South Carolina Law Review

Volume 9 | Issue 2 Article 9

Winter 1957

Widow's Election between Dower and Others Benefits

Paul J. Foster

WIDOW'S ELECTION BETWEEN DOWER AND OTHER BENEFITS

INTRODUCTION

When a husband provides for his wife in a will the question arises whether she is also entitled to dower. When the husband dies intestate the question is whether the wife is entitled to take as an heir-distributee and also by way of dower. In short the problem is whether in these situations the wife may take both interests or whether she is put to an election. This note, dealing principally with South Carolina law, concerns itself with whether or not the wife must elect and the mode and effect of election when such election is required.

Election Between Testamentary Benefits and Dower

Dower is a right which, inchoate during coverture, becomes absolutely vested in the widow as an estate on the death of her husband and it is beyond his control. The estate not being his to give, it will be presumed that any devise which he makes will have the dower attach.[1] A widow cannot be deprived of her dower right by any testamentary provision unless by her consent.[2] If a will, either expressly or by necessary implication, declares that the provision for the widow is in lieu of dower, a case of election is presented and if the widow elects to take under the will her claim of dower is defeated.[3] If, in construing a will, there be anything ambiguous or doubtful, and if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported.[4] Some jurisdictions[5] have reduced the law concerning election by widow between testamentary benefits and dower to statutes. South Carolina, however, is governed by case law. When a will expressly provides that the provision for the widow is in lieu of dower, a clear case of election is presented and no problems arise.[6] However, a perplexing problem arises when there is an attempt to force an election by implication. Since there is a presumption that the widow takes the testamentary provision in addition to her dower, the rule is that the strongest kind of implication must be shown.[7] The

1. Cunningham v. Shannon, 4 Rich. Eq. 135 (S.C. 1851).
2. Bomar v. Wilkins, 154 S.C. 64, 151 S.E. 110, 68 A.L.R. 501 (1929).
3. Ott v. Ott, 182 S.C. 135, 188 S.E. 789 (1936).
4. Braxton v. Freeman, 6 Rich. 35, 57 Am. Dec. 775 (S.C. 1853).
5. 1 *Stimson, Am. St. Law*, § 3244.
6. Cogdell v. Cogdell, 3 Deasu. Eq. 346 (S.C. 1811); Bannister v. Bannister, 37 S.C. 529 (1892) at page 531.
7. *E. g.*, Cunningham v. Shannon, 4 Rich. Eq. 135 (S.C. 1851); Scott v. Vaughn, 83 S.C. 362, 65 S.E. 269 (1909).

logical result of such a presumption is that the burden of proof rests upon the party who challenges the widow's right to both.[8] The court feels propriety in stretching rules of construction so as to allow a widow to retain both dower and testamentary benefits.[9] In the early South Carolina case of *Gordon v. Stevens*,[10] the court stated that the presumption that the widow takes dower in addition to benefits under a will rests upon the theory that a bequest or devise is to be deemed a bounty and not the payment or satisfaction of a pre-existing debt or obligation.

The governing principles of law applicable to election in South Carolina are succinctly summarized in *Garrett v. Vaughn*,[11] where the court stated:

> The following general principles may be regarded as settled beyond dispute: (1) The presumption is that the provision made by the husband in his will for his wife was not intended to be in bar and lieu of dower. (2) In order to have the effect of forcing the wife to elect whether she will take under the will, the intention of the testator must so appear by the express terms of the will, or must arise by necessary implication in view of all the surrounding circumstances. (3) Where the only effect of allowing the claim of dower is to reduce the value of the devises, the widow should not be put to her election, for that happens in every case where dower is allowed. (4) The test is whether the provision in the will and the claim of dower is so manifestly repugnant that they cannot stand together.

