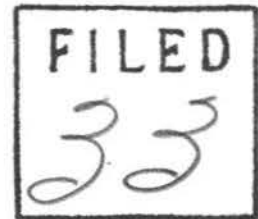


INHERITANCE TAX:  
Deductions:

Homestead and dower.

June 14, 1943

6-17



Mr. C. L. Gillilan, Supervisor  
Inheritance Tax Division  
State Treasurer's Office  
Jefferson City, Missouri

Dear Mr. Gillilan:

We are in receipt of your letter of June 9, 1943,  
requesting an opinion, which letter is as follows:

"I am in receipt of a request from a  
Probate Judge for a ruling. The facts  
as presented are as follows:

"Decedent died intestate; assets consist  
of a farm upon which he lived and per-  
sonal property; he leaves a wife (no  
children) and two brothers; the wife  
takes statutory allowance and one-half  
of assets--the two brothers one-half;  
the brothers claim a widow's dower in-  
terest should be deducted from their  
one-half interest in the real estate  
for the purpose of determining the  
amount of Inheritance Tax due on their  
interest.

"Please advise me as to the correctness  
of this claim."

In the absence of an election by the widow to take  
one-half of the real and personal estate subject to debts,  
the widow would take only one-third under the general dower  
statute, Section 318, R. S. Missouri, 1939, which is as fol-  
lows:

"Every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law, to hold and enjoy during her natural life. Dower in leasehold estate for a term of twenty years or more shall be granted and assigned as in real estate; for a less term than twenty years, shall be granted and assigned as in personal property."

Section 327, R. S. Missouri, 1939, provides for an election, and subsequent sections provide how the election shall be made.

In the case of Wallace v. Crank, 324 Mo. 1114, 26 S. W. (2d) 601, the Supreme Court held that the widow's right in the husband's estate in the place of dower is statutory, and her election must be made in substantial compliance with the statute.

In the case of Lee's Summit Building & Loan Ass'n. v. Cross, 345 Mo. 501, 134 S. W. (2d) 19, the Supreme Court held that where there is no election by the surviving spouse within the time specified by Section 329, the surviving spouse is endowed with a one-third interest for life free from debts.

Your letter states that the brothers claim a widow's dower interest should be deducted from their one-half interest. If the widow has elected to take one-half of the estate, she takes same in lieu of dower, and there is no dower whatever. If she has not elected, she will take one-third, which will be her dower.

We presume that no question of quarantine is involved because it appears from the facts that the question of dower is settled by the election to take one-half of the estate.

The only remaining problem with reference to the assessment of inheritance tax seems to be the question as to

whether or not homestead rights of the widow should be deducted from the one-half interest of the two brothers.

In the case of Adams v. Adams, 183 Mo. 396, 82 S. W. 66, the Supreme Court held that when the widow elects to take under Section 325, R. S. Missouri, 1939, she is entitled, first, to one-half of the real estate and homestead in the balance.

In the case of Coleman v. Coleman, 122 Mo. App. 715, 99 S. W. 459, the Court of Appeals held that a widow, where her husband dies leaving no lineal heirs, is entitled to one-half of the real estate absolutely, and homestead to the value of \$1,500 in the remainder.

The presumption is in favor of homestead until the contrary appears, and the burden of proving that a homestead has ceased to exist is on him who asserts it. Seilert v. McAnally, 223 Mo. 505, 122 S. W. 1064, 135 Am. St. Rep. 522. However, when the Probate Court fails to find homestead, the prima facie presumption is that there is none, and the burden of showing it is then on the parties claiming homestead. Murphy v. De France, 105 Mo. 53, 16 S. W. 861.

Therefore, in this case, if there is a homestead right, the widow would be entitled to \$1,500 out of the shares of the brothers in addition to the one-half which she has elected to take. However, if the Probate Court, in assessing an inheritance tax, determines that no homestead right exists, the presumption would be that his decision is correct.

If the widow has not complied with the statute in making her election to take one-half, the tax should be assessed on the theory that she takes only one-third. If the heirs are not satisfied with this assessment, they can resort to the remedy provided for in Section 351, R. S. Missouri, 1939, which is as follows:

"When any widow shall be entitled to dower in lands, or other real estate, whereof her husband died seized, or in which he had an interest at the time of

his death, it shall be lawful for any heir or legatee, or the guardians of such as are minors, entitled to any interest in such lands or real estate, or the executors or administrators of the intestate, or any creditor of the widow, and, after her marriage, any creditor of her husband, or any other person having any interest in such lands or such real estate, to apply by petition to the circuit court of the county wherein the principal message lies, or, if there be no such message, then in any county in which any of the lands lie, to assign and admeasure such dower, giving twenty days' notice in writing of such intended application to such widow, by personal service, or by leaving a copy at her usual place of abode."

If no election is made as required by law, and the widow takes dower under Section 518, supra, the value of her interest should be determined in accordance with Section 595, R. S. Missouri, 1939, which is as follows:

"The value of every future or contingent or limited estate, income, or interest, shall, for the purposes of this article, be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities, and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum. The commissioner of insurance in this state shall, on the application of the court, determine the value of any future or

contingent estate, interest or income and certify the same, and such certificate shall be prima facie evidence of the value of such estate, interest or income."

CONCLUSION

It is our opinion that the widow is entitled to her homestead in addition to dower if a homestead right exists, and no election or overt act on her part is necessary to protect such right. However, homestead rights do not exist in all cases, and where they have existed they are sometimes abandoned or alienated. It is within the judgment of the Probate Court, in assessing an inheritance tax, to determine whether or not there is a homestead right in favor of the widow. If she has a legal right to homestead, it should be deducted, along with dower or one-half of the assets taken in lieu of dower, from the balance of the estate which will be received by the other heirs, in determining the inheritance tax to be paid by such heirs.

Respectfully submitted

LEO A. POLITTE  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

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