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a position were destined to face difficulties.[57] Appearance in the cases[58] of the type of technical argument as that described indicates the accuracy of that prediction. The trend will undoubtedly continue. As the advantages of accurate chemical tests are apparent,[59] admissibility of their results in evidence should not depend on voluntary submission to the test by the accused. Where admissibility is dependent upon consent, statutory provision for "consent" as a condition to the use of the public highway should be considered.[60]

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Mortgages—Action for Dower in the Equity of Redemption

In a case of first impression the North Carolina Supreme Court has held that a wife's dower in the equity of redemption of real property, which had been mortgaged by her husband prior to coverture, was not barred in spite of the fact that the husband and wife had surrendered possession to the mortgagee eighteen years prior to the date of the action and the mortgagee had been in continuous possession since that time.[1]

[57] "Moreover, if the test is voluntary, and consent is necessary, how and to whom must this permission be given? Who will determine this, the judge or jury? Can an intoxicated person consent? Although as yet the queries have not been raised in any case, there is no doubt that as the tests become used more widely, the issue of 'consent' will appear as a valuable defense mechanism. Therefore, if chemical tests for alcoholic intoxication are to be employed to maximum advantage, their use should not be dependent upon the arrested driver's consent." Comment, 40 ILL. L. REV. 245, 249 (1945).

[58] State v. Sturtevant, 96 N. H. 99, 70 A. 2d 909 (1950) (Here, consent was held unnecessary so that no determination was made as to whether the test results could be excluded on the incapacity to consent because of intoxication theory. However, the court seemed to recognize that such a contention might be successful). Halloway v. State, 146 Tex. Crim. Rep. 353, 175 S. W. 2d 258 (1943) (Court held that defendant's own testimony to the effect that he was not intoxicated caused the rejection of his contention that he was incapable of consenting to the taking of a specimen of his urine). Guenther v. State, 153 Tex. Crim. App. 519, 721 S. W. 2d 780 (1949). (Defendant had raised the theory of incapacity to consent, but waived the objection, and consequently, it was not before the court). "While the test . . . shows a drunken condition which might have been sufficient to relieve appellant from any waiver of his rights to object to the evidence giving the result of the test, yet it will be seen that no such objection has come to this Court." Guenther v. State, *supra* at p. 520, 221 S. W. 2d at p. 781. Note that the Texas court requires voluntary submission by the accused in order to render results of chemical tests admissable. Apodaca v. State, 140 Tex. Crim. Rep. 593, 146 S. W. 2d 381 (1940).

[59] See note 2, *supra*.

[60] Apparently there is dispute as to whether the use of the public highway is a privilege or a right. *See* Johnston, *The Administrative Hearing for the Suspension of a Driver's License*, 30 N. C. L. REV. 27 (1951) at pp. 27-35. Statutory provision for compulsory chemical tests would be valid in either event. As a condition to the exercise of the privilege in the former, and as a reasonable exercise of police power in the latter. For a penetrating analysis of the validity of such statutory enactments, see Comment, 40 ILL. L. REV. 245 (1945).

[1] Gay v. Exum, 234 N. C. 378, 67 S. E. 2d 290 (1951).

At common law a widow had dower only in lands of which her husband was seised during coverture,[2] but by statute[3] North Carolina provides that a widow shall have dower in all equities of redemption. Hence, a wife has inchoate dower in the equity of redemption when her husband's land is encumbered by a mortgage prior to coverture. The general rule is that a wife may redeem the mortgage to protect her inchoate dower during the lifetime of her husband.[4] This is true when the mortgage was made after coverture with the wife joining in the mortgage deed,[5] or the husband purchased land encumbered by a prior mortgage,[6] or in the case of purchase money mortgages.[7] By analogy, it would seem to apply to a case where the mortgage was made prior to coverture.[8]

North Carolina has a statute of limitations which bars an action to redeem a mortgage where the mortgagee has been in possession for ten years after the right of action accrued.[9] As pointed out above,[10] the wife has the right to redeem the mortgage to protect her inchoate dower. Since her right to redeem arises when the mortgagee goes into possession, while her husband is yet alive, it would seem that requisite possession by the mortgagee should operate to bar the rights of all parties, including the wife, who could have redeemed during this period.

This is the logic followed by the Maine court in a decision involving a fact situation similar to the principal case. In the Maine case,[11] the husband executed a mortgage before coverture. After he was married, the mortgagee entered and took possession. After the husband's death the wife brought an action in equity to redeem the mortgage and have her dower allotted. The court held that the action for redemption must fail. It reasoned, in answer to the wife's contention that the statute of limitations did not begin to run against her until her husband's death, that since her husband was seised of the premises, mortgaged before coverture, she was entitled to dower in the equity of redemption and that she had such an interest in the mortgaged premises as would permit her to redeem from the mortgage in the lifetime of her husband. Therefore, her right to redeem arose when the mortgagee went into possession and since twenty years had elapsed, her right to redemption was lost.

[2] TIFFANY, REAL PROPERTY §322 (Abridged ed. 1940).
[3] N. C. GEN. STAT. §30-4 (1943).
[4] Vaughan v. Dowden, 126 Ind. 406, 26 N. E. 74 (1891); Smith v. Hall, 67 N. H. 200, 30 Atl. 409 (1892); Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721 (1906); 2 JONES, MORTGAGES §1067 (6th ed. 1928); OSBORNE, MORTGAGES 874 (1951).
[5] Taylor v. Taylor, 207 Ala. 217, 92 So. 109 (1922); Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471 (1913).
[6] Bigoness v. Hibbard, 267 Ill. 301, 108 N. E. 295 (1915).
[7] Campbell v. Ellwanger, 81 Hun 259, 30 N. Y. Supp. 792 (Sup. Ct. N. Y. 1894). See Hamm v. Butler, 215 Ala. 572, 112 So. 141 (1927).
[8] See Batchelder v. Bickford, 117 Me. 468, 104 Atl. 819 (1918).
[9] N. C. GEN. STAT. §1-47(4) (1943).
[10] See note 4 *supra*.
[11] Batchelder v. Bickford, 117 Me. 468, 104 Atl. 819 (1918).

