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Margie M. Jeppson v. Emelia Larson Jeppson and
Thora Jeppson Spilker, Ervin F. Jeppson, Alta
Jeppson Jensen, Ovid A. Jeppson, Ruth Jeppson
Sjostron and Norda Jeppson : Brief of Respondent

Utah Supreme Court

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**IN THE
SUPREME COURT
OF THE
STATE OF UTAH**

MARGIE M. JEPPSON, sometimes
known as MARGIE M. JEPPSON
EDGELE.

Plaintiff and Respondent,

vs.

EMELIA LARSON JEPPSON,

Defendant and Appellant,

and THORA JEPPSON SPILKER,
ERVIN F. JEPPSON, ALTA
JEPPSON JENSEN, OVID A.
JEPPSON, RUTH JEPPSON
SJOSTRON and NORDA JEPPSON,

Intervening Defendants.

Case No. 81353

Brief of Respondent

Appeal from the District Court of
Salt Lake County, State of Utah,
Honorable J. Allan Crockett, Judge.

FILED LAMOREAUX & TUFT
RUSSELL & LIVINGSTON

Attorneys for Plaintiff and Respondent.

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I.

STATEMENT OF FACTS

Since the statement of facts by defendant-appellant does not give a complete picture of the case as presented to the trial court, the plaintiff-respondent here files her statement of additional facts.

The defendant and all of the intervening defendants by their pleadings defended this action upon the ground that the plaintiff was a trustee. (Tr. 12,13,14). Such was the contention at the pre-trial. (Tr. 33). Upon the trial that theory was abandoned and the defendant-appellant alone defended upon the ground that she retained an interest in the premises as a surviving widow under our statutes. (Tr. 77,78).

It appeared from the evidence of both parties that the defendant-appellant and her nominee received from the respondent upon three separate occasions conveyances to three different portions of the original tract purchased by the plaintiff-respondent, a portion of which tract is the subject of this action. (Tr. 85,86). The portions conveyed were designated by the appellant. (Tr. 87). The appellant in her statement of facts contends that such conveyances were without consideration, but respondent offered evidence that such conveyances were executed and accepted in satisfaction of appellant's purported claim to an undivided interest in the whole of such real property. (Tr. 86,7).

Appellant's deposition was received at the trial by stipulation. (Tr. 138). It appears therefrom that the premises in question were purchased by the decedent, Ephraim Jeppson, in his lifetime, and that such purchase price was paid in part by a mortgage executed by the decedent, his wife who is the appellant, and others. (Page 44 of Deposition). This mortgage was refinanced by a mortgage to Home Owners' Loan

Corporation executed by the appellant as administratrix (Appellants Petition to Mortgage in Probate File) which said mortgage was assumed and paid by the respondent. (Tr. 32, 33).

II.

STATEMENT OF PARTICULAR QUESTIONS ARGUED

(A) WAS THE WIDOW'S INTEREST DIVESTED BY THE PROBATE SALE?

(B) IS THE WIDOW NOW BARRED AND ESTOPPED FROM ASSERTING SUCH RIGHT IF SUCH RIGHT WAS NOT DIVESTED?

ARGUMENT

(A) Respondent does not concede that as a general proposition a widow's interest in real property should be regarded as continuing despite a valid, duly confirmed probate sale of the premises in her deceased spouse's estate. But as will be hereinafter noted, there are circumstances herein which

should be considered if such general proposition is assumed as contended by appellant.

Appellant relies upon (a) the dicta of this court in cases which involve questions of taxation and (b) decisions which state rules regarding common law dower. In none of the cases cited by the appellant from this court was the proposition advanced by her before the court for decision, and it is submitted that the statute under consideration has never been construed in so far as the questions here under consideration are concerned.

As is pointed out by the annotations to our 1943 Utah Code, Section 101-4-3, was originally taken in part from McClain's Annotated, Statutes of Iowa, 1888, No. 3644, and incorporated in the Utah Statutes in the year 1898. In *re Reynold's Estate*, 90 U. 415, 421, 62 P. 2nd 270. The corresponding section of the 1939 Code of Iowa is No. 11990. Such later section of the Iowa code differs materially from our section in that the Utah Code limits the types of debts of the decedent to which the statutory interest is expressly subject, but it is felt that a brief reference to the Iowa decisions will be helpful since the language in our section is in part the same.

Under the Iowa decisions, a widow who received proper

notice of a probate proceeding to sell the real property of her deceased husband, must set up her rights, if any, in that proceeding, and cannot thereafter claim any interest in the property sold. 1 Annotation to Code of Iowa, 1939, 1784, Sec. 118. Re: Estate of Pennock, 122 Iowa 622, 98 NW 480.

