

Case No. 5,218.

[Baldw. 454.]¹

GARDENER V. WAGANER ET AL.

Circuit Court, E. D. Pennsylvania.

April Term, 1830.

WILLS—CONSTRUCTION—PERMISSION TO “OCCUPY AND DWELL” IN A HOUSE—RENTS, ISSUES, AND PROFITS.

1. In construing a will we must first look to the particular clause in question, at the same time taking into our view the whole instrument, endeavouring to give meaning and effect to every part of it.
2. Testator devised to his daughter G. two houses and lots, “she permitting, at the same time, her mother to occupy and dwell in the better of them for and during her natural life.” This is not a grant of the beneficial interest in the house to the mother, so that she may either occupy it herself or let it to another, receiving from it the rents it produces. It is a permission to her to live and reside in the house, and entitles her to no other use and enjoyment of it.
3. The executors of the mother were ordered to account for the rents, issues and profits received by her from the house, allowing her for expenditures nor repairs, &c, and provided that the account should not extend back beyond six years from the filing of the bill.

[Cited in *Taylor v. Benham*, 5 How. (46 U. S.) 263.]

This suit [brought by Grace Gardener, a citizen of Louisiana, against William Wagner and Jacob Wagner, citizens of Pennsylvania, executors of Grace Wagner, deceased] arose on the will of Jacob Wagner, in the following words:

“In the name of God, amen. I, Jacob Wagner the elder, of the city of Philadelphia, cooper, being very sick and weak in body, but of perfect mind and sound memory, thanks be to God, calling to mind the mortality of my body, and knowing that it is appointed for all men once to die, do make and ordain this my last will and testament; that is to say, principally, and first of all, I give and recommend my soul into the hand of Almighty God that gave it, and my body I recommend to the earth, to be buried in decent Christian burial, at the discretion of my executors, nothing doubting but at the general resurrection I shall receive the same again by the mighty power of God. And as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise and dispose of it in the following manner and form: Unto my eldest son. Jacob, I do give and bequeath my two lots on Cherry alley, with the arrearages of ground rent due on the same, as also that one of my lots on Wagner’s alley, which adjoins a certain lot now in the tenure of Henry Nagel. Unto my two eldest daughters, Elizabeth and Mary, that certain three story brick house in which I now live, and the lot or lots thereunto belonging, being twenty-eight feet in front on Moravian alley,

with, all the appurtenances, to hold jointly. Unto my son George Washington, my houses and lot next adjoining the aforesaid, with all the appurtenance thereunto belonging, together with my cooper shop, tools and utensils of my trade. Unto my daughter Grace, my two houses and lots situate in German street in the district of Southwark, she permitting at the same time her mother, Grace, to occupy and dwell in the better of them for and during her natural life. Unto my youngest son, Peter, that certain corner house situate on the corner of Sassafras street and Wagner's alley, with the lot on which it stands; also two of my lots on Wagner's alley, and one of the two vacant lots on Sassafras street. Unto my youngest daughter, Margaret, that certain house and lot adjoining the aforesaid house on Sassafras street, the remaining vacant lot on Sassafras street, and the two remaining vacant lots on Wagner's alley. Excepting always, nevertheless, that my wife, Grace Wagner, receive one-third part of the profits and rents issuing out of all and every the aforesaid estates for and during the space of her natural life; and also that she receive the whole and all of the rents and profits issuing out of each child's estate, until such child shall have arrived at the age of twenty-one years, for the maintenance of my children and in lieu of her dower. Also, it is my will, that should any of my children unluckily die before they shall have arrived at the age of twenty-one years, then their share shall be divided in an equal proportion amongst the surviving children. Further, it is my will that my house and lot on Third street, my loan office certificates, my stock and my outstanding debts, be applied to the purpose of paying and discharging my debts, and the residue, if any, to be paid to my wife. Lastly, I do hereby appoint my beloved brother, John Wagner, and my faithful relative, Peter Knight, my executors, and my beloved wife, Grace, my executrix. In witness whereof, I have hereunto set my hand and seal, this thirtieth day of November in the year of our Lord one thousand seven hundred and ninety."

Demurrer.

The case was argued on the following agreement: "It is agreed that upon the pleadings in this case, the question to be submitted for the opinion of the court is, whether under the will of Jacob Wagner, who devised two houses in German street to his daughter Grace, 'she permitting, at the same time, her mother, Grace, to occupy and dwell in the better of them, for and during her natural life,' the executors of the mother, Grace, who did not herself live in the house designated in complainant's bill, but rentel it to others, are liable to account for the rents she may have received. If the court shall be of the opinion that she had the right to receive the rents, then judgment to be entered, on the demurrer, for the defendants. If they shall be of opinion that the executors are bound to account, then the demurrer to be withdrawn, and the defendants to be at liberty to answer the bill. April 26th, 1831."

