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relief, failure of a defendant to utilize these remedies may be fatal to his cause.

Due to the ever increasing nature of this danger to the cause of defendants and to the integrity of our judicial system itself, courts must be ever vigilant to utilize all the resources at their command to protect a defendant against the prejudicial influence of newspapers and the other modern media of mass communication.

*Linza B. Inabnit*

## A WIDOW'S DOWER RIGHTS—KENTUCKY DOWER RIGHTS; ON INTESTACY OR UPON RENUNCIATION OF HER HUSBAND'S WILL

### *Introduction*

In 1956, the Kentucky General Assembly enacted several amendments<sup>1</sup> to the Kentucky "dower statute."<sup>2</sup> These related, *inter alia*, to the nature and amount of the surviving widow's interest upon her husband's death intestate, as well as her interest upon renunciation of the husband's will. Some of the effects of these amendments were construed for the first time in the recent case of *Hedden v. Hedden*, 312 S.W. 2d 891 (Ky. 1958). Dicta in this case, together with the wording of the amendments, have created uncertainties which this note discusses and evaluates.

### *Hedden v. Hedden*

In this action, appellant brought suit for a declaratory judgment to determine her dower rights under Kentucky Revised Statutes Section<sup>3</sup> 392.020<sup>4</sup> as amended. The appellant's husband had died testate, but had made no provision for her in his will. She contended

<sup>1</sup> Ky. Rev. Stat., secs. 392.010, .020, .050, .080 (1956).

<sup>2</sup> Ky. Rev. Stat., ch. 392 (1956).

<sup>3</sup> Hereinafter referred to in the text as KRS.

<sup>4</sup> Ky. Rev. Stat., sec. 392.020, as amended in 1956, provides that:

After the death of the husband or wife *intestate*, the survivor shall have an estate in fee of one-half of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple *at the time of death*, and shall have an estate for his or her life in one-third of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple *during the coverture but not at the time of death*, unless the survivor's right to such interest has been barred, forfeited or relinquished. The survivor shall also have an absolute estate in one-half of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to "dower" or "curtesy" shall be deemed to refer to the surviving spouse's interest created by this section. (emphasis added)

that it was unnecessary to renounce the will<sup>5</sup> under KRS 392.080<sup>6</sup> and that, under KRS 392.020, she was entitled to an estate in fee of one-half of the surplus realty of which her husband was seized at the time of his death. The lower court dismissed the complaint. The Court of Appeals affirmed the judgment and held that KRS 392.020 was inapplicable since the appellant's husband had not died intestate. KRS 392.080 was deemed controlling as to the amount of dower a widow may receive upon renunciation; thus, the appellant was only entitled to sue for allotment of a life estate in one-third of the real property.

On the particular question before it, the court reached a proper and logical conclusion under a literal application of the statutory provisions. The court pointed out that before the 1956 amendments, a surviving wife's dower right was the same whether the husband died intestate,<sup>7</sup> or whether the widow renounced his will.<sup>8</sup> Now, however,

<sup>5</sup> Where a deceased husband's will either makes no allowance for his wife or gives her less than that otherwise provided by statute, the widow is sometimes entitled to the statutory benefits without the necessity of making an election between the "statutory share" (discussed *infra*, note 13), and the will. See, for example *Able v. Bane*, 123 Ind. App. 585, 110 N.E. 2d 306, 308 (1953); *In re Perlmutter's Will*, 98 N.Y.S. 2d 968, 970 (1950); *Marriott v. Marriott*, 175 Md. 567, 8 A. 2d 493, 497 (1939); *Overfield v. Overfield*, 326 Mo. 83, 30 S.W. 2d 1073, 1077 (1930); *Seabright v. Seabright*, 28 W. Va. 412, 491 (1886). See also Miss. Code, sec. 669 (1942).

<sup>6</sup> Ky. Rev. Stat., sec. 392.080, as amended in 1956, provides that:

(1) When a husband or wife dies testate, the surviving spouse may . . . release what is given to him or her by will, if any, and receive his or her share under KRS 392.020 as if no will had been made, except that in such case the share in any real estate of which the decedent or anyone for the use of the decedent was seized of an estate in fee simple at the time of death shall be only an estate for the surviving spouse's life in one-third of such real estate. Such relinquishment shall be made within twelve months after the probate. . . .

