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Value of Wife's Inchoate Dower in Condemnation Proceeding - United States v. Certain Parcels of Land, Etc.

VALUE OF WIFE'S INCHOATE DOWER IN CONDEMNATION PROCEEDING

United States v. Certain Parcels of Land, Etc.[1]

In a Federal land condemnation proceeding, the question arose as to whether the owner's wife is entitled to any of the damages awarded her husband, for destruction of her inchoate right of dower. The question generally does not arise, because checks for payment of such damages are usually made payable to husband and wife jointly. Here the problem arose because the wife, who was in Greece, had given her husband a very broad power of attorney; but a Treasury regulation, as construed, prohibited the receipt of any moneys by a husband as the wife's agent. On the basis of Federal cases,[2] the District Court felt that it was obliged to decide this case according to Maryland law. The Court concluded that, under the Maryland law, the wife's inchoate dower could not be valued and so, in the principal case, nothing had to be withheld for the wife's protection.

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[1] 46 F. Supp. 441 (D. C. Md., 1942).

[2] Ferry v. Spokane, P. & S. R. Co., 258 U. S. 314 (1922); Erie R. R. v. Tompkins, 304 U. S. 64 (1938).

The decision as to the Maryland law was not an easy one. The statutory law offered no solution.[3] There were two opposing nisi prius decisions on the precise point in question. In *Baltimore and Ohio Railroad Co. v. Smith,*[4] where land had been condemned by the railroad, the jury had not assessed damages for the inchoate dower of a Mrs. Taylor. Judge Harlan decided that dower was not such an interest as to be capable of assessment, and the award "ought not be disturbed because the whole of the value of the rent incident to reversion in fee was assessed to the husband." In the other case,[5] Judge Stockbridge found the wife not to be an improper party to the proceedings because her inchoate dower was "a matter for estimation by the jury; it may be a nominal value of $1, at the same time it is a right the jury must take into consideration, and in any apportionment for damages make their estimate on it."

Except for these lower court decisions, there were no authorities directly in point. Certain early partition cases[6] indicated the possibility of an allowance in an appropriate case; but this was met by strong language in the case of *Reiff v. Horst.*[7] After pointing out that the interest of the wife was inchoate only during the husband's lifetime, could not be pledged, mortgaged, assigned, or sold, but only released to the owner of the fee, the Maryland Court concluded: "Regarding her right, as the law does, during the husband's life, as having no present value, as it is not the subject of sale, but only of

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[3] Md. Code (1939) Art. 33A, Sec. 1, providing for petitions in condemnation proceedings to be filed against husbands and wives of married owners was construed to be only a procedural provision. Md. Code (1939) Art. 16, Sec. 48, providing for sale of lands free from any claim of dower and an award from one-seventh to one-tenth in proceeds of sale refers only to consummate dower.

[4] Baltimore and Ohio Railroad Co. v. Smith, 1 Baltimore City Reports 99 (1890).

[5] Baltimore and Ohio Railroad Co. v. Textor, 2 Baltimore City Reports (1905).

[6] Warren v. Twilley, 10 Md. 39 (1856); and Rowland v. Prather, 53 Md. 232 (1880).

[7] 55 Md. 42, 49 (1880). The facts of the case were: Abraham Horst and wife, Anna, executed several mortgages on real property and afterwards united in a deed of trust of all property, personal and real, for benefit of creditors. This provided for payment to Anna, in consideration of her uniting in the deed, one-twelfth of gross proceeds of sale in lieu of her contingent right of dower. The Court discussed the nature of dower and decided that there was no standard for ascertaining its worth, but concluded that the wife should be allowed part of the proceeds "as a consideration for her release of expectant right in the parcel. Though not the subject of a grant, her right, peculiar as is its character, is the subject of contract for release."

release to the owner of the fee, we have no scale or standard for ascertaining its present worth." This language was approved in a later Maryland decision,[8] and had been the basis of the Federal court's earlier refusal to value dower in a gift taxation case.[9] From it, the Court reasoned, in the instant case, that even though the Maryland law would protect the wife's inchoate dower as against the husband in the distribution of damages; still, the Maryland rule of valuation was that there was "no scale or standard for ascertaining its present worth." Hence the wife would be entitled to no portion of the damages awarded her husband.