The same reasoning is applied when the mortgagor's wife is not made a party to a foreclosure proceeding. Such a foreclosure is invalid as to her and she may still redeem the mortgage to protect her inchoate dower;[12] but, if she does not redeem within the period allowed by the statute of limitations, by the great weight of authority, the mortgagee or those claiming under him acquire good title against the wife and her dower in the equity of redemption is lost.[13]

The court in the principal case reasons that the wife's right of dower in the equity of redemption is not barred by using an analogy to cases where a husband is disseised by adverse possession during coverture. The law seems clear that a widow's inchoate dower is not lost when her husband is disseised of real property by adverse possession, either with or without color of title.[14] The reason is that during coverture the wife has no right to possession while her husband is alive. She cannot compel her husband to sue and she is without power to sue in her own name. Since she has no right of action until dower vests at the death of her husband, adverse possession during coverture does not bar her dower.[15] However, the wife does have the right to redeem from the mortgagee in possession to protect her inchoate dower. Therefore, it would seem that the court's analogy is not applicable.

The court also states that, "the loss of the husband's right to redeem by surrendering the possession of the premises to the mortgagee for a period sufficient to bar an action by him for redemption, does not have any greater force and effect upon his widow's right of dower in the equity of redemption than if he had conveyed all his right, title, and interest in such equity of redemption to the mortgagee by deed without the joinder of his wife."[16] While this statement is true, the court fails to realize that it is not action or inaction by the husband that should operate to bar the dower, but rather the failure of the wife to exercise her right to redeem the mortgage within the period allowed by the statute of limitations.

The North Carolina Court has stated by way of dictum that a widow is entitled to dower in an equitable estate of her husband only if the husband has an equity that he could enforce if living.[17] However, the

[12] Taylor v. Taylor, 207 Ala. 217, 92 So. 109 (1922) (wife joins in mortgage); Bigoness v. Hibbard, 267 Ill. 301, 108 N. E. 294 (1915) (purchased subject to existing mortgage); Campbell v. Ellwanger, 81 Hun 259, 30 N. Y. Supp. 792 (Sup. Ct. N. Y. 1894) (purchase money mortgage). No North Carolina cases have been found on this point.

[13] Bigoness v. Hibbard, *supra* note 12, Campbell v. Ellwanger, *supra* note 12. *Contra:* Barr v. Van Alstine, 120 Ind. 590, 22 N. E. 965 (1889). As to the widow's status when she has joined in the execution of the mortgage and foreclosure is had, see Note, 19 N. C. L. Rev. 82 (1941).

[14] Rook v. Horton, 190 N. C. 180, 129 S. E. 450 (1925). See Note, 41 A. L. R. 1115 (1926).

[15] Rook v. Horton, *supra* note 14.

[16] Gay v. Exum, 234 N. C. 378, 380, 67 S. E. 2d 290, 291 (1951).

[17] "But it is said a widow may be endowed of an equitable estate. This is so

decision in the principal case clearly overrides this dictum.

The North Carolina Court has a traditionally favorable attitude towards dower,[18] but it is hard to find any logical reason for not applying the ten year limitation to the wife's dower in the equity of redemption. Should a case with similar facts come before the court again, the matter should be examined anew.

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Municipal Corporations—"Necessary Expense" as Question of Law or Fact—Determination of Local Necessity*

Until 1868 the General Assembly could authorize counties, cities and towns to levy taxes and incur debt without limit.[1] Local governmental units had taken advantage of this freedom by investing heavily in the internal improvements program, suffering heavy losses when the improvement companies failed.[1a] There was a prevalent feeling that the General Assembly had allowed the public money to be foolishly spent, and there arose a demand that restrictions be imposed upon this unlimited power. One resulting limitation upon the power of the General Assembly and upon the imprudence of county and municipal officials is found in Article VII, section 7, of the North Carolina Constitution, which provides that "[n]o county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same *except for the necessary expenses thereof,* unless approved by a majority of those who shall vote thereon in any election held for such purpose."[2] [Italics added.]

The exception of "necessary expenses" from the application of this provision raised the question of who decides what are "necessary expenses," as well as the problem of which expenditures fall within the meaning of the term.[3] It was early established that the courts are to

where the husband has an equity that he could enforce if living. But in this case he had none that he could enforce, . . . And as the husband would have had no equity the plaintiff has none. . . ." Rhea v. Rawls, 131 N. C. 453, 454, 42 S. E. 900 (1902).

[18] "Dower is a favorite of the law . . . and the courts will not be astute to find ways by which it will be barred." Rook v. Horton, 190 N. C. 180, 184, 129 S. E. 450, 452 (1925).

* This material was prepared during the summer of 1951 while the author was serving as a member of the staff of the Institute of Government.

[1] *See* University R.R. v. Holden, 63. N. C. 410, 426, 431, 434 (1869).

[1a] *See* University R.R. v. Holden, 63 N. C. 410, 426, 432 (1869); Galloway v. Chatham R.R., 63 N. C. 147, 153 (1869).

[2] This section was amended by vote at the general election of November 2, 1948. It formerly required a "vote of the majority of the qualified voters therein."

[3] See Coates and Mitchell, *"Necessary Expenses,"* 18 N. C. L. REV. 93 (1940), for a thorough discussion of the classifications of expenditures, the tests and standards which have evolved from the cases deciding what are and what are not "neces-