PEMBERTON'S LESSEE Vs. HiCKS

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Court : US Supreme Court

Decided On : 1798

Appeal No. : 3 U.S. 479

Appellant : PEMBERTON'S LESSEE

Respondent : HiCKS

Judgement :

PEMBERTON'S LESSEE v. HICKS - 3 U.S. 479 (1798)
U.S. Supreme Court PEMBERTON'S LESSEE v. HICKS, 3 U.S. 479 (1798)

3 U.S. 479 (Dall.)

Pemberton's Lessee
v.
Hicks

Supreme Court of Pennsylvania

December Term, 1798

This ejectment was tried at Newtown, in Bucks County, May, 1794, when the Jury found the following special verdict:

The Jurors impannelled, tried, sworn and affirmed to try the issue joined in this cause upon their respective oaths and affirmations say That Laurence Grouden, being seized in fee of the premises in the declaration mentioned, by his last will in writing duly made and executed, devised the same premises in fee simple to his daughter Grace Galloway, then the wife of Joseph Galloway, and afterwards died seized thereof as aforesaid:

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said: That the said Grace Galloway had issue by her said husband, one daughter Elizabeth, who is still alive: That the said Joseph Galloway afterwards by Act of Assembly passed on the 6th of March 1778, was required to surrender himself under pain of being attainted of High Treason: That the said Joseph Galloway did not surrender himself accordingly, and therefore became and stood attainted of High Treason to all intents and purposes, and his estate forfeited to the commonwealth, the said Grace Galloway then being in full life: That the said premises were afterwards duly seized and sold by the agents for forfeited estates, and the same conveyed to the Defendant by the commonwealth. That the said Joseph Galloway so

being attainted, departed out of the United States into parts beyond sea, and still continues there in full life: That the said Grace Galloway continued in the United States, and afterwards, to wit, on the 6th Feb. 1782, died seized in fee simple of the premises aforesaid, having first, to wit, on the 20th Dec. 1781, duly made and published her last will in writing, whereby she devised the said premises to Owen Jones and others: That the survivors of the said devisees afterwards, to wit, on the 6th of April 1790, conveyed the same premises to Thomas Rogers: That the said Thomas Rogers on the 20th April 1790, conveyed the same premises to the Lessor of the Plaintiff, who demised the same premises to the same Richard Fenn: That the same Richard Fenn entered and was ousted by the said Defendant.

> 'If upon these facts the law be with the Plaintiff, they find for the Plaintiff and assess six pence damages, besides the costs; but if for the Defendant they find for the Defendant.'

The general question was, whether a tenant by the courtesy initiate, has an estate forfeitable upon his attainder for treason? And it was argued at two several terms, by E. Tilghman, and Lewis, for the Lessor of the Plaintiff; and by Ingersoll and Dallas, for the Defendant.

For the Lessor of the Plaintiff, the subject was considered in three points of view: 1st. What the husband seized of real estate, gains by the marriage, before the birth of a child? 2nd. What is the nature of the estate which he acquires after issue? And 3rd. How, after issue, does a forfeiture upon attainder operate?

1st. By the marriage alone a husband does not gain a freehold in his own right, in the estate of his wife; though he is jointly seized with her, during their joint lives, and is entitled to receive the profits to his own use. The freehold and inheritance

remain in her; and he must, in legal proceedings, declare himself to be seized in fee, in right of his wife. Doug. 315.

