received deeds for lots to the whole amount of the sum which they had advanced, and give notice of this fact to the plaintiff, offering however to convey to him the lots in question, on his paying for them at the rate expressed in their contract with Morris & Nicholson.

The court will not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners, or whether he lost his remedy against Morris & Nicholson (of which very serious doubts may well be entertained), but a majority of the judges are of opinion, that the communication made by the commissioners to the plaintiff, was altogether gratuitous, and that not being within the sphere of their official duties, the United States cannot be injured by it, and that the defendants could not, without rendering themselves personally liable to the public, have made a title to the plaintiff, after a discovery of the mistake which they had made, but on the terms proposed by them; or in other words, that the United States could not, by any declaration of the commissioners, proceeding from a mistake, lose the lien which was secured to them by the contract with Morris & Nicholson, for the stipulated price of this property.

If the commissioners acted fraudulently, which is not pretended, they may be personally liable in damages to the plaintiff; but if it were a mistake, and such it is represented to be, the court has already said, that the interests of the United States cannot, and ought not to be affected by it. Were it otherwise, an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very *valuable and large tracts of real estate, and even produce alien- *370] ations of them, without any consideration whatever being received, It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself. It is the opinion of this court that the decree of the circuit court be affirmed.

Decree affirmed.

Herbert and others *v.* Wren and wife, and others. (*a*)

Dower.

Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially, where partition, discovery or account is prayed; and in cases of sale, where the parties are willing that a sum in gross should be given in lieu of dower.[1]

If a devise of land, in Virginia, to the widow, appear, from circumstances, to be intended in lieu of dower, she must make her election, and cannot take both.[2]

If a wife join her husband in a lease for years, she is still entitled to dower in the rent.

A court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in a suit in chancery, brought by Richard Wren and Susanna, his

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(*a*) February 15th, 1813. Present, all the judges, except Justice Todd.

[1] Powell *v.* Manufacturing Co., 3 Mason 347; Badgley *v.* Bruce, 4 Paige 98.

[2] See Duncan *v.* Duncan, 2 Yeates 302; Hamilton *v.* Buckwalter, Id. 389; United States *v.* Duncan, 4 McLean 99; Savage *v.* Burnham, 17 N. Y. 561; Tobias *v.* Ketchum, 32 Id. 319; Vernon *v.* Vernon, 53 Id. 351.

wife, who was the widow of Lewis Hipkins, deceased, and John and Westley Adams, her trustees, against W. Herbert, T. Swann, R. B. Lee and W. B. Page (trustees of Philip R. Fendall, deceased), and E. J. Lee, Joseph Deane and F. Green.

The case was stated by MARSHALL, Ch. J. (in delivering the opinion of the court), as follows: This suit was brought by Richard Wren and Susanna, his wife, formerly the wife of Lewis Hipkins, praying that dower may be assigned her in a tract of land of which her former husband died seised, and which has since been sold and conveyed to the defendant, Joseph Deane, or that a just equivalent in money may be decreed her in lieu thereof.

The material circumstances of the case are these: Lewis Hipkins being seised as tenant in common with Philip Richard Fendall, of one-third of a tract of land lying in the county of Fairfax, by his deed, executed *by himself and wife, leased the same to Philip Richard Fendall for the [*371 term of thirteen years, to commence on the first of September, in the year 1794, at the annual rent of 140*l.* In the year 1794, Lewis Hipkins departed this life, having first made his last will and testament in writing, in which he devised both real and personal estate to his wife: the real estate for her life, with remainder to his three daughters.

To his two sons, he devised the premises in question, and added, that if, during the minority of his sons, Philip R. Fendall should erect thereon another water-mill or water-mills, his desire was, that his sons, or the survivor of them, should, at the expiration of the lease for years made to the said Philip, pay one-third part of the value of such mill or mills, and in default of payment, that P. R. Fendall should be permitted to hold the same at the present rent, until the value should be received. He directed his two tracts of land, in London, to be sold for the payment of his debts, and appropriated the annual rent accruing on the lands leased to P. R. Fendall, to the education and maintenance of his children.

The testator then adds the following clause: "If it should so happen, that the remaining part of my estate, not herein bequeathed, should prove insufficient to pay all just demands against my estate, then my will and desire is, that my executors shall sell as much of my real and personal estate as may be necessary to make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be, in proportion to the property bequeathed to them and each of them."