Mr. Wheeler, for complainant

The mother had only a right of occupation. If she did not occupy the house, she had no right in it. 2 Bl. Comm. 157; Co. Lift. §§ 325, 328, 329; *Crickmere v. Pater son*, Cro. Eliz. 146; *Wheeler v. Walker*, 2 Conn. 201; 5 Serg. & R. 375.

Mr. Kittera, for respondents.

This part of the will is a devise in fee to the daughter of the testator, but to that devise a condition is annexed, "she permitting her mother," &c, but to the estate given to the mother no condition is annexed; conditions must be clearly expressed. The estate of the daughter could be defeated by a breach of the condition; but no intention appears in the will to restrict the estate of her mother, the widow of the testator. One-third of the profits and rents of all the estate is given to the widow for her life, and she is also to receive the whole of the rents and profits of each child's estate, until such child shall arrive at the age of twenty-one years, for the maintenance of the children. The clause in question was intended for the benefit of the widow; there is no reason why the condition now contended for should be imposed upon her. The words of the will are, "to occupy and to dwell." "And" may be construed conjunctively or disjunctively, so as to carry into effect the intention of the testator. To occupy, does not mean to live in the house, to reside in it, but to have possession of it, by yourself, or by another for you and under your will and right. If it was a condition, there must be an entry to defeat the estate; if a limitation, it expires of course. Plowd. Comm. 542, tit "Occupancy" defined; 8 Petersdf. 320. The mother did make her choice between the two houses. If Grace permitted her mother to receive the rents and profits of the house, it was a permission to occupy; and in case of the death of Grace, it would go subject to this incumbrance. If Grace's license was necessary, the intention might be defeated, as she might survive her mother. 4 Kent Comm. 114, tit "Doctrine of Conditions."

Mr. Wheeler, in reply.

If the daughter refused, the mother could have enforced her right; she has the fee, subject to her mother's right of occupancy. Her only remedy is to claim possession. Did not the testator clearly intend that his widow might elect which of the two houses she would occupy herself? she would live and dwell in? Is it necessary to change "and" for "or," to give effect to the intention? The occupancy of the house is given to herself, not to her and her assigns. The daughter is to permit the mother to occupy and dwell,

Et c. This may make her a trustee for her mother. If the daughter should forfeit by refusal of this permission, the only effect would be that the mother could enjoy at once, and there would be a reversion to" the heirs of the whole estate. *Hamilton v. Elliott*, 5 Serg. & R. 384; 2 Conn. 201; 2 Chit. R. 529. No election was made by the widow.

HOPKINSON, District Judge. The question in this case arises on the following devise in the will of Jacob "Wagner. After giving certain lots to his son Jacob, and a house and lot to his two eldest daughters Elizabeth and "Mary, the testator devises as follows: "Unto my daughter Grace, my two houses and lots, situate in German street, in the district of Southwark, she permitting, at the same time, her mother Grace, to occupy and dwell in the better of them, for and during her natural life." The mother of the devisee is now dead; and the devisee sets forth in her bill of complaint, "that she (the devisee) came of age on the—day of October 1800; since which time, until her decease, which took place on the 1st of "March 1829, the said Grace Wagner (her mother), under colour of right, under the first clause of the said Jacob, the father's will, as above recited, claimed and received the rents, issues and profits of the easternmost house, and deforced the complainant of the said house, without ever residing in the said house or either of them at all." The bill prays for a decree, ordering the executors of the said Grace Wagner deceased, to "file an account, stating what rents, issues and profits the said Grace Wagner received from the said house, and disclose what estate she left," and that the estate which she left may be made liable for the payment of the claim of the complainant; and that the said executors may be compelled to pay her the net amount of the rents, issues and profits received from the said house.

