Said County do Certify that Pottery  
E. Hosmer Commissioner appointed by the Circuit Court  
of Said County to sell certain Lands who is personally  
known to me to be the Person described in and who  
executed the same and acknowledged that he signed  
Sealed and delivered the same for the uses and purposes  
therein mentioned

Given under my hand and  
Seal of the Circuit Court of Said  
County this 3<sup>rd</sup> day of November  
1857 H. H. Talbot Clk

### Copy of Instructions

That although the Jury may believe from the evidence  
that Defendant was part owner or the owner of the  
land by Purchase at the Commissioners Sale of the Land  
yet if they are further Satisfied and believe from the  
evidence that Plaintiff is the widow <sup>Wm Weaver</sup> of that Weaver and  
owner of the land that Dower had never been assigned  
that Plaintiff was in the actual Possession of the land at  
the time any of the Trespass were committed, and that  
Defendant committed such Trespass they should find Defendant guilty  
Given

2 That in estimating the damages in this case if the Jury  
believe from the evidence Defendant is guilty they may  
take into consideration any injuries to the real estate  
if proved to have been committed by him which would

reduce the amount of 26 Yearly rents, and also any  
Injury which affected her Comfort or Convenience  
in the actual ~~Occupation~~ of the Premises done previous  
to the Commencement of this Suit

Given

Copy of Appeal Bond

Know all men by these presents that we Cain Hoots  
and Hugh W. Laughlin are held and firmly  
bound unto Serena Graham in the sum of two  
Hundred Dollars good Money for the payment of which  
well and truly to be made We bind ourselves our  
heirs and Administrators jointly severly & firmly  
by these presents upon Condition as follows

Said Serena Graham recovered Judgment against  
Said Hoots in the Circuit Court of Washington County  
Illinois at the Special October Term 1858 for the sum of  
\$25<sup>00</sup> and all costs of Suit except \$5<sup>00</sup> in the case of Serena  
Graham against Cain Hoots from which Judgment  
Said Hoots prayed an appeal to the Supreme Court of Said  
State which appeal was granted upon Said Hoots Entering  
into Bond within 30 days with Hugh W. Laughlin  
as Security in the Penal sum of \$200<sup>00</sup> Now if Said Hoots  
shall duly prosecute Said appeal & shall pay the Judgment  
Costs Interest & Damages in case said Judgment of the  
Circuit Court shall be affirmed by & in the Supreme Court  
of Said State then the above obligation to be void other-  
wise good Witness our hands & Seals this October 23<sup>d</sup> 1858

Cain Hoots Seal

Hugh W. Laughlin Seal

State of Illinois }  
Washington County }

I Henry H. Talbot Clerk of the Circuit  
Court of said County do hereby certify  
that the above and foregoing is a true and authenticated copy  
of the record of the judgment appealed from in said case

In testimony whereof I have hereunto set  
my hand & Seal of said Court

This November 5<sup>th</sup> 1859

Henry H. Talbot Clerk

And now comes Appellant by P. E. Hosmer  
his atty. & specifies the following errors

The Court erred

1<sup>st</sup> In excluding from the jury the  
order of sale & deed to & evidence of  
James Hoots showing title in said  
James & license to appellant to  
do the acts complained of

2<sup>nd</sup> In giving the instructions asked  
by plf, below

3<sup>rd</sup> In overruling motion for new trial

4<sup>th</sup> In giving judgment for  
plf, below

Wm. Howard P. E. Hosmer  
att. pro plf,

Joinder in Error Amos Watto atty for defendant

~~Serena Graham~~ 44  
72

~~Cain Hoot~~

Copy of Duree

Cain Hoots  
vs

Serena Graham

Appeal

Filed Nov. 14. 1859.  
St. Johnston Ct  
Paid by Hosmer \$5.00  
Fees \$5.00

**Cain Hoots,**  
vs.  
**Serena Graham.**

In Supreme Court, 1st Grand Division, November Term, A. D. 1859. Appeal from Washington.

