University of Miami Law Review

Volume 18 | Number 3 Article 2

5-1-1964

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FURTHERING TITLE MARKETABILITY BY SUBSTANTIVE REFORMS WITH REGARD TO MARITAL RIGHTS

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I. INTRODUCTION

The problem of title marketability has received considerable attention in recent years.[1] Most of the recent efforts have been directed towards mechanics: the simplification of the instruments used;[2] improvement of the recording system;[3] or shortening the length of time a title must be checked before it can be deemed to be marketable.[4] These matters illustrate one important approach to the problem, namely that of making the present system operate better. This article will explore an alternative approach, that of suggesting substantive reforms directed at simplification of conveyancing. Attempts along this line have been made in the past,[5] of which the best illustration is the modern English land

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Acknowledgement is accorded the Lawyers' Title Guaranty Fund for their contribution. See *infra* n.8.

1. Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47 (1958); Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139 (1960); Catsman, *A Proposed Marketable Record Title Act for Florida*, 13 U. FLA. L. REV. 334 (1960); Carmichael, *The Current Proposed Marketable Title Act*, 34 FLA. B.J. 139 (1960); Cromwell, *The Improvement of Conveyancing in Montana by Legislation—A Proposal*, 22 MONT. L. REV. 26 (1960); Jones, *Title Standards*, 28 J.B.A. KAN. 157 (1959); 46 KY. L.J. 605 (1958); 68 YALE L.J. 1245 (1959); 34 WIS. B. BULL. (May 1961 spec. ed.).

2. FLA. STAT. §§ 689.02—.03 (1963) prescribe a short form of warranty deed, and provide that they shall contain "full common law covenants."

3. Problems of interests not adequately shown by the record, like celibacy of the parties, delivery of the instruments, genuineness of signatures, capacity of grantor, imperfections in acknowledgements or witnessing, variances in names shown, unrecorded possessory interests, are attempted to be dealt with in part by marketable title legislation and by curative acts.

4. One of the facets of proposed marketable title legislation is to shorten the time which a title need be searched back. Most titles in Florida are now over one hundred years old, although this is relatively inconsequential in comparison to an "older" state like Massachusetts, where the chains of title may well stretch back to that delightful phrase of conveyancers, "time out of mind." Marketable title legislation is fully discussed in SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960). The first state to enact the most advanced type of marketable title legislation was Michigan. MICH. COMP. LAWS §§ 565.101—.109 (1948). Florida has passed marketable title legislation in the 1963 session. FLA. STAT. §§ 712.01—.10 (1963).

5. One is the suggestion of compulsory recordation as a prerequisite to the validity of instruments, even *inter se*. This is a step beyond the "race" type of recording statute, which requires recordation as a prerequisite to validity of an instrument only as against a subsequent purchaser. N.C. GEN. STAT. § 47-48 (1943). A better known alternative is title registration, or the Torrens system. MASS. GEN. LAWS ch. 185 (1932). A radical alternative is the English solution, expressed in the 1925 Property Act, in which all legal estates other than fee simple and the estate for years were abolished. See note 6 *infra*.

reform act,[6] promulgated in 1925, which through substantive reform of the most radical type, eliminated many of the problems which we still face. That the squeaking wheel gets the oil is a homily that no one will dispute, and it is certainly true of our representative form of government. Since this is not a problem of pressing public interest, it is unrealistic to expect our state legislature to move of their own accord.[7] Reform, if we are ever to have it, can only come from the efforts of those most vitally involved, the legal profession. Fortunately, in Florida, the legal profession has been acutely aware of its responsibilities.[8]

This paper is directed solely towards the questions of marital rights, the rights of the husband and wife in the realty of each other. It will not deal with questions of homestead rights, nor of either joint tenancy or tenancy in common between spouses.

The basic problem is the need for the title examiner to ascertain the existence of possible outstanding marital interests, and their effect upon the title he is examining. To do this, he must consider the marital status of all persons in the chain of title, and make certain that all spouses have joined in the deed or other instrument. The presence of a spouse increases the number of signatures needed which thereby increases the risk of forgery or impersonation. This is more than a joinder problem, for marital interests may be vested, although not of record.

