No. 8867

Supreme Court of Illinois

Elizabeth Walsh

---

vs.

Jacob Reis

Proceedings had in the Circuit Court within and for the County of Monroe and State of Illinois.

Be it remembered that on the 20th day of April 1866. the following Petition in Chancery was filed to-wit:

State of Illinois } In the May Term of the
Monroe County } Monroe County Circuit Court A.D. 1866.

To Hon Silas L Bryan Judge of the second Judicial Circuit Court of the State of Illinois, in Chancery sitting.

Petition

The petition of Mrs Elizabeth Walsh, widow of David M Walsh, late of said County, deceased; respectfully represents; that she is the widow of the said David M Walsh, who died intestate on or about the 18th day of March A.D. 1866, and as such is entitled to dower of the third part of all lands whereof her said husband was seized during coverture; that during said period of time her said husband was seized in fee simple of the following described real estate, to-wit:

A lot Eighty feet north and south on Main Street, in the Town of Waterloo, and thirty two and a half feet fronting on the Public Square of said Town of Waterloo, and being part of lot Sixty Two of the Old Town of Waterloo in Monroe County Illinois. That her

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husband, in his lifetime, made a mortgage upon said lot, dated the 4th of May 1859. to Mathias T Horine for the sum of One thousand dollars, which mortgage your petitioner never signed nor acknowledged relinquishing her dower interest therein. That said Mathias T Horine, By his Bill in Chancery Foreclosed said mortgage by a judgment order and decree of the said Monroe Circuit Court, made at the September Term thereof AD 1861, and which premises were subsequently sold by the then Master in Chancery, on the 10th day of May AD 1862, from which said parties have not redeemed, to said Mathias T Horine, and the time of redemption having expired, the said Horine took a deed. Your petitioner would further state that said Mathias T Horine has transferred by his deed said property to Jacob Reis Who by virtue of said deed now holds and occupies the same, said deed dated 28th February 1866. Recorded in Book 8 page 248. She therefore prays that the said Jacob Reis may be made a defendant to this petition, that process may issue against him, and he be compelled to answer the same fully and particularly; and that upon final hearing of her said petition she may be allowed her dower in the lands, tenements and premises before described, and have such other and further relief as to Justice and Equity shall appertain. and she will pray &c

Elizabeth Walsh

H K & O Melvaney
Attys for petitioner

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Filed April 20th 1866.

Wm End
Clk

And on the 20th day of April AD 1866, the following Bond for Costs was filed.

State of Illinois } In Circuit Court
Monroe County } To May Term AD 1866.

Elizabeth Walsh

vs

Jacob Reis

In action of Petition in Chancery, for assignment of Dower, I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of the court, in pursuance of the Laws of this State.

Cost Bond

Dated this 20th day of April AD 1866.

James A Kennedy [seal]

Approved by me
Wm End "Clk"

Filed April 20th 1866.
Wm End Clk,

And afterwards to-wit: on the 20th day of April AD 1866. the following writ was issued to-wit:

S.9867-5

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Summons

State of Illinois } ss.
Monroe County

The People of the State of Illinois
to the Sheriff of said County Greeting:

We command you, that you summon
Jacob Reis, if he may be found in
your County, that he be and appear personally
in the Circuit Court next to be holden at the
Court House in Waterloo within and for said
County of Monroe, on the first Monday of May
next, on the first day of said term then and there
in our said Court in Chancery setting to answer
Elizabeth Walsh on her petition for dower,
and hereof make due return.

Witness, Wm Erd, Clerk of said Circuit Court,
and the seal thereof hereto affixed, at my
office in Waterloo, this 20th day of
April A.D. 1866.

Seal

State of Illinois

Wm Erd Clk

which was returned with the following endorsement v.

Executed the within writ by delivering a true copy
of the same to the within named defendant
this 20th day of April A.D. 1866.

L N Wilson Sheriff
per W Dorsey Dpy

Filed April 21st 1866.

Wm Erd Clk

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And on the 9th day of May A.D. 1866. the following Demurrer to Bill was filed.

Cir. Court Monroe Co. 2d May Term 1866.

Elizabeth Walsh
vs
Jacob Reis

In Chancery
for
Dower

Demurrer

Jacob Reis by his Solicitor W. A. Morrison for answer to the petition filed by the said Complainant doth demur thereto and for cause of demurrer sets down.

1st That it is not stated with sufficient certainty that complainant is dowable in the lands described in petition

2d That it is not stated that the Mortgage to Norine was not for purchase money.

3d That it is not stated that Mortgage to Norine was subsequently made to the Marriage of complainant Elizabeth with her deceased husband David Walsh.

4th That it is not stated with sufficient certainty whether complainant is entitled to dower of 1/3 part of said premises or to the interest on 1/3 part of or income of 1/3 part of surplus after paying off and satisfying said Mortgage; and for that the said petition is otherwise uncertain and insufficient.