On the 13th day of December, in the year 1797, Susanna Hipkins, then the widow of Lewis Hipkins, conveyed her dower in the premises in question, and also in the land devised to her for life, by her deceased husband, to the plaintiffs, John Adams and Westley Adams, in trust for her use.

*In the year 1803, P. R. Fendall and Walker Muse instituted a [*372 suit against the executors and children of Lewis Hipkins, deceased, and in the month of June, in that year, the cause came on to be heard by consent of parties, when the court decreed that the whole estate of Lewis Hipkins be sold and the money brought into court. The report of the sale does not appear on the record, but an entry was made, that the report was made and confirmed by the court. Under this decree, the premises were sold and conveyed to the defendant, E. J. Lee, who purchased in trust for

P. R. Fendall, one of the executors of Lewis Hipkins. On the deed of conveyance, is a memorandum, stating that the property was sold subject to dower.

Lee conveyed the premises to the other defendants, trustees of P. R. Fendall, for the purposes of a trust deed which had been previously executed, conveying to them the other two-thirds of the same estate on certain trusts in the deed recited. The trustees sold and conveyed to the defendant, Joseph Deane. The bill stated, that the defendant, Joseph Deane, had not paid the purchase-money, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof.

Soon after the trust deed from Susanna Hipkins to John and Westley Adams, she intermarried with the plaintiff, Richard Wren.

Philip R. Fendall continued to pay the plaintiff, Susanna, during her widowhood, and the plaintiffs, Richard and Susanna, after their intermarriage, one-third part of the rent accruing on the premises devised to him by Hipkins and wife, until the year 1803 ; since which, he has refused or neglected to pay the same.

The defendants, the trustees of Philip Richard Fendall, he having depart-
*373] ed this life previous to the institution of this suit, insist, *1. That the remedy of the plaintiffs, if they have any, is at law, and that a court of equity can take no jurisdiction of the cause. 2. That the provision made by the will of Louis Hipkins for the plaintiff, Susanna, not having been renounced by her, bars her right of dower in his estate.

The defendant, Joseph Deane, has put in no answer, and as against him the bill is taken as confessed.

The circuit court determined that the claim of the plaintiff, Susanna, to dower, was not barred, and decreed her a sum in gross, as an equivalent therefor. From this decree, the trustees of Philip Richard Fendall have appealed. The plaintiffs also object to so much of the decree as refuses them rent on the premises, and have, therefore, taken out likewise a writ of error.

E. J. Lee, for the plaintiffs in error.—1. If the complainant, Susanna, has any right of dower, her remedy was in a court of law. In a suit in chancery, if a question of dower arise, and the right of dower be denied, a court of equity will send it to a court of law to be tried. The courts of the United States are forbidden by law, to exercise chancery jurisdiction, in a case in which there is a remedy at law. A court of equity takes cognisance of no case of dower which does not involve some peculiar ground of equity : such as discovery, partition, account, &c. Here was no prayer for discovery, nor partition, and although an account was prayed, yet it was unnecessary. 1 Fonbl. 19; 1 Bro. C. C. 326; *Dormer* v. *Fortescue*, 3 Atk. 130; 2 Bro. C. C. 631; 2 Ves. jr. 124.

2. She had no right to dower. Her husband, Hipkins, had devised to her an estate for life, which appears, by the various provisions in his will, to
*374] have been intended to be in lieu of dower. The lands out of *which dower is now claimed, he devised to his sons, and also devised them for payment of his debts. He specifically devised away all his lands. In the case of *Ambler* v. *Norton*, 4 Hen. & Munf. 23, the devise was not expressly in lieu of dower, but the fact was collected from the whole context of the will.

3. But if she had a right of dower, the court had no authority to make a decree for part of the purchase-money, without the consent of all parties concerned. 1 Inst. 33.

R. I. Taylor, contrà.—None of the facts upon which the claim of dower is founded, is denied by the answer. The denial of the right is founded on particular facts therein stated.

