

No. 14780

Supreme Court of Illinois

Deltzer et al

vs.

Scheuster et al

Seltzer
vs
Scheuster

Mr Justice Lawrence delivered the
opinion of the Court
Lawrence J.

Otto Anthony Scheuster died in 1841 leaving his widow Sally Scheuster, now Sally Seltzer, appellant herein, and his two minor children Otto and Edward, appellees. By his will he ~~left~~^{devised} a certain lot in Henry, Illinois, to his widow, and certain other lots to his children. The personal property was valued at \$150.50 by the appraisers. The county court allowed \$40.50 to the widow as her separate estate. She qualified as executrix of the will, and ~~took~~^{having taken} a part of the personal property at its valuation, to apply on her allowance, and then procured an order from the County Court for the sale of that portion of the real estate devised to the children, to raise a fund for the payment of her allowance and of a small amount of indebtedness ^{owed} pinned against the estate. The children filed their bill in chancery to enjoin the executrix from making this sale, ~~and~~ and on the hearing, the court made the injunction

perpetual. The executor has brought the record to this court.

We have no doubt that the complainants in this bill were entitled to some relief against the order of the county court, but not to the extent allowed. The 50th section of the statute ^{of Mills} provides, as plainly as language is capable of doing, that "the right of the widow to her separate property shall, in no case, be affected by her renouncing, or failing to renounce, the benefit of the provisions made for her in the will of her husband or otherwise, as ~~now~~ provided in Chapter ~~33~~ thirty four of the Revised Statutes". In the face of this explicit provision it is impossible to say that the appellant lost her right to the separate property allowed to her, because she did not renounce the provisions of the will in her favor. Section 10 of Chapter 34 of the Revised Statutes must be construed to ^{apply to} ~~the~~ other "personal estate" than that set apart to her under the 48th section of the chapter of Mills.

In the case at bar, the appellant, as settled in the case of *Crace v. Crace* 21 Ill. 46 is entitled to be regarded as a creditor to the extent of her separate allowance, and to have the real estate

sold for its payment. It would,
 however, be obviously inequitable to require,
 as the county court did, by its decree,
 that the fund should be raised ex-
 clusively from the ~~to~~ real estate ^{devise} ~~bequeathed~~
 to the children. The debts or claims
 against the estate are a common
 burden and, in equity, must be borne
 by all the property devised by the deceased.
 To permit the widow to ~~claim~~ hold the
 lots devised to her by the will, and to
 sell those devised to the children
 for the payment of her statutory allowance,
 would be to permit her ^{wholly} to defeat the
 purposes of the testator. If she claims her
 share from his will, she must respect
 those designed to be bestowed upon others.
 It is enough to say, ~~that~~ however, that
 here is a common fund, ~~but~~ in the
 hands of different parties, liable to a
 common burden, and the burden must
 be equally borne. Equality, here, is equity.
 The court below will ascertain the com-
 parative value of the real estate ^{within} ~~the~~
^{its jurisdiction} ~~the county~~, devised to the widow, and
 that devised to the children, and apportion
 the indebtedness of the estate, inclu-
 ding the widow's allowance, according to the
 their respective values ^{of the property devised}. The husband

however, which, as we understand the record, was devised to the children but ~~then~~ is occupied by the widow, will not be considered in the valuation, or subjected to the sale.

We are also of opinion that the appellant, acting as executrix, did not fairly disclose to the appraisers all the personal property belonging to her husband. We allude especially to the liquors ^{and which were taken by her at their valuation} in the cellar. The circuit court will therefore determine, by reference to the master, or ~~otherwise~~ by hearing testimony, the value of the property which came to the hands of the executrix and was appropriated by her at its valuation, and charge her with the actual value thereof. The court will also take an account of the rents and profits received by her, ~~allowing~~ on the property belonging to the children, allowing her such credits against these rents and profits as she may be entitled to, going out of the expenses of the children.

Reversed & remanded

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Scheuster

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Lawrence J.

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