

1959

In the Matter of the Estate of Alexis B. Malan : Brief of Respondent

Utah Supreme Court

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1959

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In The
Supreme Court of the State of Utah

FILED

AUG 28 1959

In the Matter of the Estate of
ALEXIS B. MALAN,

Deceased.

Clerk, Supreme Court, Utah

9076

**BRIEF OF RESPONDENT
ELFREDA A. MALAN**

DAVID K. HOLTHERR
Attorney for Respondent.

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ELFREDA A. MALAN

STATEMENT OF FACTS

Respondent agrees generally with the Appellant's Statement of Facts; however, the deeds referred to therein were delivered by the grantor to the grantor's son, and were by him caused to be recorded. Further, the widow, not the estate, claimed the exclusion of \$12,583.33 which represents one-third of the value of the real property described in the deeds. The question on appeal is whether the widow properly claimed an exclusion of one-third of the value of the real property described in deeds for her statutory dower in said real property in determining inheritance tax liability incident to the death of her husband. Whether said deeds were made or not made, in contemplation of death was not an issue in the case (R. 5).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING THE INHERITANCE TAX TO BE THE SUM OF \$702.42.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING THE INHERITANCE TAX TO BE THE SUM OF \$702.42.

The point above is the ultimate conclusion Respondent seeks this Court to reach. The sinews of the case itself will be dealt with by the Respondent in her brief.

Firstly, the wife's interest in her husband's real property:

"74-4-3. Wife's interest in husband's real property.—One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him; * * *
Property distributed under the provisions of this section shall be free from all debts of the decedent except those secured by liens for work or labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. * * *"
 (Emphasis added.)

What then was the effect of the deeds made by decedent, his wife not having joined with him? It is thought that the

effect is a transfer of all of the husband's right, title and interest in the property conveyed, and not more than this. It is not a conveyance of the wife's statutory interest in the property.

This court in the case of *Cardon v Harper et al.*, 151 Pac. 2d 99, decided in 1944, in an appeal from a judgment wherein certain real property of a husband, and the whole thereof, was adjudged and decreed to be a part of such husband's bankrupt estate and to be administered by the trustee, in considering the wife's interest in husband's real property, says respecting such judgment:

"Taken literally, the decree as it now stands in effect operates to divest the wife of the bankrupt, Louise C. Harper, of her contingent one-third interest in the land which she acquired by law, ownership of which had nothing whatsoever to do with the fraud. The decree could properly operate only to rescind the transfer of whatever title the husband conveyed to his wife. Without relinquishment on her part of her interest, the trustee in bankruptcy, like the purchaser at execution sale, could acquire only the title and interest which the husband had the legal right to convey.

"Except as to the family homestead, 101-1-1, U.C.A., 1943, gives a married man a right to devise away without the consent or relinquishment by the wife of her interest, two-thirds in value of each parcel of real estate, legal or equitable, which he owns. The other one-third in value vests in his wife free from his debts if she survives him and she has not theretofore relinquished her interest. 101-4-3, U.C.A. 1943. See *In Re Reynolds' Estate*, 90 Utah 415, 62 Pac. 2d 270.

"The purchaser at execution sale and the purchaser at bankruptcy sale of the right, title, equity

and interest of the husband in bankruptcy can acquire no greater rights in the property than the husband acting without the written concurrence of the wife could convey. The decree setting aside Harper's deed to his wife as fraudulent should operate so as to cancel the deed and leave the title as it was before such deed was executed.

"The decree of the lower court is modified so that the operational effect thereof is to cancel said deed and bill of sale from Thomas R. Harper to his wife, without disturbing the contingent one-third interest of his wife in the described land."
(Emphasis added.)