*Pages 1<sup>st</sup>*  
*5, 4<sup>th</sup>*  
*5<sup>th</sup>*  
*6<sup>th</sup>*  
This was an action of Trespass for damages to Real Estate, commenced before a J. P. by said Graham vs. Hoots. William Weaver died seized of North East North West Sec. 15 Town. 2 South Range 4 West, 3d P. M., unimproved land, had never lived on it, but lived at time of his death about two miles therefrom on public land, and left said Serena, his widow, and some children, said Serena, after the death of said Weaver, built on said land a Cabin worth ten or fifteen dollars and lived thereon sometime and then removed to Ashley, leaving some furniture in said house, authorizing one Weaver to have said Cabin used as a School-House, some Stools of Serena's were in said Cabin, when there was no school said Agent nailed up the Door. Whilst said Serena lived at Ashley she petitioned and by order of the Circuit Court of said county in partition said land was sold and purchased by James Hoots, son of appellant. After said sale said Serena came back into the neighborhood of said land and went one day to said Cabin and was fixing it when said Cain Hoots came, on behalf of said James Hoots, and by his leave and approbation ordered said Serena away and kicked the door open and pulled out a couple of the logs and so caused said Serena to leave. Quite a number of sapplings were cut on said land, and Cain Hoots was seen cutting some, and did cut some by leave of his said son, and other persons cut some. Some witness stated that all the damage to house and cutting sapplings would amount to \$25, but could not say Cain Hoots did all the cutting. Another witness stated that he examined house after the logs were pulled out and that he could have put them back for \$2 as good as ever, and saw nothing wrong with the door. Court below excluded all evidence of the ownership of said land by James Hoots aforesaid, and all evidence of Cain Hoots doing as above set forth on behalf of and by leave of said James Hoots. Jury found Defendant guilty and assessed damages at \$25. Motion for new trial overruled, bill of exceptions filed and case brought by appeal to this Court.

POINTS AND AUTHORETIES OF APPELLANT.

At common law and under our Statutes a widow has no right to enter upon unimproved lands where her husband never lived or in any way occupied, until dower is assigned, and if she do so she is a trespasser and may be ousted by the owner of the fee and driven to her action to have dower assigned, 4th Kents Com., 61 and 62 Revised Statute Dower Sec. 27 I G. Cruise on R. Prop. Page 108. A person wrongfully holding possession of land cannot treat the rightful owner who enters thereon as a trespasser, nor one who enters by the true owners leave, 1st Chit P. Page ~~204~~ 177 - 13 John 2 36 - 4 Blackford 286

Right of dower is a mere right of action until assigned, 11th Illinois, 385.

**P. E. HOSMER,**

ATT'Y. FOR APPELLANT.

*2 Grady E<sup>d</sup> 58625-*  
*1 John Cas 123*  
*17 Men<sup>d</sup> 257*





At a Supreme Court, of the State of Illinois,  
begun and held at Mount Vernon, on Sunday  
the fifteenth day of November, in the year of  
our Lord one thousand eight hundred  
and fifty-nine. On Monday the  
twenty-first day of November, in the year  
of our Lord one thousand eight hundred  
and fifty-nine.

Present, the Honorable John D. Catron, Chief Justice.

" " Sidney M. M. Associate "

" " P. H. Walker. " "

" Cain Hoots. Appellant.

" 44

vs

" Susanna Graham. Appellee

} Appeal from Washington.

" On this day came again the said parties,  
" and the Court having diligently examined and  
" inspected, as well the record and proceedings  
" aforesaid, as the matters and things therein  
" assigned for error, and being now sufficiently  
" advised of and concerning the premises, are  
" of opinion, that in the record and proceed-  
" ings aforesaid, and in the rendition of the  
" Judgment aforesaid, there is manifest error;  
" Therefore it is considered by the Court, that  
" for that error and others in the record  
" and proceeding aforesaid, the Judgment of  
" the Circuit Court in this behalf rendered, be  
" reversed, annulled, set aside, and wholly

2" for nothing estewms, and that this cause be  
"remanded to the Circuit Court for such  
"other and further proceedings as to law  
"and Justice shall appertain. The whole with  
"the costs against the said Emma Graham."