The cases uniformly support the above principles, but much difficulty arises in the application of these principles of law to a factual situation. In construing a will so as to reflect the intention of the testator, every case depends upon its own circumstances. It may be mentioned at the outset that in ascertaining the intention of the testator, parol evidence will not be permitted; the intention of the testator must come from the will itself.[12]

If the underlying result of allowing dower would be to derange a planned scheme, an election is presented.[13] A review of some of the cases and the varying factual situations will give some indication

8. Summerel v. Summerel, 34 S.C. 85, 12 S.E. 932 (1890); Ott v. Ott, 182 S.C. 135, 188 S.E. 789 (1936).
9. Brown v. Caldwell, Speer Eq. 323 (S.C. 1843).
10. 2 Hill Eq. 46, 27 Am. Dec. 445 (S.C. 1835).
11. 59 S.C. 516, 38 S.E. 166 (1900) at page 522.
12. Hall v. Hall, 8 Rich. 407 (S.C. 1835).
13. *E. g.*, Bomar v. Wilkins, 154 S.C. 64, 151 S.E. 110, 68 A.L.R. 501 (1929); Hair v. Goldsmith, 22 S.C. 566 (1884).

of what factors are necessary to present a case of election. It has been held repeatedly that a widow cannot consistently claim dower in lands in which she is given an estate for life,[14] or estate during widowhood.[15] The same conclusion is not everywhere reached outside of South Carolina.[16] The fact that dower will diminish the value of gifts to others is not sufficient to warrant an inference that the intention was to exclude the right of dower.[17] A devise to the widow of equal shares with others shows an intention to exclude dower.[18] Also a fractional disposition of testator's estate may be indicative of an intention to exclude a claim of dower.[19] However, some jurisdictions hold otherwise.[20] The gravamen of this type of division is that the testator intended an equal distribution of his estate and the claim of dower would derange this planned scheme. The first case in South Carolina found involving a devise to the widow in equal shares with another was *Bailey v. Boyce*.[21] In this case the testator devised one moiety each to his only daughter and his wife of all of his estate. The court, citing an English case[22] as controlling, held that the intention of the testator was that his wife was to share equally with another, therefore the claim of dower would be inconsistent and repugnant with a claim under the will. The only

14. Caston v. Caston, 2 Rich. Eq. 1 (S.C. 1845); Cunningham v. Shannon, 4 Rich. Eq. 135 (S.C. 1851); Braxton v. Freeman, 6 Rich. 35, 57 Am. Dec. 775 (S.C. 1853).

15. Wilson v. Hayne, Cheves Eq. 37 (S.C. 1840); Callaham v. Robinson, 30 S.C. 249, 9 S.E. 120, 3 L.R.A. 497 (1888); Braxton v. Freeman, 6 Rich. 35, 57 Am. Dec. 775 (S.C. 1853).

16. There is ample authority that a devise for life or widowhood is not necessarily inconsistent with a right to dower in the very land devised. 2 *Tiffany, Real Property,* § 518 (3rd ed., Jones, 1939). In Bull v. Church, 5 Hill (N.Y.) 206, Att'd 2 Denio (N.Y.) 430, 43 Am. Dec. 754 (1845), the court held that a devise of all the testator's property was not inconsistent with a right of dower, as such subsequent disposition will be presumed to have been made subject to its legal incidents. In Lewis v. Smith, 9 N.Y. 502, 61 Am. Dec. 706, Seld. Notes 237 (1854) the testator's land, devised to widow for life, with remainder over, was sold under foreclosure of a mortgage made by testator during his life-time and the widow had not joined in the mortgage. The court held her claim as doweress was not barred.

17. Ott v. Ott, 182 S.C. 135, 188 S.E. 789 (1936); Scott v. Vaughn, 83 S.C. 362, 65 S.E. 269 (1909).

18. Bailey v. Boyce, 4 Strob. Eq. 84 (S.C. 1850); Chalmers v. Storil, 2 Ves. & B. 222, 35 Eng. Reprint 303 (1813); 2 *Tiffany, Real Property,* § 518 (3rd ed., Jones, 1939). For criticism of this rule of construction see 2 *Pomeroy, Equity Jurisprudence,* § 502 (5th ed., Symons, 1941), to the effect that this ruling cannot be reconciled with the general principle that a testator is to be presumed to have devised only what belonged to him. Also see dissent in the aforementioned South Carolina case which states that the only effect of allowing dower would be to reduce gifts to others.

19. Hair v. Goldsmith, 22 S.C. 566 (1884).

20. *Cf* Annot., 22 A.L.R. 437 (1923) at page 457; 68 A.L.R. 507 (1930) at page 512.

21. 4 Strob. Eq. 84 (S.C. 1850).

