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Va. Code § 64-38.1 (1950), enacted in 1956, gives a widow whose dower cannot be conveniently assigned in kind a right to have her dower commuted to a gross sum against the wishes of the heirs. This means—

The Doweress Is Wearing a “New Look”

HARRY L. SNEAD, JR.

It is settled law in this state that a widow whose dower has not been assigned is not a competent party plaintiff in a partition suit. She has no estate in the land until her dower is assigned and therefore is not a joint tenant, a tenant in common, or a coparcener with her husband's heirs. *White v. White*, 16 Gratt. (57 Va.) 264, 268 (1861). Until recently, it was equally well settled that, except under anomalous circumstances, neither the holder of a life estate nor the other parties in interest could obtain, over the objection of the other, a commutation of the interest of the holder of the life estate to a gross sum. The consent of both was required. *Wilson v. Davisson*, 2 Rob. (41 Va.) 403, 422 (1843); *Blair v. Thompson*, 11 Gratt. (52 Va.) 441, 452 (1854); *White v. White, supra*; *Davis v. Davis*, 25 Gratt. (66 Va.) 587, 598 (1874); *Simmons v. Lyles*, 27 Gratt. (68 Va.) 922, 930 (1876); *Wilson v. Branch*, 77 Va. 65 (1883); *Slater v. Slater*, 124 Va. 370 (1919); *Powers v. Sutherland*, 157 Va. 336, 343 (1931); *Phlegar's Exr. v. Smith*, 131 Va. 268 (1921). For the “anomalous circumstances” see *American Nat'l Bank v. Taylor*, 112 Va. 1 (1911). Va. Code Ann. § 55-277 (1950), enacted in 1926, allows commutation to a gross sum where the cost of investing the share of the holder of the life estate exceeds 5 per cent of the gross annual income from that share; Va. Code Ann. § 64-46 (1950) gives remaindermen the option of paying a gross sum where a creditor is seeking to subject dower or curtesy to the satis-

faction of his lien. Because of the limited application of these statutes they will be ignored during the balance of this discussion.

Va. Code Ann. § 64-38.1 (1950), enacted in 1956, calls for a re-examination of these rules.

The cited Code section provides that a widow whose dower has not been assigned, and whose dower cannot be conveniently laid off in kind, may petition the court to have her dower commuted to a gross sum calculated according to the tables found in sections 55-269 to 277 of the Code. Section 64-38.1 further provides:

[T]he court may, in its discretion, either require the heirs at law to pay to such widow a gross sum in lieu of dower . . . or may, if such heirs fail or refuse to make such payment, have such real property sold. From the [net?] proceeds of such sale there shall be paid, first, the gross sum equivalent of the widow's dower interest; the remainder of such proceeds shall be paid to the heirs at law, pro rata, according to their interest in such real property.

The widow whose dower has not been assigned has become a competent party plaintiff, in her own right, to institute a proceeding which, in effect, could result in partition or a "sale of lands of persons under disabilities." The statute appears to be a boon to the widow whose husband died intestate leaving behind his widow, heirs (all of whom are infants), little or no personalty, and an interest in some realty. It is suggested that a widow in such circumstances, by utilizing section 64-38.1, can more often realize some cash from her dower interest and can obtain this cash quicker than if she attempted, as guardian on behalf of the infants, to bring about a sale of lands of persons under disabilities; a compliance with the strict procedural requirements of a suit for the sale of lands of persons under disabilities should not be necessary; however, as will be mentioned below, inquiries similar to, but yet different from, those made in a suit for the sale of lands of persons under disabilities should be made before entry of a decree allowing commutation against persons under disabilities.

When the personal assets of an estate are insufficient to pay the debts, an imaginative practitioner might consider using a proceeding under the statute as a substitute for a creditor's suit.

There is little likelihood of conflict between the operation of the statute and the rule that partition by sale cannot be had if it is convenient to partition the property in kind. Va. Code Ann. § 8-692 (1950); *Cauthorn v. Cauthorn*, 196 Va. 614 (1955). It would seem that if it were convenient to partition the property in kind then dower could be conveniently laid off in kind and, in such event, the statute could not be utilized.

The Discretionary Language of the Statute is Troublesome.