Attention of the court is invited to the grammatical construction of the statute under consideration, and particularly to the form and tense of the verbs used. 101-4-3, Utah Code Annotated 1943, reads in part: "one-third in value * * * *shall be set apart* as her property in fee simple, if she survives him * * * ." (Italics added). It is submitted that the form of the verbs implies some affirmative act of the probate court in awarding her "one-third in value," and that the tense of the verbs seems to indicate an interval of time between the fact of survivorship and the fact of such award of real property. If this particular section is so construed according to its grammatical construction, appellant's only complaint would be that the probate court failed to make a proper award to her, and it is now far too late to complain of what the said probate court did or did not do, even assuming that such complaint would be well founded.

As to appellant's citations concerning the general rules affecting dower rights, the following considerations are submitted for the consideration of the court:

As was said in the case of *Scott v. Wells*, 56 NW 828, at page 829:

“In various opinions in this court the estate which a widow takes in the lands of her deceased husband has been to some extent likened to dower. It has been said to be ‘in the nature of dower,’ ‘an enlargement of dower,’ etc. Such expressions are apt to be misleading. They suggest a likeness between things essentially dissimilar. The only particular in which common-law dower and the estate that now goes to the widow resemble each other is that the same person takes * * * .”

However, it is felt that a closer examination of the rules of common law dower should be made, as such rules might be of some help in the disposition of this appeal.

Appellant quoted an excerpt from 24 Corpus Juris 684 to the effect that dower generally is not divested by an administration sale. That rule is further explained in the corresponding section appearing in 34 Corpus Juris Secundum 615, Section 637, which adds: “although the reversion of lands assigned or set apart as dower may pass by such a sale.” The quoted words make it clear that the text refers to a situation where a widow has been awarded a common law dower, not to a situation where she might receive a statutory fee simple interest such as is here under discussion.

Moreover the same section, 54 Corpus Juris Secundum 616, Section 637, makes this further qualification: "a sale to satisfy a debt to which the dower estate is subject discharges dower * * * ."

The widow's statutory interest is made expressly subject by the terms of Utah Code Annotated, Section 101-4-3, to debts "created for the purchase thereof." As will appear from the statement of facts, the purchase of the premises in the probate court was made in part by the assumption of a Home Owners' Loan Corporation mortgage which was a direct renewal of a purchase money mortgage.

Furthermore, this appellant, the surviving widow, joined in the purchase money mortgage which was renewed as aforesaid. Apart from considerations as to the purpose of the mortgage, the wife's interest was inferior to the lien of the renewal mortgage even though she did not join in the execution of the latter. *Tracy Loan and Trust Company v. Luke, et al*, 72 Utah 231, 269 Pac. 780.

(B) IS THE WIDOW NOW BARRED AND ESTOPPED FROM ASSERTING SUCH RIGHTS IF SUCH RIGHTS ARE ASSUMED NOT TO HAVE BEEN DIVESTED BY THE PROBATE SALE?

Upon such assumption, the parties to this action became,

after the probate sale, tenants in common as to the whole of the property sold. The appellant owned and held an undivided one-third interest and the respondent owned and held an undivided two-thirds interest. Thereafter, the appellant received deeds to separate portions of the said land.

In 4 Thompson on Real Property 474, Section 1962, there appears the general rule:

“It is well settled that co-owners of land may, by a bona fide mutual agreement among themselves, make a division thereof so as to sever their interests without going through the ordeal of a trial by proof in court as to title.”

The next section, 1963 further states the rule, and in part reads:

“Where several members of a family effect a partition by deeds among themselves, it will not be disturbed unless it appears that substantial inequalities exist to the detriment of the interest of some.”

The appellant here does not contend that she has received an inequitable portion of the premises, but insists that the former deeds were wholly without consideration, and that she should now receive an undivided third of all of the premises remaining.

It is submitted that the finding of the court that the

appellant is "now barred and estopped from asserting any interest of, in or to the premises retained by the respondent" is supported by the evidence.

WHEREFORE, the respondent prays that the judgment be affirmed with costs assessed against the appellant.

Respectfully submitted,

LAMOREAUX & TUFT

RUSSELL & LIVINGSTON

Attorneys for Plaintiff and Respondent.

Due service of two copies of foregoing Brief of Respondent acknowledged this day of January, A. D. 1949.

Attorney for Appellant

CASES AND AUTHORITIES CITED

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Code of Iowa (1939) No. 11990	4
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