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Ten Months of Uncertainty

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NOTES AND COMMENTS

Ten Months of Uncertainty

Problems concerning the nature of the title, if any, received by the surviving spouse during the ten-month period following upon the issuance of letters of administration of the deceased spouse's estate, and also whether that title is transferable, occupied the attention of the Illinois Supreme Court in the case of *Bruce* v. *McCormick*.[1] The decision therein, while eminently sound under the present state of the law, prompts some inquiry as to whether or not the law might not well be changed by legislative revision of the present Probate Act.

According to the facts in that case, Samuel Wood died intestate owning certain Illinois real estate and leaving a widow and several descendants surviving him. Letters of administration were issued on his estate on March 12, 1943. In April of that year, the widow and two of the descendants conveyed their respective interests in the realty to the plaintiff by quit-claim deed. The following month, the widow released her interest in the land to the remaining descendants. After all claim to dower rights had been barred by lapse of time, the widow executed a warranty deed to the plaintiff who thereafter filed a partition action alleging that he had acquired title to the widow's undivided one-third interest by reason of her deeds to him. The trial court so found and decreed partition in the plaintiff's favor. Upon direct appeal to the Illinois Supreme Court, it was held that the decree should be reversed. The precise issues involved in the case were (1) is the barring of the dower right still a condition precedent to the vesting of an interest in the fee in the surviving spouse, and (2) can the dower interest be effectively released before being barred by lapse of time and, if so, to whom. Intimately connected with such issues, of course, was the further question as to whether or not the present Probate Act had wrought any change in the law which heretofore controlled on such questions.

Dower rights today are frequently regulated and modified by statute so they are seldom the same in any two jurisdictions.[2] In Illinois, certainly, while dower is still based on common-law doctrines it has been enlarged and modified by statute[3] so that a surviving spouse has an alternative of claiming either the common-law dower, preferred over the claims of creditors, or else may take an interest in the fee after all debts have been dis-

[1] 396 Ill. 482, 72 N. E. (2d) 333 (1947).

[2] See 17 Am. Jur., Dower, § 7.

[3] In general, see James, Illinois Probate Act Annotated (The Foundation Press, Inc., Chicago, 1940), pp. 12 and 29.

charged. The two potential interests are so co-mingled that an accurate analysis of one is impossible without fully considering the effect of the other.

Prior to the enactment of the present statute, Section 1 of the former Descent Act[4] provided that the surviving spouse should receive as his or her absolute estate, in lieu of dower, one-third of each parcel in which such surviving spouse should waive his or her right of dower. The present statutory provision, Section 11 of the Probate Act,[5] directs that the surviving spouse shall receive one-third of each parcel in which the surviving spouse does not perfect his or her right to dower pursuant to the statutory manner so provided.[6] The other heirs, therefore, receive the remaining two-thirds of each parcel in which the surviving spouse does not perfect his or her right to dower and, subject to the dower of the surviving spouse, all of each parcel in which dower is perfected. Section 1 of the former Dower Act[7] had likewise provided that the surviving spouse should be endowed of a third part of the lands unless dower should have been relinquished in legal form. The idea there expressed has been carried over into a corresponding section of the Probate Act which states that the surviving spouse is endowed of a third part of all real estate unless dower has been released or is barred.[8] Another section thereof declares that dower is barred unless written intention to take dower is filed within ten months after issuance of letters of administration and within the lifetime of the surviving spouse.[9] These statutory changes produced by the present Probate Act evoked the issues presented in the instant case.

In order to decide that the same devolution of real estate resulted under the Probate Act as was formerly the case, the court was obliged to construe the varied sections of the statute together in order to garner the legislative intent.[10] A comparison of Section 1 of the Descent Act with Section 11 of the Probate Act makes it evident that the same principle underlies both sections albeit the idea is expressed in different terms. Formerly, the surviving spouse received an absolute estate upon waiving dower rights. Now the fee is received by not perfecting dower. Lapse of time and inaction by the surviving spouse is regarded as being as effec-

[4] Ill. Rev. Stat. 1937, Ch. 39, § 1.

[5] Ill. Rev. Stat. 1945, Ch. 3, § 162.

[6] Ibid., Ch. 3, § 170.

