INTESTATE SUCCESSION — THE RIGHT TO ELECT DOWER — SECTIONS 21, 23 and 32, DEVOLUTION OF ESTATES ACT.

The law of intestate sucession is of such great practical importance that it should be as clear and unambiguous as possible. Unfortunately this cannot be said of the provisions of the New Brunswick Devolution of Estates Act[1] dealing with the rights of a widow whose husband dies intestate. Those provisions are set out in sections 21, 23 and 32 of the Act. Section 21 provides for the succession where the husband leaves a widow and one or more children; if there is only one child, the widow receives one-half of the estate, and if there is more than one child she receives one-third of the estate. Under section 23, when an intestate leaves a widow and no children, she is entitled to his whole estate up to $20,000, and if it exceeds that amount, then to $20,000 and one-half of the residue. So far the law is clear, but difficulty arises in interpreting section 32 of the Act, the relevant portion of which reads as follows:

> 32 .....and no widow shall be entitled to dower in the land of her deceased husband dying intestate, unless she shall elect within six months from the date of his death not to take the benefits to which she would be entitled under section 23 of this Act.

The law is clear where an intestate leaves a widow and no issue. Under section 32 the widow has the choice of taking either the benefits of section 23 or dower. However, the settlement of the estate of an intestate leaving a widow and issue is open to several interpretations.

The first possibility is that the widow of an intestate dying with issue no longer has any right to dower in the deceased's real property, but is only entitled to the benefits under section 21. This means, in other words, that dower in the land of an intestate is abolished absolutely except when he has left no issue and his widow elects not to take her benefits under section 23. While a literal reading of section 32 would give this result, several objections may be raised.

Firstly, the widow of an intestate with no issue, by having a right to take dower, would be in a preferred position to that of a widow with children. There seems no reasonable ground for this distinction, which could be inequitable to the latter. As is well known, dower attaches to all real property in which a man had a legal estate while married, even if he has conveyed it to another (unless the wife was a party to the conveyance). During his married life a man might well have owned real property of greater value than his combined real and personal property at the time of his death. In this case dower might well be of greater value than the benefit the widow would receive under section 21 — particularly if she had more than one child, when she would receive only one-third of the intestate's real and personal property. The effect is that legislation intended to benefit a widow would in fact be to her detriment.

(1.) R.S.N.B. 1952, c. 62. The Act was first passed in 1926 and these three sections are virtually unchanged. Only the provisions for interest in section 23(2) and (3) are new.

It follows from the last objection that the suggested interpretation would also have unexpected effects on the rights of a purchaser who bought land from a seller without obtaining a release from dower. If the seller died intestate leaving a widow and issue, the land in the purchaser's hands would not be subject to dower. Yet if the seller died leaving a widow and no children, the land would be subject to dower if the widow so elected. It seems inconceivable that the legislature ever contemplated so strange a result.

Another possible interpretation of section 32 is that dower in the estate of an intestate is only abolished when an intestate dies leaving a widow and no issue and she fails to elect to take dower. The widow of an intestate with issue would then receive both dower *and* the benefits of section 21, whereas if the intestate left no issue, the widow would only be entitled to dower *or* the benefits under section 23.

A similar result can be arrived at in another way. It might possibly be argued that the widow of an intestate with issue could elect not to take any of the benefits under section 23 (since she could not possibly receive such benefits anyway), and thereby be entitled to dower as well as the benefits under section 21. Both this interpretation and the previous one are subject to the objection that there seems no logical ground on which they can be justified.

Up to now, it has been assumed that the words "no widow shall be entitled to dower in the land of her deceased husband, dying intestate," in section 32 apply to all lands that have at any time been owned by the husband during his married life. It may, however, be argued that those words apply only to land owned by the husband at his death, not lands that have been conveyed to others. However, if that interpretation is adopted, it simply means that the right of election in section 32 is a meaningless procedure, because there could never be a case where dower would be more valuable than the benefits under section 23 plus dower in land conveyed to others. It is, therefore, submitted that this interpretation is incorrect.

The truth of the matter appears to be that the legislature intended that a widow should have the right to elect either dower or the benefits under the Act, whether or not the intestate left issue, but that section 32 incompletely expresses the intention. The courts might conceivably read into section 32 the necessary words, but this could more appropriately be done by the legislature. It should be noted that, under the section in the Ontario statute[2] corresponding to section 32, a widow has a choice between dower and the benefits under the Act, whether the husband leaves issue or not. It is submitted that the New Brunswick Legislature should amend section 32 so as to obtain a similar result.

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(2.) R.S.O. 1950, c. 103, s. 8(1).