

1947

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Recommended Citation

William G. Mouat, *Nature and Scope of Dower Rights in Montana*, 8 Mont. L. Rev. (1947).

Available at: <https://scholarworks.umt.edu/mlr/vol8/iss1/5>

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Therefore, in view of the codification of the rule of *Scotson v. Pegg*,² that appears in R. C. M. 1935, §7503, and in view of the many expressions that the rule thus codified is the proper definition of consideration, it is submitted that the Montana Supreme Court in the case of *Hewitt v. Novak*³ failed to give effect to the pertinent Montana statutory provisions and that if the question should arise again the Supreme Court should follow the minority rule.

Bruce C. Babbitt

²See note 9, *supra*.

³See note 1, *supra*.

NATURE AND SCOPE OF DOWER RIGHTS IN MONTANA

At common law the widow was entitled to a life interest in one-third of the lands which her husband owned during coverture, as her dower. As she took this interest under the law and not by succession to him, her husband's will could not deprive her of it. She took no forced share in the personality. While some jurisdictions retain common law dower, in most states legislation has given the widow a forced share of her husband's property, which provision is more favorable to her.² "These statutory substitutes generally allow her a share in fee of which she may not be deprived by will, rather than a mere fractional life interest," says Atkinson,³ eminent authority on Wills. Usually our statutes provide that the survivor shall have an absolute interest in one-third of the realty and the personality of the deceased. This interest to which the surviving spouse is entitled by statute, and which the deceased cannot take away by deed or will, is statutory dower.⁴ In some jurisdictions the widow takes her entire intestate share in spite of contrary provisions of her husband's will. In many jurisdictions her forced share extends to her husband's personality as well as realty, though the laws generally restrict this to personality owned by the husband at his death, and

¹ATKINSON, WILLS (1st ed. 1937) p. 81.

²28 C.J.S. *Dower* §5; *op. cit.* Skelly Oil Co. v. Murphy (1930) 180 Ark. 1023, 24 S.W. (2d) 314; Schoellkopf v. De Vry (1937) 366 Ill. 39, 7 N.E. (2d) 757, 110 A.L.R. 511; Wilson v. Hilligoss, 278 Ill. App. 564; McCulley v. Hardeman (1920) 143 Tenn. 1, 223 S.W. 146.

³ATKINSON, WILLS (1st ed. 1937) p. 82.

⁴Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 331 (1928-29).

sometimes make the same provision regarding realty.⁶ Where community property prevails, dower is not recognized.⁶

The Montana statutes leave the extent of the widow's dower interest somewhat unsettled. In Montana, by the provisions of R. C. M. 1935, §5813,

"A widow shall be endowed of the third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. When a wife joins with her husband in the execution of any conveyance of land, she thereby relinquishes her inchoate right, and shall not thereafter have dower therein, except that in case of sale under mortgage signed and executed by herself and husband she shall have a right of dower in the surplus. Equitable estates shall be subject to the widow's dower, and all real estate of every description, contracted for by the husband during his lifetime, the title to which may be completed after his decease."

This language signifies that the Montana statutes are in general declaratory of the common law dower. However, the statement, "Equitable estates shall be subject to the widow's dower" is certainly an enlargement of the common-law dower which did not include equitable estates in the widow's dower interest.⁸

The common law dower is further modified by R. C. M. 1935, §5818,

"Any married man residing and owning real property in the state, whose wife has never been in the state or territory of Montana, can by deed, mortgage, or other con-

⁶ATKINSON, WILLS (1st ed. 1937) p. 82.

⁶TIFFANY, REAL PROPERTY (1st ed. 1940) §368.

⁷R.C.M. (1935) §5813.

⁸At common law, equity and law differed regarding the subject of dower. Chancellor Redesdale said that courts of equity followed the law regarding dower rights in acting upon trusts. It has long been recognized that a woman should not have dower in equity who is not entitled at law; but equity may give a woman an equitable interest in property, and prevent her husband from acquiring rights in that interest corresponding to the rights which a husband has at common law in property legally owned by his wife. The legal title might be given to a third person as trustee, while the equitable interest remains in the woman herself. In the old law of uses it was settled that a widow of the *cestui que use* was not entitled to dower or the surviving husband to curtesy. In the case of the modern trust, however, it has been generally held that the widow of the *cestui que trust* is not entitled to dower. But either by virtue of statute or by common law the incident of dower attaches to the estate of the *cestui que trust* in a great majority of American states.

veyance, grant the full title to such property by his own signature, and the wife or widow shall have no dower interest in the property to which the title of the husband is so divested.¹⁰

At common law it made no difference where the widow resided; her dower right could not be forfeited without her consent.¹⁰

The most important, yet the most unsettled and confusing question relating to dower in Montana is whether our statutes follow the common law in giving the widow a life estate in one-third of her deceased husband's realty, or whether her dower interest is one-third in fee. The answer to this question turns upon the first sentence in §5813,

"A widow shall be endowed of the third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage . . ."