While the Malan case has no mortgage involvement, such as was in the case of *In Re Reynolds' Estate*, *Zion's Savings Bank & Trust Co. v State Tax Commission*, 62 Pac. 2d 270, decided in 1936, the case, nevertheless, contains language expressing an interpretation of a wife's interest. The Court deciding in that case that the widow's dower is unaffected by mortgages in which she joined with her husband where there was no need because of the solvent condition of the estate to use the dower interest in their satisfaction; and deciding that it was proper for the one-third interest in value of the real property without consideration of any mortgage lien to be deducted in reference to inheritance tax determination, and on such no liability for inheritance taxes accrued. The Court says:

"The wife's interest has some of the aspects of joint tenancy in one-third of the real estate. In the common law joint tenancy, each owned every bit of the whole. One who died simply fell away from the title. The husband by predeceasing her does not effectuate a passage of title of her one-third, but only recedes from the interest she had, at the same time maturing it."

Next comes the provisions of the inheritance tax law which we examine to see whether or not it provides for inheritance taxation on a wife's interest in her husband's real property.

Section 59-12-3, Code Annotated, 1953, pertinently provides:

"Gross estate how determined—* * *.—The value of the gross estate of a decedent shall be determined by including the value at the time of his death, * * * of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or county, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death. * * *." (Emphasis added.)

Nowhere in Chapter 12, dealing with inheritance tax, is there a provision for the exclusion of dower.

That dower is excludable, however, has not ever been questioned. The point being that the dower interest is not considered in the inheritance tax provisions as ever includable in the ascertainment of the gross estate. The custom and the practice, however, seem to be to include the dower interest in the appraisement of real property and to exclude the value of the dower interest on the form and in the manner provided by the State Tax Commission (R. 11).

It is, therefore, apparent that the dower interest of a wife is not property "which shall pass" in the intendment of the inheritance tax provisions.

Now to the cases, excerpts therefrom, and analysis.

In the case of *In Re Bullen's Estate*, 47 Ut. 96, 151 Pac. 533, decided in 1915, the question was, "Is the widow's one-third interest in her husband's real property subject to the inheritance tax?" The then statutory provision under Comp. Laws, 1907, paragraph 2826, is substantially similar to the provisions of 74-4-3, U.C.A., 1953, appearing above. The then pertinent statutory provisions of Comp. Laws 1907, paragraph 1220x, is substantially similar to the pertinent correlative provisions of 59-12-3, U.C.A., 1953, appearing above.

The Court then states:

"What the wife receives under Section 2826—one-third in fee simple of all the legal and equitable estate in real property possessed by the husband during coverture, and not relinquished by her — she receives, not as an heir of her husband, but in her own right, something which belongs to her absolutely, and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our intestate or succession statutes."

And the Court further states:

"* * * the wife's interest, under section 2826, does not pass by the intestate laws, or, as called in the inheritance tax act, statutes of inheritance * * *."

And:

"So here, while under our statute the wife does not take as a survivor of community property, she nevertheless takes her one-third interest in the husband's real estate in fee simple, just as absolute and as much in her own right as does the wife take her one-half in community property. In neither instance can she be deprived of that right by will, or by any other

voluntary act of her husband without her consent, and in neither is her interest awarded or acquired by succession, descent, or inheritance. Succession, as defined by the statute, 'is the coming in of another to take the property of one who dies without disposing of it by will.' That implies that property acquired by succession may be disposed of by will. But the property which the wife takes under section 2826 may not be disposed of by will without her consent."

And finally:

"With that conclusion it follows that the interest which the wife takes under section 2826 is not subject to the inheritance tax * * *."

(Emphasis added.)

The concurring opinion of Frick, J. emphasizes that wife's right under section 2826 is contingent only upon her surviving her husband; is not limited to such real estate as the husband dies seized of, but extends to all the legal and equitable estate in real property possessed by her husband at any time during the marriage and to which the wife has made no relinquishment of her right; she takes her full interest, although the husband had fully disposed of his interest during his lifetime; and:

"When the legislature, therefore, adopted the statute by which a tax upon all property 'which shall pass by will or by the statute of inheritance' was imposed, the wife's interest in the husband's real estate under section 2826 was, manifestly, not included in view of the terms of the statute."

(Emphasis added.)

While the *Bullen* case is one that deals with the question of inheritance taxability of dower interests, and determines that such dower interests are not, nor were they ever, intended to be so taxable; the determination was made in

particular consideration of an intestate estate. There may, therefore, be considered these matters in the light of estates wherein wills were involved.

