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WHEN ARE PROVISIONS FOR WIDOW IN WILL IN LIEU OF HER RIGHT UNDER THE LAW?*

We will confine our discussion to Missouri cases.

What are the rights of the widow under the laws of Missouri?

First—Her common law dower and her share of the real estate and her share of the personal property of the deceased husband in accordance with Article XV "Dower," in Chapter I "Administration," Revised Statutes, often called her statutory dower:

Second—Her homestead rights under Section 5857 of said statutes;

Third—Her absolute property and allowances under Sections 105, 106 and 107, of said statutes.

It must be remembered that all these rights are vested in the widow by law beyond the husband's power to deprive the widow thereof. With reference to most of them he can by his will force her to elect, but it appears as to some he cannot.

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On account of the differences in the law pertaining to dower, homestead and the widow's absolute property and allowances, the cases pertaining to each will be separately treated.

FIRST—AS TO DOWER.

The common law rule declared by Story, as quoted by the Supreme Court,[1] is as follows:

"If a testator should bequeath property to his wife manifestly with the intention of its being in satisfaction of her dower, it would create a case of election. But such an intention must be clear and free from ambiguity; and it will not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own subject to dower. There is no repugnancy in such a devise or bequest to her title to dower. Besides, the right to dower being in itself a clear legal right, an intent to exclude that right by a voluntary gift ought to be demonstrated either by express words or by clear and manifest implication. In order to exclude it, the instrument itself ought to contain some provision inconsistent with the operation of such legal right."

The common law rule prevails in Missouri, except as modified by Section 328 R. S. Mo. 1919, which reads as follows:

"If any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of her husband whereof he died seized, or in which he had an interest at the time of his death, unless the testator, by his will, otherwise declared."

The distinctions made by that statute and the extent of its modifications of the common law rule will appear in the discussion of the cases herein.

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1. Pemberton v. Pemberton, 29 Mo. 412.

In one of the earliest cases, *Hamilton v. O'Neil*,[2] the Supreme Court declared said statute related only to devises of real estate, and the provision made for the wife by the will, being only the personal estate, she was under no obligation to renounce that provision, in order to entitle her to dower in the real estate.

In *Halbert v. Halbert*[3] a bequest of a slave to the widow did not bar her dower in real estate.

In *Pemberton v. Pemberton*,[4] the Supreme Court declared that an inventory and appraisement would have aided by showing what proportion the personal property bequeathed to the wife bore to the whole personal estate, and that the testator having itemized in detail the personalty to the wife, such enumeration was entirely unnecessary if she was to have any more than what was enumerated.

In *Applegate v. Smith*,[5] by a will executed in Kentucky, a testator devised to his wife his whole estate, real, personal and mixed, "wherever situate." After the date of the will the testator acquired land in Missouri. Held, that the title to said land passed to the widow under the will.

In *Martien v. Norris*,[6] the will of the husband contained a recital that he had purchased a house and lot and caused the same to be conveyed to his wife, it "to be held by her in lieu and discharge of her dower in my real estate, and the same having been accepted by her as such, I do, in this, my last will and testament, make no further provision for her out of my real estate." Held, that the deed and will, together or separately, evidenced no such provision made for the wife out of the estate of the husband as required a renunciation of the provisions of the will in order that she might have her dower in her husband's real estate. The Court said:

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3. 19 Mo. 453.
4. 29 Mo. 408.
5. 31 Mo. 166.
6. 91 Mo. 465.
2. 9 Mo. 11.

"That the testator, by his will, having made no devise of real estate to his wife, and the bequest of personalty therein contained being voluntary and unconditional, she was not required to renounce the provisions of the will, or make an election, in order to be endowed of the real estate whereof her husband died seized."

In *Young v. Boardman,*[7] a will providing " family residence * * * to be retained for her use," vested a life estate in the widow and put her to election before she could claim dower. The Court said:

"It is true he devised all of his property to the trustees and directs a sale thereof for the purposes of the trust; but at the same time, he says the family residence and furniture shall be retained for the use of his wife during her life. This we think vested in her a life estate, and put her to an election before she could claim dower. The defendants insist on the authority of *Kaes v. Gross,* 92 Mo. 648, that the homestead is exempt from the operation of the will and therefore nothing was devised to or for the wife. The answer to this is, that a life estate and homestead exemption are different things. As shown in that case, a homestead may be lost by abandonment; whilst as to this life estate, the widow would have been entitled to the income therefrom had she lived and seen fit to reside elsewhere, and we see no reason why that life estate was not at her disposal. Again, for aught that is shown, this family residence is in excess of the homestead exemption both in quantity and value."