We must observe, that other houses and lots than those above mentioned are given and devised to other children of the testator; and after all, there is the following clause in the will, "excepting always, nevertheless, that my wife Grace Wagner receive one-third part of the rents and profits issuing out of all and every the aforesaid estates, for and during the space of her natural life; and also that she receive the whole and all of the rents and profits issuing out of each child's estate, until such child shall have arrived at the age of twenty-one years, and in lieu of her dower." To this bill the defendant has demurred, which, together with an agreement of the parties, submits the question to the court, whether, on the facts stated, and the true construction of the will of Jacob Wagner, the complainant is entitled to the relief she prays for. The rules adopted, in equity and at law, for the interpretation of wills, are well settled, and entirely consistent with justice and common sense. We must look for the intention of the testator in the particular clause in question; at the same time taking into our view the whole instrument, with a reasonable endeavour to give meaning and effect to every part of it. In this case the inquiry is, whether the permission, enjoined upon Grace, the daughter, and attached to her legacy of two houses, to be given to her mother to occupy and dwell in the better of them, is

a grant of the beneficial interest in the house to the mother during her life, so that she might, at her pleasure, either occupy and dwell in it herself, or give the occupancy to another, and receive in lieu of it, the rents and profits it would produce; or whether it is to be taken strictly as a permission to her to reside in the house, and to be entitled to no other use or enjoyment of it.

We first look at the terms of the grant—the expressions which the testator has chosen to manifest his intention. The houses are devised, in fee, to his daughter; but it is a condition, or rather an appendage to the gift, that she shall permit her mother to occupy and dwell in the better of them. There seems to be no ambiguity here. If the testator had used only the word “occupy,” which signifies “to possess,” the uncertainty would have been greater; but he adds, as if explanatory of his meaning, “and dwell.” To dwell, is to inhabit; to live in a place; to reside; to have a habitation. It is then as if the testator had said, “she permitting her mother to live in the house—to have a habitation there.” Could there have been any doubt if these terms had been used? The defendant is entirely conscious that this is the proper meaning of the clause as it stands in the will, and endeavours to avoid it by changing the phraseology, and turning “and” into “or;” or rather by expunging the one and introducing the other into its place. But what right have we to do this? It is true it may be done when it is necessary to carry into effect the clear and manifest intention of the testator. How does this necessity appear here? There is nothing incongruous or unreasonable in the plain and ordinary interpretation of the words as they now stand. To say that the intention was different, would be to go directly in opposition to the language he has adopted to express his intention—indeed it would be to assume the very matter that is in controversy.

In looking to other parts of this will, we not only find them in full accordance with this construction of the clause in question, but truly not reconcilable with any other. After making all the devises we have mentioned of houses and lots to his children, the testator limits the fullness of these gifts by excepting that his “wife, Grace Wagner, receive one third part of the rents and profits issuing out of all and every the aforesaid estates for and during the space of her natural life.” This provision includes the two houses given to his daughter Grace, now in.

question. What do we collect to be the clear and consistent meaning of the testator from both clauses in his will? What was his design? Assuredly this: my wife shall have a third part of the rents and profits of all and every part of my real estate; but, as to one of the houses, if she shall choose to live or dwell in it, she shall be permitted so to do, and, in this manner, have the whole use or enjoyment of it; but if she shall decline this permission or privilege, then the offer of it becomes inefficacious, and she must resort to the other part of the will which gives her one-third of the rents of all and every of the houses and lots before devised to the children. She may take or reject the permission or privilege as it is offered, but she cannot alter or enlarge it. The construction contended for by the respondents would make the testator say, as to the house in question, that he gives his wife all the rents and profits issuing from it or one-third of them, at her option, which is incongruous and absurd. To say to her, you may live in a certain house, or take one-third of the rents and profits it may produce, is intelligible; but to say, you may take all the rents, or one-third of them, at your election, is senseless, or so nearly so that it should not be imputed to a sane testator, if we can escape from it.

On the 26th of December, 1831, this cause came on for hearing on bill of demurrer and plea, and the court after hearing the arguments of counsel, do award and decree, that the defendants account for the rents, issues and profits received by the said Grace Wagner from the house mentioned in the complainant's bill, subject to the payments and expenditures made by her for repairs or otherwise in relation to the same. And they further direct that it be referred to the master to report an account to this court provided, however, that said account shall not extend back beyond six years from the filing of the bill.

NOTE. Before the above order and decree was made, the following agreement, signed by the counsel of the parties respectively, was filed of record: "It is agreed; that if the court shall be of opinion that the testatrix had not a right to receive the rents of the house, in the complainant's bill mentioned, to her own use, but was bound to account to her daughter, they shall also decide for what period of time her executors are bound to account; and under their opinion the case shall be referred to the master of the court to take and state an account between the parties touching and concerning the rents, issues and profits received by the Grace Wagner from the house mentioned in the complainant's bill, and the payments and expenditures made by her for repairs or otherwise in relation to the same: and that the said master report the balance which, on said account, shall be found due from either party to the other; and that the said master have power to examine the parties and witnesses on oath, and to compel the production of books, documents and papers: and that further proceedings be reserved until the coming in of the said report."

¹ [Reported by Hon. Henry Baldwin, Circuit Judge.]