

CHAPTER 233.

DOWER AND CURTESY.

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233.01 Widow's right to dower. The widow of every deceased person dying after August 31, 1921, shall be entitled to a dower defined to be a one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage unless she is lawfully barred thereof, except as hereinafter provided. But such widow shall have no dower in any homestead of which her husband died seized, except in the proceeds thereof in lieu of her homestead rights in case of sale of the premises while she has homestead rights therein.

Where the husband had only a contractual right based on his individual interest in a land contract signed by him as purchaser but not signed by his wife, and he was in default, she had no interest arising out of her rights in dower or otherwise. *Olsen v. Ortell*, 264 W 468, 59 NW (2d) 473.

233.02 Rights of nonresident. A woman, being an alien, shall not on that account be barred of her dower, but any woman residing out of this state shall be entitled to dower only of lands of her husband, being in this state, of which he died seized; and the same may be assigned to or recovered by her in like manner as if she and her husband had been residents of this state at the time of his death.

233.03 Dower on exchange of lands. If a husband seized of an estate of inheritance in lands exchange them for other lands his widow shall not have dower of both, but shall make her election to be endowed of the lands given or of those taken in exchange; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange within one year after the death of her husband she shall be deemed to have elected to take her dower of the lands received in exchange.

233.04 Dower in mortgaged lands. When a person seized of an estate of inheritance in lands shall have executed a mortgage of such estate before marriage his widow shall be entitled to dower out of the lands mortgaged as against every person except the mortgagee and those claiming under him.

233.05 Where mortgage for purchase money. Where a husband purchases land during coverture and as a part of the transaction of purchase executes a purchase money mortgage thereon or a portion thereof to secure the payment of all or a part of the purchase money, his widow shall not be entitled to dower out of such mortgaged land as against the mortgagee or those claiming under him, although she did not unite in such mortgage, but she shall be entitled to dower as against all other persons.

233.06 Dower in surplus after sale. Where, in either of the cases mentioned in sections 233.04 and 233.05, or in the case of a mortgage in which she shall have joined with her husband, the mortgagee or those claiming under him shall, after the death of the husband, cause the mortgaged premises to be sold by virtue of such mortgage, or if his executor or administrator shall sell the same for the purpose of paying such mortgage debt, and any surplus shall remain after the payment of the moneys due thereon and the costs and charges of the sale, such widow shall be entitled to one-third part of such surplus.

233.07 Dower after mortgage paid. If in either of the cases above specified the heir or other person claiming under the husband shall pay and satisfy the mortgage the amount so paid shall be deducted from the value of the land, and the widow shall have set out to her for her dower in the mortgaged lands the value of one-third of the residue after such reduction.

233.08 Measurement of dower when land aliened. When a widow shall be entitled to a dower out of any lands which shall have been aliened by the husband in his lifetime and such lands have been enhanced in value after alienation, such lands shall be estimated, in setting out the widow's dower, according to their value at the time they were so aliened.

233.09 By jointure. A woman may be barred of her dower in all the lands of her husband by jointure settled on her with her assent before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least to take effect in possession or profit before or immediately on the death of the husband.

Since enactment of 6.015 in 1921, a post-nuptial agreement providing for releases by each party of any interest in the property or estate of the other is valid. Estate of Cortie, 230 W 103, 283 NW 336; Estate of Nickolay, 249 W 571, 25 NW (2d) 451.

233.10 How assent expressed. Such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and if she be under age, by her joining with her father or guardian in such conveyance.

233.11 Provision when to bar dower. Any pecuniary provision that shall be made for the benefit of an intended wife and in lieu of dower shall, if assented to as provided in section 233.10, bar her right of dower in all the lands of her husband.

233.12 Widow to make election. If any such jointure or pecuniary provision be made before marriage and without the assent of the intended wife, or if it be made after marriage, she shall make her election after the death of her husband whether she will take such jointure or pecuniary provision or the share of his estate hereinafter provided.