(2) Subsection (1) does not preclude the surviving spouse from receiving his or her share under KRS 392.202 (sic), in addition to any bequest or devise to him or her by will, if such is the intention of the testator, plainly expressed in the will or necessarily inferable from the will. (emphasis added)

<sup>7</sup> Ky. Rev. Stat., sec. 392.020, prior to 1956, provided that:

After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture, unless the survivor's right to such dower or interest has been barred, forfeited or relinquished. The survivor shall also have an absolute estate in one-half of the surplus personalty left by the decedent.

<sup>8</sup> Ky. Rev. Stat., sec. 392.080, prior to 1956, provided that:

(1) Except as provided in subsection (2), when a widow claims her dowerable and distributable share of her husband's estate, she shall be charged with the value of any devise or bequest to her by his will; or she may . . . relinquish what is given her by the will and receive her dowerable and distributable share as if no will had been made. Such relinquishment shall be made within twelve months. . . .

(2) Subsection (1) does not preclude the widow from receiving her dowerable and distributable share, in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will or necessarily inferable from the will.

when a widow renounces her spouse's will, either formally in probate court or by implication of law, the conditions of KRS 392.080 are applicable. The court emphasized that since the provisions of the "renunciation statute" (KRS 392.080) are less beneficial to the survivor than those contained in KRS 392.020, a paramount consideration in determining the amount of a widow's dower interest is whether her husband died testate or intestate. Also the following dictum of the court might suggest that the rights created by KRS 392.080 are not inchoate:

It is *not until* the right of renunciation under KRS 392.080 is exercised that the neglected spouse is entitled to a dower share under KRS 392.020, and that reference is for the purpose of fixing the amount of personality. *The share of realty is fixed by the renunciation statute.*<sup>9</sup> (emphasis added)

#### *"Inchoate" Dower*

To portray more fully the implications of the preceding statement by the court, it may be helpful to compare the clearly inchoate rights conferred under KRS 392.020 with the rights arising under KRS 392.080.

In addition to certain provisions which are not pertinent here, the amended version of KRS 392.020 gives the surviving spouse a life estate in one-third of the real property of which the decedent was seized in fee simple during coverture but not at death, unless such right is barred, forfeited or otherwise relinquished. This is precisely the same right which a surviving spouse had in the husband's realty at common law,<sup>10</sup> and under KRS 392.020 prior to its amendment in 1956. Thus the net effect of KRS 392.020, as amended, is to confer inchoate common law dower with respect to land owned during coverture *but conveyed away before death* without release of the dower right.<sup>11</sup>

By comparison, there is some doubt as to whether the rights arising under the renunciation statute are inchoate and require release upon *inter vivos* conveyance. KRS 392.080 now reads, in part:

When a husband dies testate, the (surviving widow) may . . . release what is given . . . her by will . . . and receive . . . *her share under* KRS 392.020 as if no will had been made, except (in respect to real estate held at the time of death). (emphasis added).

<sup>9</sup> Hedden v. Hedden, 312 S.W. 2d 891, 893 (Ky. 1958).

<sup>10</sup> At common law, dower was a wife's inchoate right to a life estate in one-third of all freeholds of which her husband was at any time seized during coverture. Leach, Cases and Text on the Law of Wills 16 (1955). This common law right was "inchoate" in the sense that the wife had an existing protected expectancy in her husband's dowable property which he owned at any time during the marriage; the expectancy had a present value but was subject to divestiture.

<sup>11</sup> With respect to land owned during coverture and still owned at the death of the husband intestate, KRS 392.020 confers a "statutory share" of one-half in fee. Obviously, this right is not inchoate in any sense.

In view of the *Hedden* case dictum, that in the case of renunciation this section fixes the share of realty rather than KRS 392.020, it might be argued that in the event a husband dies *testate*, his surviving spouse is not entitled to an inchoate dower interest or share in lands he held during coverture, and that she may only secure an interest in lands which he held at the time of death. Conversely, the statute may mean that a surviving spouse who has renounced a will should have an inchoate right to a life estate in *all lands* held by her husband during coverture and conveyed without her release. Suppose for example, "H", who owned Blackacre, was married to "W" and made an *inter vivos* conveyance of the property to "X" without a release of dower. If "H" thereafter dies *testate* and his widow renounces the will,<sup>12</sup> what effect does KRS 392.080 have upon "W's" dower right?<sup>13</sup>

