

1942
 *Nov. 26

IN THE MATTER OF THE ESTATE OF JAMES D. MORICE,
 DECEASED

1943
 *Feb. 2.

CAROLINE MORICE APPELLANT;

AND

C. W. DAVIDSON, EXECUTOR OF THE SAID ESTATE, AND SAMUEL A. MOORE, ADMINISTRATOR OF THE ESTATE OF JESSIE M. GAUVREAU, DECEASED, REPRESENTING, BY DIRECTION OF THE COURT, ALL PERSONS INTERESTED IN THE SAID MORICE ESTATE EXCEPT THE APPELLANT	}	RESPONDENTS.
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ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Devolution of estates—Administration of estates—Testator's widow taking under The Dower Act, Man. (Cons. A. 1924, c. 53)—Her life estate in the homestead—Sale of the homestead by consent—What should go to her from the proceeds.

A testator's widow was entitled to and did elect, rather than take under his will, to take under *The Dower Act*, Man. (then Cons. A., 1924, c. 53). Under that Act she was entitled to a life estate in his homestead and also an amount equal in value to one-third of his net estate (including the value of the homestead). After she had been in possession of the homestead for a time, it was sold, with her consent, and the price received. There was a dispute as to what should go to her from the proceeds. Adamson J. (47 Man. R. 390) held that she was entitled to be paid forthwith \$1,400, being one-third of said sale price, and that said \$1,400 when paid should be payment *pro tanto* on the amount equal in value to one-third of the testator's net estate (to which amount she was entitled as aforesaid) and that, in addition, she was entitled to receive for her life the income of the remaining two-thirds of said sale price, which two-thirds should be kept intact in the hands of the executor of the testator's estate and not distributed until after the widow's death. The judgment of Adamson J. was affirmed (without written reasons) by the Court of Appeal for Manitoba. The widow appealed.

Held, that for said holding (appealed from) there should be substituted the following: The net proceeds of the sale of the homestead should be divided in proportion to the respective values of the life estate and of the remainder, the widow accordingly receiving out of such proceeds the share representing the value of the life estate.

APPEAL by Caroline Morice, widow of James D. Morice, late of the city of Winnipeg, in the province of Manitoba, deceased, from the judgment of the Court of

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

Appeal for Manitoba (1) dismissing (without written reasons) her appeal from the judgment of Adamson J. (2) answering certain questions raised on an application by way of originating motion by the Executor of the Will of the said deceased for the opinion, advice and direction of the Court. The questions raised required consideration of certain provisions of *The Dower Act*, Statutes of Manitoba, Consolidated Amendments, 1924, c. 53 (The Act is now R.S.M. 1940, c. 55). The questions submitted and the answers of Adamson J. (as set out in the formal judgment in the Court of King's Bench) and the material facts and circumstances of the case for the purpose of the judgment now reported, sufficiently appear in the reasons for judgment in this Court now reported.

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O. M. Biggar K.C. for the appellant.

E. K. Williams K.C. for the respondents.

The judgment of the Court was delivered by

HUDSON, J.—This is an appeal from a judgment of the Court of Appeal in Manitoba dismissing appellant's appeal from a judgment of Mr. Justice Adamson in the Court of King's Bench, on an application by the respondent by way of originating summons for the opinion, advice, and direction of the Court.

The late James D. Morice died on 13th October, 1936, leaving an estate which was valued for succession duty purposes at \$23,817.75. This amount included the estimated value of a homestead consisting of farm lands not far from Winnipeg, Manitoba.

Under the provisions of *The Dower Act* of Manitoba, the widow who is now the appellant became entitled to: (1) a life estate in the homestead; (2) a third of the net value of the estate including the value of the homestead.

The appellant took possession of the homestead and operated the farm for something over a year, but it was decided by her and by the respondent (the executor) that it would be advisable to sell this homestead. Discussions took place as to the proportion of the proceeds which should be received by the appellant in respect of her life

(1) Noted in [1942] 1 W.W.R. 865; [1942] 2 D.L.R. 777. (2) 47 Man. R. 390; [1939] 3 W.W.R. 618; noted in [1939] 4 D.L.R. 819.

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interest. The parties were unable to agree on this but, an opportunity for a favourable sale coming up, the parties agreed to the sale being made, from which sale a net sum of \$4,275 was realized. The parties continued discussions as to the proportion of the sale price which should go to the appellant for her life estate. They were, however, unable to agree.