2. On the birth of a child, the husband becomes only tenant by the curtesy initiate; and, to complete his estate, the death of the wife is an indispensable requisite. The quality and reason of a tenancy by the curtesy, do not depend merely on the marriage; but, if the husband survives his wife, he obtains the custody of the estate for the sake of the heir, as well as for his own immediate benefit. 1. Bac. Abr. 659. The requisites to constitute a tenancy by the curtesy, are stated in Co. Litt. 30. a; and they must all concur before the estate can exist; so that until the estate is consummated by the death of the wife, the husband is not seized in his own right; he has only a possibility, depending on the contingency of his survivorship. Litt. s. 35. To say that his estate is consummate before her death, is to say that a thing exists before the fact, which is necessary to its existence. But by attainder the husband became civilly dead; and could not, in legal contemplation, survive his wife, nor take an estate by act of the law. 7 Co. 25. a. In Godb. 323. is the only dictum, which seems to have a direct relation to the present question; but it must be respected as the admission of Lord Keeper Coventry, when Attorney-General. It is said, that curtesy is forfeited on attainder of the husband, by way of discharge; and the discharge there meant, must be a discharge of the estate, as to the husband's own future right against the heir. 1 Bac. Abr. 660. 2 Leon.

3. But the attainder, and consequent forfeiture, prevent the guilty person from being tenant by the curtesy. The law, which never does a useless thing, will not cast an estate upon an alien, or a felon; 1 Vent. 412. 413; nor, by a parity of a reason, will it cast an estate by the curtesy on a person, who is previously rendered incapable to take, or enjoy, it. 'If a Feme takes Baron, who have issue, and after he is attainted of felony, and then the king pardons him, per Keble, he shall not be tenant by the curtesy by the issue had before; contra, if he had issue after.' 7 Vin. Abr. 162. pl. 4. in not. Bro. tit. 'Tenant by Curtesy,' pl. 15. p. 250. S. C. 13 H. 7. 17. S. C. 3 Com. Dig. 244. S. C. Stamf. P. C. 196. S. C. 3 Inst. 19. So, in the present case, Mr. Galloway could not be tenant by the curtesy, in consequence of the issue before his attainder; the attainder destroys all relationship between the father and such issue, so that he can take no benefit from their birth; and the wife's estate being discharged of his right, descends, of course, to her heir at law, or devisee. Unless, in short, Mr. Galloway had an estate for life, at the time of the attainder, he could not forfeit it. A mere right of action, or condition, shall not be forfeited

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on attainder, by general words. 3 Co. p. 2. 3. 13 Vin. Abr. 441. pl. 14. 3 Inst. 19. And the hardship of the case cannot be overlooked; for, as the attainder deprives the child of all rights of property, derived through the guilty father, it ought not, surely to work a disinheritance, likewise, as to the estate of an innocent mother.

For the Defendant, it was answered, that whether the subject was considered on general principles and authorities; or on the positive provisions of the Act of Assembly; a tenant by the curtesy initiate possesses such an interest in the wife's estate, as is forfeitable upon an attainder for treason.

1st. On general principles and authorities. It seems a strange position, that the attainder of a traitor should, during his natural life, accelerate a descent to his child. But if the traitor had an estate in the premises, it cannot descend, it must be forfeited during the continuance of such estate; for all his estates are forfeited. 4 Bl. C. 374. 2 Wood. Lect. 504. The question is, therefore, simply, whether a tenant by the curtesy initiate has any estate in the premises, of which his wife is seized? Before issue, his interest is, indeed, merely in prospect, a contingency, an expectation, a possibility: but after issue 'he begins to have a permanent interest in the lands;' and nothing but his own natural death can defeat it. 2 Bl. Com. 126. The contingency has then happened, which, by the act of the law, makes him as much tenant for life, as if he were tenant for life in reversion, or remainder, per formam doni. The distinct use of the words, initiate and consummate, must not be regarded as creating a contingency, but as descriptive of a peculiar estate. While the wife lives, even before the birth of issue, the husband is seized of the land in fee in her right; and, after the birth of issue, during her life, he cannot have a better estate; though his title to an estate, upon her death, is commenced, or initiate. Hence his estate by the curtesy is called consummate on the death of the wife, in relation to the new and independent form by which he holds it; the seizen being then separate, that was before joint. Co. Litt. 67. a. But, surely, when a man acquires a right to exercise acts of ownership, that the bare seizen in right of his wife, would not authorise, he must be considered as possessed of some estate. Thus, we find, that a tenant by the curtesy initiate acquires the right to do homage to the Lord alone. Litt. s. 9. Co. Litt. 30. 67. 2 Bl. Com. 126. Avowry shall be made on him only in the life of his wife. Co. Litt. 30. a. He may use the title of his wife's dignity. Co. Litt. 29. b. He may do many acts to charge the land.