[7] Ill. Rev. Stat. 1937, Ch. 41, § 1.

[8] Ill. Rev. Stat. 1945, Ch. 3, § 170.

[9] Ibid., Ch. 3, § 171.

[10] Classen v. Heath, 389 Ill. 183, 58 N. E. (2d) 889 (1945); Schoellkopf v. DeVry, 366 Ill. 39, 7 N. E. (2d) 757, 110 A. L. R. 511 (1937); Sisk v. Smith, 6 Ill. 503 (1844). See also James, op. cit., p. 14.

tive for purpose of waiving dower as it is in not perfecting dower. The same result, therefore, is obtained in either case despite the different language used.

In holding that the Probate Act had not changed the prior law, special emphasis was placed by the court on the word "the" found in the clause "unless the dower has been released or barred" to be found in Section 18 of the Probate Act.[11] It was held to relate to the right of dower previously given and not to indicate that dower was to come into being by election after a fee interest had vested in the surviving spouse. Again, the close similarity in language between the former and the present statute, except for a slight change in terms from "relinquished" to "released" or "barred," certainly fails to disclose any legislative purpose to change the rules.

It may be deduced, therefore, that now, as before, the surviving spouse's incohoate dower becomes dower consummate on the death of the spouse owning the land, but that the fee to the real estate descends to the heirs subject to the surviving spouse's alternative right to claim dower or to receive a third of the fee.[12] The surviving spouse's right to perfect dower is a right resting in action only. That action is limited to perfecting dower, releasing the dower right, or allowing dower to be barred by lapse of time. In the last mentioned case, the fee vests in the survivor at the moment the right to perfect dower becomes barred.[13] Until then, the heirs hold the full fee title encumbered by the surviving spouse's right of dower. When the dower is barred, the several interests of the respective heirs automatically become reduced proportionately in order to give the statutory dower substitute of an undivided one-third in fee to the surviving spouse.[14]

In the light of these principles, it seems clear that the widow in the instant case did not have any estate to convey to the plaintiff during the ten-month period following the issuance of letters of administration and while she held only an unassigned dower right. What then was the effect of her release to some of the heirs? It is established law in this state that unassigned dower is not such an estate that can be conveyed by deed to

[11] Ill. Rev. Stat. 1945, Ch. 3, § 170. Italics added.

[12] Braidwood v. Charles, 327 Ill. 500, 159 N. E. 38 (1927); Steinhagen v. Trull, 320 Ill. 382, 151 N. E. 250 (1926); Kryczka v. Brzozowski, 328 Ill. App. 220, 65 N. E. (2d) 619 (1946); Wilson v. Hilligoss, 278 Ill. App. 564 (1935).

[13] Liesman v. Liesman, 331 Ill. 287, 162 N. E. 855 (1928); Maring v. Meeker, 263 Ill. 136, 105 N. E. 31 (1914); Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111 (1896); Anderson v. Smith, 159 Ill. 93, 42 N. E. 306 (1895); Hart v. Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371 (1889); Best v. Jenks, 123 Ill. 447, 15 N. E. 173 (1888); Hoots v. Graham, 23 Ill. 79 (1859); Summers v. Babb, 13 Ill. 483 (1853).

[14] Ruwaldt v. McBride, Inc., 388 Ill. 285, 57 N. E. (2d) 863, 155 A. L. R. 1209 (1944).

a stranger, although it may be released to the owner of the fee. This rule was succinctly stated in the case of *Best* v. *Jenks*[15] where the court said: "It [dower] may be released so as to bar the right of asserting it against the owner of the fee, but it cannot be invested in another separately from the fee."[16] The determination therein has been followed with approval many times,[17] so it was proper to hold, in the instant case, that the quit-claim deed by the widow to some of the heirs was sufficient to release her right of dower but only to the extent of removing the incumberance thereof from the interests held by those named as grantees in that deed.[18] She did not release her right of dower in the shares of the estate held by the descendants who were not named in that deed, nor did she effectively transfer the same to the plaintiff for he was then a stranger to the fee. Since that deed was only a quit-claim instrument it could not operate to divest her of an after-acquired title.[19] When that dower was eventually barred by lapse of time, the widow received a one-third in fee of the undivided estate held by the descendants who were not named in the release and this was the only interest she had to convey to the plaintiff by her subsequent warranty deed. The decision in the instant case, then, clears the air of any doubts which may have existed that the present Probate Act had been designed to change the prior law. The basic law, rules, and doctrines remain unchanged and the new statute merely restates, codifies and consolidates the earlier statutes on this point.[20]