22. Chalmers v. Storil, 2 Ves. & B. 222, 35 Eng. Reprint 303 (1813).

other South Carolina case found involving an arithmetical disposition was *Hair v. Goldsmith*.[23] The will in this case provided essentially as follows: four-tenths of testator's estate to his widow for life with remainder to his daughter; three-tenths to the children of deceased son; and three-tenths to another daughter. The court held that it was the intention of the testator that the children and grandchildren share equally and that to allow dower would derange a planned scheme of division. The additional one-tenth given one daughter was to compensate for the life estate given the widow and to make her share equal with the other devisees. Though not mentioned in the majority opinion, the devisees in this type of division take as cotenants, and this feature has been used as a test in subsequent cases to determine the testator's intention in regard to his widow's claim of dower.

Another South Carolina case in which the equality of distribution was one of the factors considered was *Bannister v. Bannister*.[24] In this case the testator directed that his executors sell his estate and divide the proceeds into two shares: one share to go to his brother absolutely, and the other share to be held in trust by trustee to pay the income to his widow for life, then over to his brother. The court disallowed an additional claim of dower, and held that it was obvious that the scheme of the will was that the division should be "equal".

One of the first considerations given a will in ascertaining whether the intention of the testator was to exclude dower is the value of the testamentary benefits given the widow. If the aggregate amount of the testamentary benefits given the widow is at least equal or greater than the value of dower, then an inference that the intent to exclude is warranted.[25] If the amount so given is less in value than dower, then an inference of exclusion of dower would not be warranted.[26] No case was found where the widow was denied dower when the amount received under the will was less than her dower.

Several other factors considered by the court in determining if an election is necessary are: the duty imposed upon the widow (such as executorship);[27] inability to set off the widow's dower by metes and bounds.[28] It is difficult to determine just what weight the court

23. 22 S.C. 566 (1884).
24. 37 S.C. 529 (1892); *See* Callaham v. Robinson, 30 S.C. 249, 9 S.E. 120, 3 L.R.A. 497 (1888).
25. Blackmon v. Williams, 113 S.C. 437, 102 S.E. 324 (1919); Bomar v. Wilkins, 154 S.C. 64, 151 S.E. 110, 68 A.L.R. 501 (1929); Bannister v. Bannister, 37 S.C. 529 (1892).
26. Summerel v. Summerel, 34 S.C. 85, 12 S.E. 932 (1890).
27. Callaham v. Robinson, 30 S.C. 249, 9 S.E. 120, 3 L.R.A. 497 (1888).
28. See note 2 *supra*.

places upon each of the factors, but it is unlikely that any one standing alone would be sufficient to create an election.

A provision for the wife in the nature of an annuity charged upon the testator's real estate is not inconsistent with the widow's claim of dower in the land.[29] In the case of *Garrett v. Vaughn*,[30] the testator provided for the wife to receive one-half of the annual rent for life and directed the estate be equally divided on her death; the court held allowance of dower would only reduce rents and was not repugnant to a claim of dower.

A devise of lands to trustees or executors to sell is understood to pass the real estate subject to dower.[31] This seems to be true though the widow is to receive part of the proceeds of the sale.[32] However, a direction to sell and create a trust fund for the widow with a portion of the proceeds may preclude a claim of dower.[33]

Mode and Effect of Election

Assuming that the widow must elect, there is no specific period of time within which she must indicate her choice. Some states have provided statutes limiting the time within which the widow may elect and if she fails to elect within this period she is considered to have taken under the will.[34] South Carolina has no statutory period within which election must take place, and it has been held that the election must take place within a reasonable time.[35] Of course, a delay must be subject to any intervening equities.[36] The right of an election is a personal right and can only be exercised by the person entitled to elect, unless the will so provides, or the widow or other person is under a disability.[37]

The cases uniformly hold that a widow is not bound to elect until all the circumstances necessary for a deliberate and discriminating

29. Heirs v. Gooding, 43 S.C. 428, 21 S.E. 310 (1894); Cunningham v. Shannon, 4 Rich. Eq. 135 (S.C. 1851).

30. Garrett v. Vaughn, 59 S.C. 516, 38 S.E. 166 (1900).

31. Hall v. Hall, 2 McCord Eq. 269 (S.C. 1827); Gordon v. Stevens, 2 Hill Eq. 46, 27 Am. Dec. 445 (1835); Adsit v. Adsit, 2 Johns Ch. (N.Y.) 448, 7 Am. Dec. 539 (1817).