The first outstanding will case is *In Re Osgood's Estate*, 52 Ut. 188, 173 Pac. 152, decided in 1918. The decedent's will provided, in substance, all of his estate to a trustee—partial benefits therefrom to his wife—and specifically saying “provided, however, that this provision for my wife shall be in lieu of, and not in addition to, her statutory dower interest in my estate granted by section 2826 of the Compiled Laws of Utah 1907.”

In this case the Court considered paragraphs 2826 and 1220x Comp. Laws 1907, as was done in the *Bullen* case, and in addition section 2827 dealing with the election by widow to take under will or distributive share. This latter section is identical with the present law 74-4-4, U.C.A., 1953. Due to its importance in that case, and to show the nature of provisions which are not duplicated in our law with respect to deeds, its provisions are herein set forth in full.

“74-4-4. Election by widow to take under will or distributive share.—If the husband shall make any provision by will for the widow, such provision shall be deemed to be in lieu of the distributive share secured by the next preceding section, unless it shall appear from the will that the decedent designed the testamentary provisions to be additional to such distributive share. If, however, it does not appear from the will that its provision for the widow is additional, then the widow shall be conclusively presumed to have renounced such provision and to have accepted her distributive share, unless within four months after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, by written instrument filed with the clerk of the court, accept the testamentary provi-

sion, which acceptance shall be construed to be a renunciation of her distributive share. In the event that the wife shall be insane or incompetent, or absent from the state, an election shall be made for her by a general guardian, if she has one, or by a special guardian for the purpose appointed by the court."

(Emphasis added.)

It appearing in that case that an intentional election, in writng, was made for the widow by her guardian to take under the will as construed by stipulation, and such being in lieu of her statutory right, the Court says, "She of necessity relinquishes her right to take under section 2826, and thus whatever share she receives from her husband's estate under the will passes to her by such will and not otherwise." In consequence, the estate, including that property which, but for her election, she could have received under the provisions of section 2826, was subject to inheritance taxes.

Appellant cites this case as one in the series of cases heretofore considered by this Court bearing upon facts and conditions giving rise to determinations of taxability in estates on facts appearing, just as in the *Bullen* case there were facts and conditions warranting non-taxability. The cases are not similar, and each is supportable in law and in reason on the fact situations in each appearing and the applicable laws, particularly as set out in 74-4-4, U.C.A., 1953.

The second outstanding will case is *In Re Kohn's Estate*, 56 Ut. 17, 189 Pac. 409, decided in 1920. Here the court determined and so finds "that the widow not only intended to and did waive her right to take under the statute, but elected to and did take under her husband's will." She served as sole executrix and distributed the estate in accordance with the terms and provisions of the will. The same substantial statutory provisions were considered in this case as were considered in the *Osgood* case, namely

Comp. Laws 1917 paragraph 6406 (dower) and 6407 (election by widow to take under will or distributive share). Inheritance taxation on all property of the estate resulted.

The Court further pointed out that in this case:

“Distribution could not have been made in accordance with the provisions of the will unless the executrix elected to take under it and had waived her statutory right.”

We now come to the case *In Re Kjar's Estate*, 62 Ut. 427, 220 Pac. 501, decided in 1923. In this case it was taken as facts that decedent conveyed by deed substantially all of his estate shortly prior to death and in contemplation of death to his wife and children. In the determination of the inheritance tax liability the district court permitted the administrator, over the objection of the State Tax Commission, the deduction of an amount equal to the widow's one-third of the value of the real estate; then the appeal. In the Supreme Court the validity of the objection presented the only question to be determined, the Supreme Court stating the matter as follows:

“The concrete question to be determined is, was the administrator, in the circumstances, authorized by law to deduct from the value of the property one-third of the value of the real estate as and for the widow's third allowed her under Comp. Laws Utah 1917, paragraph 6406? And, especially, it may be asked, was the administrator authorized to make such deduction, where the widow herself was making no claim on her own account under the statute referred to, and where there is nothing, in the record to indicate that she did not join in the conveyances or that they were made without her consent?”