The court has since held that the rights of a widow in homestead property under the present law will be lost by remarriage but not by abandonment.

Hall v. Smith.[8] The testator died leaving a widow and five daughters. To some of the daughters he had conveyed various pieces of real estate in which his wife did not join,

7. 97 Mo. 181.
8. 103 Mo. 289.

and she never relinquished her dower in the lands. He left a will by which he gave his wife a life estate in the home farm, $2,000 in money and other specific bequests. He provided that all his daughters share equally in his estate and charged those to whom he had conveyed real estate with the amounts at which it had been valued. The Court held that the statute requiring the widow to elect between dower and a devise under the will was confined to lands to which he *died* seized, that said statute not applying, the common law would determine whether or not she had to elect, that an examination of the will showed nothing indicating an intention on the part of the testator to relieve the land from the right of dower held therein by the wife, that "dower is a provision made by the law for the benefit of the wife after the support and protection of the husband has been lost, and generally at the time of life when such support is most needed. This provision the husband evidently intended his wife to reserve."

McKee v. Stuckey.[9] There was a homestead consisting of a house and lot not exceeding two acres, valued at $500, in the town of Lathrop. This he willed to his wife "for and during her natural life," and also $1,000, and provided that if the personalty be not sufficient, then an eighty-acre farm be sold to pay that sum to her out of the proceeds, which was done.

"The plaintiff asked the Court to declare that if the Lathrop property was the homestead of her husband, no real estate passed by the will to her; that the homestead was hers by operation of law beyond the power of the husband to dispose of it by will or otherwise; and that the $1,000 bequest not being expressed to be in lieu of dower, she was not put to the election of choosing it or her dower, but was entitled to both.

"Under the homestead statute the widow had the right to use and occupation of the homestead during her life and

9. 181 Mo. 719.

widowhood, but on her remarriage her interest in it would cease. Under the will she has a life estate in it even if she should marry again. The statute gave her a determinable life estate. The will gave her an absolute life estate. She had her election and chose to take what the will gave her and she is bound by her choice.

"But the plaintiff has also had her full share of the eighty acres in question.

"The thousand dollar legacy was, according to the first mention of it in the will, to be paid out of the testator's personal estate, but in the last clause of the will, as if apprehensive that there might not be personalty sufficient to pay it, the testator authorized the executors to sell this land and pay his widow the $1,000 out of the proceeds before paying any part of it to his children to whom he had devised it. The power of sale was given to the executors primarily for the widow's benefit, and she has received the full benefit of the exercise of that power. The sale was not made to the defendant subject to the widow's dower, but absolute except as to the mortgage which he was required to pay and has since paid. The widow cannot receive the proceeds of the sale made under a power given, in part at least, for her benefit, and then take back from the purchaser the property sold. That would not be fair dealing and the law would not countenance it."

The decisions of the Supreme Court in the two appeals in *Orchard v. Store Company*[10] are very interesting and hard to reconcile.

The property in question was a twenty-year leasehold.

On the first appeal the Supreme Court declared that at common law a leasehold, whatever its duration in years, was personal property, and that it had not been converted into real estate by the Missouri Statutes as to conveyances of real estate concerning chattels real, as to the statute of frauds

10. 225 Mo. 414, and 264 Mo. 554.

concerning leases, as to executions concerning leases for three years or more and interests in land, as to partition concerning estates for years, or as to definition of the words "tenements and hereditaments," but that Section 315 R. S. Mo. 1919, provides "dower in leasehold estate for a term of twenty years or more shall be granted and assigned as in real estate" and that said twenty-year leasehold was an interest in the real estate within the meaning of Section 328 R. S. Mo., 1919, and that as the testator had devised real estate to his widow and did not declare it was not in lieu of dower and she had not renounced the will within twelve months, she "had no dower in this leasehold and no interest whatever unless the lease was disposed of by the will" (l. c. 465) and "if this leasehold is not disposed of by the will, the widow had no interest therein and nothing passed to the plaintiff" (l. c. 466).

On the second appeal the Supreme Court declared that at the new trial it was shown that the leasehold involved in the action was not mentioned in the will, and then ignoring its decision on the first appeal, declared that the widow had a one-third interest in the leasehold, because it was personal property not included in the will and that she accordingly was entitled to a child's share therein as her dower in personal property.