32. Konvolinka v. Schelegel, 104 N.Y. 125, 9 N.E. 868, 58 Am. Rep. 494 (1887). *See* Hall v. Hall, *supra* note 31.

33. Bannister v. Bannister, 37 S.C. 529 (1892). In this case the court stated that a claim of dower should be considered as all other claims, which may be a tendency away from preferential treatment of dower claims

34. 1 *Stimson, Am. St. Law*, §§ 3265, 3266; McGinnis v. Chambers, 156 Tenn. 404, 1 S.W. 2d 1015, 82 A.L.R. 1492 (1928).

35. Hall v. Hall, 2 McCord Eq. 269 (S.C. 1827).

36. Boykin v. Boykin, 21 S.C. 513 (1883); 1 *Pomeroy Equity Jurisprudence*, § 513 (5th ed., Symons, 1941).

37. 2 *Tiffany, Real Property*, § 519d (3rd ed., Jones, 1939); *Cf* Taylor v. McRa, 3 Rich. Eq. 96 (S.C. 1850); Haynesworth v. Cox, Harp. Eq. 117 (S.C. 1824).

choice are ascertained.[38] An election made in ignorance of the circumstances would not be binding. In one case the widow accepted a legacy which later failed and she was thereafter permitted to take her dower.[39] In any event a widow cannot be compelled to elect before the estate is settled.[40] Once there is a bona fide election the widow cannot retract.[41] The election by the widow may be express or implied by her acts. Election may be manifested by accepting the property given in lieu of dower, or accepting income.[42] Acts of ownership, such as selling, in dealing with property given under a will, would amount to an election.[43] Where a widow proved the will and received profits therefrom for five years, the court held that she had elected.[44] In another case the widow lived eleven years on land (given a life estate by the will) and the court held her conduct sufficiently indicated her election to take under the will.[45] Participation in partition proceedings would be tantamount to an election to take under the will or as distributee.[46]

A devise by the husband to the wife of his whole estate, during widowhood or life, does not, though accepted, bar the widow from demanding dower in lands alienated during coverture.[47] However, as will be seen later, acceptance under the statute of descent and distribution will bar dower in all lands, including those alienated during coverture. The weight of authority, with which South Carolina is in accord, is that a legacy in lieu of dower, being in consideration of an existing legal right, constitutes the widow a purchaser for value and for that reason is entitled to priority over the other general legacies to volunteers or mere beneficiaries of the testator's bounty, which must abate in the widow's favor.[48]

---

38. Pinckney v. Pinckney, 2 Rich. Eq. 218 (S.C. 1846); Geiger v. Geiger, 57 S.C. 521, 35 S.E. 1031 (1899).
39. Gist v. Cattell, 2 Deasu. Eq. 53 (S.C. 1801); See also Stokes v. Norwood, 44 S.C. 424, 22 S.E. 417 (1895).
40. Hall v. Hall, 2 McCord Eq. 269 (S.C. 1827); Pinckney v. Pinckney, 2 Rich. Eq. 218 (S.C. 1846). A widow is entitled to one-third of profits until dower is assigned. Stewart v. Pearson, 4 S.C. 4 (1872).
41. *E. g.*, Glover v. Glover, 45 S.C. 187, 22 S.E. 739 (1895).
42. Seabrook Ex'rs. v. Seabrook Ex'rs., McMul. Eq. 201 (S.C. 1841); Wilson v. Hayne, Cheves Eq. 37 (S.C. 1840).
43. Shaffer v. Shaffer, 16 S.C. 625 (1881); Bomar v. Wilkins, 154 S.C. 64, 151 S.E. 110, 68 A.L.R. 501 (1929).
44. Wilson v. Hayne, Cheves Eq. 37 (S.C. 1840).
45. Caston v. Caston, 2 Rich. Eq. 1 (S.C. 1845).
46. Weathersbee v. Weathersbee, 82 S.C. 4, 6 S.E. 838 (1908).
47. Braxton v. Freeman, 6 Rich. 35, 57 Am. Dec. 775 (1853); *Cf* Stokes v. Norwood, 44 S.C. 424, 22 S.E. 417 (1895).
48. Boykin v. Boykin, 21 S.C. 513 (1883); *Cf* Witherspoon v. Watts, 18 S.C. 396 (1882); Towle v. Swasey, 106 Mass. 100 (1870).

