FOSTER v. HILLIARD ET AL.

Case No. 4,972.

{1 Story, 77; 3 Law Rep. 175.}[1]

Circuit Court, D. Massachusetts. May Term, 1840.

SALE OF REAL PROPERTY—DIVISION OF PURCHASE MONET BETWEEN LIFE TENANT AND REMAINDER MEN—COMMON LIFE TABLES—DEATH OF LIFE TENANT—WHEN RIUHTS OF PARTIES WERE DETERMINED.

1. When a sale of real estate is made jointly by persons having independent interests, in the absence of other countervailing circumstances, the purchase money is to be divided according to their respective interests.

2. In the case of a tenant for life, remainder in fee, of lands under mortgage, the parties contribute to discharge the incumbrance according to the relative value of their respective interests,

calculated according to the value of the estate of the tenant for life by the common tables.

[Cited in Danforth v. Smith, 23 Vt. 256.]

3. The same principle applies where a mortgagee devises the mortgaged estate to one for life, remainder over in fee.

4. A court of equity will decline to interfere in adversum to change real estate, by a sale, into personal estate, without imposing conditions, by which the proceeds snail retain throughout the character of the original fund. Yet it would be different, if there had been a voluntary sale by the parties.

5. Certain real estate was devised to A. for life, remainder to certain minors in fee. A., with the consent of the guardian of the minors, sold the land, but died before receiving the whole of the purchase money, and the residue was received by his executors. *Held,* that the rights of the parties were absolutely fixed at the very time of the sale; and that the executors of the deceased and the remainder men were entitled to share in the proceeds, according to the interests of A., and the remainder men at that time.

6. The interest of the tenant for life was to be determined, not by the time when he actually died, but by the value of his life, as ascertained by the common tables at the time of the sale. And although he died within four years from the time of the sale, yet his interest was to be calculated for about twenty years, as that was the duration of his life, as ascertained by the common tables.

Assumpsit [by Samuel C. Foster against Abraham Hilliard and another, executors]. The case came before the court upon an agreed statement of facts, in substance as follows:—A devise was made by Thomas Foster of certain wild and uncultivated lands in Maine, to John Foster as tenant for life, remainder to his nephews, Andrew, Samuel C, James, and George Foster, then minors, under the guardianship of Mary Foster, their mother. In 1832, after the death of the testator, the tenant for life and the guardian of the remainder men, who were then still under age, sold the land to Jacob D. Brown, and the tenant for life received a part of the purchase money, and took from the purchaser a deed of mortgage of the same land, in his own name, to secure certain notes, made payable to him or his order, which were given for the balance of the purchase money, and certain other moneys due from the purchaser to him. Soon after the sale, the tenant for life brought a bill in equity and obtained an injunction against the purchaser to restrain him from committing waste on the mortgaged premises, and incurred great expenses in prosecuting this suit and in other legal procedures in the collection of said notes. The tenant for life, after receiving sundry sums of money on account of the mortgage and other securities, sold and assigned the same, and took, in payment therefor, other notes and securities, in like manner made payable to his order, and a sum in money. He subsequently died, and after his death, his executors sold the last mentioned notes and securities, and received payment therefor in money. The tenant for life, while he lived, had the possession, control, and entire use of the money and the securities and notes given in payment for said land, and the moneys and interest paid thereon; and neither the guardian nor the remainder men exercised or asserted any right of supervision, or interfered in any way, in the management and use of the said property by the tenant for life; nor were they knowing to, or ever consulted in reference to said legal procedures, or the transfers, sales, and

investments made by the tenant for life or his executors, or any matter or thing concerning the property in his hands John Foster died on the 1st of November, 1836, aged 54 years, 3 months, and 27 days; having been born on the 4th of July, 1782. At the time of the sale, on the 14th of November, 1832, his age was 50 years, 9 months, and 10 days, and at that time his expectancy of life, by Wigglesworth's tables, was 20.90 years; by the Carlisle tables, used at the life office in Boston, it was a fraction greater. The executors were requested to pay over to the devisees in remainder, the whole capital sum, retaining only the interest, as belonging to John Foster. They offered to pay only that portion of it, which would result from a calculation of the value of John's life estate, supposing the land to be converted into cash on the day of sale, and the money divided on that day, according to the rules for calculating the value of annuities. The case was submitted to the court upon the agreed statement of facts, with liberty to infer such other facts as a jury would be authorized to infer.

!Mr. Dehon, for plaintiff.

