Volume 25 | Issue 2 Article 7

January 1918

Specific Performance of Contract to Release Inchoate Right of Dower

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sumptions,[20] and thereby arrives at a maximum possible recovery of $15,695.63. While these assumptions are not at all strained or improbable, still they were not conclusive presumptions. Hence, the jury was not bound to have given them their full face value and it is impossible to say that they were given full weight in arriving at the verdict. Although the jury *could* have found $15,695.63 as actually based on the evidence, adding the residue of the $19,000 by reason of passion, prejudice or some other motive, there is no way of determining that they actually did so. If it could be determined that they actually so reached a verdict, a *remittitur* could be allowed which, instead of superseding the verdict would really be based on the verdict. On the other hand, if, by discounting assumptions in favor of the plaintiff, as they might and may have done, the jury determined that the plaintiff was entitled on the evidence to recover only $15,000 and added the extra $4000 on account of passion or prejudice, then to allow a *remittitur* reducing the recovery to the sum of $15,695.63 would be nothing more nor less than substituting the judgment of the court for the verdict of the jury. Although the principal case offers about as plain a case as can be offered for *remittitur* of damages in an action *ex delicto*, the court certainly acted within its proper discretion in ordering a new trial on the damages. To have allowed a *remittitur* might have resulted in injustice. It is interesting to note, however, that a *remittitur* has been allowed in a case under precisely similar circumstances.[21] The principal case is of chief interest as a further expansion of the salutary rule recently adopted of limiting issues upon new trials.

—L. C.

SPECIFIC PERFORMANCE OF CONTRACT TO RELEASE INCHOATE RIGHT OF DOWER.—In the case of *Crookshanks* v. *Ransbarger*[1]

[20] That deceased's earning capacity would have continued undiminished during his entire expectancy of life; and that he would have shared his earnings equally during all that time with his wife and his child.

[21] McKay *v.* New Eng. Dredging Co., 92 Me. 454, 43 Atl. 29 (1899). This was an action for death by wrongful act. The verdict was held excessive. The appellate court calculated the proper amount, basing its calculation upon the life expectancies of deceased's parents and his earning capacity. It was ordered that plaintiff might accept the reduced amount resulting from the court's calculation by way of *remittitur*, or else submit to a new trial.

[1] 92 S. E. 78 (W. Va. 1917).

it was held that though a married woman had joined with her husband in a contract to sell and convey land of the husband and had signed, sealed and acknowledged the contract, a court of equity could not specifically enforce it against her and compel her to release her inchoate dower right in the land. The decision seems somewhat surprising at a time when women are so rapidly winning what are claimed to be equal rights with men. Nevertheless, the judgment is correct under the present law of West Virginia. In fact it would be difficult to give any good legal argument for a contrary decision though perhaps all will admit that the law should be otherwise.

At early common law an inchoate dower right could be barred only by a fine or common recovery, but as these actions were never used in this country it came to be the custom to have the wife join in the conveyance of her husband and this was held to bar the dower right in the land thus conveyed.[2] The manner in which a married woman may release her inchoate dower right is now covered by statute in West Virginia. West Virginia Code, c. 73, § 4 provides:

> "When a husband and wife have signed a writing purporting to convey real estate, the wife may acknowledge the same together with, or separately from, her husband."

The form of acknowledgment for a married woman is then given. Section 6 of the same chapter provides:

> "When the acknowledgment of a married woman shall have been so taken and certified as aforesaid, such writing shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any real estate conveyed thereby, as effectually as if she were, at said date, an unmarried woman."

The court in *Crookshanks* v. *Ransbarger, supra,* held that the words "writing purporting to convey real estate" in c. 73, § 4, did not include an executory contract passing only an equitable title in land and, therefore, the execution and acknowledgment of the contract by the wife did not operate as a release of dower. Language similar to that of c. 73, § 4, has been in the statutes of

[2] See 1 SHARWOOD & BUDD, LEADING CASES IN THE AMERICAN LAW OF REAL PROPERTY, 370; 2 SCRIBNER, LAW OF DOWER, 2 ed., 285 *et seq.*

Virginia and West Virginia for a hundred years[3] so that it seems certain that there could have been no intent on the part of the legislature, at a time when a married woman had not even the power to contract, to include within the meaning of the words used in the statute, such an instrument as that involved in the case under discussion. Furthermore, the court pointed out that there is no such thing as an equitable title in inchoate dower. It is submitted that even if the language of the statute under consideration could be construed to include executory contracts which pass mere equitable interests in land, this last objection would still be unanswerable. It has long been settled that inchoate dower cannot be conveyed by a married woman nor can it be released to a stranger except by the wife joining in the conveyance of her husband for that purpose.[4] A contract by a wife to release such right has therefore never been enforceable at law or in equity. In order to pass an equitable title in inchoate dower by the execution of a contract to release such dower, it must first be assumed that equity will enforce such a contract specifically.

