University of Miami Law Review

Volume 17 | Number 3 Article 13

5-1-1963

Personal Property -- Extent of Dower in a Stock Margin Account

Carlos P. Lamar III

different from Welsh's. But the criteria established in this case might prove helpful, or even decisive in a later determination by other courts.[24]

It is this author's opinion that the Commissoner will not acquiesce,[25] nor will he allow a flood of deductions from other working degree candidates. If it is not overruled, however, the case may lead to an eventual request for certiorari, and ultimately a conclusive determination by the Supreme Court of the United States. Or it might prompt Congress to take further action to codify a clear and unambiguous construction of the deductibility of expenses leading to a degree, especially a degree that is useful in as many professions as a law degree.

CHARLES L. RUFFNER

PERSONAL PROPERTY—EXTENT OF DOWER IN A STOCK MARGIN ACCOUNT

The decedent maintained with his broker a stock margin account, against which he owed 84,140 dollars. The Florida statute[1] provides that a widow is entitled to dower in personal property owned by her husband at the time of his death. In this action by the widow against the personal representative of her husband's estate,[2] the trial court found that the widow was entitled to dower in only the net value of the account, *i.e.*, the value of the securities less the margin obligation. On appeal, *held,* reversed: stock purchased through a broker is owned by the purchaser and the indebtedness to the broker is not a limitation on this ownership. The widow is entitled to dower as measured by the full value of the securities in the margin account at the time of her husband's death. *Rubin v. Rubin's Estate,* 144 So.2d 527 (Fla. 3d Dist. 1962).[3]

Florida has extended common-law dower by statute[4] to allow the widow a "one-third part absolutely" of the personal property "owned"

24. There is no indication that the Tax Court proposes to alter in any way its consistently negative position. See note 2 *supra.*

25. The practical effect of a non-acquiescence is that the Commissioner will propose to disallow all similar deductions and make the deducting taxpayer defend his position in court.

1. FLA. STAT. § 731.34 (1961). The widow is entitled to "one-third part absolutely of the personal property owned by her husband at the time of his death, and in all cases the widow's dower shall be free from liability for all debts of the decedent . . . ."

2. The interest of the broker is not in question since the dower interest would not infringe upon the amount due the broker. See note 29 *infra* and accompanying text.

3. The same court subsequently decided Smith v. Estate of Marmer, 144 So.2d 870 (Fla. 3d Dist. 1962), on the basis of this case. The court rejected the additional argument that the debt was in the nature of a purchase money mortgage on the stock. *Id.* at 871.

4. FLA. STAT. § 731.34 (1961); 11 FLA. JUR., *Dower* § 9 (1957).

by her husband at the time of his death.[5] Stock in a corporation is personalty which is subject to dower in Florida.[6]

It was formerly held that dower rights in personalty were not affected by the fact that the owner did not have the property in his possession, as long as he was the owner at the time of his death.[7] But when *Henderson v. Usher*[8] was decided in 1936, the statute allowed dower in property of which the husband died "possessed."[9] In *Henderson* the court had to determine whether stock held by the broker in a margin account was possessed by the deceased husband. The court decided:

> Inasmuch as the husband could not, under the contract, have had full title to or have taken the securities out of the possession of the broker without paying the amount due on them under the contract of purchase, it cannot be said that the decedent was in possession, at the time of his death, of more than his ultimate rights in the brokerage account. . . . Consequently the widow is entitled to dower only in the rights held by her husband, at the time of his death, in such brokerage account.[10]

However, it is evident that a divergent result could be obtained under the present dower statute because of the statutory change in wording from "possessed" to "owned."[11]

In *In Re Payne's Estate*[12] the Supreme Court held that a widow was entitled to dower in the entire purchase money indebtedness due her husband from the sale of his interest in a partnership. Charges or offsets due the purchaser from the decedent were not allowed in computing the dower rights of the widow. The court discussed the *Henderson*[13] case but said that:

> The same principles cannot be applied to the instant case because of the language of the present exemption statute and the nature of the property here involved.[14]

---

5. FLA. STAT. § 731.34 (1961). A previous Florida statute gave dower in personal property of which the husband died "possessed." See note 8 *infra*.

6. Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).

7. Woodberry v. Matherson, 19 Fla. 778 (1883).

8. 125 Fla. 709, 170 So. 846 (1936). This case presents the crux of the problem in applying dower to a stock margin account since it was the first and only controlling case law of the Florida Supreme Court.

9. 3 SKILLMAN, COMPILED GENERAL LAWS OF FLORIDA 1927 § 5503 (1928). This statute has since been changed to give dower to the widow in property which the husband "owned" at the time of his death. See note 1 *supra*. The significance of such a semantic distinction is exemplified by the result, contrary to Henderson, achieved in the instant case under a similar factual situation.

10. Henderson v. Usher, 125 Fla. 709, 728, 170 So. 846, 853 (1936).

11. See note 9 *supra*.

12. 83 So.2d 109 (Fla. 1955). This case can be factually distinguished from the instant case and Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936), since it did not involve a stock margin account.

13. Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).

14. In Re Payne's Estate, 83 So.2d 109, 111 (Fla. 1955). The change in language

The decision in the *Rubin* case relied on this pronouncement as controlling authority for the proposition that *Henderson v. Usher*[15] no longer applies. But the factual situation in *Payne* was not the same as that found in the *Henderson* and *Rubin* cases, thus rendering this reliance vulnerable to attack.

Having decided that the legislature meant to change the law by substituting the word "owned" for "possessed," the court in the instant case then concluded that the stock itself, not the margin account, was owned.[16] The debt due the broker was said not to constitute a limitation on the ownership of the stock, but to be a debt to a third person.

Associate Judge Paul D. Barns dissented, relegating the statements concerning the *Henderson* case in *In Re Payne's Estate* to dictum. He cited *Henderson* as authority for the proposition that dower extends to the right of redemption of the pledged[17] securities from the broker and not to the securities themselves.[18] Under this view the statutory change from "possessed" to "owned" would be of no consequence since the right to redeem was owned as well as possessed.

The position taken by the *Rubin* dissent seems consistent with the general statement that "a wife's dower interest cannot be greater than the interest of her deceased husband in any particular property."[19] More specific authority was expounded by the Supreme Court in its statement in *Henderson* that:

> When decedent bought the stocks and securities "on margin," his property rights therein and thereto were expressly made, by the purchase agreement, subject to the right of the broker to hold the stocks and securities until all amounts due the broker by the customer under the contract had been paid in full. The widow takes dower in such rights in and to the stocks and securities as her deceased husband had at the time of his death, which was the right to possess the stocks and securities or the value thereof remaining after all claims of the broker under the contract had been fully satisfied out of the stocks and securities or their value.[20]

---

referred to is the change from "possessed" to "owned." Dowling, *Dower in Florida*, 31 FLA. B.J. 345, 351 (1957). See note 9 *supra*.

15. 125 Fla. 709, 170 So. 846 (1936).

16. Rubin v. Rubin's Estate, 144 So.2d 527, 529 (Fla. 3d Dist. 1962). The distinction between ownership of the stock itself, as opposed to ownership of the account which encompasses the stock and the indebtedness, is the basis of the dissenting opinion. These ramifications are critical since ownership of the account alone furnishes a basis for dower only in the net proceeds.

17. The relationship between purchaser and broker is that of a pledge although the relationship at times is characterized as principal and agent, debtor and creditor and trustee or fiduciary. Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).

18. See note 16 *supra*.

19. La Mar v. Lechlider, 135 Fla. 703, 185 So. 833 (1939); 11 FLA. JUR., *Dower* § 7 (1957).

20. Henderson v. Usher, 125 Fla. 709, 727, 170 So. 846, 853 (1936); see also Markham v. Jaudon, 41 N.Y. 235 (1869).

The pledged stock is not part of the pledgor's estate until the secured debts are paid. Until then the pledgee is entitled to hold the stock as against the pledgor's executor or administrator and as against the claim of the pledgor's widow for a year's allowance in lieu of homestead.[21] The widow has no right to require the executor to pay the amount due on the purchase price of the stock.[22] Can it be said that this property was owned to any greater extent than it was possessed in the *Henderson* case?