The first question is, whether the change of the property from real to personal estate affected the relative rights of the parties making the conveyance. The mutual relative rights were settled by the will. The sale effected merely a substitution of personal for real estate, and the substitute, like the original, was dependant on the provisions of the will. To suppose any other result to be effected by the change is absurd; for otherwise no guardian could have consented to such a conveyance, as might injure the interest, or affect the estate, of the ward. In the absence of any agreement, it is the reasonable and natural inference, that the parties did not intend to vary their right When, therefore, John Foster received from Brown the money, and notes, and mortgages from the sale of the estate, he was entitled to the interest and income thereof, for his life only, but to no part of the principal. He was further entitled to the exclusive possession and control of the fund and property, subject to restraint from any such use as would endanger the interests of the remainder men. As there was no division of the proceeds after the sale, the court should presume, that there

was an agreement between John Foster and the guardian, that be should have the same use and enjoyment of the proceeds, as he would have had of the estate, if it had not been sold; arid that the remainder men should take no part till his decease, and then, that they should take the whole. It will not be questioned, that John Foster actually received the whole proceeds, and held them within his entire control and management during his life; and there is no evidence to show, that either the guardian, or the remainder men, ever moved in reference to the estate, after it was sold, until the death of John Foster. The acts of all the parties, therefore, show what was their intent at the time of the sale. It is not, however, necessary to make out such an agreement It is enough to show, that John Foster exercised the right of a tenant for life; that is, that he has received all that the testator intended, that he should have; and, it seems, that the representatives of his estate can, with little justice or equity, claim more. We contend, that John Foster has had the use and enjoyment of the estate in the only manner, in which he could legally have or enjoy it under the will. Had it remained real estate, it could not have been partitioned in 1832. The estate of John Foster was a life estate, and that of Andrew's children a remainder in fee simple conditional, disposable on the subsequent uncertain event of their death, before they arrived at the age of 21 years. Upon reaching that age the fee would become absolute. Lippett v. Hopkins [Case No. 8,380]; Sayward v. Sayward, 7 Greenl. 210. The statute of Massachusetts of 1817, c. 90, by which the power of partition of real estate is conferred on the probate court, is judicially construed in Wainwright v. Dorr, 13 Pick. 333, and Packard v. Packard, 16 Pick. 194. By these decisions it appears, that a division of remainders is not contemplated by the statute, and that no division can take place, until the several proportions of the parties are ascertained and made certain. The estate of the minors is a remainder, and their shares are uncertain and within the rule. No division of the realty, therefore, could have been made; and if the proceeds are to be considered as personal property, the same reasons exist against a division of them, as against a partition of real estate. If the conversion to personal property took it out of the jurisdiction of the court and left it in the hands of the parties, we say, that, as they made no division, an agreement is to be presumed, that the personal estate should stand just as the real estate did. 1 Story, Eq. Jur. § 487. But if the court decide, that the present fund should be divided, we are not content with the rule of apportionment. The rule of calculating the value of life estates by the tables is one of convenience, and only to be resorted to in cases of necessity, where it cannot be otherwise ascertained. The adoption of this rule, resulted from the necessity, under which courts were placed, of ascertaining the relative value of life estates and remainders, where some charge was to be borne by them pro rata; or where the tenant for life was to be paid a sum for his estate, equal to its value, the duration of his life being uncertain. But, how can the court be asked to resort to the tables to guess at the probable duration of a man's life, when his death has rendered it

certain; more especially when the result must necessarily prove erroneous? It would be doing actual injustice to the remainder men. If the division was to have been made in 1832, the value of John Foster's share would properly have been calculated according to the tables; but not since his death; because we have no right to resort to approximation, where we can arrive at certainty. We contend, therefore, that the life estate should be calculated according to the time he actually lived after the sale, viz. 4 years, less by 14 days. Clyat v. Batteson, 1 Vern. 404; Nightingale v. Lawson, 1 Brown, Ch. 443.