The executor made an application to the Surrogate Court of the Eastern Judicial District of the Province of Manitoba for advice as to what amount the widow is entitled to out of the purchase price, but the Judge of the Surrogate Court held that he had no jurisdiction and suggested the parties should try and settle the matter. However, no settlement was carried out and then the executor made the present application.

There were two questions submitted, as follows:

1. Is the testator's widow entitled to receive from the executor the full amount equal in value to one-third of the testator's net estate out of the first moneys from time to time coming into the executor's hands and available for distribution before any other beneficiaries are paid, or is she entitled only to receive from time to time one-third of the amounts coming into the executor's hands, leaving the remaining two-thirds of such amounts available to the other beneficiaries?

2. Is the testator's widow entitled to receive all or any portion of the sale price of the testator's homestead, whether as part of his net real and personal property or otherwise, and if so, what amount and how and when?

The application was accompanied by an affidavit of the executor by which the above facts were verified, and adding that although he had used every endeavour to complete the administration of the estate, there were certain assets still unsold, the value of which was problematical, and certain other assets which may or may not be collected, and some of which could only be collected in part.

There were also filed on behalf of the present appellant affidavits showing the earnings of the homestead during the time in which it was held by the appellant, and also setting out certain facts bearing on her life expectancy.

The application was heard before Mr. Justice Adamson who answered the questions as follows:

(1) That the said testator's widow is entitled to receive from the said executor the full amount equal in value to one-third of the testator's net estate as defined in Section 2 (h) of *The Dower Act* including therein the amount realized from the sale of the homestead \$4,200, after the

testator's net real and personal property is ascertained in the manner provided in Section 2 (g) of *The Dower Act* as if the same were a debt of the testator at the time of his death, and that the same is payable forthwith to her out of the first moneys from time to time coming into the executor's hands and available for distribution, except two-thirds of the amount received from the sale of the homestead, before any other beneficiaries are paid.

(2) That in ascertaining and computing the value of the net real and personal property of the testator and making the payments to the testator's widow, the values of the unrealized assets and securities should be very conservative, no payments should be made on the basis of doubtful assets and the executor must take every precaution to guard and preserve the interests of the other beneficiaries.

(3) That the widow is entitled to be paid forthwith the sum of \$1,400, being one-third of the amount of the sale price of the homestead, and the said sum of \$1,400 when paid shall be payment *pro tanto* on the amount equal in value to one-third of the testator's net estate referred to in paragraph 1 hereof; and in addition the widow is entitled to receive for her life the income of the remaining two-thirds of the said sale price which two-thirds shall be kept intact in the hands of the executor and shall not be distributed until after her death.

When the appellant made her election to take the homestead and such election was approved by the Surrogate Court and she entered into possession, the homestead became her property for life. She could use it or sell or dispose of such life estate as she pleased. It was severed from the estate of the deceased. The respondent as executor was obliged to convey to her the life estate on demand. Until such conveyance he was a bare trustee for appellant of such life estate.

When the appellant and respondent agreed to sell the property, they were selling two separate estates: the life estate of the appellant and the remainder of the fee simple held by the respondent as executor of the estate. The proceeds of the sale belonged to the parties in the proportion which the life estate bore to the remainder.

The efforts of the parties to arrive at an agreement for division of the proceeds are evidence of recognition of the legal situation.

In my opinion, the value of the life estate must be ascertained on the basis of \$4,275, being the value of both life estate and remainder, and when this is done the appellant will be entitled to be paid the amount fixed as value of the life estate.

It was suggested that we here should fix the amount. I do not feel that we have adequate information to enable us to do that. We have the age of the appellant and the

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total value of the land. The earnings of the farm for a single year do not afford much assistance. If the parties cannot agree, no doubt the amount should be fixed on a reference with the aid of an actuary.

In regard to the answer to the first question, I agree in the main with Mr. Justice Adamson, but, in regard to the second, with respect, I approach the matter in quite a different way. The second answer given in the court below should be amended by substituting the following words:

The net proceeds of the sale of the homestead should be divided in proportion to the respective values of the life estate and of the remainder, the widow accordingly receiving out of such proceeds the share representing the value of the life estate.

The costs of both parties should be paid out of the estate.

Judgment below amended. Costs of both parties to be paid out of the estate.

Solicitors for the appellant: *Coyne & Coyne.*

Solicitor for the respondents: *N. J. D'Arcy.*