Wm. A. Morrison for Def't

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Filed May 9th 1866.
Wm Ends Clk

And afterwards to wit, at the May Term 1866, on Wednesday May 9th 1866 the following order was made, and entered of record.

Elizabeth Walsh
vs
Jacob Rice
} Petition for dower

Order

Now comes the complainant by H K S O'Melveny her solicitor, and the defendant by W R Morrison his solicitor, and the demurrer to the Bill having been overruled by the Court, the defendant enters a motion to dismiss the Bill, which motion is refused, to which the defendant excepts. Thereupon the defendant is required by the Court to answer by the first of July next; and this cause is set for hearing at the next term of this Court, to which Term this cause is continued.

And on the 26th day of November 1866, the following answer was filed.

State of Illinois } Special Nov Term 1866.
Monroe County } Monroe Circuit Court

Elizabeth Walsh
vs
Jacob Rice
} Petition for dower.

7.

Deft answer

To Hon S L Bryan Judge &c.
The answer of Jacob Rice above named
Defendant to the above named complainants
petition.
In answer to the said petition said
Defendant says:
True it is that said Mathias T Horine by
deed dated & recorded & setforth in said
petition transferred said lot in said
petition described to this Defendant who
now holds & occupies the same by virtue
thereof.
But Defendant denies that said Petitioner
is entitled to dower of the third part of all
the lands whereof her said husband was
seized during coverture.
Defendant says he is a stranger to all &
singular all other matters & things in said
petition contained and leaves the
petitioner to the proof thereof
And defendant says that said petioner
has no right of Dower or otherwise in
said premises.
And Defendant says that he is informed
and verily believes that after the sale
under the foreclosure in the Bill recited.
the said Walsh having claimed the premises
as his homestead. said Horine paid to said
Walsh who so accepted the same $100,00
according to provision of our homestead Law,
Wherefore Defendant says that petitioner
is not entitled to dower in said premises. pass.

5886-B

as ancillary to said homestead right and the money so paid and accepted and that her pretended dower right can and ought therefor attach only to so much or such part thereof as might remain after deducting said money so paid from the value of said premises.

And defendant says also that he has been informed & verily believes that said Mathias T Horine after taking possession of said premises made lasting and valuable improvements thereon to the value to wit of $600,00 and defendant says also that since his said purchase he himself has made other lasting & valuable improvements of the value to wit of $100,00.

Wherefore he says that her said pretended Dower right if at all allowed, ought to be considered ancillary to and after deducting such value of said improvements.

And Defendant says said petitioner is not entitled to Dower in said premises save as ancillary to said Mortgage in her petition recited if at all and only to so much or such part as might remain after deducting full amount legally due payable or paid by virtue of said Mortgage.

And all these things defendant is ready to verify and prove as the Court shall

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direct and hence he prays to be dismissed with his reasonable costs &c

Jacob Reis

Morrison "Job"

Deft

General traverse & Replication to the foregoing answer

R K S McIlvaine

for Plff

And on the 27th day of Nov 1866, the following Demurrer to answer was filed

State of Illinois } In Monroe County Cir Court
Monroe County } Special Nov Term A D 1866.

Elizabeth Walsh
vs
Jacob Reis } Bill in Chy to assign Dower

Demurrer to answer.

Demurrer to answer.

And the said complainant says that the said answer of defendant, and the matters therein contained in manner and form as the same are therein set forth are not sufficient in law to debar the said complainant of her dower in the said premises - in this, that her dower interest is not ancillary to the Homestead right, and that complainant is not bound by law to answer the same.

Wherefore she prays judgment - &c

By Kennedy

Plffs Sol

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(OBLTD)

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And afterwards to wit: at the Special Nov Term 1866, on Wednesday Nov 28th 1866, the following order was made and entered of record.

Elizabeth Walsh
v
Jacob Reis
} Petition in Chancery for Dower

Order.

Now comes the complainant by Kennedy her Solicitor and also the defendant by Morrison his Solicitor, and the defendants answer being on file, the complainant by her Solicitor files her exceptions to the same, which are refused by the Court, to which ruling the complainant excepts and stands by the answer, Thereupon this cause is submitted to the Court on the Bill and answer; and upon the hearing of the same the decree that the Complainant is entitled to dower according to Law, in the premises described in her Bill to wit: A lot Eighty feet North & South on Main Street in the Town of Waterloo and thirty two and a half feet fronting on the Public Square of said Town, being part of Lot No 62 of said town in Monroe County Illinois, after deducting out of the same the sum of $1040,00 received by the husband of said complainant, under the Homestead Law of the State, and also the value of the improvements made by the said defendant and by former owners,

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upon said premises. Thereupon the said Complainant makes a motion for a new hearing of this case which being refused by the Court, an appeal is prayed for and allowed upon said complainant, within Sixty days, enter into bond in the sum of $200.00 with Security to be approved by the Clerk of this Court.

