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Dower -- Widow's Claim in Insolvent Estate After Foreclosure of Mortgage in Which She Joined

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Plaintiff's husband died seized of land encumbered with mortgages in which *P* had joined. These mortgages were foreclosed, realizing no surplus. The estate being insolvent, *D*, Administratrix, sold other unencumbered land to make assets. *P* then filed a claim equivalent to her dower in the foreclosed parcels, contending that such claim took preference over the unsecured creditors and was entitled to prior payment out of the estate assets. *Held,* the widow's position was that of a surety whose property had been sold to pay the debt of her principal, and she was thus subrogated to the unsecured position of the mortgagee in these assets.[1]

At common law a widow received no dower from her husband's equitable estate. When she joined in his mortgage she released any right to dower in the property itself, and since her husband retained only an equity of redemption no further dower right could attach.[2] Today, the widow's right to dower in her husband's equitable estate is generally recognized; hence, joinder in his mortgage is not a final relinquishing of dower. However several views are taken as to the amount of dower the widow may receive from such mortgaged property. (1) A majority[3] restrict her dower to one-third of the surplus derived from foreclosure, on the theory she has released her contingent right of dower in the whole of the land and takes only from the remaining equitable estate. (2) Other states[4] compute her dower as one-third of the entire sale price payable out of the surplus, but do not discuss the problem arising where there is insufficient surplus. Their rationale is that the wife signs away her dower only as further security for her husband's debt; and that she still has against all but the mortgagee a prior lien on the property to the amount of her dower. Tennessee[5] has allowed the wife one-third of the surplus and then one-third of an amount which the mortgagee could have recovered as his

[1] Brown v. McLean, 217 N. C. 553, 8 S. E. (2d) 807 (1940).

[2] Steele v. Carroll, 12 Pet. 201 (U. S. 1838); Needermeyer, Inc. v. Fehl, 153 Ore. 656, 57 P. (2d) 1086 (1936).

[3] *In Re* Gish, 32 F. (2d) 322 (W. D. Ky. 1928) (statute); Trawbridge v. Sypher, 55 Iowa 353, 7 N. W. 567 (1880); McClain v. McClain, 151 Ky. 356, 151 S. W. 926 (1912) (statute); Bank of Commerce v. Owens, 31 Md. 320 (1869); Burrall v. Berder, 61 Mich. 608, 28 N. W. 731 (1866); Hawley v. Bradford, 9 Paige 200 (N. Y. 1841); Hoy v. Varner, 100 Va. 600, 42 S. E. 690 (1902); Poteet v. International Harvester Co., 153 Va. 304, 149 S. E. 512 (1929).

[4] Oades v. Standard Savings & Loan Ass'n., 257 Mich. 469, 241 N. W. 262 (1932); Turner v. Washington Realty Co., 130 S. C. 501, 126 S. E. 137 (1925); Zion's Savings Bank & Trust Co. v. State Tax Commissioner, 90 Utah 415, 62 P. (2d) 270 (1936); Commercial Banking and Trust Co. v. Dudley, 76 W. Va. 322, 86 S. E. 307 (1915); *Re* Lesperance, 61 Ont. L. R. 94, 4 D. L. R. 391 (1927).

[5] Yoe v. Sanson, 48 S. W. 317 (Tenn. 1898); Flynn v. Flynn, 1 Tenn. App. 188 (1925).

pro-rata share had he first gone into the personalty, which was primarily liable. (3) North Carolina[6] and Ohio[7] pursue a quasi-suretyship theory and allow the widow one-third of the whole to be taken from the surplus, or if there is no surplus she becomes *ipso facto* a creditor of her husband's estate. In adopting the "suretyship" analogy, the two courts admit that "properly speaking she is not a surety,"[8] yet decide that "as between each other he (the husband) would be the principal and she the surety."[9] Since this doctrine is one of convenience,[10] it appears likely that the wife would not be held to assume the full status of a surety, with its attendant rights and obligations.

Conceding that the wife retains a dower claim, what is its relation to other claims against the estate? Where the estate is solvent, it is generally held that as against the heirs the wife is entitled to full exoneration from the personalty,[11] although New York[12] allows no reimbursement beyond the foreclosure surplus.

Where the estate is insolvent the problem is more intricate. Since any surplus remaining after foreclosure is deemed to be realty, the widow has a prior lien to the extent of her allotted dower.[13] Under the North Carolina "suretyship" view there is a similar result where a surplus exists, yet if it appears that there will be insufficient surplus the widow may adopt either of two procedures: (1) She is entitled[14] to have the mortgage satisfied by first selling the two-thirds of the land not embraced by dower and the reversion in the other third, then having any residue[15] of the debt paid ratably out of the administration

[6] Creecy v. Pearce, 69 N. C. 67 (1837); Gwathmey v. Pearce, 74 N. C. 398 (1876); Gore v. Townsend, 105 N. C. 288, 11 S. E. 160 (1890); Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 123 S. E. 196 (1924); Barnes v. Crawford 201 N. C. 434, 160 S. E. 464 (1931); Parsons v. Leak, 204 N. C. 92, 167 S. E. 567 (1933); Realty Purchase Corp. v. Hall, 216 N. C. 237, 4 S. E. (2d) 514 (1939); See Trust Co. v. Benbow, 135 N. C. 303, 312, 47 S. E. 435, 438 (1904).