Cases elsewhere deciding this point have reached different results, the majority holding the wife is not entitled to compensation for destruction of her inchoate dower, and a strong and persistent minority holding the opposite view. The majority view has been stated to be that "Dower exists in the fund resulting from land taken by eminent domain proceeding after death of the husband but not as to the proceeds of the land taken in his lifetime . . ."[10] This is based on reasoning that public interest requires dower to be extinguished when the land is taken by right of eminent domain, and since it does not rise to the dignity of a vested property interest it can be taken without due process of law. The interest of the wife is only inchoate during the husband's lifetime and cannot be assigned, granted, mortgaged or pledged, and the only thing which the wife can do with it is release to the owner of the fee.

The view of the minority has been stated to be that "though she has no actual estate in dower during the life of her husband, yet she has an interest and a right of which she could not be divested but by her consent,[11] or

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[8] Roth v. Roth, 144 Md. 553, 555, 125 A. 400 (1923). Here the effect of the Court's decree was to protect the wife's right when the husband sought to sell the land free from the wife's claim of dower by having court appoint a trustee for the dower interest of the wife, the trustee to be directed to join in sale of the property. Yet, in the principal case, which also relied on the *Reiff* case, the effect was not to protect the wife's interest.

[9] Hopkins v. Magruder, Collector, 34 F. Supp. 381 (D. C. Md., 1940), noted (1942) 6 Md. L. Rev. 167.

[10] 28 C. J. S. 49.

[11] In Roth v. Roth, 144 Md. 553, 555, 125 A. 400 (1923) the Court used the following language: "The marital interest (dower) which is sought to be made the subject of a judicial sale in this case is one of which the wife cannot be divested without her consent;" and also, quoting an earlier case, "a sale cannot be made without her concurrence . . . and she cannot be coerced."

crime, or her dying before her husband."[12] This is a valuable interest, affects marketability of title, entitles the wife to redeem from a mortgage, is not subjected to claims of husband's creditors, is a good consideration for a promise, cannot be defeated by sale of husband's trustee's in bankruptcy, and so should not be completely destroyed by ignoring all possibility of her survival of her husband.

Courts following the majority view speak of the wife's right as being only a contingent possibility of interest which can neither be the subject of a grant nor assignment, but only of release to the owner of the fee, and so should not be protected in such a case as the principal one. But, in a condemnation case the wife is neither assigning nor granting; she is being forced to release. Should not the law protect her and give her a portion of the proceeds?

Although the Maryland Court in the *Reiff* case states that there is no standard for determining present value, other courts have found no insurmountable difficulty in determining the present value of a wife's inchoate dower. One way is to ascertain the present value of an annuity for the life of the wife, equal to the interest in one-third of the proceeds of the estate to which the right attaches, and then deduct from this the value of a similar annuity dependent upon the joint lives of the husband and wife.[13] Some cases add that, in applying this, a proper regard should be had to the value of the property, and the health, and ages of the parties.[14]

Cases which are in accord with the principal one often give as another reason for refusing the wife any part of the damages awarded, that to do so overlooks the possibility that the husband might survive the wife[15] and denies the husband full use of his property to which he is entitled.

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[12] Bullard v. Briggs, 7 Pick. 533 (Mass., 1829).

[13] Shaw v. Trickle, 183 Wis. 1, 197 N. W. 329 (1924); Jackson v. Edwards, 7 Paige 386 (N. Y., 1839); Doty v. Baker, 11 Hun. 222 (N. Y., 1877); Brown v. Brown, 94 S. C. 492 (1913); Strayer v. Long, 86 Va. 557, 10 S. E. 574 (1890); Buzick v. Buzick, 44 Iowa 259 (1876); Lancaster v. Lancaster, 78 Ky. 198 (1879); Grayson v. Grayson, 190 S. W. 930 (Mo., 1916); Bullard v. Briggs, 7 Pick. 533 (Mass., 1829); Gore v. Townsend, 105 N. C. 228, 11 S. E. 160 (1890), see note, 34 A. L. R. 1021.