And on the 8th day of May AD 1867, the following Affidavit and Report of Commissioners was filed.

State of Illinois } In Monroe Cir Court
Monroe County } May Term AD 1867

Elizabeth Walsh
vs
Jacob Reis
} Petition for assignment of Dower

Commissioners Report

We do solemnly swear that we will fairly and impartially allot and set off to Mrs Elizabeth Walsh, widow of David W Walsh her dower out of lands and tenements described in the order of the Court for that purpose, if the same can be made consistent with the interest of the Estate, according to the best of our Judgment, So Help us God.

A H Durfee
Valentine Siegel
Geo L Reiss.

Sworn and Subscribed
this 8th day of May AD 1867
Wm Ernd
Clk

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State of Illinois } In the Monroe Co Cir Court
Monroe County } May Term AD 1867.

To Hon Silas L Bryan
Judge, &c.

The undersigned commissioners appointed by this Honorable court to set a side to Mrs Elizabeth Walsh, her dower in the lands and tenements of her deceased husbands estate, David W Walsh, to wit; in a lot eighty feet North and South, on Main Street, in the Town of Waterloo, and thirty two & a half feet, fronting on the Public Square of said town, and being part of Lot Sixty two of the old Town of Waterloo, in Monroe County, State of Illinois" according to the terms and conditions mentioned in the Judgment and order of this Court, would respectfully report that having examined the premises, and being fully advised in the matter, that the premises in quistion are not susceptible of a division without great injury to the proprietor or owner thereof.
all of which is respectfully submitted this 8th day of May AD 1867.

A K Durfee
Valentine Siegel
Geo L Rice

Filed May 8th 1867
Wm Ford Clk

And afterwards to wit; at the May Term 1867, the following Order was made and entered of record,

Elizabeth Nash
vs
Jacob Rice
} Petition for Dower

Order.

Now comes the complainant by Kennedy her Solicitor upon whose motion Valentine Siegel, Alexander Darfee, and Geo L Rice, are appointed commissioners to assign dower to the complainant in the premises described petition to wit; A Lot eighty feet North and South on main Street in the Town of Waterloo, and thirty two and a half feet fronting on the Public Square of said Town, being part of Lot 62 of the Old Town, in Monroe County, State of Illinois, and that they make a report to this Term of the Court. And on Wednesday May 8th 1867, the said commissioners come and present their report, stating ~~that~~ Dower cannot be assigned in the said premises without great injury to the same and the owners thereof; which report is ordered to be filed. Thereupon the Complainant makes a motion to reform the decree made herein at the last Term of the Court, in reference to the Homestead, and this cause is continued till the next Term.

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And afterwards to wit, at the Special Nov Term 1867, on Wednesday Nov 27th 1867, the following order was made and entered of record,

Elizabeth Walsh
vs
Jacob Reis
} Petition in Chancery for Dower

Order.

Now on Wednesday Nov 27th 1867, comes the complainant by Kennedy & O'Melveny her Solicitors, also the defendant by Morrison his Solicitor, and the Complainants motion to reform former decree, having been overruled by the Court, by consent of the parties, this Cause is referred to Wm Ord, who is appointed a Special Master herein, for the purpose of taking testimony of the value of the improvements made on the premises in question, and to report the same to the next term of this Court; to which Term, this cause stands continued.

And on the 7th day of May 1868, the following depositions were filed.

Testimony

Depositions of Witnesses taken before the undersigned, Special Commissioner to take Evidence in the Case of Elizabeth Walsh, vs Jacob Reis, upon a Petition for assignment of dower, taken this 6th day of May, said

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Cause now pending in the Monroe County Circuit Court, at the May Term A.D. 1868.

Wm End Spl Master.

Mathias T Haime a witness introduced in behalf of defendant

I sold the property to defendant Reis - had it from the Spring or Fall of 1865. When Walsh the husband of Complainant claimed against me the right of Homestead, the Commissioners to set aside Homestead, valued the property, in which complainant claims dower, at three thousand dollars; it was indivisible & Walsh took the property

They set about a fair value of the property at that time, & had the property about a year - while I had it I spent about two hundred & fifty five dollars, and ninety cents in repairs and improvements. Since I sold it to the defendant, he has buy a mill, built an Ice-house and Smoke-house, buy a cellar, finished the upper Story, made improvements in the second Story & expended thereby considerable Money; the amount of which, I dont Know, As to the age of Mrs Walsh, complainant, I should guess she is between forty five and fifty years.

From A.D. 1866, forward for a series of fifteen years the place or property in the condition in which I took it, before the improvements were made by me and defendant Reis, respectively, the rental value of the property

per annum, would be, I think, about
Two hundred & forty dollars ($240.)
The ordinary annual repairs for the same
period of fifteen years would be about
fifteen dollars per annum; the insurance
would be about thirty-seven and a half dollars
per annum; the annual taxes of all descriptions,
State, County, School & town, about seventy five
dollars annually.