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6. Law of Property Act, 1925, 15 Geo. 5, c. 20. See generally, Bordwell, *English Property Reform and its American Aspects*, 37 YALE L.J. 1 (1927); Cheshire, *The Recent Property Legislation in England*, 74 U. PA. L. REV. 767 (1926).

7. Curious results are likely to obtain when a legislature actually takes up its cudgels in favor of change. Attempts at radical change were made by the District of Columbia and Massachusetts. Massachusetts twice enacted legislation abolishing the estates of dower and curtesy, but recalled the legislation due to afterthoughts of unconstitutionality. Congress enacted a statute which purported to abolish the right of dower in the District of Columbia. Instead, it inadvertently enlarged the common law concept of dower, extending it to both husband and wife, granting to each an inchoate interest in the realty of the other. Rather than having the effect of simplifying titles to realty, this enactment actually doubled the complications. See *infra* notes 194 and 195.

8. The Real Property, Probate and Trust Law Section of the Florida Bar has been most active in promoting both substantive reforms and procedural methods for improving conveyancing. The adoption of Uniform Title Standards and the continual review of existing standards and the promulgation of new ones are ample testimony of the profession's concern and dedication.

The Lawyers' Title Guaranty Fund, a Massachusetts trust type organization of Florida Attorneys, which insures its members' opinions of title, cooperates most actively with the organized Bar, with the law schools throughout the state, and with the law students in promoting interest in real property problems. The Fund conducts annual seminars at the various law schools on title examinations; contributes to student publications; gives writing supplies to students; conducts an annual essay contest for students; and makes an annual contribution to the major law schools. At the University of Miami the Fund's contribution is used to subsidize student research of specific problems. This article is one result of that activity. It is contemplated that additional articles exploring the bulk of our traditional property estates as well as other timely articles, such as that on the Marketable Title Act, 18 U. MIAMI L. REV. 103 (1963), will also be published as a result of this contribution.

The seriousness of the problem may be illustrated by the following hypothetical case which, although perhaps not typical, occurs with sufficient frequency to cause concern. H and W are married in another jurisdiction. Troubles later develop; the two separate and H moves to Florida. Subsequently, in dealing with realty, H represents himself as a single man, although in fact the parties were never divorced. At the death of H many years later, W can, if she acts promptly, claim a one-third interest in all the parcels which he had conveyed without her joinder. A further complication is possible. Suppose that H "remarries" without benefit of divorce, and his second "wife" joins with him in the execution of all his conveyances.[9] Other situations are no less probable. H, who owns land in Florida which he has been trying to sell for some time, receives an offer in the mail at his northern home from his Florida broker, which is acceptable to him. If the offer is accompanied by a prepared deed, he may be tempted to consumate the sale without telling his wife, via the device of utilizing a female friend or secretary to impersonate his wife, and to join with him in executing the prepared deed before a friendly notary who is not too particular about details. Of course, the Florida purchaser is not personally familiar with the true wife's signature so as to be able to detect the impersonation.[10]

The difficulties involved in this aspect of title examination are instantly apparent, since marital status must be checked well back into the chain of title. In addition, the validity of divorces obtained by persons in the chain of title must be investigated as well. The major problem, of course, is that of *inchoate* dower, which together with curtesy, will be examined from their historical development to their actual impact upon titles today.

II. CURTESY

Curtesy is traceable to Roman law, with its concept of the *dos*, which is the separate property of the wife which she brought with her to the marriage.[11] Upon the marriage, control of this property passed to the husband, who became the usufructuary of the dotal property with full rights to manage it. However, both the title and the right to posses-

9. See Alexander v. Colston, 66 So.2d 673 (Fla. 1953), where the husband deserted his wife, bigamously remarried, and dealt in four different parcels with his bigamous new "wife." When a possibly bigamous second "wife" is involved, complications arise from the conclusion usually reached by the law that the last marriage is valid. This conclusion is supported by the presumption that the prior marriages had terminated legally. Although this presumption is stated to be among the strongest known to the law, it can be effectively rebutted. Quinn v. Miles, 124 So.2d 883 (Fla. 1st Dist. 1960).