Opinion by

Walker J.

"It appears from the evidence that one William  
"Mason died seized of the premises upon which  
"the alleged trespass was committed, that they  
"were unimproved during his life. That he left  
"Appellee his widow, and that she, with her own  
"means improved the premises after his death,  
"and took possession and occupied them for a  
"time, and then moved to another place, and  
"was about returning to again occupy them,  
"when Appellant ordered her to leave the place,  
"and pulled a couple of the logs out of the house.  
"After she left the place to reside upon another  
"the house was with her permission occupied  
"for a school, and after it ceased to be so  
"occupied her agents fastened the door with  
"nails, and that her dower had never been  
"assigned to her. The evidence also shows that  
"Appellant had cut some saplings upon the  
"land. He also offers to prove, by the petition,  
"the record and decree of the Circuit Court

3. " And a conveyance executed to him by the  
" Commission appointed by the decree to make  
" sale in a proceeding for partition that he was  
" the owner of the premises in fee, at the time  
" of the Commission of the acts complained of  
" as a trespass, but the Court rejects this evidence,  
" and the Jury found a verdict for 25 $\frac{1}{2}$  in favor  
" of Appellee. Thereupon Appellant entered a  
" motion for a new trial which was overruled  
" and Judgment rendered upon the verdict  
" from which he prosecutes an Appeal to this  
" Court.

" The first question which we propose to consider  
" is, whether her right of dower in these premises,  
" which had never been allotted to her, gives  
" the widow the right, as against the owner of  
" the fee, to use and occupy it, as her own.  
" The doctrine seems to be well and almost  
" uniformly settled, that until assignment,  
" the widow's dower is merely inchoate. It is  
" not the subject matter of sale and transfer  
" until it is allotted. Although she may  
" release the right to the owner of the fee,  
" she can make no other disposition of  
" it until set apart or adjudged to her.  
" It is a personal right, that lies only in action,  
" and not in grant, before it is assigned to her.  
" It is said that the situation of a dowress

44 After the death of her husband, Anna before  
" assignment, is very peculiar. Although by  
" that event the title of dower becomes consummated  
" matter, the title of entry does not accrue  
" until the ministerial act of assigning to her  
" a third part in certainty has been performed  
" by the proper person. "In the mean time  
" her situation is an anomalous case in the  
" law of England, standing on its own peculiar  
" circumstances, and neither borrowing nor af-  
" fording any analogies. It is probably the  
" only existing case in which the title, though  
" complete, and unopposed by any adverse  
" rights of possession, does not confer on the  
" person in whom it is vested, the rights of  
" reducing it to possession by entry. The situation  
" of a dowress has no resemblance to that of a  
" person who has become entitled to a particular  
" estate by way of remainder or springing use;  
" she has no frize in law, nor can she  
" exercise any act of ownership before assign-  
" ment." Park on Dower 334. The same author  
" informs us that her title to be endowed is not  
" of an undivided third of the entirety, but  
" of a third in severalty, which is unascertained  
" till assigned; it, therefore, bears no analogy to  
" the case of Coparceners, or <sup>to</sup> other persons  
" becoming entitled to undivided interests. He

5. also informs us that a dowress can never be  
" remitted to her dower, previous to actual  
" assignment. And that, although the title  
" to dower becomes Consummate on the death  
" of her husband, yet until actual assignment,  
" that title affords no impediment to the validity  
" of a recovery, nor is it to be considered for  
" any other purpose an out-standing estate of  
" freehold.