Cross Examined

I made a warranteed deed to the defendant.
I estimate the value to be now about
five thousand dollars ($5000.00); I sold
the premises to the defendant for four
thousand dollars, with a credit of five
years, the notes bearing six per cent interest,
the usual rate being Ten per cent.
I think it would rent now for double
as much as it would in its then
condition, when I got it; it is a good
business stand, a corner lot & house, in
Waterloo, opposite to the Court House.
Property similarly located has increased
in value for the last year or so.

Mathias F Skinner

Sworn to & subscribed
before me this 6th day
of May 1868.
Wm Ervin
Clk

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Adam Reis Examined & Sworn.

Am a cousin of defendant. have lived and owned property in Waterloo for many years - Know the condition of the property in which complainant claims dower, at time Mr Math J Koons got possession in 1865 have carefully read & heard the Evidence above given by him. My opinion as to the value of the property, the improvements, the annual rents, repairs, taxes & Insurance, is substantially the same as his except that I think the property for a series of fifteen years from 1866 forward is worth a rental value of three hundred dollars per annum.

Sworn to & subscribed before me this 6th day of May AD 1868, Wm Erd Clk

Adam Reis,

Geo Leip a Witness on

Have lived in Waterloo many years; have owned & rented houses in Waterloo: Know pretty well the condition of the Walsh property when Math J Koons got it: I have heard taken the testimony of Mr Koons, above sworn to; my opinion in all things stated by him as to the value of the Walsh property - its rental value per annum, taxes, repairs and insurance is substantially the same as his, given both on direct and cross examination

Geo Leip

[illegible]

Sworn to an subscribed before me this 6th day of May AD 1868 Wm Erd Clk

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Mr Geo Pinkel Examined &c

Have lived in Waterloo for some years past, and am selling goods on the corner opposite the Walsh property in which the complainant claims dower; knew the property when Mr Horine got it, but never paid particular attention as to its exact condition at that time. It has been greatly improved since, & think that for a series of fifteen years from 1866 forward that two hundred and forty dollars ($240.00) would be a fair annual rental value for said premises in the condition they were when Mr Horine got them in 1865, & in all other respects, I corroborate the statements contained in the depositions of Mr Math J Horine, Adam Reis, and Geo Leip.

Geo Pinkel

Sworn to & subscribed before me this 6th day of May 1868,

Wm Ewd Clk

Filed May 7th 1868,

Wm Ewd Clk

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And afterwards, at the May Term 1868 the following Decree was made and entered of Record, to wit:

Elizabeth Walsh
vs
Jacob Reis
} Petition in Chancery for assignment of Dower

Decree.

Now on Thursday, May the 7th 1868, come the complainant by J A Kennedy her Solicitor, and the defendant by W R Morrison his Solicitor, said cause is heard by the Court upon the Bill, answer, replication, depositions taken and oral evidence introduced, after a due consideration of the evidence and the argument of the solicitors, it is ordered adjudged and decreed that the complainant have Dower in the increased rental value of the premises in said Bill described, to wit: a Lot eighty feet north and South on Main Street in the Town of Waterloo and thirty two & a half feet fronting on the Public Square of said Town, being part of Lot No Sixty-two, in the old Town of Waterloo, which rental value is estimated and considered to be the sum of two hundred dollars, that the Dower interest therein is fixed at the sum of $80.00 per annum, that the same be paid to her by the defendant on the first of January annually, beginning January A.D. 1869, and each successive year thereafter during her natural life; that damages are due her for the

nonassignment of Dower for the last two years, in the sum of Forty Dollars, that the same be paid to her by the defendant within Sixty days from the rendition of this decree. That the Judgment herein made be a lein upon the premises, and in default of payment of the above specified amount and the annual installments as they fall due, a special execution issue, and Judgment is further rendered against the said defendant for costs &c

State of Illinois } ss
Monroe County }

I Wm Ewd Clerk of the Circuit Court of said County in the said State, Do hereby certify that the foregoing Record contains a true and correct copy of the Petition, bond for cost, Summons with Sheriffs return on the same, Demurrer to the Petition, answer, Demurrer to the answer, affidavits and Report of the commissioners, depositions, and all the orders of court and final Decree, as the same appear of Record in my Office, in the foregoing entitled cause.

In Testimony whereof I have hereunto set my Hand and affixed the Seal of Office this 21st day of July A.D. 1868.

Wm Ewd Clk

And the said plff in error comes and by H K S O'Melveny her atty says that in the foregoing record there are manifest errors and lets down and assigns for error to wit:

1st the Court erred in its Judgment of assignment of dower that $1000. be subtracted from the [illegible] amount of plff.