2 Bl. C. 118. He may make a feofment; and what he may grant, he, surely, may forfeit. Co. Litt. 30. a. b. 31. a. If, besides, nothing but a man's own death (independent

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of the punishment for crime) can prevent his enjoying an estate for life, has he no interest in the land? The death of the issue, or its arrival at full age, or the treason of the wife herself, cannot defeat the right acquired by a tenant by the curtesy initiate; and so far is Lord Coke from considering it as a mere expectancy, contingency, or possibility, that he emphatically declares, the husband 'having issue, is entitled to an estate for the term of his own life, in his own right, and yet is seized in fee in the right of his wife, so as he is not a bare tenant for life.' Co. Litt. 67. a. On the very point of forfeiture, the dictum in Godb. 323. is strongly in favor of the Defendant, if properly explained; for, forfeiture on attainder for treason is always to the Crown; 4 Bl. C. 376. 381. and that there should be a forfeiture merely to discharge the father's lien upon the estate, in favor of his children, is absurd. During the coverture, the whole estate is forfeited: and if the husband dies first, the estate is as much discharged by that event, as it can be by his attainder. But the analogy between the case of curtesy, and the case of dower, will assist in supplying the defect of positive authority. Dower is forfeitable at common law; and yet dower depends on the same contingency of survivorship as curtesy. 1 H. P. C. 253. 359. 2 Bl. C. 130. 1. The seizen of the husband gives an inchoate right to dower; as the birth of heritable issue gives a curtesy initiate; And when it is said, that he cannot forfeit his curtesy by his wife's treason, there is great room to infer that he may forfeit it for his own. 4 Bl. C. 375.

Suppose an estate devised, or conveyed, to Galloway and his wife, and the survivor of them; or to him during the life of his wife, with remainder to him if he survived her; would not the whole estate be forfeited? Would not the forfeiture reach the right of survivorship? Again: suppose an estate in fee simple devised to him with a double aspect; a devise for years, with a contingent remainder to him in fee; would not the remainder be forfeited? True, the tenancy by the curtesy was not consummate, until the death of the wife; but does this prove, that he had no estate at the time of the attainder, nothing more than a possibility? Is homage done for a possibility? Can a right by possibility enable a man to do many acts to charge the land? Will a possibility make a man a member of the pares curioe? Would a possibility give effect to a feoffment made during the life of the wife, in case he survived? And if so, what more could be effected by the feoffment of a joint tenant?

There are four requisites necessary to make a tenancy by the curtesy; three had occurred at the time of the attainder; shall the fourth consummate, or defeat, the estate? In favor of the

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husband, or a purchasor under him, as against the heir, it consummates: why not in favor of the Commonwealth? It is urged, in answer, that the law does not cast an estate upon him, who cannot hold it: but the rule is clearly otherwise, if the estate accrues by the happening of a contingency, by a limitation, by a condition, or by a purchase, in the legal sense, distinguished from descent.

In Co. Litt. 67. a. the curtesy is considered as vested, liable to be defeated by the death of the husband, happening before the death of the wife; but when the husband

is regarded by that authority as more than tenant for life, with a power to charge the lands, to sell them, to perform the feodal investiture, &c.; can it be reasonable to say that he has no estate? Is not this an interest beyond a right of action, a right of entry, or condition? all of which, it will be shown, are subjects of forfeiture under the act of Assembly. But it is said, that tenancy by the curtesy is a future estate. Litt. s. 35. and in some respects the assertion is true: yet, it is equally true, that in other respects, after the birth of issue, it is an interest, and not a contingency; an existing right, and not merely a possible benefit.