The Court determines the answer to this concrete question:

"It is expressly stated in the petition of the administrator that the deeds made by the deceased prior to his death were in the nature of a final distribution of his estate, and no doubt it was so intended and so understood, not only by the deceased, but by his wife and other members of the family. In the absence of evidence to the contrary, it must be presumed that the conveyances were made with the consent of his wife, and that she therefore relinquished her right to such portions of the property as were not conveyed to herself."

The Court distinguished the *Bullen* case as one where husband died leaving real estate to which the wife had not relinquished her right. And distinguished the *Osgood* case as a will case, commenting that a person claiming an exemption from the tax was charged with the burden of proving the facts entitling him to exemption; and no such facts were attempted to be shown.

The Court does say, as Appellant set out:

"Under the inheritance tax law, conveyance by deed stands upon the same footing as conveyance by will."

and quotes Comp. Laws Utah 1917 paragraph 3185 as amended in Sess. Laws 1919 C. 64, the preceeding law to Section 59-12-3, U.C.A., 1953, italicizing therefrom:

"* * * or by deed * * * made in contemplation of the death of the grantor * * *"

Since this same statute at that time had the words "or intended to take effect in possession or enjoyment at or after death of the grantor," it is presumed that these words would have been italicized had the Court found them more apt in relation to the facts found. In consequence, it is assumed that a situation where "in contemplation of death" or "to take effect in possession at or after death" would be

treated the same.

The *Kjar* case was decided with no brief filed by the respondent, in other words, without either the widow or the administrator actively controverting the attempted appeal. This is wholly understandable in view of the facts that apparently the deeds included both the widow and children as grantees and from ought that appears, they were in possession of the property prior to the death of the grantor, and a claim of dower would be at the expense of children named in the deeds.

Since this is the case Appellant contends is indistinguishable from the *Malan* case, and controlling, it behooves Respondent to make the distinguishment as follows:

Kjar's

Malan's:

- | | |
|---|--|
| 1. Deed conveyance made prior to death of wife and children. | Deed conveyances made prior to death to wife. |
| 2. Made in contemplation of death. | Made to take effect at or after death, but whether in contemplation of death undetermined. |
| 3. An apparent inter vivos transfer. | Conveyances made by grantor, delivery by him to son, with instructions to record after death of grantor. |
| 4. Administrator originally seeking tax determination excluding dower interest. | The widow originally seeking tax determination excluding dower interest. |
| 5. Administrator, as respondent on appeal, apparently unresisting effort of | The widow, as respondent on appeal, vigorously resisting effort of State Tax Commis- |

State Tax Commission to assess tax on "Dower" interest.	sion to assess tax on dower interest.
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| 6. "Widow herself was making no claim on her own account under the statute." | Widow herself is making claim on her own account under the statute (R. 2). |
| 7. "Nothing in the record to indicate that she did not join in the conveyances." | The record shows conclusively widow did not join in the conveyances (R. 7, 8, and 9). |

While the Court says, "in the absence of evidence to the contrary, it must be presumed that the conveyances were made with the consent of his wife, and that she therefore relinquished her right to such portions of the property as were not conveyed to herself," such in no way says, nor infers, that even in the case of consent of his wife, such constitutes a relinquishment to such portions of the property as were conveyed to herself.

The *Kjar* case presents difficulty in as much as it appears that the decision to permit taxation was, in effect, uncontested, and no effort was apparently made to inform the Court of those reasons why taxation should not be made. The case is not controlling in the *Malan* case, the factual situation being different, and the expressed fact premises for the conclusion reached in the *Kjar* case being diametrically opposite those in the *Malan* case.

The deeds of Mr. Malan to his wife undoubtedly conveyed to her the title and interest which he had a legal right to convey. He could not give her more. He could not convey to his wife her inchoate dower interest, the law gave her this on Mr. Malan's acquisition of the real property during

their coverture. On Mr. Malan's death that inchoate dower interest of Mrs. Malan ripened and was absolute.