2. The Court erred in fixing the dower at $20.

3. The Judt of the Court was against the law; and also against the evidence

Wherefore &c

H K S O'Melveny
atty for plff in error

And the said defendant in Error comes & says that there is no manifest error in the records & proceedings in the above case as above therein complained of by the said plaintiff in Error, but the said defendant in Error on his part says that there is manifest error in this, to wit

1. The Court did not sustain the demurrer of defendant.

2 That Court did not dismiss bill on final hearing.

3d That Court allowed any dower at all

4 That Court entered decree in favor of complainant instead of for defendant

Gustavus Koerner for def. in Error

Sundry in Error by Pl in error H K S O'Melveny for plff

[1867-11]

16 —— 14

Elizabeth Walsh
Plaintiff in error
vs
Jacob Reis Defdt in
error —

"Error to Mason"

Filed 8th May 1869
W. D. Wiscombe
Clerk

Recd 10/00

Illinois Supreme Court.---First Grand Division.

JUNE TERM, 1869.

1°16.

ELISABETH WALSH, pltff. in error,
vs.
JACOB REIS, defendant in error. } Error to Monroe.

BRIEF OF DEFENDANT IN ERROR.

I am not aware that the Supreme Court (so far as its decisions have been published) has ever had occasion to examine the question raised in this record. It presents a conflict between the right of dower and a right of homestead, and out of it arises the question how far the doctrine of merger may be applied, if at all.

To say that the dower is the greater estate and cannot merge in the homestead, as is asserted in the brief of the pltff. in error, is hardly correct as a universal principle. Whether it is a greater estate or not, depends upon the value of the premises. If, for instance, the deceased husband has left only a homestead worth not more than one thousand dollars, the homestead right is beyond question the greater estate. The widow, claiming under her right of dower, would only be entitled to the use and occupation during life, of one-third of such homestead, while under the homestead law she has a life estate in the whole of it, with survivorship to her children, until the youngest becomes of age. No widow, so situated, would ever claim a dower estate in such premises, as an assignment to her would be a useless act. In this instance her dower interest is closely merged in her homestead right. Should the husband have left other estate, or should he have sold it without her having joined in the deed, of course she would be endowable in such other estate.

Now in this case the house and lot were worth more than a thousand dollars. Upon foreclosure, the mortgagee Horine paid to Walsh, the husband of pltff., one thousand dollars. Walsh had a right to dispose in this wise of the homestead. "While," as the Supreme Court says, in Cassell vs. Ross, et. al., 23 Ill., 244, "the homestead act was designed more for the protection of the wife and children than of the husband, yet as the title is usually vested in the latter, he must be treated as acting, at least to some extent, as their trustee."

Indeed by the clear letter of the law, the mortgagee had a right to extinguish the homestead right of the whole family, by the payment of the one thousand dollars to the head of the family. There can be no question of that.

Had there been no homestead exemption, the widow would have been entitled, after death of husband, to the life estate in one third of the premises. It so happens that in this case the property was worth at the time Horine obtained it by foreclosure and sale, about $3000. Surely her dower right in the whole premises could not have been worth more than her homestead right. Can she now in equity still claim her dower, her homestead right in this instance being greater than her dower right. Her dower right would have been a life estate in one-third of the premises, or the rent and profits thereof, while instead of the rents and profits her husband, being also trustee for her, got the full value of one-third of the entire property at once paid down, which at ten per cent would net him, or after his death, his wife and children, $100.00 per year, while the value of the rent of the entirety, deducting for repairs, insurance and charges, only amounted to $112.50, (according to the testimony,) and the widow's part thereof would only amount to $37.50. It is therefore contended on behalf of the defendants in error, that in this case the widow had no right in equity to have any dower assigned at all in the premises.

But suppose that her dower, in the whole, is not merged, yet can she claim dower in more than two-thirds of the rents and profits. One-third of the property was absolutely paid for, under the homestead exemption law, and by its operation her homestead right, which as to the one-third part of the premises was surely a larger estate than her dower right, was fully extinguished. Now, can she claim dower in the same premises? Suppose the house and lot had been divisible, and a thousand dollars worth of the lot and house had been set apart as a homestead, and was now occupied by her for life, could she have had dower assigned therein? Of course not as it would have had to be assigned on her own estate. The land having been changed into money by due course of law, her rights are not changed, and she cannot have rent and profits out of land, which was once before converted into money for her benefit. The money paid under the homestead law in this case, was precisely one third of the whole value of the land, so she could only be endowed in the rent and profits in the other two thirds. By what calculation the Court came to the sum of $20,00, it is not material to enquire into, suffice it to say, that it is just about the rents and profits of two-thirds of the real estate, according to the testimony, deducting insurance, taxes and repairs. Under this view of the case, the result of the Judge's computation is correct, although he may have come to it in the wrong way.

The defendant has assigned cross errors.

1st. That the Court should have dismissed the bill on final hearing, because the bill does not allege that the said mortgage was made during coverture. If Walsh had made the mortgage, before he married complainant, she could not have dower in it, against the mortgage or those claiming under him. Chap. 34, Dower, 1 sec. Gross' Stat., P. 231. It would be perceived that there was no testimony taken in the case as to time of marriage of complainant with her deceased husband.