S. Greenleaf, for defendants.

The general question is that of an apportionment between the tenant for life and the remainder man. The old rule, in case of incumbrances, of one third and two thirds, is now exploded. 1 Story, Eq. Jur. p. 465, §§ 487,488. The modern rule is, that each shall contribute to the relief of the estate, according to the "benefit he derives" from the payment; which, of course, will depend on his age, and the present value of his life; and a reference will be directed to the master, to ascertain the proportion he ought to pay. 1 Pow. Mortg. (Rand's Ed.) 312, etc., note M; Allan v. Backhouse, 2 Ves. & B. 65, 79. In White v. White, 4 Ves. 33, it is said, that it shall be "according to his interest," that is, the value of his life. Lord Penrhyn v. Hughes, 5 Ves. 107. If the estate is sold, the proceeds shall be divided according to the interests. Clyat v. Batteson, 1 Vern. 404; 1 Pow. Mortg. 314a, note Q; 3 Pow. Mortg. 920, 923, note H; Id. 1043, note O; 1 Story, Eq. Jur. pp. 465, 466, and the cases there cited. The same principle is applied, when the mortgagee devises the mortgage to one for life, with remainder over; and the money is paid by the mortgagor during the lifetime of the devisee for life; viz. it is divided between them according to the present value of their interests. In Brent v. Best, 1 Vern. 69, the principle is correct; the rule of proportion only, that is, of one third and two thirds, is exploded. Thynn v. Duvall, 2 Vern. 117; Lord Penrhyn v. Hughes, 5 Ves. 107; 1 Story, Eq. Jur. 446, note 1. In Swaine v. Perine, 5 Johns. Ch. 482, the same principle is adopted in a bill for dower, brought by the widow of the mortgagor against the heir, who had paid off the mortgage. The same principle is applied in distributing the proceeds of an estate sold, as between tenant

by courtesy and reversioners. Houghton v. Hapgood, 13 Pick. 154. The parties here have turned the land into another species of property, subject to other rules, and have thereby reduced the question to one of a mere division of money. How is this division to be made? We say, according to the interest of the parties, and the rights vested in them at the moment of sale. The interest of John Foster was then equal to the value of an annuity for his own life, viz. the interest of the whole price for which the land was sold. Besides, it is better and safer for all parties, and even indispensable to the security of the remainder men, that a right to a present division should exist. But in this case, it was particularly desirable, because in Massachusetts, where the parties were all resident, there exists no chancery power, to prevent the tenant for life from expending the whole of the property. It was undoubtedly the intent of the testator, that, under the circumstances, there should be a sale and division of the proceeds. The will itself demands such an interpretation; because every devise imports a benefit intended. And in the present case, where the devisee was an only brother, and heir at law, and the property consisted of wild lands, from which no benefit could accrue, until they were sold, such a sale might be enforced at law. In Revel v. Watkinson, 1 Ves. Sr. 93, the tenant for life being heir at law, and Otherwise unprovided for, was allowed maintenance out of the estate. The same was adjudged by Lord Harecourt, in the Case of Rutter of Woodhall, there cited. The rule of construction with regard to wills is, that every will must be expounded most favorably for the devisee (6 Mass. 169; 10 Mass. 303; 12 Mass. 546), and with equal favor to all the devisees. The rule, that the plaintiff insists upon, however, will not be equally beneficial to all, as it gives to John Foster no vested and present right to any part of the money.

STORY, Circuit Justice. The case may be shortly stated, upon which the arguments have been addressed to the court. A devise was made of certain wild and uncultivated land in Maine to A., as tenant for life, remainder to his nephews, who were minors, in fee. After the death of the testator, the tenant for life, with the assent of the guardian of the minors, sold the land, and received a part of the purchase money, and then died, and the residue of the purchase money has since been received by the executors of the tenant for life. The minors have since come of age; they do not seek to disturb the sale; but they claim the whole purchase money from the executors. The present action is brought by one of the remainder men, to recover his share. There is no proof of any agreement between the tenant for life and the guardian, as to the distribution or division of the purchase money between the tenant for life and the remainder men. On behalf of the remainder men, it is contended: (1) That the purchase money is to be treated as a mere substitute for the land on the sale; that the tenant for life was entitled to the income thereof during his life; and that the whole principal now belongs to them. (2) That if they are not so entitled, the apportionment of the purchase money is to be made between them and the executors, not according to the value of the life estate of the tenant for life, according to the common