It is contended, however, that the forfeiture itself prevents the guilty person from being tenant by the curtesy; 1 Bac. Abr. 660. but this authority evidently turns entirely upon the principle, that his title vests in the crown. In that case, too, if no office is found, the estate would return to the husband on a pardon; and even if an office be found, a pardon with words of restitution would restore it to him, provided no interest vested in the subject. 4 Bl. C. 402. 2 Bl. C. 128, 255. 3 Bl. C. 259. 3 Bac. Abr. 810. It is true, if tenant by the curtesy acquires a new right, after the pardon, the estate would be his of course; as if he had no children before, or at the time of, the attainder; in which case no forfeiture of the curtesy could be incurred; but has issue after the pardon, in which case he is a new man, capable of taking as if the attainder never had happened. After the attainder, and before the pardon, indeed, the estate will not vest even for the benefit of the crown, which explains 1 Bac. Abr. 660. but if the curtesy is initiate at the time of the attainder, the estate passes to the crown, with all the capacity of being enlarged and consummate, as well as being defeated, to which it was liable in the hands of the individual attainted.

It is not consistent with the authorities to say, that a tenant by the curtesy initiate, cannot grant his right, living his wife; and whatever a man has in his own right he may forfeit 4 Leon 112. Green's Bank Law, 124. The case cited from 7 Vin. Abr 162. pl. 2. is contradicted by pl. 4. it is not supported by 13 H.

7. 17. and it is at best a dictum of Keble, when a lawyer at the bar. It is to be found, likewise, in Noy. 159. and there it appears, that it was a question turning on the corruption of blood.

2nd. But whatever doubt may be created on the English authorities, the positive provisions of the act of Assembly cannot be obscured or evaded. By the original act defining treason and prescribing its punishment, the forfeiture upon attainder it declared, in general terms, to be 'the estate' of the delinquent: I Vol. State Laws. s. 3. p. 727, 8. Dall. Edit. And in the act for the attainder of divers traitors, including by name Mr. Galloway, it is declared, that unless they appear and conform to the law; 'they shall suffer and forfeit as persons attaint of high treason.' Ibid. s. 2, 3, 4. p. 751, 2. But when the same act enters into a specification of the subjects of forfeiture, it embraces, in express terms, 'all and every the lands, tenements, hereditaments, debts, or sums of money, or goods or chattels whatsoever, and generally the estates, real and personal, of what nature or kind soever they be, within this State, whereof the aforesaid Joseph Galloway , &c.; shall have been possessed of, interested in, or entitled unto, on the 4th of July, 1776, or at any time afterwards, in their own right, or to their use, or which any other person or persons, shall have been possessed of, interested in, or entitled unto, to the use of, or in trust for them, or any of them, shall according to the respective estates and interests, which the persons aforesaid, or any

in trust for them, or any of them, shall have had therein, stand and be forfeited to this State.' Ibid. s. 5. p. 752, 3.

If tenancy by the curtesy initiate is an estate of any kind; if it gives any interest in the lands; if it gives any title to the tenant; then is it a subject of forfeiture, under the positive provisions of the act of Assembly. It is evident, that the forfeiture under this act is more extensive, than by the common law, or statutes, of England. I H. H. P. C. 212. In England the forfeiture is of lands and tenements of inheritance, and rights of entry; and the profits of lands and tenements, which the attainted person had in his own right for life, or for years: 4 Bl. C. 381. But here, in addition to these objects, rights of entry touching lands, a right to reverse a judgment, and all conditions, uses, and trusts, are forfeited. If, therefore, a tenancy by the curtesy initiate is forfeited by attainder in England, a fortiori it is forfeited in Pennsylvania.

Cur. Adv. Vult.