If one interprets this section literally he might conclude that the words, "endowed of the third part of all lands whereof her husband was seised of an estate of inheritance" indicate

¹⁰In the case of *Rosenow v. Miller et al.* (1922) 63 Mont. 451, 207 P. 618, in an action to compel a vendor to convey all his title and interest in property at the price stipulated, in a contract to which the vendor's wife was not a party, less the determined value of the latter's dower right, the complaint was held defective, in that it did not allege that the plaintiff contracted in ignorance of the fact that the defendant was a married man, or that his wife was or ever had been in the state, since, under Revised Codes of 1935, §5818, if she was never in the state, she had no dower interest in the property. However, in the case of *Mathey v. Mathey* (1939) 100 Mont. 474, 98 P. (2d) 373,

"the widow's loss of dower rights is limited to lands conveyed by her husband without her signature where she, during coverture, was never in the state of Montana. It is clear from reading §5818 that it has reference to such cases only, as the section provides that the wife or widow shall have no dower interest in the property in which the title of the husband is so divested. "So divested" refers to the manner he employs to divest himself of title, namely, by deed, without the wife's signature. In case of his death, title is divested by operation of law and thereupon vested in his heirs."

"We therefore conclude that non-residence of the wife or widow, does not bar her from asserting dower in lands to which she would otherwise be entitled to dower."

¹⁰R.C.M. (1935) §7072 has the effect of causing an estate for the life of another to pass to the heirs, thus making such estates inheritable, so the Montana statutes apparently modify common-law dower in respect to estates of inheritance, which are all made subject to the widow's dower right by R.C.M. (1935) §5813. At common law, dower or curtesy was allowed only with respect to estates in fee of the deceased spouse; thus the dower right did not extend to property held for the life of another.

a fee simple. At the present time our statutory dower and curtesy and our statutes making husband and wife heirs of each other are liberally interpreted by the courts and vigorously enforced," and a policy to favor the widow will be given effect." This, in addition to Atkinson's statement embodied in the first paragraph, would initially lead to a strong presumption that the dower interest in Montana gives a widow a one-third interest in fee. This presumption has led counsel to state,

"Under our statute it is the duty of the husband to support the wife and in addition she is endowed of the third part of all lands whereof he was seised of an estate of inheritance at any time during the marriage—not for the term of her natural life, but in fee."¹³

Undoubtedly many more Montana lawyers have concluded likewise. The implication of a fee simple, in one-third of the estate as the widow's dower interest may be found in at least two Montana Supreme Court cases: In the case *In re McLure's Estate*, we find the following statement,

"What portion of his estate did the testator intend his widow to have by saying, 'My wife shall be endowed in my estate . . . ? What did he mean by the word 'endow'? Did he intend thereby that his widow should be limited to her right of dower—a third part of all his lands—as contended for by appellant; or did he intend that she should have the same portion of his estate, both real and personal, to which she would have been entitled had he died intestate?"¹⁴

Two years later, in the case of *Mathews v. Marsden et al.* the Honorable Frank P. Lieper, District Judge, sitting in place of Mr. Justice Holloway, disqualified, made the following statement,

"While not expressly admitted, yet it is tacitly conceded by appellant that respondent is entitled to a one-third interest in the real estate of which her husband died seised . . . Upon the death of Peat the respondent's inchoate right to a one-third interest in all of the lands, of which Peat died seised, became consummate. She had the right to demand that it be assigned to her."

¹³Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 333 (1928-29). Op. cit. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1895.

¹⁴28 C.J.S. *Dower* 5. Op. cit. *Mayo v. Arkansas Valley Trust Co.* (1918) 132 Ark. 64, 200 S.W. 505; *Wilhite v. Farley* 15 Tenn. App. 317.

¹⁵*O'Malley v. O'Malley* (1912) 46 Mont. 550, 129 P. 501.

¹⁶*In re McLure's Estate* (1922) 63 Mont. 541, 208 P. 900.

§5821 of our statutes lends a further indication that the widow's dower interest might be one-third in fee. This section gives the widow one-half in fee in lieu of dower and provides,

"If a husband die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have in lieu of her dower in the estate of which her husband died seised, whether the same shall have been assigned or not, absolute and in her own right, as if she were sole, one-half of all the real estate which shall remain after the payment of all just debts and claims against the deceased husband; provided, that, in case dower in such estate shall have been already assigned, she shall make such new election within two months after being notified of the payment of such claims and debts."¹⁵

If, as it does, the above section gives the widow *one-half in fee*, (italic supplied) in lieu of dower, wouldn't it be meaningless to assume that §5813 provides for an estate less than one-third in fee?¹⁶ The answer is provided in the section itself. In the first place, the only widows who can claim under §5821 are those who have no children nor descendants of children; in the second place, the widow gets one-half in fee, not of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, but only in the estate of which her husband died seised; in the third place, the widow gets this one-half in fee only after the payment of all just debts and claims against the deceased husband. So that, in many cases the dower interest provided in §5813 may be actually greater than the statutory substitute, §5821.