annuity and life tables, but according to the actual facts, he having died shortly after the sale. On the other hand, the executors contend: (1) That the tenant for life was entitled, and they, as his executors, are entitled, to hold so much of the purchase money as the value of his life estate, at the time of the sale, bore to the whole interest in fee. (2) That the apportionment between them is to be made according to the value calculated by the common annuity and life tables, at the time of the sale, without any reference to the actual duration of his life. It is admitted, that there is no case exactly in point; and, perhaps, considering the frequency of sales by a tenant for life and a remainder man, it is a matter of some surprise, that no such case should be found. The circumstance, however, may be reasonably accounted for, either upon the ground, that the sale usually takes place upon distinct and independent bargains; or, where there is a joint bargain, the shares of the respective parties are usually ascertained and apportioned by some private agreement Here, no such agreement can be traced; and the sale seems to have proceeded upon a mutual confidence, that the proceeds would ultimately be divided justly and equitably between the parties, according to their respective rights. What are those rights? It seems to me, that when a sale of real estate is jointly made by two or more persons, having independent interests, the natural, nay, the necessary conclusion, in the absence of all other countervailing circumstances, is, that they are to share the purchase money according to their respective interests. If three tenants in common should jointly sell an estate, they would certainly be entitled to share the purchase money according to their respective undivided interests. If one held a moiety, and the others one quarter part each, they would share in the like proportions. So, if three parceners should sell an estate, they would all share equally in the purchase money. What difference can it make, whether they have undivided interests in the fee, or separate interests, carved in succession out of the fee? Whether they are tenants in common of the fee, or tenants for life, and remainder men in fee? In contemplation of law, in each case, the sale is a sale of distinct and independent interests; and if the parties do not fix the amount of their respective shares in the purchase money by some positive agreement, the natural conclusion is, not

that any one of them surrenders his right to the other, but that they silently agree to apportion the same among themselves according to their respective rights. Now, if in the present case, the tenant for life had separately sold his life estate to the purchaser, there is no pretence to say, that he would not have been solely entitled to the principal of the purchase money. What difference can it make, except as to the means of ascertaining the value of his life estate, that he proceeds to make sale, or joins in a sale of the remainder in fee? It does not strike me, that there is any. Suppose A. and B., the several owners of two adjoining acres of land, should unite and sell them both in one deed, to a purchaser for a gross consideration; would not the purchase money be divisible between them according to the relative value of the two acres? I think it clearly would.

But it is said, that, upon the sale, the purchase money was substituted for the land, and it is therefore to be treated exactly, as if the land had remained in the parties; and hence, that the tenant for life had an interest for life in the purchase money, that is in its income, and, subject thereto, that the whole purchase money belonged to the remainder men, the present claimants. Now, this is assuming the very point in controversy; it is stating the difficulty, and not solving it. When a sale is made, the ordinary result is, that the vendor is entitled to the purchase money itself, and not merely to the income thereof. If a different appropriation takes place, it is a matter of private agreement, and not an inference of law. If (as I have already suggested) a tenant for life of land sells his life estate, he has a title to the whole purchase money, and not merely to the income thereof. He sells his own estate, and he is entitled to its full value at the time of the sale. Then, how stands the law in cases, bearing a close analogy. Suppose the case of a tenant for life, remainder in fee, of lands under mortgage, in what manner do the parties contribute to the discharge of the incumbrance? Exactly, as we all know, according to the relative value of their respective interests in the land, calculated according to the value of the estate of the tenant for life, by the common tables. I need not cite authorities to this point; they are familiar to the profession. See 1 Story, Eq. Jur. § 487, where many of the authorities are collected; 1 Pow. Mortg. (by Coventry & Rand) 312, note M; Id. 314, in note Q.; 3 Pow. Mortg. (by the same) 920, 923, note H; Id. 1043, note O. The rule is founded upon the obvious equity, that every one of the parties in interest shall contribute in proportion to the benefit, which he derives from the discharge of the incumbrance. The same principle applies to the case of a sale. Each party is to participate in the purchase money, in proportion to the beneficial interest he has in the land. The same principle applies, where a mortgagee devises the mortgaged estate to one for life, remainder over in fee; the tenant for life and the remainder man share the mortgage money, if paid by the mortgagor during their lives, according to the value of their respective interests at the time of the payment. See 1 Story, Eq. Jur. § 485, and note; 3 Pow. Mortg. (by Coventry & Rand) 1043, note O. This was indirectly admitted in Brent v. Best, 1 Vern. 69; and directly held in Thynn