There are two possible approaches for resolving this uncertainty in favor of giving dower to "W". (1). If the husband dies *intestate*, KRS 392.020 provides certain "dower interests" in personalty and realty held at death, and also in realty held during coverture but not at death, provided such dower has not been relinquished. In view of this statutory categorization, KRS 392.080 seems to say that when a wife renounces her husband's will, she is entitled to the same inchoate dower rights she would have received under KRS 392.020 had he died *intestate*, *except only* in respect to realty which he held at the time of death. Hence, lands which a married man conveys *inter vivos* are subject to inchoate dower under both KRS 392.020 and KRS 392.080. (2). The 1956 changes to the dower statute were intended to enlarge the widow's dower interest only where the husband dies *intestate*. However, there is no indication of legislative intent that a will-renouncing widow should be in a worse position than she would have occupied had the dower statute not been amended. In other words, prior to 1956, a widow who renounced her husband's will was entitled

<sup>12</sup> Had "H" died *intestate*, Ky. Rev. Stat. 392.020 would have clearly provided "W" with a life estate in one-third of Blackacre.

<sup>13</sup> "Dower interest" or right may be somewhat of a misnomer since Kentucky has apparently forsaken common law dower for an interest in the nature of a statutory (forced) share. However, since "dower interest" is the label accorded by Ky. Rev. Stat. 392.020, its use has been retained herein.

Statutory, or forced, shares and common law dower differ in the following respects: (a) dower applies only to land, whereas forced shares apply to both land and personalty; (b) dower exists with regard to property of which the husband was seized at any time during coverture, whereas forced shares only pertain to property which the husband owns at the time of his death; (c) dower was free from the claims of creditors, whereas forced shares are free in only a few states. Leach, Cases and Text on the Law of Wills 17 (1955).

Note that the one-third life estate created by KRS 392.020 differs from common law dower to the extent that the one-third interest does not apply to lands which a decedent held at the time of death, whereas dower applied to *all* realty held at any time during coverture.

to inchoate "common law dower" in his lands. There is no indication that the legislature intended to deprive her of this bounty when the statute was amended in 1956. Thus, the amended renunciation statute leaves the inchoate "common law dower" rights essentially the same as they were when a widow renounces her husband's will.<sup>14</sup>

The best argument against giving dower to "W", in the hypothetical situation posed above, is found in the court's opinion in the *Hedden* case. As shown by the dictum previously quoted, the court intimated that "dower" in land, in the case of renunciation, is governed and fixed by the renunciation statute, and not by KRS 392.020. If this is the proper interpretation of KRS 392.080 with respect to the nature of the share arising thereunder, as well as the amount of the share, then the right upon renunciation is not inchoate since it extends only to land owned at the time of death. Under this view, KRS 392.080, in effect, creates no more than a protected right in a widow dependent upon the event that the property to which the interest attaches becomes part of her husband's estate. This right will not result into a possessory property interest if the husband unilaterally sells or gives the property away *inter vivos*.

This latter interpretation necessarily leads to the conclusion that a purchaser of real estate is not subject to the assertion of inchoate dower rights by the wife of a predecessor in title who died *testate*, although he held the land during coverture. It is difficult to believe that the court intended for this conclusion to flow from the dictum stated. Since the only land involved in the *Hedden* case was that held by the testator at his death, the dictum probably should be read in context as a statement made merely to support the point that renunciation under KRS 392.080 is necessary for the widow of a testator to get anything.

#### *A Widow's Right When the Will Bequeathes Her a "Dower Interest"*

There is also uncertainty as to the effect of the Kentucky statutes upon an interpretation of a testator's will which gives his wife a "dower interest." At least four approaches may be taken to an interpretation of this phrase:

(1). KRS 392.020 states that any reference to dower in the Kentucky statutes is deemed to refer to the surviving widow's interest created by that section. It may be argued, therefore, that any reference to "dower" encompasses the rights created by KRS 392.020, as a matter of law.

<sup>14</sup> This view was given support by the court when it stated: "We do not know why (the dower statute) was liberalized as to the amount of dower . . . where a spouse dies intestate and *remains the same in cases of testacy*." (Emphasis added). *Hedden v. Hedden*, 312 S.W. 2d 891, 893 (Ky. 1958).

(2). Unlike many states, Kentucky has not expressly or completely abolished common law dower. Thus, if "dower interest" as defined in KRS 392.020 applies only when another *statute* makes reference to dower, then it might be argued that the bequest of a "dower interest" confers common law dower rights on a surviving widow.

(3). The *Hedden* case discusses the doctrine of "renunciation implied by law," but its operation is by no means made clear. It is possible that where a testator bequeathes his wife a "dower interest," the court could compel the wife to take her share under KRS 392.080 by finding an implied renunciation.