The language of the statute giving the court discretion is susceptible of at least two interpretations. The first is that the court has no discretion whatsoever as to whether to commute dower when it is not convenient to assign it in kind, but discretion merely to decide whether (1) to cause the heirs to pay or (2) to order the land to be sold.

The second, and more reasonable, interpretation is that the discretion of the court relates to whether commutation to a gross sum is to be allowed. This interpretation is believed by the writer to be the more reasonable one because the statute itself contains unmistakable directions as to when the land should be sold (hence there is no need for the court to exercise its discretion relative to that issue); and the first interpretation, among other things, would enable a widow with an abbreviated life expectancy—due to an incurable, fatal disease, for example—to have her interest in the land computed on the basis of normal life expectancy. Such a drastic change in the dower interest should be occasioned, if at all, by clearer language than that found in section 64-38.1. The statute should be re-drafted so as to make clear the direction in which the judge's discretion can be exercised.

Assuming judicial or legislative adoption of the second interpretation, what factor or factors should a trial judge take into account in deciding whether to allow commutation? Three

distinct groups of factual situations suggest themselves:

First, when the evidence shows that the life expectancy of the widow is materially less than normal, it is submitted that a commutation should not be allowed.

Second, in cases in which the life expectancy of the widow is not in issue, but the rights of incompetents are involved, it is submitted that the court should engage in a balancing process: On the one hand, it should consider the financial needs of the widow and the advantages to her of allowing commutation; on the other hand, the disadvantages to the incompetent heirs (or devisees) of making sale of the property. It is impracticable to discuss the myriad situations which could arise; discussion of two possible situations will illustrate the balancing process: A young widow wealthy in her own right, is seeking commutation against her infant children; the evidence discloses that the children have no funds with which to pay the widow the value of her commuted dower and that a sale of the realty would not be advantageous to the children; commutation should not be allowed. However, if the widow was in financial need and all other facts remained the same, commutation should be allowed. If the factors on each side appear to be in balance, the commutation should be allowed.

Third, when a widow seeks commutation against remaindermen all of whom are *sui juris*, and the widow's life expectancy is not in issue, the commutation should be allowed, absent some circumstances which would shock the conscience of the court; for example, a severely (but temporarily) depressed real estate market which would render it difficult both to determine the value of the realty and to make sale of it at a fair price.

It should be noticed that neither the consent, as such, of the heirs nor the remainderman's chance of surviving the widow is a factor to be considered by the court in deciding whether to allow the commutation; consideration of either, or both, of these factors would dilute the right apparently intended to be given the widow by the statute.

In any event, once the court has decided to commute dower to a gross sum, consistency with partition proceedings, as well as the statute, seems to demand that the court not order the land sold if the heirs are willing and able to pay. Consistency with partition proceedings would likewise demand that any one or more of the heirs be given an opportunity to buy the land before it is offered for sale to third parties.

A show cause order (fixing a reasonable time within which the heirs are to pay or themselves buy the land or allow the land to be sold to some third party) could be used to good advantage at this stage of the proceedings.

Although dower is a legal interest and *can* be assigned by a proceeding at law, it is reasonable to assume that the legislative intent was that the proceeding under the statute be commenced on the equity side of the court; the use of the word "petition" in the statute points to this conclusion, as does the fact that commuting dower or commuting dower and selling realty are the kinds of business usually done on the equity side.

Funds No Longer Tied up in Court.

Before the enactment of section 64-38.1, where dower could not be assigned in kind, if the heirs refused to consent to a commutation of a widow's dower interest to a gross sum, the widow's share of the net proceeds from a sale was invested under the supervision of the court and the income therefrom paid to her during her life. Upon her death the corpus was distributed to the remaindermen. *Wilson v. Davisson*, 2 Rob. (41 Va.) 403, 422 (1843); *Harrison v. Payne*, 32 Gratt. (73 Va.) 387 (1879); *American Nat'l Bank v. Taylor*, 112 Va. 1 (1911); *Slater v. Slater*, 124 Va. 370, 375 (1919); *Phlegar v. Smith*, 131 Va. 268 (1921). The disadvantages of this method were the skimpy returns received on the court-invested corpus and what was, in essence, a drawn-out administration of the "estate," with those entitled to the remainder having to await the death of the widow before realizing upon one-third or the whole of their inheritance. (The 1956 amendment to section