2d. That the Court found her entitled to any dower at all. The reasons for this assignment of error are already stated above, and need therefore no repetition.

GUSTAVUS KOERNER, for Defendant in Error.

Rejoinder in argu:

10 14

June Term 1869. 1st Div.

Case No 16. on Docket.

Walsh vs Rees

The Homestead right, is no estate at all: McDonald vs Crandall 43. Ill. 237 & 238.

The 1st Cross error: Dft answer admits the marriage, and only sets up that, the complainant is not entitled to Dower because her husband had received $1000 - homestead money. - The bill is not before us, but in reply we make the point that on the bill the presumption after decree, is, that it sufficiently appeared to the Court - on the proof or admissions, that she was entitled to dower in the case.

H K & S Milburn
for Complainant

Filed 29th June 1869
R.H.D. Willcocks
Clerk

State of Illinois
First Grand Division
of the Supreme Court
June Term A.D. 1869.

Elizabeth Walsh, pltff in Error
vs
Jacob Reis Defft. in Error

Error to Monroe County.

The Clerk of the Supreme Court
will please enter the proper summons
& writ, directed to the Sheriff
Monroe County, against Jacob
Reis, in the above cause
and docket same &c

D. K. S. Mulkey
for Pltff
in Error

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Walsh
vs
Reis

Precipe

Filed 8th May 1869
Jas. Wilcox
Clk

SUPREME COURT OF THE STATE OF ILLINOIS

FIRST GRAND DIVISION

June Term, A. D. 1869

ELIZABETH WALSH,
Plff in Error,
vs.
JACOB REIS,
Deft in Error.
} Error to Monroe

ABSTRACT.

1 & 2 Petition for assignment of dower in usual form, in part lot 62, old town of Water
3 loo,; bond for costs; summons, &c., dated and served 20th April, 1868.

5 & 6 Demurrer to petition; demurrer overruled; motion by defendant to dismiss petition;
7 overruled; rule to answer by July, 1866. Answer of defendant: denies that petition-
er is entitled to dower, *because her husband, through whom she claims,* had mortgaged
8 the lot to M. T. Horine, who foreclosed it, and the said husband having claimed a
right of homestead in the lot, it being worth more than $1,000, that sum was paid to
him, that is to the husband, and for that reason it is averred, she is only entitled to
dower in the residue of the property after deducting that sum from its value; and,
further, that Horine sold to defendant, and both made valuable improvements, &c.

9 & 10 Exceptions to answer; overruled. Exceptions, &c., and Decree: 1st. That petition-
er have dower in part lot 62, "*after deducting out of the same* $1000, *received by the husband of the complainant, under the homestead law of this State;*" and also the value of the improvements made by Horine and defendant.

11 Commissioners appointed to assign the dower.

12 Report that same cannot be done.

13 Complainant moves court to reform its decree hereinbefore stated; motion refused, and report approved, and cause referred to *special* commissioner to take evidence as to "*value of the improvements made on the premises in question.*

EVIDENCE REPORTED BY COMMISSIONER.

M. T. Horine, defendant's vendor, says he spent $250 for improvements; for 15 years before 1866 the property would not rent for more than $240 per annum; repairs, $15; insurance, $37, and taxes, $75, each year; property worth now $5000; sold it for $4000 to defendant George Leip corroborates Mr. Horine, and Adam Reis substantially same, except he says the property is worth $300 per year rent. George Pinkle sets the yearly rent at $240. The *court*, on the evidence, sets the yearly rent at $200, and that the dower interest therein he fixed at $20 per annum.

ERRORS

1st. In the judgment of the court that commissioners assign dower, *after the deduction of* $1000.

2. Because the assessment was for $20 only, of the $200, found as the yearly value of the rent.

3. Because said decree is against the law and the evidence.

H. K. S. O'MELVENY, for Plff in Error.

BRIEF.

1. The sum of $20 per year is inconceivably small, and inconsistent with the proof, and inconsistent with the finding of the court, which was $200 per annum, even after deducting the $1000 *homestead* and the subsequent improvements; for one-third of the $200 would be $26 per year, after subtracting the $127 for taxes, insurance and repairs.

2. This record seems to present the judicial eccentricity of construing law and evidence most strongly against the *petitioner for dower*: whereas it has been the uniform pleasure of courts to grant petitions of this kind with pleasure, and give to such cases a liberal inter-

pretation. 4 Kent, side p. 61; Story Eq. Juris., sec. 629, 630; Sisk vs Smith, 1 Gil. Rep., 500. But the most palpable error is in the judgment of the court, that the widow should account for the value of $1000 paid to her husband as homestead money; or, that (to use the language of the court) "the petitioner have dower after deducting out of the same the sum of $1000, received by the husband of the complainant under the homestead law of this state."