1. As to the jurisdiction. At the present day, courts of law and equity have a concurrent jurisdiction in dower, if the facts are not denied upon which the claim of dower is founded; such as seisin, &c. In general, a court of chancery is the proper tribunal. A discovery is almost always sought; partition is frequently required, and an account is generally taken. Comyn Dig. tit. Chancery, E; Mitford 109, 129; 1 Fonbl. 22; 6 Bac. Abr. 417; 2 Ves. jr. 122, 124. There is no case in Virginia where the jurisdiction has been denied. In this case, a partition was necessary, and that is a special ground of equitable jurisdiction.

But the property had been sold by order of court, expressly subject to dower, and the deed to Deane contained a covenant to indemnify him against the claim of dower. A court of chancery can call all parties before it, and by decreeing a compensation in lieu of land, prevent circuity of action. The widow and the purchaser had consented to such a decree. An account of rents and profits was also necessary. The act of congress prohibiting the resort to chancery where there is a remedy at law, is only an affirmance of a principle of the common law.

*But it is said, that by joining in the lease for thirteen years, she barred her dower during the lease. This is not so. Her husband [*375 still had a freehold of inheritance in the land, and died seised thereof. And the widow is entitled to dower in all lands of which the husband was seised of the freehold of inheritance, during the coverture. 1 Inst. 32; Com. Dig. tit. Dower, A. 6.

But the most formidable objection arises upon the devise to her by the will. That devise was not expressly in lieu of dower, nor is there such averment as the statute of Virginia requires. There is no averment that she accepted the lands devised in lieu of dower; nor that her husband was seised of such an estate in those lands as would be a bar, if she had accepted them. The decree of the court was for a sale of the whole real estate of her husband. It does not appear, that the land devised to her was not sold as well as the rest. If it was, she is not barred of her dower. Co. Litt. 18 *b*, Harg. note; *Dormer* v. *Fortescue*, 3 Atk. 130; Ridg. temp. Hardw. 184; Fonbl. 22; 6 Bac. Abr. 417.

But there is an error in favor of the plaintiff in error, and if the cause should be sent back, it ought to be corrected. There was no allowance made for arrearages of rent.

As to the decree for money in lieu of land. The widow was willing to receive it, and the defendant, Deane, to pay it. If there had not been a decree for money, Deane would have been obliged to pay the whole purchase-money to the trustees, and then sue them for a breach of covenant, and recover back in damages the value of the dower, to be assessed by a jury. By ascertaining that value, in the first instance, this circuity of action and loss of time are prevented. Whether the court below ought themselves to

have fixed the value of the dower, or left it to be ascertained by a master in chancery, or by a jury, we do not pretend to say. We do not wish the decree to be affirmed. We hope the bill will not be dismissed; but sent back, with instructions to allow us the arrearages of rent, with the profits thereon, and that an account be taken accordingly.

*376] *C. *Lee*, in reply.—The essential point of the case is, that she is barred of her dower by her acceptance of a jointure under the will. The act of assembly (Rev. Code 180, § 11) says, "that if any estate be conveyed by deed or will, either expressly, or by averment, in lieu of dower," &c., "such conveyance shall bar her dower of the residue," &c. She has accepted her jointure and resides upon it. All the circumstances of the will show the intent to be in lieu of her dower. By averment, means by allegation and proof dehors the will. 1 Inst. 36 *b*, note; Wooddeson, tit. Dower; Hargrave Co. Litt. 36 *b*, note; *Pearson* v. *Pearson*, 1 Bro. C. C. 292. The court had no right to decree money in lieu of the land, without consent of the creditors. No arrearages of dower can be recovered for the time preceding the demand.

February 26th, 1813. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:—The material questions in the cause are: 1. Has a court of equity jurisdiction in the case? 2. Is the plaintiff, Susanna, entitled to dower? 3. If these points be in her favor, what decree ought the court to make?

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist, in England, in favor of this jurisdiction: one of which is, that partitions are made and accounts are taken in chancery, in a manner highly favorable to the great purposes of justice. In this case, dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate, as well as of assignment of dower in the part of which Lewis Hipkins died seised.

*377] *An additional reason, and a conclusive one, in favor of the jurisdiction of a court of equity, is this: The lands are in possession of a purchaser, who has not yet paid the purchase-money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now, if the plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law, and compel her to receive her dower in the lands themselves. This is, therefore, a proper case for application to a court of chancery.

2. It is perfectly clear, that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower, for several reasons, of which it will be necessary to mention only two. 1. It is not expressed to be made in lieu of dower. 2. It is not averred, that she has accepted the provision and still enjoys it.