233.13 Election between dower and devise. If any lands be devised to a woman or other provision be made for her in the will of her husband she shall make her election whether she will take the lands so devised or the provision so made or whether she will claim the share of his estate provided in section 233.14; but she shall not be entitled to both unless it plainly appears by the will to have been so intended by the testator.

The election of the widow not to take under the will has the same effect as her death, and accelerates the remainders so that the beneficiaries enter directly into the enjoyment thereof; but such rule does not apply if the terms of the trust expressly provide otherwise, since the intent of the testator must prevail. Will of Borchert, 259 W 361, 48 NW (2d) 496.

233.14 When deemed to have elected to take devise, etc. When a widow shall be entitled to an election under either sections 233.12 and 233.13 she shall be deemed to have elected to take such jointure, devise or other provision unless within one year after the filing of a petition for the appointment of an administrator of the estate or for the probate of the will of her husband she file in the court having jurisdiction of the settlement of his estate notice in writing that she elects to take the provisions made for her by law instead of such jointure, devise or other provision; and upon filing such notice she shall be entitled to the same dower in his lands and the same right to the homestead as if he had died intestate leaving lawful issue, and the same share of his personal estate as if he had died intestate; provided, that when he shall have died testate the share of personal estate which she may so take shall not exceed the one-third part of his net personal estate, and the provisions of this and sections 233.12 and 233.13 shall not apply to any case where the husband shall die intestate leaving no issue. When no provision shall be, or shall heretofore have been made, for a widow in her husband's will and she shall not be or shall not have been entitled to an election under section 233.12, she shall, without doing any act on her part, be entitled to the share of his estate as provided in this section.

In the phrase "net personal estate," the words "net estate" mean that part of the estate which remains after payment of all charges against the entire estate. In computing the widow's one-third share of the net personal estate, to which she is entitled by reason of having elected to take under the law and not under the provisions of the will, there first must be deducted from the gross personal estate the federal estate tax as well as all debts, expenses and allowances. A widow who has so elected is not entitled to claim the benefit of a clause in her husband's will directing that all federal estate taxes be paid out of the residue of the estate. Such clause remains effective as between the recipients of specific legacies and the remaindermen who take the residue, but the widow's renunciation of the will prevents such clause from being operative so as to relieve her share from the impact of the federal estate tax. Will of Uihlein, 264 W 362, 59 NW (2d) 641.

The rule that the election of the widow not to take under the will has the same effect as her death and accelerates the enjoyment of the interests of the remaindermen (which interests here are subject to

the trust provisions for the benefit of the widow during her life) does not apply if the terms of the will manifest an intent on the part of the testator to the contrary. The granting under the instant will of the special power to the widow to appoint the residue of the trust estate, on her death, to the nieces and nephews of the testator, their descendants, and certain charities, evidenced an intent that the trust so far as it affected the remaindermen should continue until the widow's death, and the widow's election to take under the law and not under the will did not extinguish such special power of appointment, and did not accelerate the enjoyment of the remaindermen's interest. (Ruggles v. Tyson, 104 W 500; 232.46.) Will of Uihlein, 264 W 362, 59 NW (2d) 641.

The widow's interest in the homestead should be denominated in a judgment of the county court as "homestead rights," and not as a "life interest," since it would be extinguished if she should remarry. Will of Uihlein, 264 W 362, 59 NW (2d) 641.

The share of the testator's estate to which the widow becomes entitled, as a result of electing to take under the law and

not under the will of her deceased husband, is exclusive, and she does not take any additional share in any remaining portion of the estate which may be left undisposed of by the will, even though she is the sole heir at law and next of kin of the deceased. Will of Uihlein, 264 W 362, 59 NW (2d) 641. The doctrine of election applies where A gives to B property belonging to C and by the same instrument gives to C other property belonging to A. No rule permits a testator to appropriate property belonging to another solely for the benefit of the residue of his own estate. Will of Parker, 273 W 29, 76 NW (2d) 712.