If this is so, then a homestead worth $1000 only, sold for debts of husband. carries with it and extinguishes the widow's dower, if she survived her husband. If worth $2000, the creditor can bid it off at what he chooses on his debt over $1000, take his deed and extinguish the right of dower.

In this case $1000 is to be deducted from the value of the property before the commissioners were authorized to assign dower in the residue. No wonder they reported their inability to assign dower by metes and bounds.

The dower is the greater estate and cannot merge in the homestead at all The dower would remain after the youngest child arrives at age, if a widow should so survive her her husband. Nothing, it would seem all be better settled than that the widow cannot be deprived of her dower without her consent or misconduct, so in any view we can take of the case, the decree is erroneous. Sisk vs. Smith, 1 Gil. Rep., 503; Francisco vs Hendrix, 28 Ill., 68; Nichol vs Ogden, 29 Ill., 386; Moulton vs Hurd, 20 Ill., 142; Grattau vs Grattau, 13 Ill., ; Eberly vs Finch, 13 Pa., 526, and Exparte McElwain, 29 Ill., 442.

H. K. S O'MELVENY, for Plff in Error

15 Abstract & Brief
of
Plaintiff in error

Elizabeth Walsh
Plaintiff in error
vs
Jacob Rees
Deft in error

Error to Mount

Filed 20th June 1809
R. D. Willmuth Jr
Clerk

Illinois Supreme Court.---First Grand Division.

JUNE TERM, 1869.

ELISABETH WALSH, pltff. in error,
vs.
JACOB REIS, defendant in error.
} Error to Monroe.

BRIEF OF DEFENDANT IN ERROR.

I am not aware that the Supreme Court (so far as its decisions have been published) has ever had occasion to examine the question raised in this record. It presents a conflict between the right of dower and a right of homestead, and out of it arises the question how far the doctrine of merger may be applied, if at all.

To say that the dower is the greater estate and cannot merge in the homestead, as is asserted in the brief of the pltff. in error, is hardly correct as a universal principle. Whether it is a greater estate or not, depends upon the value of the premises. If, for instance, the deceased husband has left only a homestead worth not more than one thousand dollars, the homestead right is beyond question the greater estate. The widow, claiming under her right of dower, would only be entitled to the use and occupation during life, of one-third of such homestead, while under the homestead law she has a life estate in the whole of it, with survivorship to her children, until the youngest becomes of age. No widow, so situated, would ever claim a dower estate in such premises, as an assignment to her would be a useless act. In this instance her dower interest is closely merged in her homestead right. Should the husband have left other estate, or should he have sold it without her having joined in the deed, of course she would be endowable in such other estate.

Now in this case the house and lot were worth more than a thousand dollars. Upon foreclosure, the mortgagee Horine paid to Walsh, the husband of pltff., one thousand dollars. Walsh had a right to dispose in this wise of the homestead. "While," as the Supreme Court says, in Cassell vs. Ross, et. al., 23 Ill., 244, "the homestead act was designed more for the protection of the wife and children than of the husband, yet as the title is usually vested in the latter, he must be treated as acting, at least to some extent, as their trustee."

Indeed by the clear letter of the law, the mortgagee had a right to extinguish the homestead right of the whole family, by the payment of the one thousand dollars to the head of the family. There can be no question of that.

Had there been no homestead exemption, the widow would have been entitled, after death of husband, to the life estate in one third of the premises. It so happens that in this case the property was worth at the time Horine obtained it by foreclosure and sale, about $3000. Surely her dower right in the whole premises could not have been worth more than her homestead right. Can she now in equity still claim her dower, her homestead right in this instance being greater than her dower right. Her dower right would have been a life estate in one-third of the premises, or the rent and profits thereof, while instead of the rents and profits her husband, being also trustee for her, got the full value of one-third of the entire property at once paid down, which at ten per cent would net him, or after his death, his wife and children, $100.00 per year, while the value of the rent of the entirety, deducting for repairs, insurance and charges, only amounted to $112.50, (according to the testimony,) and the widow's part thereof would only amount to $37.50. It is therefore contended on behalf of the defendants in error, that in this case the widow had no right in equity to have any dower assigned at all in the premises.

But suppose that her dower, in the whole, is not merged, yet can she claim dower in more than two-thirds of the rents and profits. One-third of the property was absolutely paid for, under the homestead exemption law, and by its operation her homestead right, which as to the one-third part of the premises was surely a larger estate than her dower right, was fully extinguished. Now, can she claim dower in the same premises? Suppose the house and lot had been divisible, and a thousand dollars worth of the lot and house had been set apart as a homestead, and was now occupied by her for life, could she have had dower assigned therein? Of course not as it would have had to be assigned on her own estate. The land having been changed into money by due course of law, her rights are not changed, and she cannot have rent and profits out of land, which was once before converted into money for her benefit. The money paid under the homestead law in this case, was precisely one third of the whole value of the land, so she could only be endowed in the rent and profits in the other two thirds. By what calculation the Court came to the sum of $20,00, it is not material to enquire into, suffice it to say, that it is just about the rents and profits of two-thirds of the real estate, according to the testimony, deducting insurance, taxes and repairs. Under this view of the case, the result of the Judge's computation is correct, although he may have come to it in the wrong way.

