

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FREEMAN et al. v. CLAY et al.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1892.)

No. 12.

1. RES JUDICATA—INJUNCTION—APPEAL.

Both members of a partnership being dead, the widow of the partner who first died had set off to her a dower interest in the partnership lands, and afterwards sued the heir at law of the other partner to recover back rents on her dower interest. The heir at law thereupon brought a bill to enjoin this suit and for an accounting of the partnership affairs, which bill was dismissed on demurrer. The heir at law appealed to the supreme court, notwithstanding which the widow prosecuted her suit for rents to a final decree, and the same was paid by the heir at law without compulsory process. Thereafter the supreme court reversed the decree appealed from, holding that the widow was not entitled to the rents, and remanded the case for further proceedings. *Held*, that neither the decree in the widow's suit for rents nor the fact of its voluntary payment was a bar to the heir at law's right under her bill to an accounting of the rents thus paid.

2. SAME.

Nor was her right affected by the fact that, before sustaining the demurrers and dismissing the bill for injunction and accounting, the trial court offered to retain the same for the purpose of an accounting, which offer was declined by the heir at law.

3. BILL OF REVIEW—WANT OF EQUITY.

A bill to review a decree rendered in the heir at law's suit, which, among other things, ordered the restoration of the rents collected in the widow's suit, was without equity, since the debts of the partnership were entitled to precedence over the widow's dower right in the partnership property, and since, therefore, the widow had obtained, as a result of the prior proceedings, a sum of money which in equity and good conscience she was not entitled to retain.

4. SAME—CITATION ON APPEAL—SERVICE.

An allegation in the bill of review that the widow was not a party to the appeal to the supreme court, because no citation was ever served upon her or any agent or attorney of hers, was immaterial, it appearing from the record that this fact was not alleged in the pleadings filed by her in the main case after the cause was remanded, and that the citation was in fact served upon her attorney of record in that case.

Appeal from the Circuit Court of the United States for the Western
Division of the Northern District of Mississippi.

In Equity. Bill of review brought by Lucy C. Freeman and C. L. Freeman, her husband, citizens of the state of Missouri, against Pattie A. Clay and Brutus J. Clay, her husband, for alleged errors appearing on the face of a decree rendered against complainants under an original bill brought against them by defendants for injunction and an accounting. A demurrer to the bill of review was sustained, and the bill dismissed. Complainants appealed. On motion an order was made dismissing the appeal, unless a perfected appeal bond should be filed before a given day. See 48 Fed. Rep. 849, 1 C. C. A. 115. The question is now on the merits. Affirmed.

For opinions rendered in the course of the litigation resulting in the decree sought to be reviewed, see 34 Fed. Rep. 375, 6 Sup. Ct. Rep. 964, and 11 Sup. Ct. Rep. 419.

Statement by PARDEE, Circuit Judge:

The appeal in this case is from a decree in the court below sustaining a demurrer to a bill of review. In 1859, David I. Field and Christopher I. Field were partners in planting, and owned a plantation in Bolivar county, Miss., as tenants in common, and also slaves and other personal property. David I. Field died in that year, leaving appellant Lucy C. Freeman, his widow, and David I. Field, his only child and heir at law. Christopher I. Field, the surviving partner, remained in the possession of all the partnership property until his death, in the year 1867, when his administrator continued the possession. In 1869 the half interest of David I. Field was sold under a decree of the probate court of Bolivar county for one half of a debt due by the partnership to Christopher I. Field's estate, and Mrs. Pattie A. Clay, the daughter and heir at law of Christopher I. Field, became the purchaser. Said decree and sale were void, and no title passed thereby, but Mrs. Pattie A. Clay received a deed thereunder, and entered into possession. In 1879, Mrs. Lucy A. Freeman, by proceedings in the state court, had her dower of one third in the one-half interest of her deceased husband, David I. Field, in the said plantation set off to her, and in September, 1880, she filed a bill in equity in the chancery court of Bolivar county against the said Mrs. Pattie A. Clay for an account for back rents on her dower interest, which cause was afterwards removed to the United States circuit court for the western division of the northern district of Mississippi. In November of 1880, David I. Field, Jr., brought an ejectment suit in the United States court for the western division of the northern district of Mississippi, as heir at law of David I. Field, deceased, to recover his half interest in the said plantation, and also for back rents. Both the said suits were pending when Mrs. Pattie A. Clay and Brutus J. Clay, appellees herein, filed their bill on the equity side of the said court to enjoin both proceedings, to charge the said plantation with a large debt due by the partnership of David I. & Christopher I. Field, and for an accounting with Mrs. Lucy C. Freeman, widow of David I. Field, and her son David I. Field, Jr., touching the partnership affairs. To this bill demurrers were filed by both Mrs. Freeman and David I. Field, Jr. After hearing upon the demurrers, the court rendered a decree partly

sustaining and partly overruling the same, and ordering a reference to take an account between the parties; but afterwards, on the 6th of March, 1884, the following decree was rendered in the case:

"Be it remembered that this day came on to be heard the above-entitled cause, and the parties appearing in open court by consent, the account herein filed by the master is withdrawn, and the decree of reference hereinbefore rendered is set aside; and counsel for complainants declining to avail himself of the offer of the court to retain the bill for the purpose of stating an account, it is ordered, adjudged, and decreed that said bill be and the same is hereby dismissed, and that the complainants pay the cost, for which let execution issue; and thereupon complainants prayed an appeal to the supreme court of the United States, which is granted upon their entering into a bond in the penalty of one thousand dollars, with two securities, conditioned according to law."