(4). Finally, the effect which should be given to a testator's bequest of a "dower interest" could be left for determination as a question of fact. That is, rather than state that such an interest is any one thing, as a matter of law, the court would ascertain the testator's intention in view of all the attendant circumstances, and determine what was meant by "dower interest" in each particular case.<sup>15</sup>

### *Renunciation Implied by Law*

Another uncertainty stems from the *Hedden* case because the Court of Appeals suggested that it does not matter whether a widow's renunciation of her deceased husband's will is formally made in probate court, or is implied by law, since the relinquishment is made under KRS 392.080 and the conditions of that statute are applicable. No authority was cited for this proposition, and no Kentucky cases have been found to support it precisely.

By the weight of authority, however, renunciation of a devise of realty may be made by unequivocal acts, omissions, or methods of dealing with the property, which show such an intention. Conversely, failure to manifest such a refusal in a clear and unequivocal manner does not constitute a renunciation. For any particular conduct to be binding as a renunciation, it must be done with the intention of constituting an election, and with full knowledge of the elector's rights and material facts which might influence his decision.<sup>16</sup>

The Court of Appeals seemed to assume, without saying, that the appellant-widow in the *Hedden* case had renounced her deceased husband's will. There was apparently no express or formal renunciation, nor any "clear and unequivocal" act which would lead to the conclusion that there had been a renunciation. Is the "renunciation implied by law" in this case to be inferred from the fact that the appellant had filed for a declaratory judgment; or had received nothing

<sup>15</sup> Cf. Annot., 36 A.L.R. 2d 147, 148-53.

<sup>16</sup> Atkinson, Wills 771-78 (2d Ed. 1953); 4 Page, Wills secs. 1406, 1409 (3rd Ed. 1941).

under the terms of her husband's will; or because renunciation was prerequisite to securing any benefits under the dower statute? This aspect of the case is particularly unclear, and it would be advisable for Kentucky attorneys to be cautious in using it as a general precedent on implied renunciation of a will.

### *Miscellaneous*

Two miscellaneous items of uncertainty about KRS 392.080 should also be mentioned. KRS 392.080(1) provides that:

When a husband or wife dies testate, the surviving spouse may . . . release what is given him or her by will, *if any*. . . . (emphasis added).

It would seem that the words "if any" must refer to such devise or bequest as may exist, rather than be construed to mean that the survivor may renounce only if he is a devisee or legatee.<sup>17</sup>

Also, KRS 392.080(2) states that:

Subsection (1) does not preclude the surviving spouse from receiving his or her share under KRS 392.020 . . . if such is the intention of the testator. . . . (emphasis added).

The Kentucky Revised Statutes do not contain any section bearing the number 392.202, and the section which is obviously referred to is KRS 392.020. However, the statute (KRS 392.080) as enacted in 1956 incorporated the use of KRS 392.202.<sup>18</sup> What will the Court of Appeals do when confronted with a case involving KRS 392.080(2)? Will it overlook the technical error in the statute, or will it return a decision rendering the obvious intentment of the statute inoperative?

### *Purposes of the 1956 Amendment to the Kentucky Dower Statutes*

The uncertainties which have been illustrated above are not materially reduced when one examines the purposes which may underlie the 1956 amendments, or when one compares the Kentucky dower statute to similar legislation in other states.

Dower is almost universally recognized in one form or another, as modified or extended by statute, in all but community property states. There are infinite variations among the different states in respect to their statutory dower provisions, and any attempt at generalizing would be difficult if not impossible. In spite of some similarities to dower provisions found in other states, the present Kentucky Revised

<sup>17</sup> Matthews, "Dower, Principal and Income, Perpetuities, and Intestate Succession," 45 Ky. L.J. 111, 114 (1956).

<sup>18</sup> Ky. Acts 1956, ch. 117, sec. 3(2), p. 240.

Statutes stand almost alone in providing a widow with a greater interest in her deceased husband's realty if he dies intestate, as compared with what she receives when he dies testate and she renounces his will. Only Mississippi seems to have a comparable provision. There, if a husband dies intestate without children or descendants, the widow is entitled to the entire estate,<sup>19</sup> but she only acquires one-half of such estate if her husband dies testate and she renounces the will, irrespective of whether there are surviving children or dependents.<sup>20</sup> It is more common to permit a widow to renounce her deceased husband's will and elect to take substantially the same share of his property as she would have taken upon his intestate death.<sup>21</sup>

Broadly speaking, the main uncertainties about our dower statute are traceable to the fact that the widow's rights are greater where her husband dies intestate than where he dies testate and she renounces the will. The court in the *Hedden* case said that it did not know the reason or purpose for these amendments of 1956. It is submitted that at least four reasons or purposes may underlie the change, and thus partially explain the confusion.