The defendant has assigned cross errors.

1st. That the Court should have dismissed the bill on final hearing, because the bill does not allege that the said mortgage was made during coverture. If Walsh had made the mortgagee, before he married complainant, she could not have dower in it, against the mortgage or those claiming under him. Chap. 34, Dower, 1 sec. Gross' Stat., P. 231. It would be perceived that there was no testimony taken in the case as to time of marriage of complainant with her deceased husband.

2d. That the Court found her entitled to any dower at all. The reasons for this assignment of error are already stated above, and need therefore no repetition.

GUSTAVUS KOERNER, for Defendant in Error.

Walsh

vs

Reis

Error to Monroe

Brief of defendant

Filed 25th June 1809
R A D Wimmicks
Clerk

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

The People of the State of Illinois.

To the Clerk of the Circuit Court for the County of Monroe *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 Monroe County, before the Judge thereof, between

Elizabeth Walsh

Plaintiff, and

Jacob Reis

Defendant, it is said manifest error hath intervened to the injury of the aforesaid

Elizabeth Reis Walsh

as we are informed by 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 the 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 Mt. Vernon, in the County of Jefferson, on the first Tuesday in June 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, Sidney Breese, Chief Justice of the Supreme Court, and the seal of said Court at Mt. Vernon, this 8th day of May in the year of our Lord, one thousand eight hundred and Eighty nine

W. B. Wilmans

Clerk of the Supreme Court.

[1881-18]

16 — 14

June Term 1869

SUPREME COURT

FIRST GRAND DIVISION.

Elizabeth Walsh

PLANTIFF IN ERROR

VS.

Jacob Reid

DEFENDANT IN ERROR.

WRIT OF ERROR

Issued E.W.S. FILED. 8 May '69

R. B. Wilcox [?]
Clerk

SUPREME COURT OF THE STATE OF ILLINOIS

FIRST GRAND DIVISION

June Term, A. D. 1869

ELIZABETH WALSH,
Plff in Error,
vs.
JACOB REIS,
Deft in Error.
} Error to Monroe.

ABSTRACT.

1 & 2 Petition for assignment of dower in usual form, in part lot 62, old town of Water
3 loo,; bond for costs; summons, &c., dated and served 20th April, 1868.

5 & 6 Demurrer to petition; demurrer overruled; motion by defendant to dismiss petition;
7 overruled; rule to answer by July, 1866. Answer of defendant; denies that petitioner is entitled to dower, *because her husband, through whom she claims*, had mortgaged
8 the lot to M. T. Horine, who foreclosed it, and the said husband having claimed a right of homestead in the lot, it being worth more than $1,000, that sum was paid to him, that is to the husband, and for that reason it is averred, she is only entitled to dower in the residue of the property after deducting that sum from its value; and, further, that Horine sold to defendant, and both made valuable improvements, &c.

9 & 10 Exceptions to answer; overruled. Exceptions, &c., and Decree: 1st. That petitioner have dower in part lot 62, "*after deducting out of the same* $1000, *received by the husband of the complainant, under the homestead law of this State;*" and also the value of the improvements made by Horine and defendant.

11 Commissioners appointed to assign the dower.

12 Report that same cannot be done.

13 Complainant moves court to reform its decree hereinbefore stated; motion refused, and report approved, and cause referred to *special* commissioner to take evidence as to "*value of the improvements made on the premises in question.*

EVIDENCE REPORTED BY COMMISSIONER.

M. T. Horine, defendant's vendor, says he spent $250 for improvements; for 15 years before 1866 the property would not rent for more than $240 per annum; repairs, $15; insurance, $37, and taxes, $75, each year; property worth now $5000; sold it for $4000 to defendant George Leip corroborates Mr. Horine, and Adam Reis substantially same, except he says the property is worth $300 per year rent. George Pinkle sets the yearly rent at $240. The *court*, on the evidence, sets the yearly rent at $200, and that the dower interest therein he fixed at $20 per annum.

ERRORS

1st. In the judgment of the court that commissioners assign dower, *after the deduction of* $1000.

2. Because the assessment was for $20 only, of the $200, found as the yearly value of the rent.

3. Because said decree is against the law and the evidence.

H. K. S. O'MELVENY, for Plff in Error.

BRIEF.

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H. K. S O'MELVENY, for Plff in Error

Abstract & Brief of
Plaintiff in error

Elizabeth Walsh
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vs
Jacob Rice.
Deft in error

Error to Missouri

8867

Filed 2nd June 1869
B. R. Wilmarth
Clerk