64-1, placing the widow in the second class of inheritance, has the following result: Under Va. Code Ann. § 64-27 (1950), a widow's dower is always at least a life interest in one-third of her husband's realty, but it is a life interest in the whole if he died intestate "without issue." Since it was held in *Munday v. Munday*, 164 Va. 145 (1935), that an adopted child is not "issue," before the amendment of section 64-1 if the husband left adopted children but no natural children, section 64-27 worked to the detriment of his parents or his brothers and sisters, as well as his adopted children, but under the amended statute the parents or brothers and sisters would inherit no interest in the realty and section 64-27 would deprive them of nothing. Section 64-27, therefore, now serves only to discriminate against adopted children. This discrimination is probably due to an oversight, and section 64-27 should be amended to read "children" instead of "issue.")

Offset against the advantage section 64-38.1 has of removing the widow's share from court supervision during her lifetime are the loss of relative security which allegedly naive and gullible widows have in court-invested funds, and the mechanical way in which the mortality tables apportion the interests of the widow and heirs with only statistical consideration of the possibility of an early demise on the part of the widow.

Leaving aside respect for maternal wishes and tax considerations, the chances are that heirs would prefer to gamble on the early death of a comparatively young widow and refuse to consent to commutation of her dower to a gross sum; under section 64-38.1 the widow under appropriate circumstances has a clear right to commutation even against the wishes of the heirs, and if she dies after the decree commuting her dower is entered the sum ordered paid to her is part of her estate. Dower has been enlarged and the rights of the heirs have been diminished by section 64-38.1.

In most situations that actually arise under the statute, any "hardship" on the heirs will be apparent only: The young widow whose commuted dower siphons off a large portion of

the proceeds of a sale may die shortly after the commutation of her dower; but, in all such instances her husband died with either children or grandchildren, or both, surviving him (if he had not, the widow would have taken the fee—Section 64-1, as amended) and in most families the widow will see to it that the sum she received for her dower interest is willed to the children (or grandchildren) or it will pass to them under the intestacy laws. Stepmothers might prove to be an exception.

Does a Renouncing Widow Have a Right to Commutation?

A widow who has renounced the will of her husband, or a widow for whom no provision has been made in her husband's will, is entitled to claim dower. Does she have a right to commutation to a gross sum under section 64-38.1? Although the statute speaks only of compelling the "heirs at law" (as distinguished from devisees) to pay the widow, this alone should not be taken to mean that the statute cannot be used by a renouncing widow against the devisees. The first sentence of section 64-38.1 places no limitation on the right to commutation other than the prerequisite that the petitioner's dower cannot be conveniently laid off in kind.

Although there are plausible arguments which could be advanced against allowing a widow to use the statute against devisees, it is likely that the failure of the legislature to make express provision for its use against devisees was an oversight. It is recommended that the statute be amended so as to clarify its applicability as against devisees by a widow who has renounced the will of her husband. Allowing the renouncing widow a right to commute as against the devisees would be in harmony with the trend toward enlarging the rights of a surviving spouse in the property of the deceased spouse.

The same observations are pertinent as regards the right of a widow to claim a right to commutation against creditors of her husband's estate.

Can the Widow's Petition be Filed in a Pending Suit?

To obtain commutation without the consent of the heirs,

does a widow have to institute proceedings as a plaintiff or may she file her petition in a pending suit such as a suit for partition, a suit for the sale of lands of persons under disabilities, or any other suit wherein the claim would be germane?

It would seem that a widow should be permitted to file her petition in a pending suit. Otherwise her substantive rights under section 64-38.1 might depend upon a race to the Clerk's Office to institute proceedings, or the bringing of an independent proceeding by her which, in any event, should be heard together with any other pending suit relative to the same subject matter; either alternative would be out of keeping with modern concepts of procedure.

There seems to be no good reason why the widow's "petition" could not be set out by way of petition or cross-bill in any proceeding wherein the matter of commutation might properly come before the court.

Who Can Act for an Incompetent Widow?

