

# REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

## COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE  
LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES  
AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

---

RICHMOND:  
PUBLISHED BY A. MORRIS.

1854.

Entered according to the act of Congress, in the year 1854, by .

ADOLPHUS MORRIS,

In the Clerk's Office of the District Court of the United States in and for the  
Eastern District of Virginia.

WASHINGTON *v.* SMITH.*Friday, May 1st, 1801.*

A forthcoming bond given by the defendant only, without any security, will support a motion, and judgment will be rendered on it in favor of the plaintiff.

A forthcoming bond was taken without any security, and the District Court gave judgment on it in favor of the plaintiff, upon a motion. From this judgment, Washington appealed to this Court.

PER CUR. Affirm the judgment.

FITZHUGH ET UX. *v.* FOOTE ET AL.*Wednesday, April 29th, 1801.*

An assignment of dower in *lands and slaves*, by order of the County Court, by motion only, and without any suit for that purpose, not set aside after a great length of time, but the inequalities and excess only corrected.\*

When, in dividing slaves, it cannot be conveniently done, without separating infant children from their mothers, compensation may be made in money.

Wife not entitled to money arising from land sold by the husband during his lifetime, in lieu of her dower.†

Richard Foote and William Haywood Foote filed a bill in the High Court of Chancery, against John Thornton Fitzhugh and Margaret, his wife, stating, that Richard Foote, the father of the plaintiffs, died in 1778, leaving the plaintiffs infants of very tender years; and that the defendant Margaret, who was the testator's wife, alone qualified as executrix of his will. That, in 1780, she intermarried with the defendant John Thornton Fitzhugh; and in September, of that year, an order

[\* See *Moore et ux. v. Waller et al.* 2 Rand. 418]—deciding, that

An assignment of dower by commissioners, under an order of Court, on the mere motion of one of the co-heirs, is binding on the widow, if it be *full and just*: and on the co-heirs also, even though infants, if not excessive.

† Nor to  $\frac{1}{2}$  of the purchase money of land sold by the executors, pursuant to the husband's will. The third should be set apart, and its interest paid to her annually during her life. *Herbert, &c. v. Wren and wife*, 7 Cra. 370—2 Cond. Rep. 534, '8.

For dower in land sold by the husband during coverture, she may file a bill in Chancery—under which she will recover also rents of the land from the date of her subpœna. *Tod v. Baylor*, 4 Leigh, 498.

for the assignment of her dower and thirds, was made by the County Court of Prince William; but that no suit for that purpose was instituted, nor guardian appointed the plaintiffs; and that their grand-father by the mother's side did not, [14] as the defendants pretend, pay attention to it on behalf of the plaintiffs; he being more attached to Fitzhugh than to their father: That, in carrying the order of the County Court into effect, the most valuable part of the lands, (having all the improvements on it,) were assigned for dower; which was not laid off by the County Surveyor, but by Moffet, the friend of the defendant J. T. Fitzhugh; and that more than a third part was assigned: That the allotment of the slaves and personal estates was also unfair and unequal, to the prejudice of the plaintiffs. The bill, therefore, prays, that those assignments may be set aside, and others made; and that the plaintiffs may have general relief.

The answer states, that the grand-father was appointed executor, and although he never qualified, yet he never renounced, but managed the estate during the defendant Margaret's widowhood; and applied to the County Court for the order of assignment: That the dower and thirds were laid off in his presence, without the interference of the defendant, who did not procure Moffett to make the survey; for, it was the grand-father who did it; and he was influenced therein as well because a great part of the land lay in Fauquier, where Moffett lived, as because of the great age of the surveyor of Prince William: That the survey was fair, and not more than a third part of the lands were assigned for dower; nor was the part assigned so fertile as the residue: That the allotment of the slaves was not unequal at the time, although, from subsequent causes, as deaths, births, &c. it may have become so: That the order of the County Court was agreeable to the usage of the country; and the assignments, under it, fairly, equally, and impartially made.

Several witnesses were examined as to the value of the assignments; and the High Court of Chancery appointed [15] Commissioners to view and examine the dower lands, and to correct the excess, if any; as also to examine into the allotment of the slaves, and, if the widow received more than her *due share*, to allot her *one equal third part of the whole stock of surviving slaves*; and in both cases, to estimate the compensation which ought to be made the plaintiffs, for the excess.

The commissioners reported, that there was an excess, as to quantity, in the dower lands, which they had corrected; that all the valuable improvements were upon those lands; and that

they had left them still attached to the new assignment, but had diminished the quantity; that they had assessed a yearly rent, as well for the original excess in quantity, as for the additional surplus, arising from the reduction under the new assignment; that the excess of quantity, under the first assignment, did not proceed from the misconduct of Fitzhugh, or the grand-father, but from an accidental defect in the survey; and that there was an excess of £30 10s. in the value of the dower slaves.