In re Tyler,[11] the will gave the widow an undivided half share of testator's estate, which she accepted. Held she was not entitled to quarantine also.

In *Sprakes v. Dorrell*[12] a husband dying childless, had devised all his real estate and $15,000 in cash, being one-half of his personal estate, to his wife. Other bequests were made amounting to about $6,000 of his personal estate. The residue, undisposed of by will, amounted to about $9,000. The widow claimed one-half of the intestate property. The

11. 40 Mo. App. 378.
12. 151 Mo. App. 173.

Springfield Court of Appeals held that it was manifest from a fair construction of all the terms of the will that the testator intended the bequest to the widow to be in lieu of dower and of her statutory rights in the personal property, and that she must make her election, that she cannot claim under the will and also claim the dower or property as allowed by law.

That decision is justly subject to criticism. It is directly opposed to the general reasoning in the other cases and is in direct conflict with the decision of the Supreme Court in the last appeal in the Orchard case.[13] The $9,000 as to which he died intestate was all personal property, none of it could even be regarded as being any interest in any real estate. As to the undisposed of personalty it should be regarded as if he had made no will and the widow should have had her share thereof.

In *Dobschuez v. McAlevey*,[14] the testator gave all his property, real and personal, to his wife and named her executrix. As Section 318 applies only to real estate whereof the husband died seized, it was held the widow could take under the will and could also claim dower in land which had belonged to her husband but was sold before his death and in which her dower had not been relinquished.

In this connection it may be interesting to compare a widower's rights under the law and the provisions for him in a wife's will and see how he fares in the courts.

Take for example *Mosely v. Bogy*.[15] The first clause of the will read: "Should I die leaving surviving me my husband and a child or children, then it is my will that my whole estate, real and personal, be divided between my husband and children, in the proportion of one-half to my husband and one-half to my child or children." Held, "that testatrix's intention was to devise to her husband a half interest in fee simple in her entire property, and a half interest in

13. 264 Mo. 554.
14. 213 S. W. 82.
15. 272 Mo. 319.

fee simple to her children, and not to devise the real estate subject to the husband's curtesy, even though the will by its terms does not attempt to dispose of his curtesy. The word 'estate' did not mean the interest she had in the property, but meant the property itself."

That decision was not consistent with the common law rule applicable thereto. Section 328 R. S. Mo. 1919 does not apply to a wife's will nor the widower's curtesy.

Then again, the courts champion the widower's cause as in *Headington v. Woodward,*[16] where a childless wife willed her husband half of her estate (exactly what statute allowed him). Unknown to him, she conveyed some real estate to her nephews, retaining life interest and requesting the deeds be not recorded until after her death. Held, that was fraud on husband's marital right and he was allowed to keep the half of the property under the will and also recover half of the property she had conveyed. As he was entitled to half of all, there was no inconsistency and he was not precluded by probating the will.

In *Lynch v. Jones,*[17] a widower, whose wife died without leaving issue or descendants, although a child had been born to them which died during coverture, if he had renounced the will, could under the common law have had his curtesy, and under the statute, also half of the estate. There is no statute requiring him to elect between the statutory half and curtesy as requires a widow to take between statutory half and common law dower. The will gave him a life interest in real estate and all personalty and appointed him executor. By qualifying as executor, making final settlement and retaining all the personalty he elected to take under the will.

In *Schuster v. Morton*[18] it was declared, there being no children, under the statute the widower was entitled to one-

16. 214 S. W. 963.
17. 247 S. W. 123.
18. 187 S. W. 2.

half of the estate absolutely. Under the will he got a life interest in all the estate with remainder to others. Held, he could not take under both will and statute and was required to elect.

SECOND—AS TO HOMESTEAD.

In determining whether the widow must choose between the will and her statutory right of homestead we must ascertain whether the husband died before or after the Act of 1875, materially changing the homestead law, went into effect. The widow's homestead rights are determined as of the death of the husband.

Under the previous homestead law the widow got the same estate as the husband had held, an absolute fee if that was what he had had, subject only to the rights of occupation of the minor children during their minority; but his will could require her to elect, and if she chose her homestead right she nevertheless could lose it by abandonment, *e. g.*, by marrying again and going to live with her second husband elsewhere.