The distinction between owned and possessed relied upon by the majority opinion is, at best, a semantic distinction which could be argued from various points of view.[23] The Florida Supreme Court has looked to the nature of the transaction in deciding whether the property was possessed.[24] The same approach should have been made in deciding whether it was owned. According to the intent and purpose of the transaction, the broker does not contemplate that the customer will ever receive the stock or own it.[25] The transaction is an executory agreement for speculation in stock which the broker agrees to carry in his own name, accounting to his customer for the profits and holding him responsible for the loss.[26]

The contention of the dissenting opinion that the *Henderson*[27] case decided that the stock margin account (not the stock therein) is the property which had to be possessed, or owned under the present statute,[28] in order for dower to attach, seems more plausible after examining the reasoning in that case. This interpretation would not deprive the statutory change from possessed to owned of all meaning. For instance, personal property which is bailed at the time of the husband's death is property owned although not possessed.

The result of this decision is to change the nature of personal property to which dower may attach. The widow's dower interest may now attach to the full value of stock within a margin account, rather than to the net value of the account. But the interest of the broker is not compromised since the court limits its decision to the statutory specification that:

> [N]othing herein contained shall be construed as impairing the validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property.[29]

21. Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).
22. *Ibid.* See also Hewitt v. Cox, 55 Ark. 225, 15 S.W. 1026 (1891).
23. The words "owned by" are defined as referring to an absolute and unqualified title. BLACK, LAW DICTIONARY (4th ed. 1951).
24. Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).
25. *Id.* at 725, 170 So. at 852; Markham v. Jaudon, 41 N.Y. 235, 256 (1869).
26. Henderson v. Usher, *supra* note 25.
27. *Ibid.*
28. FLA. STAT. § 731.34 (1961).
29. FLA. STAT. § 731.34 (1961).

Consequently, it is only the personal representative of the deceased husband's estate who can claim loss; the share which he would receive in his representative capacity has been substantially reduced by the change in the law regarding the widow's interest.

The dower interest has been increased at the expense of the share administered by the personal representative. This increase is equal to one-third of the indebtedness on the stock. Dower did not attach to the indebtedness when the basis used was the net value of the account.

The court's rationale for the resulting change in the law is subject to criticism. But one reason, not mentioned by the court, may be a prevailing factor in its liberal interpretation of the statutory change in language. This is the court's zealous protection of dower rights. Dower is a favored institution of the law,[30] and public policy is summoned to protect and extend it.

CARLOS P. LAMAR III

FAILURE TO TESTIFY—COMMENT BY CO-DEFENDANT

The appellant and a co-defendant were charged jointly with violation of the narcotic laws. Each defendant retained his own attorney. The co-defendant's attorney, in arguing to the jury, contrasted his client's willingness with the appellant's unwillingness to take the witness stand and testify.[1] The appellant objected to the comments as being inflammatory and prejudicial and moved for a mistrial. The motion was denied and the jury found the appellant guilty and the co-defendant not guilty. On appeal, *held*, reversed and remanded: When one of two defendants jointly tried in a criminal proceeding in a federal court exercises his right not to testify, the Fifth Amendment protects him from prejudicial comments on his failure to testify made to the jury by an attorney for the co-defendant. *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962).

The roots of the self-incrimination clause of the fifth amendment lie in English law during a very confusing period of legal history.[2] The first formal description of the procedure whereby a man on mere suspicion

30. Dowling, *Dower In Florida*, 31 FLA. B.J. 345 (1957). The courts in Florida have long favored and protected the widow's right to dower.

1. The following is typical of the comments made by the co-defendant's counsel concerning the failure of the appellant to testify: "Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross examination, and tell you the whole story . . . . You haven't heard a word from this man [the appellant]." De Luna v. United States, 308 F.2d 140, 142 (5th Cir. 1962).

2. Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 W. & M. L. REV. 247 (1958); Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610 (1902).