[7] Mandel v. McClave, 46 Ohio St. 407, 22 N. E. 290 (1889).

[8] Gore v. Townsend, 105 N. C. 228, 230, 11 S. E. 160, 161 (1890).

[9] Mandel v. McClare, 46 Ohio St. 407, 414, 22 N. E. 290, 292 (1889).

[10] Could not these courts adopting the second view, by applying the principle of subrogation, obtain a result similar to that of the suretyship state. They already apply a rule under which the husband's interest is completely exhausted before that of the widow's. See Commercial Banking & Trust Co. v. Dudley, 76 W. Va. 332, 342, 86 S. E. 307, 311 (1915) ("A suggested relationship of suretyship between the husband and wife is not at all essential to the conclusion," in that since the wife signs the mortgage only for the benefit of the mortgagee she has relinquished nothing against the heirs and unsecured creditors.)

[11] Whitehead v. Bautwell, 218 Ala. 109, 117 So. 623 (1928); Gore v. Townsend, 105 N. C. 228 (1890); Mowry v. Mowry, 24 R. I. 565, 54 Atl. 383 (1902).

[12] House v. House, 10 Paige 158 (N. Y. 1843); Mosely v. Marshall, 22 N. Y. 200 (1889).

[13] See Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 824, 123 S. E. 196, 200 (1924).

[14] Caroon v. Cooper, 63 N. C. 386 (1869); Overton v. Hinton, 123 N. C. 1 (1898).

[15] Creecy v. Pearce. 69 N. C. 67, 70 (1873) ("We adopt the analogy in bank-

of the estate. Then if any part of the mortgage debt remains unsatisfied it will be a charge on the dower land.[16] Or (2) she may allow the sale of the property as a whole and become a creditor of her husband's estate for the amount of her dower sold and not satisfied out of the surplus.[17] The principal case holds that since the widow suffered the sale without demanding protection of her dower, she becomes only an unsecured creditor of the estate. This seems to intimate that had she insisted upon the first procedure, she would have been a priority creditor of the estate (probably on the ground that her dower status had not been abandoned). In no North Carolina case has a dower claim been given priority in the personalty of an insolvent estate. *Gwathmey v. Pearce*[18] is absolutely contrary to such a distinction. In that case the supreme court in a previous appeal[19] had ordered sale of the property under the first method outlined, and after a necessary sale of the dower interest the widow was deemed by the lower court an unsecured creditor entitled to share pro-rata in the estate. The supreme court found no error.

Certain dicta in *Virginia-Carolina Chemical Co. v. Walston*[20] was relied upon by the plaintiff to establish her priority as a creditor. Concerning the rights of a widow in the personalty of an insolvent estate, it was there said "that the widow's dower is superior to the rights of unsecured creditors . . . and the widow is entitled to dower as against unsecured creditors, devisees and legatees." In support thereof were cited *Creecy v. Pearce*[21] and *Campbell v. Murphy*,[22] but in those cases the court expressly dismissed such rule as inapplicable where there is a mortgage. Often the rule of "priority in the surplus" is loosely stated and may easily mislead a reader into the erroneous belief that the court is stating a rule of the widow's position as to the personalty.

No authority supports a priority view under either of the two procedures, and it is difficult to conceive "on what principle it is that a debt which because a charge on the land, is also to have priority in respect to the personal estate."[23] Had the mortgagee suffered a deficiency his status against the estate would have been that of an un-

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rupt cases where a creditor having collateral security is only allowed to prove the balance after exhausting the collateral security.")

[16] Creecy v. Pearce, 69 N. C. 67 (1873); see Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 823, 123 S. E. 196, 199 (1924).

[17] Of necessity, under the suretyship theory she is to become a creditor, for she is a surety whose property has been sold to pay the debt of the principal. American Blower Co. v. MacKenzie, 197 N. C. 152, 147 S. E. 829 (1929); see Trust Co. v. Benbow, 135 N. C. 303, 312, 47 S. E. 435, 438 (1904).

[18] 74 N. C. 398 (1876).

[19] Creecy v. Pearce, 69 N. C. 67 (1873).

[20] 187 N. C. 817, 824, 123 S. E. 196, 200 (1924).

[21] 69 N. C. 97 (1873).

[22] 55 N. C. 357 (1836).