Cases where suit has been brought for the specific enforcement of a contract by a husband to convey land, where the wife refused to join in the deed for the purpose of releasing her dower are quite numerous,[5] but only one other case, *Goldstein* v. *Curtis*,[6] has been found where it appeared that the wife had joined in the contract to convey and specific performance was sought against her as well as against her husband.[7] In that case, the New Jersey court allowed specific performance against the wife. The case seems to be correctly decided under the statutes of New Jersey which can reasonably be construed to authorize the wife to bind herself by contract to release her dower right.

Under modern law it is settled that an executory contract by a married woman duly executed according to law, to sell her separate

[3] VIRGINIA CODE, 1819, p. 365; VIRGINIA CODE, 1860, c. 121, § 4; ACTS OF WEST VIRGINIA, 1861-2, c. 9.

[4] See 2 SCRIBNER, LAW OF DOWER, 2 ed., 288, 307.

[5] See collection of cases in 14 Ann. Cas. 671; Ann. Cas. 1914A, 207; and 24 L. R. A. 673.

[6] 63 N. J. Eq. 454, 52 Atl. 218 (1902).

[7] In Lucas *v.* Scott, 41 O. St. 636 (1885), which was cited by the court, the suit was for specific performance against the husband alone, though the wife had signed the contract. A somewhat analogous situation is found in the case of Lyon *v.* Harden, 129 Ala. 643, 29 So. 777 (1901), where a husband and wife had signed and acknowledged a contract for the sale of the husband's land in the form required by statute for the release of the homestead right and it was held there could be no specific performance of the contract against the wife.

real estate, may be specifically enforced against her.[8] Without doubt such a contract would be enforced in West Virginia though it seems the point has not yet been decided. Hence, while a married woman may bind herself by contract to convey her separate real estate there seems to be no way in which she can bind herself to release her dower rights in real estate belonging to her husband. The purchaser of land from a married man must take the risk of getting a clear title unless the wife be an infant or *non compos mentis*.[9] If the wife refuses to join in the deed the plaintiff is not even given an adequate remedy against the husband in a court of equity. He can specifically enforce the contract against the husband if he is willing to pay the full contract price and take the title of the husband subject to the inchoate dower right, but he cannot have specific performance against the husband with either abatement in price or indemnity.[10]

The result reached in *Crookshanks* v. *Ransbarger* is not the fault of the court but is due to the somewhat archaic law as to inchoate dower rights, which ought to be substantially altered to accord with the increased capacity to hold property and to make and enforce contracts conferred upon married women by modern statutes. The legislature should see that a method is provided by which a married woman may bind herself by contract to release her inchoate dower right, for, since she is permitted to release the right, there seems to be no good reason why she should not be permitted to contract to make such release. Incidentally, the whole collection of statutes of West Virginia governing a married woman's

[8] Davis *v.* Williams, 121 Ala. 542, 25 So. 704 (1899); Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3 (1898); Hazen *v.* Colossal Cavern Co., 29 Ky. L. Rep. 502, 76 S. W. 116 (1903); Baker *v.* Hathaway, 5 All. (Mass.) 103 (1862); Kingsley *v.* Gilman, 15 Minn. 40 (1870); Clay *v.* Mayer, 183 Mo. 150, 81 S. W. 1066 (1904); Dankel *v.* Hunter, 61 Pa. St. 382 (1869); Gentry *v.* Gentry, 87 Va. 478, 12 S. E. 966 (1891); Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423 (1883).

[9] WEST VIRGINIA CODE, c. 83, § 10 provides a method of securing the release of an inchoate dower right of a wife who is insane or an infant.