10. A similar tangled situation is reported in Omwake v. Omwake, 70 So.2d 565 (Fla. 1954).

11. The roots of curtesy extend perhaps beyond the time of the Romans. It is mentioned in the Bible, as the property which the wife brings with her to the marriage. *Genesis* 30:20, 34:12. See generally Kagan, *The Nature of Dowry in Roman Law—Rights of Husband and Wife*, 20 TUL. L. REV. 557 (1946).

sion of the property remained in the wife; the husband did not receive an "estate" in the property. As a mere usufruct, he was not permitted to commit waste, and all accretions belonged to the *dos*. As usufruct, he had a duty to maintain the property, to keep up the herds or repair the manors.[12] The Norman and French law had customs whereby the husband acquired rights in his wife's property after her death, the birth of issue being required.[13] England recognized curtesy as early as the beginning of the twelfth century.[14] Rights in the husband were initially granted only as to the lands which were the wife's marriage portion, and which were settled upon her at the time of their marriage. Later developments granted curtesy to all lands owned by the wife, acquired before or during their marriage.[15] The English law as it developed was more liberal than the Norman law from which it was derived, in that it gave recognition to the possessory right of the husband in all the property of his wife during their joint lives.[16] However, if issue capable of inheriting the estate of the wife were born alive during their marriage, the husband's interest was extended, and thereafter the husband held a life interest in all the lands of the wife, for his life alone.[17] The interest was no longer tied to their joint lives. In addition, he retained the usufructuary right which he had obtained prior to the birth of the issue.[18] In a large sense, the idea of curtesy is akin to that of guardianship, hence the requirement of issue being born alive. The duties of the husband to be the guardian of his issue is part of the rationale for extending his interest in the wife's property beyond her death. This interest also favored family stability, for in the absence of curtesy, the husband would be turned out of the wife's lands at her death, and control of the property and the guardianship of their children would pass to the heir at law of the wife. This right of guardianship was a valuable one.[19] Another reason underlying the concept of curtesy could be found in the incident of the feudal organization which required military service from the land. If the lands remain in the husband, he could be compelled to render the military service then due. This could not be done if the lands descended to the heirs of the wife, who might still be infants.[20]

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12. Kagan, *op. cit. supra note* 11.

13. SUMMA DE LEGIBUS NORMANNIE 307 (Tardiff ed. 1896); ANCIENNE COUTUME DE NORMANDIE 301 (de Gruchy ed. 1881).

14. GLANVILLE, DE LEGIBUS VII 18 (Woodbine ed. 1932).

15. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 414 (2d ed. 1898).

16. This possessory right was called *jure uxoris*. Its creation did not depend on the birth of issue, in distinction to curtesy. Bank of America v. Banks, 101 U.S. 240 (1879).

17. This life interest to the husband was called curtesy initiate. It became curtesy consummate upon the death of the wife, although there was then no enlargement of the surviving husband's rights.

18. Of course, if no issue were ever born alive, then at the death of the wife, her lands descended to her heirs. 3 Holdsworth, THE HISTORY OF THE ENGLISH LAW 185 (5th ed. 1942).

19. Ratcliff's Case, 3 Co. Rep. 37, 76 Eng. Rep. 713 (K.B. 1592).

20. 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 468 (2d ed. 1898).

Therefore, the requirements of curtesy soon hardened into three: (1) a valid ceremonial marriage; (2) an estate of inheritance in the wife; (3) birth of issue alive. The possible later death of the wife did not affect the husband's rights, for once those three elements obtained, the rights of the husband were thereafter fixed and were no longer governed by their joint lives. The nomenclature varied slightly, as the husband's interest was called curtesy initiate prior to the death of the wife, and curtesy consummate thereafter, but the incidents of the estate did not change. Actual seisin in the wife was initially held to be a prerequisite,[21] but the passage of the Statute of Uses[22] granted to the husband curtesy rights in the equitable estates[23] of his wife to which he was not entitled under prior law. Since issue capable of inheriting the estate of the wife was required, curtesy was granted to the husband in lands which his wife held in fee simple and tail general, but not to those held by her in fee tail special.[24] Nor did curtesy attach to life estates held by the wife, nor the estates pur autre vie held by her, since an inheritable estate was clearly required.[25] Curtesy can attach to equitable estates of the wife,[26] or to proceeds from the sale of land where under the doctrine of equitable conversion it can be said that the character of realty is retained in the proceeds.[27] Similarly, it can attach to the proceeds from a foreclosure sale, since they represent the equity of redemption of the mortgagor-wife in the encumbered lands.[28]