Election Between Distributive Benefits and Dower

This situation is specifically covered by statute in South Carolina, which reads as follows: "When a husband dies intestate and his widow accepts her distributive share in his estate she shall be barred of her dower in the lands of which her husband died seised and all such he had aliened."[49] It is to be noted that acceptance of the distributive share will bar dower in land previously aliened, whereas election to take testamentary benefits only bars dower in lands of which the testator was seised.[50] The rule may be stated that acceptance of statutory benefits will exclude dower,[51] and acceptance of dower will bar a claim as distributee.[52] However, the widow's acceptance of a *legacy* which was in lieu of dower would not bar dower in intestate lands.[53] The statute above mentioned makes it clear that a claim of dower precludes a claim as distributee: so if a widow claims dower in testate lands, she cannot also claim a distributive share of property as to her husband died intestate. Acceptance of a distributive share by the widow will bar dower whether she intended to waive dower or not, and the burden is on her to prove that she was misled in electing.[54]

The widow may manifest her intention to elect between distributive share and dower in much the same manner as between testamentary benefits and dower. The cases indicate that the doctrine of estoppel is the determining factor in the election. The widow cannot be forced to elect without full information concerning her interest, and it appears that an election made in ignorance of her interest would not be binding.[55] Under the statute of Descent and Distribution,[56] the widow is entitled to one-third of the intestate's realty in fee, and if the widow dies without claiming her dower, her represen-

49. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-151. See also CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-57 which provides as follows: "In all cases in which provision is made by this chapter for the widow of a person dying intestate the same shall, if accepted, be considered as in lieu of and in bar of dower. And if such widow shall have forfeited her dower she shall also forfeit her distributive share of her husband's real estate."

50. *E. g.*, Douglas v. Clarke, 4 Deasu. Eq. 143 (S.C. 1810); Williams v. Newton, 82 S.C. 227, 64 S.E. 219 (1909).

51. Avant v. Robertson, 2 McMul 215 (S.C. 1842).

52. Evans v. Pierson, 9 Rich. 9 (S.C. 1855); Kennedy v. Kennedy, 74 S.C. 541, 54 S.E. 773 (1906).

53. Hall v. Hall, 2 McCord Eq. 269 (S.C. 1827); Seabrook v. Seabrook, 10 Rich. Eq. 495 (S.C. 1859); Snelgrove v. Snelgrove, 4 Deasu. Eq. 274 (S.C. 1812); Busby v. Busby, 142 S.C. 395, 140 S.E. 801 (1927).

54. Lavender v. Daniel & Harmon, 58 S.C. 125, 36 S.E. 546 (1900).

55. Geiger v. Geiger, 57 S.C. 521, 35 S.E. 1031 (1899); Williams v. Newton, 82 S.C. 227, 64 S.E. 219 (1908); Hill v. Gray, 45 S.C. 91, 22 S.E. 802 (1895).

56. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-52.

tatives are entitled to the third which the statute gave her.[57] If a widow elected dower and had it set aside and then died, her representatives could not retract the election.[58] Where the children of the intestate conveyed their interest in land to the mother for life for release of her claim of dower, her action amounted to an election and she could not retract; she also would be barred of dower in lands previously aliened by her husband.[59] A widow having her dower admeasured by legal process and enjoying the same for several years has made her election and cannot later claim as distributee by retracting her election.[60] Certain acts of ownership such as joining with other heirs in deeding land would be tantamount to an election.[61] Where the intestate leaves only personal property, the widow will be barred of dower in lands previously aliened if she accepts her distributive share of such personal property.[62]

PAUL J. FOSTER.

57. Douglas v. Clark, 4 Deasu. Eq. 143 (S.C. 1810); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-52.
58. Buist v. Dawes, 3 Rich. Eq. 281 (S.C. 1851).
59. Wilson v. Woodward, 41 S.C. 363, 19 S.E. 685 (1892).
60. Quarles v. Garrett, 4 Deasu. Eq. 145 (S.C. 1810); Buist v. Dawes, 3 Rich. Eq. 281 (S.C. 1851).
61. See note 51 *supra*.
62. Evans v. Pierson, 9 Rich. 9 (S.C. 1855).