[10] Graybill *v.* Braugh, 89 Va. 895, 17 S. E. 558 (1893); Haden *v.* Falls, 115 Va. 779, 80 S. E. 576 (1914); Milan *v.* Williams, 73 W. Va. 467, 80 S. E. 770 (1914). The doctrine that specific performance of a contract to convey land cannot be had against a husband where his wife refuses to join in the conveyance, unless the vendee is willing to pay the full contract price for such title as the husband is able to convey, is followed in several jurisdictions. See cases collected in 14 Ann. Cas. 671 and Ann. Cas. 1914A, 207. The reasons usually given for this doctrine are that the court of equity cannot make a new contract for the parties and that the right of dower is of such a contingent nature that no abatement in price can be made which will be just to both parties, the value of the dower being too indefinite for a court to determine. The absurdity of these reasons has been pointed out by Mr. Pomeroy. See POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, 2 ed., § 460.

property rights and power to contract reminds one of a squatter's shack—built of pieces of plank, fragments of driftwood with old tin cans nailed over the most troublesome holes. It would be a relief to the legal profession if these statutes were repealed and some progressive legislation substituted defining the rights and powers of a married woman in understandable terms.

—J. W. S.

LIABILITY FOR DAMAGES RESULTING FROM AN UNFORESEEABLE FLOOD.—Examination of the reports shows a large number of actions brought for damages alleged to have resulted from a flooding of the plaintiff's premises by reason of the defendant's obstructing the flow of a water course. A large proportion of these actions are against railways, but the underlying principles of liability in such cases do not differ from those applied generally. In all cases the first question to answer in determining legal liability is whether the defendant's act in so obstructing or diverting the stream was negligent.[1] This must be settled by applying the ordinary test of negligence, *viz.*, whether a man of ordinary prudence under the circumstances should have foreseen harm to the plaintiff as a result of the defendant's act. The care required is that which a man of ordinary prudence would have exercised under the circumstances.[2] To be free from negligence, the defendant must guard against such floods as are foreseeable,[3] bearing in mind previous known floods at that place,[4] the nature and extent

[1] Schloss-Sheffield Steel & Iron Co. *v.* Wilson, 183 Ala. 411, 62 So. 802 (1913); Berninger *v.* Sunbury R. R. Co., 203 Pa. St. 516, 53 Atl. 361 (1902).

[2] American Locomotive Co. *v.* Hoffman, 108 Va. 363, 370, 61 S. E. 759, 128 Am. St. Rep. 953 (1908).

[3] Southern Ry. *v.* Plott, 131 Ala. 312, 31 So. 33 (1901); Schloss-Sheffield Steel & Iron Co. *v.* Wilson, 183 Ala. 411, 62 So. 802 (1913); Ohio & M. Ry. Co. *v.* Ramey, 139 Ill. 9, 28 N. E. 1087 (1891); Dunn *v.* Chicago, I. & L. Ry. Co., 114 N. E. 888 (Ind. 1917); Atchison, T. & S. R. Ry. Co. *v.* Herman, 74 Kan. 77, 85 Pac. 817 (1906); Madisonville, H. & E. R. Co. *v.* Thomas, 140 Ky. 143, 130 S. W. 143 (1910); Western Md. R. Co. *v.* Martin, 110 Md. 554, 73 Atl. 267 (1909); Dorman *v.* Ames, 12 Minn. 451 (1867); Houston & G. N. R. R. Co. *v.* Parker, 50 Tex. 330, 344 (1878); Lisonbee *v.* Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784 (1898).

[4] Southern Ry. Co. *v.* Weidenbrenner, 109 N. E. 926, 930 (Ind. 1915); Wm. Tackaberry Co. *v.* Simmons Hardware Co., 170 Ia. 203, 212, 152 N. W. 779 (1915); Riddle *v.* Chicago, R. I. & P. Ry. Co., 88 Kan. 248, 128 Pac. 195, 197 (1912); L. & N. R. Co. *v.* Conn, 166 Ky. 327, 330, 179 S. W. 195 (1915); Madisonville, H. & E. R. Co. *v.* Renfro, 127 S. W. 508 (Ky. 1910); South Side Realty Co. *v.* St. Louis & S. F. R. Co., 154 Mo. App. 364, 134 S. W. 1034 (1911); Mayor *v.* Bailey, 2 Denio 433, 441 (N. Y. 1845); Mundy *v.* New York, L. E. & W. R. Co., 75 Hun