In this case there is and has been no question that inheritance taxes became owed on two-thirds in value of all of Mr. Malan's real property, and on other taxable property, the tax being \$702.42, and such has been paid.

It is not reasonable for the State Tax Commission to contend that the inheritance taxes accrued upon the dower interest of Mrs. Malan when it is obvious that such interest of Mrs. Malan did not pass to her by deed, but passed to her, or was hers, under the law.

This does not do violence to the provisions of 59-12-3, U.C.A., 1953, whereunder the method of determining gross estate is set forth. Such requires inclusion of " * * * property, real or personal, * * * which shall pass to any person * * * by deed * * *".

A real violence to the laws of this State would be done were it possible that a woman's dower interest be taxed upon the death of her husband in clear and plain disregard of the law provisions 74-4-3, U.C.A., 1953, and in the light of the cases all cited herein recognizing the subsistence of the dower statute. The two will cases cited recognize the dower statute and find, and in accordance with the provisions of that statute, that a relinquishment by the wife was made; in one by the wife's guardian, the other by herself in administering and in distributing in accordance with the will. The *Kjar* case is obviously a case not applicable or comparable factually to the Malan case, and decided, it appears, without contest, and certainly without due consideration being made of the provisions of our dower statute, the gross estate stat-

ute, nor the statutes of fraud. The Will cases and the determinations made therein are aided, or perhaps it would be more accurate to say are controlled, by the special statute dealing with election by widow to take under will or distributive share; but there is no correlative statute requiring that a wife taking under a deed—such legal right, title and interest as a husband can convey by such process—must surrender, and give up, and it must be interpreted as a relinquishment by her of her statutory dower interest. Absent such a statute there seems no legal, equitable or statutory reason for depriving a widow of her dower rights and of all the emoluments thereof. There is no reason why the receipt of such title as, under our laws, is possessed by a husband, by a wife or widow, should operate to deprive a wife or widow of the right in real property the law itself set up for her.

Appellant suggests the widow is taking an inconsistent position claiming through the deeds to get the entire amount of the property whereas she would, under the laws of succession, be entitled to but one-third or one-half of the husband's property; yet for inheritance tax purposes refusing to recognize the deeds or gift and attempting to take by dower. Appellant suggests there is an estoppel.

It is apparent Appellant misunderstands Respondent's position—specially does she not claim through the deeds to get the entire amount of the property.

Respondent does claim under the deeds all of the right, title and interest in the property her husband had a legal right to convey, subject to the inheritance taxes resulting thereon. Respondent does claim under the dower statute all of the right, title and interest in the property such statute affords her, together with all of the emoluments thereof,

including the right to freedom from inheritance taxes on the property so hers under the statute. There is no more overlapping or inconsistency in these claims than there is in the simple equation of $\frac{2}{3}$ plus $\frac{1}{3}$ equals $\frac{3}{3}$.

There is no attempt to acquiesce in and enjoy the benefits of a transaction and at the same time reject the accompanying burdens, as is specifically stated in 19 Am. Jur. Estoppel, Sec. 21, nor to claim under an instrument without confirming it as further provided in said citation. We, therefore, fail to see an estoppel in this case.

A dower interest is an interest in real property. In this case the widow did not join in the conveyance to herself (R. 7, 8, and 9). The deeds were delivered by the grantor to his son for recording subsequent to the death of the grantor, and pursuant thereto such deeds were recorded (R. 3,7,8, and 9).

Has the widow made any relinquishment of her dower rights? The Statute of frauds too has applicability in the determination of this question.

“25-5-1. Estate or interest in real property.—No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.” (Emphasis added.)

It seems apparent to the writer that the decedent owned

real properties in his lifetime; made conveyances to his wife, as the facts disclose; died; his wife survived; his son recorded the deeds; and his wife has made no relinquishment of dower rights; nor have her rights been deprived her by act or operation of law.

CONCLUSION

It is respectfully urged that this Honorable Court determine the question submitted in this appeal, and having done so, affirm the Judgment and Decree of the lower court.

Respectfully submitted,

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