3. It remains to inquire, what decree the court ought to make in the case? The first question to be discussed is this: Is the plaintiff, Susanna, entitled both to dower and to the provision made for her in the will of her late husband? The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to

support that averment by matter *dehors* the will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary the previously existing common law.

In the English books, there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which *she has been [*378 permitted to hold both. The principle upon which these cases go appears to be this:

It is a maxim in a court of equity, not to permit the same person to hold under and against a will. If therefore, it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention, discovered in other parts of the will, must be defeated by the allotment of dower to the widow, she must renounce either her dower, or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed, that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of *Arnold* v. *Kempstead and wife* (Amb. 466), of *Villareal* v. *Lord Galway* (Ibid. 682), and of *Jones* v. *Collier and others*, (Ibid. 732), are all cases in which, upon the principle that has been stated, the widow was put to her election. In the case under consideration, neither party derives any aid from extrinsic circumstances, and therefore, the case must depend on the will itself.

The value of the provision made for the wife, compared with the whole estate, is not in proof: but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify. The only fund provided for the maintenance and education of his five children is the rent of 140*l.* per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower. That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill, and not receiving from the sons of the testator their half of its value, to hold the premises, until the rent should discharge that debt, indicates an intention that, in such case, the whole rent should be retained. *The clause, [*379 too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property, without any regard to the incumbrance of dower. Upon this view of the will, it is the opinion of the majority of the court, that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the court, that she has accepted the provision of the will, nor that she enjoys it. Indeed, there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life

from its operation, nor is the court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence, that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one-third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her, in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is, therefore, apparent, that she never intended to abandon her claim to dower.

The next inquiry to be made by the court is, to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower? It is unnecessary to decide, whether, in general, a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case, the plaintiff was in the actual enjoyment of dower. She received one-third of the rent accruing from the premises, for nine years; she was, therefore, in full possession of her dower estate; and when, after-
*380] wards, the land was sold under a decree of a *court, P. R. Fendall was one of the executors who made the sale, and was himself, in effect, the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one-third of 140*l.* per annum, for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff, Susanna, cannot claim the profits on her dower and hold any portion of the particular estate devised to her, or of the profits on that estate. An account, therefore, must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire, whether the allowance of a sum in gross, in lieu of dower in the land itself, or of the interest on one-third of the purchase-money, might legally be made? This must be considered as a compromise between the plaintiffs and the defendant, Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist, that instead of a sum in gross, one-third of the purchase-money shall be set apart, and the interest thereof paid annually to the tenant in dower, during her life. If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still it is uncertain, on what principle seven years were taken as the value of the life of the tenant in dower. It is, probably, a reasonable estimate, but this court does not perceive on what principle it was made, nor does the record furnish the means of judging of its reasonableness.

This court is of opinion, that there is error in the decree of the circuit
*381] court, in not requiring the plaintiff, *Susanna, to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate, if she shall elect to take dower. The decree is

to be reversed and the cause remanded for further proceedings in conformity with the following decree:

This Court is of opinion, that the plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins died seised, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said Lewis. She ought, therefore, to have made her election, either to adhere to her legal rights and renounce those under the will, or to adhere to the will, and renounce her legal rights, before a decree could be made in her favor.

This court is further of opinion, that the plaintiff, Susanna, having been in possession of her dower by the receipt of rent, for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession, from the time when he ceased to pay the same, until the sale was made to the defendant, Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon, since the same was sold and conveyed to him; to ascertain which, an account ought to be directed. And the court is further of opinion, that an account ought also to be directed, to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will: all which must be deducted from her claim for dower.

The court is further of opinion, that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one-third part of the purchase-money, given by the said Joseph Deane for the lands in which the plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive, during life, the interest accruing thereon, *and shall apply to the circuit court to reform its decree in this respect, the same ought to be done. [*382

It is the opinion of this court, that there is no error in the decree of the circuit court for the county of Alexandria, in determining that the plaintiff, Susanna, was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This court doth, therefore, reverse and annul the said decree; and doth remand the cause to the said circuit court, with instructions to reform the said decree according to the directions herein contained.

Johnson, J., dissented from the opinion of the court, but did not state his reasons.