A close scrutiny of other statutes subsequent to R. C. M. 5813, the writer believes, indicates, contrary to the generally prevailing statutory rule, that the widow's dower interest in Montana gives her only a life estate in one-third of the realty remaining after her husband's death. R. C. M. 1935, §5816, provides that when, after the husband's death, a mortgagee shall sell mortgaged land, and any surplus shall remain after the payment of the moneys due on such mortgage and the costs and charges of sale, the widow shall be entitled, not to one-third of the surplus, but to "the interest or income of one-third part of such surplus for life" as her dower.¹⁷

The widow must maintain the houses, and shall be liable to the person having the next immediate estate of inheritance

¹⁵R.C.M. (1935) §5814.

¹⁶Italics supplied.

¹⁷R.C.M. (1935) §5816.

therein for all damages occasioned by waste committed by her.¹⁸ From this section an inference might easily be drawn that the words, "next immediate estate of inheritance therein" gives the widow only a life estate in one-third. Another statutory lead establishing as her dower interest, the widow's life estate in one-third of her husband's property, is found in §9568, which provides that the dowress is entitled to receive from the proceeds of the sale of the whole property, if a sale is directed, a gross sum in satisfaction of her right of dower, or, to have one-third of those proceeds paid into court for the purpose of being invested for her benefit. Such inferences seem to be well taken in the light of the majority of the Montana cases concerning the extent of the dower interest, though there is a surprising dearth of material directly in point.

The first direct statement defining dower, by the Montana Supreme Court, came in the way of dictum in the case of *Burt v. Cook Sheep Company* (1891), wherein it was stated,

"Now, as applicable to the right of dower, the two forms of statute (Michigan and Montana) are vastly different. Dower is a life estate, in the widow, cast by law, in conjunction with certain conditions, which together operate to initiate and consummate the right of dower."¹⁹

It is not altogether clear whether this justice was attempting to define common-law dower, or dower as it existed in Montana. However, a few years later Mr. Chief Justice Brantly, in the case of *Dahlman v. Dahlman et al.*, stated that R. C. M. (1935) §5813 "recognizes the common-law right of dower," thus it was in that opinion theorized that §5813 re affirmed the nature and scope of dower as it existed under common-law rules. This theory was quite definitely and positively affirmed by Justice Holloway in the case of *Rosenow v. Miller et al* (1922), who said:

"But what is the character of the right? (1) She has her common-law right of dower—a life estate in one-third of the land."²⁰

¹⁸R.C.M. (1935) §5827.

¹⁹See *Burt v. Cook Sheep Co.* (1891) 10 Mont. 581, 27 P. 399.

²⁰*Rosenow v. Miller et al.* (1922) 63 Mont. 458, 207 P. 618. In this case, as dictum, Justice Holloway queries: "Will Mrs. Miller survive her husband. . . . "Will the husband die without leaving children or the descendants of children? If so, will Mrs. Miller elect to take a life estate in one-third of the land, or an absolute title to one-half after the payment of the debts and charges against the estate?"

R. C. M. 5813 and *Dahlman v. Dahlman* were cited by Mr. Justice Holloway in support of his statement. The fact that the common-law right of dower is preserved in this state by §5813, was reiterated in *Swartz v. Smole*,²¹ and *Dahlman v. Dahlman* was recently cited as an authority in the case of *Mathey v. Mathey*, which proclaimed,

“The holding in the *Dahlman* case has been a rule of property in Montana for more than thirty-five years.”²²

From the foregoing opinions and authorities it is difficult to escape the conclusion that §5813 preserves the dower right as it existed at the common law.²³

In view of the increasing proportion of personal property in relation to real property, it is submitted that §5813 should be amended to increase the widow's dower interest to an absolute one-third share of both the real and personal property possessed by the husband during the marriage, thus conforming to the more modern and liberal concepts of statutory dower.

William G. Mouat

²¹*Swartz v. Smole* (1931) 91 Mont. 95, 5 P. (2d) 566.

²²*Mathey v. Mathey et al.* (1939) 109 Mont. 476, 98 P. (2d) 373.

²³Dower is not in any sense an estate until assigned; the widow not being vested with the title or possession.

TORT LIABILITY OF THE STATE HIGHWAY COMMISSIONERS

A recent Montana case involves an interesting question as to whether members of the State Highway Commission are individually liable for injuries incurred in an automobile which overturned on an oil-surfaced state highway, which was in need of repair, in slippery condition and where no warning signs had been erected. In *Coldwater v. State Highway Commission*,¹ the plaintiff's complaint alleged the following facts pertinent to this question:

1. The commissioners applied oil to the road surface, knowing such oil was unsuitable for that purpose.
2. The defective condition of the road had existed for such a time that the commissioners knew or should have known of such fact, and the commissioners failed to repair the highway.

¹(1945) Mont., 162 P. (2d) 772.