But the Act of 1875 excepted the homestead out of the laws relating to devises and gave her a life estate coupled with the right of the minor children therein until each reached majority, and that life estate was not lost by abandonment. By the amendment of 1895 her life estate was reduced to estate during widowhood.

It may be surprising that most of the decisions pertaining to election between homestead and the provisions of a will are based on cases where the testator died before the Act of 1875 and therefore apply only to the old law. We will consider them first.

In *Davidson v. Davis*,[19] the husband died in August, 1874. By his will he gave his widow a different estate in the land from that which the law gave her. The Court held that the

19. 86 Mo. 440.

right under the will and that confirmed by the homestead law were repugnant to each other and that she had to repudiate one or the other.

In *Burgess v. Bowles*,[20] the husband died in 1872, and the facts and the opinion of the Court are contained in the following extract:

"For the purposes of this case, the land must be regarded as the homestead of deceased. It was within the legal limits regarding value and extent, and was all the realty he owned. He left some personal property.

"Defendant, while his widow, took possession of all this property, had the will probated and paid off a number of his debts. In so doing she probably intended to act under the will, but, after her marriage to Mr. Bowles, she claimed the land by virtue of the homestead law. That is her claim now.

"The law in force when Giles died controls the rights of these parties. Under it the widow would take the same estate owned by the deceased in the homestead, his children being adults when this action was begun. * * *

"Plaintiff's counsel contend that, as defendant acted under the will, she must be deemed to have elected the estate thereby created and hence could not take under the homestead law adversely to that estate.

"Had she received any greater estate (real or personal) under the will than that which she would otherwise have been entitled to claim under the homestead and administration law, it would be necessary to meet and decide that question.

"But the doctrine of election can have no application where the property received is not greater than the party would have the right to take under the law without reference to any will. Plaintiffs did not establish in this case that it was greater. Without such showing the homestead, the subject of this action, must be regarded as vested absolutely in defendant from Giles' death (Wag. Stat., p. 698, Sec. 5), as

20. 99 Mo. 543.

well as his personal property to the extent defined by the administration of law then in force. * * *

"If there was no property on which the will would operate, as against the widow's absolute statutory rights, there would be no consideration for an election by her and the reason on which the doctrine of election rests would fail. No formal renunciation of the will would be necessary in such case to confirm her title to the property which the law itself gave her."

In *Schorr v. Etling*,[21] the will was executed in 1861; the homestead law, the first to be enacted in Missouri, the old law, was enacted in 1865; the homestead was acquired in 1866 and was in no wise referred to in the will; the testator died in 1872. The Court said:

"After a devise of specific real and personal property and all mixed property to his wife for life, the testator makes the following disposition of the remainder: 'And after her death all real, personal and mixed property of whatever she, the said Regina Schorr, may be possessed of at the time, shall be equally divided between my next relations and her said next relations or heirs.' The former part of the will makes no attempt to dispose of any property except such as is specifically named, and does not include an after-acquired homestead. The disposition of the remainder clearly refers to the property previously disposed of.

"Whatever construction might be put upon the last clause of the will in regard to property the testator had the right to dispose of, we do not think an intention appears therein to deprive the wife of property and rights to after-acquired property to which she was entitled by operation of a law thereafter enacted. No such intention could have been in the mind of the testator. No such intention appears upon the will. There is no inconsistency between holding the specific property devised to her under the will and an entirely distinct

21. 124 Mo. 42.

property under the law. 'The intent to exclude the widow from her legal right must clearly appear; if it be doubtful, she is not to be excluded.' "

It thus appears the above quoted section (now 328 R. S Mo. 1919) modifying the common law rule does not apply to homestead.

In *Ball v. Ball*,[22] the facts and decision of the Court are set forth in the following syllabus thereto:

"The will put all testator's property in the widow, for her support and the education and maintenance of his children during minority, and as they arrived at age she and his brother were to set off to each child 'a reasonable portion' of the estate 'so that the children shall be made equal' and so that '*my wife shall have such portion as she will now be entitled to under the statute of descent and distribution.*' *The testator died in* 1874, *and at that time a homestead to the value of fifteen hundred dollars vested absolutely in the widow at the majority of the children,* and under the statutes of descents and distributions then in force, the lands descended to the children subject to the widow's dower. The widow continued to occupy the homestead, which consisted of 160 acres and was worth more than $1,500, and after the children became of age she and her brother-in-law set off to them two or three hundred acres of detached lands, and they exchanged deeds with each other therefor. Held, first, that until dower was assigned, the widow was entitled to remain in and enjoy the mansion house and the messuages or plantation thereto belonging without being liable to pay any rent therefor; second, the widow received nothing more under the will than she was entitled to receive by law had she not accepted its provisions, and, hence, was not deprived of her dower or homestead; third, after dower was assigned, she was entitled, by operation of law, to homestead in the mansion house and messuages to the value of $1,500; fourth, by a valid and