On the 25th of July following said decree, bond was given, and approved by the presiding judge of the court, and thereupon a citation was issued directed to Lucy C. Freeman and David I. Field, appellees, which on the 31st day of July, 1884, was served by handing the same to Frank Johnston, Esq., as attorney of record of the within named appellees. In regard to this the bill of review alleges:

"That said citation, while directed to your oratrix, was never served upon her, or on any agent or attorney of hers; so that your oratrix avers that she was never before the supreme court on said appeal, and that any judgment of the court in the premises was, as to her, *coram non iudice*, and void."

Said appeal was prosecuted, and was decided by the supreme court of the United States April 26, 1886, (118 U. S. 97, 6 Sup. Ct. Rep. 964,) and the report shows that in said case Mr. Frank Johnston and Mr. J. E. McKeighan appeared for appellees. And it may be noticed in this connection that Mr. Frank Johnston appears in this court as the solicitor of Mrs. Freeman. The supreme court in passing on the case said:

"It results from these views that the lien for partnership debts takes precedence not only of the interest of David I. Field, Jr., as heir at law of David I. Field, but of Lucy C. Freeman's right of dower. As, however, dower was actually assigned to her nearly three years before the filing of the present bill, such assignment should not now be disturbed; but no further exaction for detention of dower should be enforced. We think, therefore, that, upon the allegations of the bill, the complainants are entitled to relief, and that the demurrers should have been overruled."

And the decree of the circuit court was reversed, and the cause remanded, with instructions to overrule the demurrers, and to proceed in the case according to law and the principles announced in that opinion. Pending the appeal aforesaid, on the 14th of June, 1884, Mrs. Freeman pushed her cause for back rents on the dower estate to a decree, and recovered \$2,215, and costs. The amount of this decree Mrs. Pattie A. Clay paid in full. On return of the mandate of the supreme court a decree was rendered in the case of *Pattie A. Clay et al. v. Lucy C. Freeman et al.*, overruling the demurrer of the defendants to complainants' bill, and issuing an injunction restraining David I. Field, Jr., from the

further prosecution of his ejectment suit against the complainants, and from suing out final process for the enforcement of a judgment for rent obtained therein; and upon the same day complainants were granted leave to file a supplemental bill "setting up the result of the cause of Lucy C. Freeman against them for arrearages of rent, and such facts in connection therewith as they may desire, and praying such relief touching the same as they may be advised."

The supplemental bill filed alleged as follows.

"(1) After, notwithstanding the filing of the bill in this cause, the defendant L. C. Freeman prosecuted her suit in this court against your orators for arrearages in rent upon and for her dower interest in the Content plantation, as shown in the pleadings, and on the 12th day of June, 1884, A. D., after her demurrer and exception to your orators' original bill had been sustained, recovered a final decree against your orator Pattie A. Clay for three thousand and ninety-two and thirty-four one-hundredths dollars, and costs. On the 14th day of June, 1884, on motion, this judgment or decree was reduced to two thousand two hundred and fifteen one-hundredths dollars, the same, with the costs in the cause, one hundred and sixty-two dollars, your orators well and truly paid, and so performed the said payment and decree of the said district court, from which there was no appeal, as, by the record of said cause, doth appear. (2) That said recovery and payment was not according to right and justice, as appears from the opinion of the supreme court of the United States on your orators' appeal to the above decree of this court in this cause, and the said Lucy C. Freeman ought in this cause to be decreed and adjudged to restore the said sum and costs to your orators, or be compelled to accept it as a charge against her in any accounting hereafter to be had in the cause. The premises considered, your orators pray as prayed in the original bill, and that the said Lucy C. Freeman be adjudged to restore to them the money so wrongfully secured by her in the said cause, and for general relief."

Mrs. Lucy C. Freeman thereafter filed her answer to the original bill, and as to the supplemental bill she answered as follows:

"As to said supplemental bill she says that on the 30th day of September, 1880, your respondent filed against the complainant her original bill of complaint in the chancery court of Bolivar county, Miss., demanding of complainant rents for the dower of respondent in lands of her former husband, David L. Field, deceased, and which complainant had wrongfully withheld from her. Said cause was removed to this court, and on the 10th day of August, 1882, the complainant filed against respondent this, her original bill in this cause, under which respondent was enjoined from prosecuting her suit aforesaid. That afterwards, on the 6th day of March, 1884, after demurrer to the original bill herein, said demurrer having been sustained by this court, said injunction was dissolved, and the bill dismissed. In making said decrees of dissolution and dismissal, the court offered to retain the bill for the purpose of stating the account between the complainant and respondent; yet complainant, well knowing that she could appeal this cause to the supreme court of the United States, and could not appeal the other if it should result in a decree for less than \$5,000.00, deliberately elected not to have said bill so retained, and thereby consented to its dismissal in so far as this account is concerned. Thereupon your respondent proceeded with her cause, as she had a right to do, and said cause resulted, on the 16th day of June, 1884, as is stated in said supplemental bill, in a decree in favor of your respondent against the complainant for the sum of \$2,215.00, not the sum of \$2,200.15 dollars, as