" From this doctrine, and it is the common law,  
" until the Appeller has her dower actually  
" assigned, she has no right of entry into these  
" premises. And it has been said that the  
" entry of the widow upon the death of her  
" husband, without assignment, was to be  
" treated as an abatement, and a dowress  
" in under a void assignment, may be treated  
" as a disseisor. Park on Dower 336. If then  
" such an act is a violation of the right of the  
" heir, and her entry upon the land before  
" assignment was an abatement, we are at a  
" loss to perceive how she could thereby  
" acquire the right to recover against him  
" or his assigns as trespassers. No case has  
" been referred to, and it is believed that none  
" exists, which holds that a trespasser or a  
" person in possession as a wrong doer can  
" recover against the owner of the fee with

60 right of possession. Such a rule would be  
" an end to the enjoyment of property, and its  
" protection by Judicial determinations.  
" It would be to hold that actual possession  
" however acquiesced was paramount title. The  
" Appellee then has no right by the rules of  
" the Common law to hold the possession, or  
" to recover on that possession, against the heirs,  
" or their grantee, or person succeeding to their  
" title.

" But her right to hold this land until her  
" dower is assigned is placed, upon the 27<sup>th</sup>  
" Sec. of the 34 Chap. R. S. p 202. That Section  
" authorizes the widow to retain the dwelling  
" house in which her husband most usually  
" resided next before his death, together with  
" the out houses and plantations thereto  
" belonging, free from molestation and rent  
" until her dower shall be assigned. The  
" property in this case is not the kind embraced  
" in this Section. It has on it no dwelling  
" house in which her husband ever resided;  
" nor was it any portion of the plantation  
" upon which her husband resided. It was  
" some three miles distant, was unimproved, and  
" does not appear to have been in any manner,  
" or for any purpose connected with the  
" residence of the husband. It was vacant,

7" wild, unimproved land, and by no known rule  
" of interpretation can be ~~be~~ held that such  
" land is embraced within its provisions. When  
" the legislature describe one kind of property,  
" they must have intended to have excluded  
" all other property, not embraced in the descrip-  
" -tion. If vacant unimproved land had  
" been intended to have been embraced, it  
" seems clear the legislature would have  
" specified it, or used language sufficiently  
" comprehensive to embrace it.

" The evidence fails to show that, she entered  
" under a lease from the heirs, but that appellants  
" have purchased the fee subject to her rights of  
" dower. For these reasons we are of the  
" opinion that the court below erred in  
" refusing to permit appellants to show title  
" in fee to justify the acts complained of as  
" being trespasses. If the widow expended  
" her own means in improving this land before  
" her dower was assigned, she must to enjoy  
" that right prosecute her claim for dower, and  
" rely upon <sup>having</sup> those improvements embraced in the  
" portion of the land allotted to her as her share  
" part thereof. If she has expended her money  
" before she was authorized by law to do so  
" it is her misfortune, which cannot invest  
" her with the right to recover for injury done



to it, by the owner.

" The Judgment of the Court below is  
" reversed and the cause remanded.

" Judgment reversed."

State of Illinois, &c.

Supreme Court of said State.

First Grand Division.

J. Noah Johnston Clerk of the Supreme Court,  
within and for the first Grand Division of  
the State of Illinois, do hereby certify that  
the foregoing is a true copy of the final  
Order, and of the Opinion of the said  
Supreme Court, in the above and therein  
specified Cause, of record in my office.

In Testimony Whereof, I have  
hereunto set my hand and affixed  
the Seal of the Supreme Court  
of the State of Illinois, at Mount-  
Carmel, this tenth day of February,  
in the year of our Lord one  
thousand eight hundred and  
Sixty. Noah Johnston Clerk

Lain Hoots  
Appellant

vs

Serra Graham  
Appellee.

No 44 = 7-

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Nov. Term 1859.

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Hoots

vs

Grakum

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Appl. from Washington

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Reverse & Remanded

8696