22. 165 Mo. 312.

binding agreement between her and testator's children the entire mansion house and plantation could have been set off to her as her homestead regardless of its value, whether in excess of $1,500 or otherwise; fifth, a conveyance by her to some of the children of a part of the homestead whole value was in excess of $1,500, and which had not been enlarged by valid agreement between her and the heirs, and by such children to other children, did not affect the rights of the other children who had no part in such conveyance, since these grantees were not innocent purchasers; sixth, as the widow never relinquished her dower in her husband's lands, she is entitled thereto unless her interest in the homestead equals or exceeds a lifetime one-third interest therein, in which case she is not entitled to dower in addition to homestead."

As reason for its decision the Court said:

"It thus seems clear that she received nothing more under the will than she was entitled to receive by law had she accepted its provisions. Not only this, but there is not one word said in the will which would indicate an intention upon the part of the testator to exclude the right of his wife to homestead in the land upon which he resided at the time of his death, so that the widow can, we think, claim both the benefits given her by the law and the will."

In *Stoepler v. Silberberg*[23] we quote from the syllabus as follows:

"Where no steps were taken by the widow to have the homestead admeasured to her upon the death of her husband in 1867, and she never asserted homestead in the premises, but caused the will, which gave her a life estate, to be probated and accepted appointment as executrix thereunder, and continually asserted that she had a life estate only, and the value of the life estate given her exceeded in value her homestead right, and the property itself largely exceeded the statutory

23. 220 Mo. 258.

value of the homestead, it will not be held that she took a homestead under the statute, which upon her death descended to her heirs."

In *Bank v. Looney*[24] the decision was rendered in 1917, but the testator died in January, 1875, before the 1875 Act was passed and went into effect.

The will, among other things, provided:

"I will that all my real estate situated in the County of Polk, in the State of Missouri, known and described as the home place on which I now reside, remain in the possession and control of my wife, Mary Malica Looney, as long as she remains my widow."

The Court held that:

"The widow, having accepted the provisions made for her here out of the real estate of the deceased, and those provisions being incompatible with the retention by her of the homestead estate in such land, neither she nor those claiming under her could thereafter claim such homestead."

We now come to decisions under the homestead Act of 1875.

The first decision was in 1887, *Kaes v. Gross*.[25] The testator died in September, 1879. We quote the following from the Court's opinion:

"I have purposely refrained from discussing the question of the effect of the will on the homestead, and have made this case turn on the points set forth in the preceding paragraph. My reasons for doing so are these: I am persuaded that the will has no bearing on this case. Section 2693, Revised Statutes, expressly excepts the homestead out of the laws relating to devises. This exception is in marked contrast to the provisions respecting dower in real estate; for there, when the husband, by will, passes any real estate to the wife, 'such devise shall be in lieu of dower out of the real estate

24. 271 Mo. 545.
25. 92 Mo. 647.

* * * whereof he died seized, * * * unless the testator, by his will, otherwise declared,' R. S., Sec. 2199. And Section 2200 required the wife, if she refuses to take under the will, to file her renunciation within twelve months from the probate of the will. There is no such provision respecting renunciation or election as to a homestead; and, as already seen, it is entirely beyond the power of the husband to devise the homestead, as much so as by his sole deed to convey or mortgage the homestead. R. S., Sec. 2689.

"As the law excepts the homestead out of the law of devises, it is not to be presumed that the husband, in this case, intended to go counter to express statutory provisions, and if he did, *his* will must yield to the will of the *legislature.* The very fact, standing alone, that the legislature has made no provision for election or renunciation regarding a homestead, is very strong evidence, indeed; but where this fact is coupled with the other, already noted, that the homestead is excepted out of the law of devise, they form, as I think, a conclusive argument against the power of the husband, by his will, to put his wife to her election in regard to her homestead."

In *Bogart v. Bogart*[26] the testator died June 18, 1875, and he devised to his wife so long as she remained his widow all his real estate and the rents and profits thereof, and declared it to be his intention thus to provide for the raising and educating of his children. The Court held that real estate passed to his widow within the meaning of Section 4527 R. S. 1889, and that accordingly the widow was not endowed of said real estate unless she formally denounced said devise. But the widow's failure to renounce said devise did not deprive her of her right of homestead.