The Court of Chancery confirmed the correction in the dower lands, and made the following decree, with regard to the slaves :

“That the Court, doubting, at least, the power thereof to compel the sons of Richard Foote to accept a compensation for excess in value of the slaves assigned to Margaret Fitzhugh for dower, whereas a division of the stock of slaves themselves, if it be not unequal, is indubitably sanctified by law, doth, after hearing counsel, adjudge, order and decree, that the said slaves shall be divided into three equal parts; that of those parts be allotted, one to John Thornton Fitzhugh and Margaret, his wife, and the other to the sons Richard Foote [16] and William Haywood Foote; and that John Fitzhugh and Margaret, his wife, account with Richard Foote and William Haywood Foote, for so much of one-third part of the said profits as exceeds her proportion of those profits.”

From which decree, the defendants appealed to this Court.

WICKHAM, for the appellants.

The Chancellor ought not to have set aside the allotment of dower altogether, but should have corrected the excess only, as was done at common law, in the writ of admeasurement of dower. Fitzherb. N. B. 149. The practice of the country, at that time certainly, and perhaps even now, in a great measure, was to make these summary applications to the Court for dower, and no inconvenience resulted from it; for, the same justice was done as if there had been a friendly bill and answer drawn; because, the parties interested always attended when they were of full age, and, when minors, some of their friends attended for them: added to which, the Court always exercised the same control over the allotment in the one case as in the other. In the present instance, the executor attended and sanctioned the act. The conduct of Fitzhugh and his lady was perfectly fair, and has, indeed, operated to the benefit of the estate. If the dower is better than the orphan shares, it has happened from accidental causes subsequent to the allotment.

Therefore, the enquiry as to the excess, should only be at the time of the allotment, and not at any subsequent period; for, the former allotment was made when the slaves were all alive and before the commissioners: This gave them an opportunity of judging of their value, which future commissioners cannot have. It was better to assign the dower all in one tract, than to have given the dowress parts in several tracts. This was more convenient both for herself and for the estate: because, the other mode would have obliged her to have disturbed [17] the purchasers, and would have turned them upon the estate, which would have been far more inconvenient than the plan which was pursued. The lands allotted to the heir were timber lands, daily growing in value; and, therefore, better for him than those which were cut down.

RANDOLPH, contra.

The County Court could not assign dower in this summary way; for, it was contrary to the principles of natural justice, as the other parties had no opportunity of being heard. The event proves the propriety of the argument; for, the allotment was every way unequal. There is no similitude between the writ of admeasurement, and this case: Especially, as that was only applicable to lands, which are permanent in their nature, whereas slaves are liable to constant fluctuation.

PER CUR. The Court is of opinion, that the appellant, Margaret, is entitled to dower in all the slaves whereof her former husband, Richard Foote, was possessed at the time of his death, as the sale of any of them was not necessary for the payment of his debts; and, therefore, that the commissioners, appointed by the Court of Chancery to enquire whether more slaves were retained by the said Margaret than she was entitled to for dower, ought, in the valuation of all the slaves of the said Richard Foote, which was made by them, to have ascertained the value of the widow's third part of the said slaves, to have included the value of the slave Lucy, said to have been appointed for, and delivered to Mrs. Alexander, the daughter of the said Richard, which they omitted to do: That an equal division of slaves, in number or value, is not always possible, and sometimes improper, when it cannot be exactly done without separating infant children from their mothers, which humanity forbids, and will not be countenanced in a Court of Equity: so, that a compensation for excess must, in such cases, be made and received in money: And, that [18] under all the circumstances of the present case, as stated

in the proceedings in this cause, between children and parents, a new division of the slaves of the said Richard Foote, ought not, after such a length of time, for a small excess, to have been ordered; especially as the whole of the dower slaves, with their increase, will belong to the appellees on the death of the said Margaret, their mother; so, that only a reformation of that which was wrong ought to have been decreed, and a return or delivery of a part of the slaves to the value of the excess, if that could be properly done; accounting, also, for profits, as usual in such cases; or, if that could not have been properly done, then a satisfaction in money, or in payment of interest for the amount of such excess, should have been directed: That the commissioner be directed to correct the error in the valuation of the whole slaves of the said Richard Foote, by adding thereto the value of the slave Lucy, and in case an excess shall then appear, to report whether the same can be rectified by a delivery of one or more of the dower slaves retained by the said Margaret, to the appellee, to the value of the excess; and, if that can be reasonably done, then they are to name the slave or slaves, and the appellants to be decreed to deliver to the appellees such slave or slaves, and account for profits from the time the appellees were entitled to the possession of their respective shares of the slaves of the said Richard Foote; or, if the excess cannot be restored or rectified in that manner, then, that a compensation in money be decreed to the appellees:\* That the claim of the appellants to one-third of the money received from the estate of ——— Grayson, for land sold by the said Richard Foote, in his lifetime, and charged by the appellant, J. T. Fitzhugh, to the estate of the said Richard, in the year 1784, should not be allowed,† unless the appellants can prove themselves entitled to it under some contract or agreement with the parties interested, that the same should be paid to them in lieu of [19] the dower of the said Margaret, in the land so sold by the said Richard Foote, and that the said account be rectified accordingly: That so much of the said decree as is declared to be erroneous, be reversed, and the residue be affirmed; and, that the cause be remanded to the High Court of Chancery for further proceedings to be had therein, according to the principles of this decree.

[\* *Sheppard's ex'r. v. Starke et ux.*, 3 Munf. 29.]

[† See *Herbert et al. v. Wren et ux. et al.*, 7 Cranch, 370.]