[14] Gordon v. Tweedy, 74 Ala. 232 (1883).

[15] Long v. Long, 99 Ohio St. 330, 124 N. E. 161 (1919): "As her interest in the realty was 'inchoate' . . . so when this real estate was converted to personalty her right therein was still 'inchoate' . . . she did not have a present right to possess it, to seize it, and to use it, because it was still conditioned upon her survivorship, the same as her interest in any other personalty of the husband."

This is an unavoidable criticism of cases which give the wife a lump sum from the award. But it is equally true that by refusing to give the wife anything a court overlooks the possibility of the wife's survivorship.

It seems that the approach of a New York court would be more just in avoiding the absolute character of the "lump sum or nothing approach." In *In Re Cropsey Ave*,[16] the court created a trust in one-third of the damages awarded (less liens) which was invested, and the income paid to the husband during his life and thereafter to his wife, if she survived, during her life. This protected the inchoate dower right and yet assured the husband of the enjoyment of his property until death. It is difficult to find any theoretical unfairness in this approach.[17] This could be followed in a jurisdiction which, like Maryland in the *Reiff* case, finds it impossible to find a standard for ascertaining the present worth of dower.

The best way to approach the question would seem to be to consider what is the policy of the law in relation to inchoate dower elsewhere. The law has always favored dower; it has been said ". . . the tenant in dower is so much favored, as that it is the common byword in the law, that the law favored three things: 1—Life; 2—Liberty; 3—Dower."[18] Elsewhere the law protects dower, will not allow a husband to defeat it by conveyance, and will not allow it to be defeated by a sale by the husband's trustees in bankruptcy or subjected to levy and execution.

Since dower is so protected elsewhere, and other similar interests are protected in condemnation proceedings,[19] there seems to be no just reason for refusing protection for the wife's right of inchoate dower in a condemnation proceeding. In the absence of direct Maryland holding, it would seem to be the better policy for a Federal court to find the Maryland law to be what the court feels it should

[16] 268 N. Y. 183, 197 N. E. 189 (1935). A similar approach has been taken, where damages awarded in condemnation proceeding were substituted for the land in case of a mortgage, In Re Neptune Ave., City of New York, 271 N. Y. 331, 3 N. E. (2d) 445, 446 (1936); and in case of right of survivorship in land held by tenant in entirety. In Re Jamaica Bay, 252 App. Div. 103, 297 N. Y. S. 415 (1937).

[17] This might, however, be impractical in cases where only a small amount of money is involved, or where, as in the principal case, the husband needed it to buy new property to carry on his restaurant business.

[18] BACON, STATUTE OF USES 37.

[19] *Mortgagees:* City of Birmingham v. Edmond, 134 So. 622 (1931); In Re Forman, 138 Misc. 502, 240 N. Y. Supp. 718 (1930).

Lessees: Clark v. United States, 67 Ct. Cl. 337 (1929); Wren v. Smith, 41 F. (2d) 972 (Ct. of App. D. C., 1930).

Vendee: Cullen v. Bender, 122 Ohio St. 82, 170 N. E. 633 (1930).

be. The instant opinion states that it was the judge's duty "to determine what the state law is, not what it ought to be."

This gives the impression, when taken along with the rest of the opinion, that the judge's feeling was that the Maryland Court of Appeals, if faced with the problem, would adopt as its view what was not the most socially desirable result, although such result is accepted by decisions elsewhere. *Quaere* might be raised as to whether this was either a wise or a necessary approach. Should not a Federal court, in seeking to discover unsettled state law, assume that the state court would do what it should do?