The last case, *Jenkins v. Jenkins,*[27] a Kansas City Court of Appeals case, is anomalous. It held that "although a will

26. 138 Mo. 419.
27. 234 S. W. 365.

does not give to testator's widow a greater amount of property than she would be entitled to by law, and though Sec. 328 R. S. Mo. 1919, as to devise to her being in lieu of dower, is not applicable to homestead, yet the will, by its disposition of the real estate, clearly indicating the intention to exclude her dower and homestead rights, she, under the doctrine of election, cannot have her statutory homestead rights; her acts clearly showing that she accepted the terms of the will."

If the testator in that case died before the Act of 1875, the decision would appear to be correct. The opinion states that the land was acquired in 1869 or 1870, and while it does not state when he died it does say that both he and his wife were aged persons, and the decision was in 1921. If the testator died after the Act of 1875 then according to the previous Supreme Court decisions this last case was wrongly decided.

THIRD—WIDOW'S ABSOLUTE PROPERTY AND ALLOWANCES UNDER THE STATUTES.

While the provisions of a will may be construed to be in lieu of dower in real or personal property, hardly ever has the language been construed strong enough to make its provisions in lieu of the widow's absolute property and allowances under the statutes, now Sections 105, 106 and 107 R. S. Mo. 1919.

And even though the will may be so plain and explicit as to take away the $400 statutory allowance, yet "it is doubtful if a clearly manifested purpose so to do would be effective" to deprive the widow of her allowance in lieu of one year's provisions. (Goode J. in *Glenn v. Gunn.*[28])

In *Bryant v. McCune*[29] the testator devised and bequeathed to his wife a large portion of his estate, real and personal, to hold during her life, and died without issue. The

28. 88 Mo. App. l. c. 445.
29. 49 Mo. 546.

Court held that the devise of a life estate in real estate, by reason of the statutes (now Section 328 R. S. Mo. 1919) precluded the widow from taking dower in other real estate not devised, but that said section did not pertain to what the statutes gave the widow as her absolute property out of the personal property, which the Court accordingly allowed to the widow in addition to what she got under the will. The Court said, "there is no indication in the will that she was expected to surrender anything, and 'it is an established principle that a provision in the will of a husband in favor of the wife will never be construed by implication to be in lieu of dower or any other interest in his estate given by law; the design to substitute one for the other must be unequivocally expressed.' "

In *Hassenritter v. Hassenritter*[30] the testator willed to his wife one thousand dollars life insurance and "dower in all real property according to law." Held that did not preclude her from also receiving the $400 as her absolute property and an allowance in lieu of provisions under the statutes. The Court approved the language in *Bryant v. McCune* quoted above and added "this is no case for surmises or presumptions."

In re Klostermann,[31] it was held that "it will not be inferred that the husband intended to bar his widow of her absolute statutory allowance of $400 from the fact that he made a general disposition of his property by will, wherein he bequeathed to her $400. An intent to bar the widow of this legal right by legacy must clearly appear, at least by manifest implication from provisions in the will inconsistent with the legal right."

In *Schwatken v. Daudt*[32] the plaintiff as widow had applied for an order on the executor to pay her $400 as provided by the statute. The executor defended on the ground

30. 77 Mo. 162.
31. 6 Mo. App. 314.
32. 53 Mo. App. 1.

that the provisions of the will were in lieu thereof. The Court declared "under the will the entire property passed to the widow to be used and enjoyed by her for her sustenance so long as she remained a widow, and, if necessary to her support, the entire property could be sold by her, but, in the event of marriage, the widow was endowed under the laws of the State. These provisions are clearly repugnant to the idea of a present right of dower. If the second clause left the question in doubt, the third puts it beyond all controversy."

In speaking of that case, Judge Goode in *Glenn v. Gunn*[33] said "that is the only authority in this State, we believe, in which she was refused the benefit of the statute."