An election by the widow to make use of section 64-38.1 indicates that she has "consented" to a commutation of her dower to a gross sum. If the widow is incompetent, by reason of infancy or because *non compos mentis*, who is capable of filing the petition on her behalf, *i.e.*, giving "consent" for her?

Va. Code Ann. § 55-276 (1950) provides that where any of the parties interested in a commutation are under disability, the court may, upon application of the guardian, committee, or trustee, and if none, upon application of a guardian *ad litem* appointed by the court, after hearing evidence satisfactory to the court, enter an order authorizing the named persons to consent to the commutation on behalf of the incompetent. Compliance with this statute has been held to be indispensable to the effective commutation of curtesy. *Powers v. Sutherland*, 157 Va. 336 (1931).

The application of section 55-276 to a proceeding brought under section 64-38.1 could produce a rather unique pro-

cedural situation: An infant widow for whom no guardian had been appointed could presumably institute proceedings by next friend and name the heirs as defendants. The court would be required to appoint a guardian *ad litem* for the infant widow—a plaintiff—for the purpose of consenting to commutation. The court would also appoint a guardian *ad litem* for the infant defendants, if such there be. It should be noted, however, that the appointment of the guardian *ad litem* for the infant defendants would be for the purpose of giving the court jurisdiction over them and not for the purpose of consenting to commutation; strictly speaking, the consent of the heirs is not necessary to a commutation under section 64-38.1.

Estate Taxes: Commutation and the Marital Deduction.

Before the enactment of section 64-38.1, dower in Virginia could be looked upon as only a life estate in realty. It did not qualify for the marital deduction under the federal estate tax laws because it was a "terminable interest." Int. Rev. Code of 1954, § 2-56(b)(1).

The enactment of section 64-38.1 calls for a reconsideration in Virginia of the eligibility of "dower" for the marital deduction. Authority is scarce. U.S. Treas. Reg. 105, § 81.47a(b)(2)(iii) provides "that the dower or curtesy interest (or statutory interest in lieu thereof) of the decedent's surviving spouse is considered as having passed from the decedent to such spouse." This regulation is favorable to the widow because it recognizes that the dower interest meets the requirement that property in which the marital deduction is claimed pass from the decedent to the surviving spouse.

In regard to "the terminable interest" rule and dower, in Rev. Rul. 279, 1953 Int. Rev. Bull. No. 25, at 34, it is stated that where under local law the widow's dower interest consisted of a life estate in one-third of decedent's realty and that interest was thereafter commuted to a gross sum under a state statute allowing the personal representative, with the widow's consent, to sell the land and pay the widow a gross

sum for her dower interest, the sum received by the widow would not qualify for the marital deduction. It was reasoned therein that the sum received by the widow did not qualify because it stemmed from the life interest received under state law and was a terminable interest; that the sum received by the widow was not a statutory interest in lieu of dower and could not be regarded as separate and distinct from the basic dower interest to which the widow was entitled.

However, in *Crosby v. United States*, 148 F. Supp. 810 (N.D. Fla. 1957), it was held that where under an Alabama statute a personal representative was permitted to sell a decedent's land for the payment of debts and the widow by consenting to such sale could have her dower (life estate in one-third) sold and the proceeds paid to her in a lump sum, the amount paid the widow for her dower interest qualified for the marital deduction.

Both the Revenue Ruling and the above-cited case are addressed to factual situations in which state statutes empowered the personal representative to make the initial decision to institute proceedings leading to commutation. Because section 64-38.1 is believed to give the widow, in appropriate circumstances, an absolute right both to initiate the proceedings and to obtain commutation of her dower to a gross sum, and as these rights accrue immediately upon, and because of, the husband's death, it could be argued that dower (where the requirements of section 64-38.1 are met) should no longer be classed as merely a life estate in realty, but also in the nature of a vested and absolute right to acquire full ownership of personalty. Thus it could be argued that the widow's interest under section 64-38.1, if thereafter commuted to a gross sum, is in the nature of a statutory interest in lieu of dower which passed to the widow upon the death of the decedent, is not a terminable interest, and qualifies for the marital deduction.

Not Applicable to Curtesy.

Section 64-38.1 does not appear to be applicable to a husband's curtesy.