233.15 Insane widow; administrator or executor to elect for. (1) The election under sections 233.12 and 233.13 for an insane widow or for a widow becoming, during the year allowed therefor by section 233.14, insane or mentally incompetent to make the same, may be made by her guardian; and when a widow dies within said year, not having made her election, and leaving issue by such deceased husband, the election may be made by her executor or administrator. Elections by guardians, executors, and administrators may be made within two years after the filing of a petition for the appointment of an administrator of the estate or for the probate of the will of the husband, and, so far as may be, shall be made in the manner provided by section 233.14.

(2) The period of time from the commencement to the final determination of any action brought to contest the validity of any will, jointure or pecuniary provision furnishing any such right of election, or to obtain a judicial interpretation of any such will, shall not constitute any part of the period within which such election may be made.

233.16 Sale of real estate under will; widows' rights. Whenever an executor or trustee is given power of sale in a will any election by the widow or by any person for her shall not prevent the exercise of such power as to any realty, except that any homestead shall not be sold without the written consent of the widow, and in case of such sale the widow shall take her dower from the proceeds thereof, the same to be determined and paid on order of the county court of the county having jurisdiction of the estate; and said lands so sold by such executor or trustee shall be clear and free from any homestead interests of the widow in case the homestead is so sold.

233.17 When endowed anew. If a woman is lawfully evicted of lands assigned to her as a dower or settled upon her as jointure, or is deprived of the provision made for her by will or otherwise in lieu of dower, she may be endowed anew in like manner as if such assignment, jointure or other provision had not been made.

233.18 Damages for withholding dower. Whenever, in an action brought for the purpose, a widow shall recover her dower in lands of which her husband shall have died seized she shall be entitled also to recover damages for the withholding of such dower.

233.19 How estimated. Such damages shall be one-third part of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated in an action against the heirs of her husband from the time of his death, and in actions against other persons from the time of her demanding her dower of such persons, not exceeding six years in the whole. Such damages shall not be estimated for the use of any permanent improvements made after the death of her husband by his heirs or by any other person claiming title to such lands.

233.20 Recovery in lands aliened. When a widow shall recover her dower in any lands alienated by the heir of her husband she shall be entitled to recover of such heir, in an action, her damages for withholding such dower from the time of the death of her husband to the time of the alienation by the heir, not exceeding six years in the whole; and the amount which she shall be entitled to recover from such heir shall be deducted from the amount she would otherwise be entitled to recover from such grantee; and any amount recovered as damages from such grantee shall be deducted from the amount she would otherwise be entitled to recover from such heir.

233.21 Acceptance of assignment of dower a bar. When a widow shall have accepted an assignment of dower in satisfaction of her claim upon all the lands of her husband it shall be a bar to any further claim of dower against the heir of such husband or any grantee of such heir or any grantee of such husband unless such widow shall have been lawfully evicted of the lands so assigned to her as aforesaid.

233.22 Infants not prejudiced by collusion. When a widow not having right to dower shall, during the infancy of the heirs of the husband or any of them, or of any person entitled to the lands, recover dower by the default or collusion of the guardian of such infant heir or other person such heir or other person so entitled shall not be prejudiced thereby, but when he comes of full age he shall have an action against such widow to recover the lands so wrongfully awarded for dower with damages.

233.23 Estate by the curtesy. The husband of every wife dying after September 1, 1947 shall be entitled to curtesy defined to be a one-third part of all the lands of which she died seized of an estate of inheritance and which were not disposed of by her last will

and testament. But such surviving husband shall have no curtesy in any homestead of which his wife died seized, except in the proceeds thereof in lieu of his homestead rights in case of the sale of the premises while he has homestead rights therein.

History: 1957 c. 210, 705.

Note: 233.23 was amended by chs. 210 and 705, effective July 1, 1959, to read as follows:

233.23 The husband of every wife dying after September 1, 1947, shall be entitled to curtesy defined to be a one-third of all the lands of which she died seized of an estate of inheritance; but such surviving husband shall have no curtesy in any homestead of which his wife died seized, except in the proceeds thereof in lieu of his homestead rights in case of the sale of the premises while he has homestead rights therein.