(1) Oversight by the legislature. Although no debates or committee hearings on the 1956 amendment are recorded, the inherent confusion makes it seem very unlikely that the full relation of the renunciation statute to KRS 392.020 was carefully considered.

(2) A legislative intent that one should have some discretion in disinheriting his wife to a limited extent, or that widows should be discouraged from renouncing their husband's wills. But in view of the fact that dower is a favored institution of the law for the protection of widows when they need it most, it is difficult to believe that the legislature intended to discriminate between the rights of widows whose husbands die testate, and those whose husbands die intestate.

(3) A fear that any broad changes in the dower laws would unsettle existing wills. However, this fear need not have presented an insurmountable problem because the desired changes could have been made effective as of a certain date, with only wills executed subsequent to that time affected thereby.

(4) Assumption by the legislature that the surviving spouse of an intestate decedent needs more assistance and protection than one

<sup>19</sup> Miss. Code, sec. 470 (1942).

<sup>20</sup> *Id.*, at sec. 668.

<sup>21</sup> E.g., Ala. Code Tit. 61, sec. 18 (1940); Ark. Stat. Annot., secs. 61-201-223 (1947); Del. Code Annot., Tit. 12, secs. 904, 905 (1953); Kan. Gen. Stat., sec. 59-603 (Supp. 1957); Me. Rev. Stat., ch. 170, sec. 13 (1954); Mont. Rev. Codes, sec. 22-107 (1947); N.C. Gen. Stat., secs. 30-4, 5 (1950); W. Va. Code Annot., sec. 4091 (1955); Wis. Stat., secs. 233.13, .14 (1957). Even in the absence of a statute fixing the rights of a person renouncing a will, such person is deemed to take as in intestacy. 4 Page, Wills 73 (3rd Ed. 1941).

whose husband dies testate. This may be predicated on the idea that a testator usually has a large estate, or wishes to make more than a minimum provision for his wife. Under the new law: "The survivor's position is substantially improved where a decedent leaves land as his principal intestate asset, especially a survivor of advanced age without the life expectancy to make a life estate valuable."<sup>22</sup> But since a will may be drawn in such a manner as to virtually compel the testator's spouse to renounce it, it is submitted that a widow who is thus forced to renounce the will should also enjoy a substantially improved position when the decedent leaves land as his principal intestate asset. Any reasons for improving the surviving widow's position in the event of her spouse's intestate death would seem to be equally compelling reasons for liberalizing her dower interest in the event she renounces her deceased spouse's will.

### Conclusion

The confusion and uncertainty which inhere in KRS 392.020 vis-a-vis KRS 392.080 can best be resolved by placing the sections on a par so that a widow who renounces her deceased husband's will may be placed in the same position as one whose spouse dies intestate. This would tend to eliminate: (1) seemingly arbitrary inequality; (2) attempts to compel a widow to renounce her spouse's will and force her to take mere "common law dower" in lands held by her husband at death; (3) some of the doubts as to what a survivor may acquire if her deceased spouse wills her a "dower interest."

It should be noted that, in the event a man dies with a spouse surviving him, her rights in his land may vary considerably under the existing law. If he were legally or beneficially seized of land at the time of his death, the widow's rights therein will depend on whether he died testate or intestate. If the husband held land during coverture but not at death, because of an *inter vivos* conveyance without his wife's release of dower, she is entitled to an inchoate dower interest in the land if he died intestate. If the husband died testate under the facts of this last situation, his widow would *probably* be entitled to inchoate dower, but dictum in the *Hedden* case might suggest that such a conclusion may be entirely speculative. This doubt should be terminated by expressly providing that a wife is entitled to inchoate dower in *all* lands which her husband conveyed *inter vivos* without her release of dower, irrespective of whether he dies testate or intestate. This could be accomplished by making a precise enumera-

<sup>22</sup> Matthews, *supra* note 17.

tion, in KRS 392.080 itself, of rights conferred by that section, rather than by reference to KRS 392.020.

KRS 392.080(1) should also be amended to make it obvious that the surviving spouse may release such devise or bequest *as may exist*, and thereby remove any doubt as to whether such survivor may renounce a will only if he/she is a devisee or legatee. Furthermore, the reference in KRS 392.080(2) to "KRS 392.202" should be changed to read "KRS 392.020."

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