The strong and important differences between the widow's absolute statutory allowance and dower in personal property, and the reasons why the courts might be willing to concede that the language of a will might preclude the widow's dower in personal property but nevertheless will insist that her statutory allowance be not precluded are well set forth in the two masterly opinions of Judge Goode in the two appeals in *Glenn v. Gunn,* the first being on the subject of the $400 absolute property, [34] and the other on the subject of the widow's absolute allowance in lieu of provisions.[35]

Although the will provided: "I want all of my debts paid, and it is my express will and wish and decree that my said wife and my said daughters shall share alike in all my real and personal property after the paying of all just debts," nevertheless the widow was also allowed $400 as her absolute property under the statute and an allowance in lieu of provisions.

In the first case Judge Goode declared, "a careful study of the decisions in this State and elsewhere, in which the deprivation of the statutory bounty by reason of accepting legacies is discussed, has led us to the conclusion that in most,

33. 88 Mo. App. l. c. 426.
34. 88 Mo. App. 423.
35. 88 Mo. App. 442.

if not all, instances, the courts insist on something more in the will to bar the widow from claiming the bounty than a provision that the bequests to her shall be in lieu of dower While they will deny her dower in personalty when the will so stipulates, or, when, constructively, its provisions are inconsistent with the estate, they appear to require as a condition precedent to denying her the preference given by the administration law, words of the testator, either unequivocally providing that she shall be denied it if she accepts the bequests or else showing unmistakably that he had that right in his mind's eye and intended that his provision for her should supersede it. On no other theory can harmony or consistency be tortured out of the decisions."

The opinion in the second appeal is very short, but important, and reads as follows:

"The judgment is right. The will cuts no figure. This statutory provision for a year's support for the widow and children does not depend on the husband's testacy or intestacy, solvency or insolvency. It is theirs absolutely—given to them by the wise and humane sentiments of an enlightened age, out of compassion for their hapless state when the breadwinner is lost. Creditors cannot seize nor should bequests defeat it. The law makes no difference between the indigent and the opulent in respect to this bounty. The terms of the will speak no wish to take away this right, *and it is doubtful if a clearly manifested purpose to do so would be effective.* The respondent was entitled to what she asked."

In *Ellis v. Ellis*[36] the testator undertook to dispose of all his personal property among his wife and certain legatees, that to the wife in lieu of dower. It was held that the widow could take under the will and was also entitled to the $400 absolute personal property under the statute, as that was not dower.

In *Lowe v. Lowe*,[37] the Court considered a prenuptial

36. 119 Mo. App. 63.
37. 163 Mo. App. 209.

contract, which for our present purposes is the same as if it were a will. The party of the second part, who became wife and then widow, had received property and money under the contract to the value of $3,800, a little over one-third of her husband's estate. The Court declared "we believe the contract made reasonable provision for the wife and was fair and just considering the amount of the husband's estate" and therefore held it valid as an ante-nuptial contract. The contract provided "the second party does hereby accept said provisions for her benefit in full and in lieu of dower in the property of the first part and of all marital rights in his property and estate, but she shall be excluded from all marital rights in the estate of first party, except as above provided." The Court said, "it will be seen that the language of the ante-nuptial contract does not expressly bar plaintiff's right to the statutory provision for one year's support as the widow of her deceased husband," and concluded "in the absence of express language to that effect we must presume that the parties did not intend to include the absolute property of the wife as one of her marital rights in the property and estate of the husband."

In *Peugh v. McKinney*[38] the testator by his will gave widow all household and kitchen furniture (except curios) and $3,600, "to be the absolute property of my wife," and to a child by a former wife the entire remainder of estate absolutely subject only to debts, funeral expenses and the said $3,600. The widow took everything willed her, and also applied for and was granted allowance in lieu of provisions and the $400 absolute property. The Court said:

"The wording of the will is not such as to unequivocally provide that the widow shall be denied the allowances now sought if she takes under the will; nor does the will show unmistakably that the testator intended that his bequests to her should supersede them. It is only by a process of infer-

38. 211 S. W. 83.

ences or deduction from the result of the testamentary disposition of his property that such a conclusion can be reached. Such is not sufficient to defeat these statutory allowances to the widow. Remarks of the courts in cases dealing with the rights of widows to pure dower where they have accepted under wills * * * are not applicable to their rights to the statutory allowances here in question."

It is thus apparent that in considering whether the provisions of a will are in lieu of dower, we must give effect to every word in the statute, now Section 328 R. S. Mo. 1919, whether if at all and to what extent it applies. It is also evident that different reasoning is applied as to homestead and the widow's absolute property and allowances under the statute.

While we have felt free to criticise some of the Missouri decisions, decisions on the subject in other States are much more confusing and make us well satisfied with our own Courts.