The court, of course, determined no problems in the instant case other than the ones before it. A discussion of this sort, however, would not be complete without considering some of the possibilities which could arise. Suppose, for example, the facts were slightly changed and the quitclaim deed to plaintiff had been executed after he had received deeds from some of the heirs. It could be argued, following the decision therein, that plaintiff then held a sufficient fee interest in the land to give legal effectiveness to the widow's release of her unassigned dower right to him, but only as it related to the proportion of the estate held

[15] 123 Ill. 447, 15 N. E. 173 (1888).

[16] 123 Ill. 447 at 456, 15 N. E. 173 at 178.

[17] Maring v. Meeker, 263 Ill. 136, 105 N. E. 31 (1914); Fletcher v. Shepherd, 174 Ill. 262, 51 N. E. 212 (1898); Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111 (1896); Anderson v. Smith, 159 Ill. 93, 42 N. E. 306 (1895); Heisen v. Heisen, 145 Ill. 658, 34 N. E. 597 (1893).

[18] Fletcher v. Shepherd, 174 Ill. 262, 51 N. E. 212 (1898); Hart v. Burch, 130 Ill. 426, 22 N. E. 831 (1889).

[19] O'Malley v. Deany, 384 Ill. 484, 51 N. E. (2d) 583 (1943); Thornton v. Louch, 297 Ill. 204, 130 N. E. 467 (1921); DuBois v. Judy, 291 Ill. 340, 126 N. E. 104 (1920).

[20] Any other interpretation would have been in direct conflict with the views expressed by the framers of the statute: James, op. cit., p. 14. See also Fins, "Analysis of the Illinois Probate Code," 34 Ill. L. Rev. 405 (1940) at 411.

by him. In the event that the situation were the same as in the instant case except that the widow had originally given a warranty deed instead of a quitclaim, the same decision as in the instant case should result. The theory then to be employed would be that after release given to the heirs the widow would never receive an interest in the fee which could inure to the plaintiff as after-acquired title unless she subsequently received a reconveyance from the heirs. On the other hand, if no release was given and no action taken to claim dower, a warranty deed given in the ten-month period should vest the grantee with a one-third interest in the fee when acquired by the surviving spouse, and would probably be similarly effective as to the dower interest if action should be taken by the spouse to claim the same.[21] It is obvious, however, that despite these possibilities there would be a period of time during which the eventual ownership of the property would be a matter of doubt and uncertainty.

As stability, alienability, and certainty of titles to real estate is desirable, and the foregoing discussion indicates the existence of several doubtful contingencies, the legislature might well consider the wisdom of amending the Probate Act so as to vest a fee title in the surviving spouse immediately upon death of the owner just as the common law provided should be the case with respect to the heir. In that way, a conveyance at any time by the surviving spouse would serve to pass an immediate interest to the grantee. The statute might then well direct that any such conveyance made before election to take dower should just as effectively bar the right to perfect dower as would a release to the heirs. If retention of common-law dower as an elective interest is desirable, and there are times when it might be, the statute could indicate that the surviving spouse should take the statutory share in the form of a vested fee subject to be defeated by a positive election to take the common-law interest within a limited time and before any conveyance. The requirement of a positive act of election would be no more onerous that the present statute while the uncertainty as to the eventual outcome of the title, forced by the present state of the law during the ten-month waiting period, could readily be avoided. Cerainly, if this were the law, the surviving spouse would be able to find a wider market and, probably, a better price for the estate thereby vested than is presently the case.

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[21] See Thornton v. Louch, 297 Ill. 204, 130 N. E. 467 (1921), to the effect that a deed reciting that grantor was seized or possessed of the land conveyed would estop the grantor from denying the grantee's right to an after-acquired title. See also Ill. Rev. Stat. 1945, Ch. 30, § 6.