[23] See Creecy v. Pearce, 69 N. C. 67, 69 (1873).

secured creditor, and it appears paradoxical to subrogate the widow to a more favored position. To hold it a priority claim is to make the unsecured creditors insurers of the wife to the value of a property interest which she has validly contracted away.

There appears no persuasive logic in allowing the claim under the first procedure and not under the second. The inconsistency of such a distinction is clearly illustrated by a hypothetical application of the two methods to an insolvent estate with a piece of property mortgaged for $1,000.00. (1) Under the first procedure assume that the mortgagee sells for $500.00 the two-thirds and remainder in the one-third of the dower property, leaving $500.00 to share ratably in the personalty. Assuming also that the estate is paying 40% on claims, thus paying mortgagee $200.00 and leaving a deficiency of $300.00 to be taken from the dower. The sale of the dower brings exactly $300.00. Thus the creditor is paid entirely and the widow becomes a creditor of the estate for $300.00, and if the intimation of the instant case governs, she will be a priority creditor. Under this view the corpus of the estate suffers two invasions to the extent of $500.00. (2) Under the second procedure, where the whole property is sold: Assuming that the sale brings $800.00, the mortgagee becomes a creditor of the estate for $200.00 and the wife for $300.00 (the value of her dower interest), each receiving 40%, for the principal case intimates that under this procedure the wife is not a priority creditor. Thus the estate pays the creditor $80.00 and the wife $120.00 or a total of $200.00. Even if the widow were held a priority creditor, receiving $300.00, the maximum paid by the estate would be slightly under $380.00, considerably less than the $500.00 paid under the first procedure. Therefore, there would seem to be more reason for allowing the widow's priority under the second procedure than under the first, because even with the same priority the estate would pay less. It would also bring increment to the estate in that a single sale of the whole property would ordinarily bring a higher price than selling parts separately. Although the mortgagee receives at least $120.00 less under the second procedure, he is a party to his own injury since he failed to adopt the first method.

It is difficult to see why the court should not favor the second procedure and allow the wife no superior priority as a result of following the first,[24] for only under the second can the "Bankruptcy Rule" and "Suretyship Rule" function together smoothly. In contrast, under the first method inequity and uncertainty will of necessity arise, it being necessary to pro-rate the claims once without the widow's claim included, since only after the pro-rata share of the mortgagee is determined can the amount taken from dower be known, thereby determin-

[24] See note 22, *supra*.

ing the claim of the widow. Then the subsequent addition of the widow's claim will have one of two inequitable results: (1) If all the liabilities computed in the pro-rata are paid at once, the estate will be exhausted, having nothing for the subsequent claim of the widow, or (2) if only the mortgagee be paid and the widow's claim then thrown in with the other unpaid creditors, it will reduce their pro-rata share, thereby making the mortgagee's claim preferred to those of other creditors of equal rank. Under the first procedure it is impossible to avoid this problem, because if the mortgagee draws on the personalty, dower cannot remain untouched, for the insolvent estate pays only a ratable share, thus leaving a residue of debt which will ultimately bring in the widow as creditor. However, if the second method be used, all the claims are definite and simultaneously computable, thus facilitating the administration of estates and correcting the inequities arising from two computations.

Accordingly, it is recommended that North Carolina follow its precedents in allowing priority only in a surplus existing after satisfaction of the mortgage debt, and that the intimation of the principal case receive no embodiment in our law.

J. KENYON WILSON, JR.

Injunctions—Courts—Injunction Against Threatened Violation of Agreement Not to Sue.

Plaintiffs petitioned Polk County Superior Court to enjoin the husband of one of them from instituting against the other plaintiff a civil action in Forsyth County Superior Court for alienation of plaintiff wife's affections. It was alleged that defendant husband had signed separation papers accompanied by an agreement to refrain from bringing such a suit, that the threatened suit would violate said agreement, and would do irreparable injury to plaintiff wife's character. The trial judge granted a temporary injunction until the final hearing, and defendant appealed. *Held,* affirmed.[1]

The problem of enjoining litigation brought or threatened in violation of an agreement not to sue may involve litigation in the courts of another state,[2] in a local inferior court,[3] or in a court of concurrent jurisdiction with that in which the injunction is sought or in another branch of the same court. This note deals with the latter situation.

Some states by statute[4] or by judicial decision,[5] purport to deprive

[1] Boone v. Boone, 217 N. C. 722, 9 S. E. (2d) 383 (1940).
[2] Note (1935) 13 N. C. L. REV. 235.
[3] Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534 (1897).
[4] Judicature Act, 1873, 36 & 37 Vict., c. 66; 17 HALSBURY, LAWS OF ENGLAND (1911) 261.
[5] State v. Rightor, 39 La. Ann. 619, 2 So. 385 (1887); Schumert-Warfield-Buja, Inc. v. Buie, 148 La. 726, 87 So. 726 (1921); Kuhn v. Beard, 151 La. 546, 92