v. Duvall, 2 Vern. 117. That is certainly a case nearly approaching the present, where it might have been said, that the devisee for life of the mortgagee ought to be entitled only to the interest for life, and to no part of the principal. A doctrine somewhat different was asserted in the case of Lord Penrhyn v. Hughes, 5 Ves. 99, 107, where the master of the rolls said, that where there is a tenant for life and remainder men, entitled to an estate under incumbrances, the tenant for life and the incumbrancers have a right to have the estate sold to discharge the incumbrances, and the surplus of money, after discharging the incumbrances, is to be divided between the parties, in the proportion, that their interests bear to the estate; that is, as the master of the rolls afterwards explained, by putting the whole out at interest, and allowing the tenant the interest for his life. See White v. White, 9 Ves. 554, 4 Ves. 33; 3 Pow. Mortg. 1043, note O. It is not, perhaps, very easy to see the reason of this particular doctrine. It may be, that the tenant for life shall not, by his own act, compel the remainder men to submit to a sale, by which his interest in the remainder may be materially affected without his consent. But that case is unlike the present, where there is a voluntary joinder in the sale, or a confirmation of it A court of equity may well decline to interfere in adversum to change real estate, by a sale, into personal estate, without imposing conditions, by which the proceeds shall retain throughout the character of the original fund, when it might not act in the same manner, where there had been a voluntary sale by the parties. The distinction is often acted on in courts of equity. See Story, Eq. Jur. § 1357. In the case of Houghton v. Hapgood, 13 Pick. 154, as far as I am able to gather from the report, (which, on this point, may be thought somewhat indeterminate,) a tenant by the curtesy of his wife's estate, which was sold by an executor improperly, but the sale was afterwards confirmed both by himself and by her heirs, was held entitled to share in the proceeds according to the value of his life estate, as tenant by the curtesy, calculated by the common tables of life annuities. If I take a right view of that case, it is in exact coincidence with the opinion, which I hold in the present case.

It appears to me, that the sale in the present case, having been confirmed and adopted by all the parties in interest, must be treated in the same way and manner, and have the same effect, as if it had been originally made

by the consent of all the parties in interest, and all of them were then competent to make the sale; and that the rights of all the parties were fixed at that time. And this leads me to say a few words on the second point, made at the bar, as to the rule of apportionment I think it must be according to the value of the life of the tenant for life at the time of the sale, calculated according to the common tables. If I am right in the opinion already stated, that the rights of the parties were absolutely fixed at the very time of the sale, then it follows, as a necessary consequence, that they are entitled to share in the proceeds according to the relative values of their respective interests in the estate at the time of the sale. The case of Clyat v. Batteson, 1 Vern. 404, is not opposed to this doctrine. In that case lands in mortgage were devised to A. for life, remainder to B. in fee. B. bought up the mortgage, taking an assignment thereof in the name of trustees. A. died; and then B., the remainder man, brought a suit against the defendant, who was the representative of A., to redeem the mortgage, and insisted, that the representative ought to pay one third of the mortgage money, paid by B., by reason, that A. enjoyed the profits during his life. The court held, that if B. had brought the bill in. A.'s lifetime, he would have been entitled to the proportion of the money according to the value of the respective estates of the tenant for life and the remainder man (that is, according to the old rule, now exploded, to one third); but that A. being dead, and having enjoyed the estate but one year only, the representative was bound only to allow for the time A. enjoyed the estate. This decision turned, therefore, upon the very point of the value of the estates of the tenant for life and the remainder man at the time, when the parties were charged with the payment of the money. But when the tenant for life sells his life estate, he sells it for what it is then worth, and of course his share of the purchase money does not depend upon the future event of his life or death, but upon its present value. It strikes me, therefore, that the true rule in the present case is to apportion the purchase money between the tenant for life and the remainder men, according to the relative values of their respective estates in the land at the time of the sale, unaffected by the subsequent events. It is said, that the duration of the life of the tenant for life, calculated according to the common tables, was over twenty years, whereas he died in a little less than four years after the sale. Be it so. The event has turned out unfavorably for the remainder men,—as contingent events sometimes do. But the tenant for life might have lived thirty years, and then the apportionment would have been favorable to them. The fact, therefore, does not shake the propriety of the rule of apportionment; but it only shows, that it has the common elements of uncertainty belonging to all calculations of contingencies. A tenant for life of a mortgaged estate may die within a year after he has been compelled to pay one third part of the mortgage money upon a decree for redemption, his life having been calculated as worth that proportion of the money. He may, on the other hand, live far beyond the period of average life. Yet

this inequality has never been supposed to justify any departure from the general rule of contribution.

In the view, which I take of the case, the other points made at the bar are not material to be discussed. I think, that the remainder men are entitled to their proportion of the purchase money, according to the relative value of the life estate, and the remainder at the time of the sale; that the executors are liable for this amount to the remainder men, and that, upon so much of the money as either the tenant for life or the executors have received interest, they are entitled to receive their proportionate share of the interest.

[1] {Reported by William W. Story, Esq. 3 Law Rep. 175, contains only a partial report}