In those states where the Uniform Partnership Act[29] has been adopted, there can be no curtesy in lands owned by the partnership.[30] The rights of curtesy are derivative in the same sense as dower, and curtesy can be cut off upon the determination of the underlying estate. However, certain determinable interests of the wife will not cut off curtesy once obtained by the husband.[31]

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21. Co. LITT. 31a; 2 BLACKSTONE, COMMENTARIES *128.

22. 27 Hen. 8, c. 10 (1536).

23. Countess of Radnor v. Vandebendy, 16 Lds. Jo. 159, 1 Eng. Rep. 48 (H.L. 1697); Snell v. Clay, 2 Vern. 324, 23 Eng. Rep. 809 (Ch. 1695).

24. An estate in tail *general* is a grant to a person and to the heirs of that grantee's body. McLeod v. Dell, 9 Fla. 427 (1861). An estate in tail *special* limits the estate entailed only to the issue of the grantee by a *special* (particularly designated) spouse. Toney v. Toney, 218 Ark. 433, 236 S.W.2d 716 (1951). All entails are abolished in Florida FLA. STAT. § 689.14 (1963).

25. 4 KENT, COMMENTARIES *30.

26. *Supra* note 23.

27. Mullen v. Mullen, 98 N.J. Eq. 90, 129 Atl. 749 (1925); Deffenbaugh v. Hess, 225 Pa. 638, 74 Atl. 608 (1909).

28. ILL. REV. STAT. ch. 3, § 26 (1959); ORE. REV. STAT. § 113.140 (1961); W. VA. CODE § 4099 (1961).

29. Approved by the Conference of Commissioners on Uniform State Laws in 1914.

30. Uniform Partnership Act § 25(2)(e). See note 59 *infra*.

31. Holden v. Wells, 18 R.I. 802, 31 Atl. 265 (1895) (husband of wife who held fee tail, which had ended due to the death of their issue, still entitled to his curtesy estate after the death of his wife even though her estate had determined).

Curtesy is an interest only of historical interest in Florida, for the enactment of the Married Women's Property Act[32] has, in effect, abolished curtesy initiate since it grants entire possession and management to the wife just as though she were not married, save for the vestigial requirement that any conveyance by the wife of her separate realty must be joined in by her husband.[33] Even this joinder requirement can be eliminated by a judicial declaration that the wife is a "free dealer,"[34] a declaration which can be obtained despite the objections of her husband.[35] Curtesy consummate has effectively been abolished by the Florida Statute of Wills,[36] which permits a wife freely to will and devise her separate property without any reservation by law of any interest to the husband,[37] and by the provisions dealing with descent and distribution,[38] which similarly allow for the distribution of intestate property of the wife[39] without reservation of any curtesy rights to the husband.[40]

III. DOWER IN GENERAL

Dower originated prior to the time of the Norman conquest, well back in the pre-Anglo-Saxon Teutonic era in England.[41] Dower originally arose out of the agreement of the parties, as part of their marriage contract.[42] The major reason for dower at common law was the needs of the times. Clearly, there was a need to provide for the possible future support of the wife after the death of her husband. The bulk, if not all, of the wealth of the country was in the form of realty. The wife would

32. FLA. STAT. §§ 708.01-.10 (1963).

33. FLA. STAT. § 708.08 (1963).

34. FLA. STAT. §§ 62.38-.46 (1963). But note that this situation must be distinguished from that of homestead property, wherein both spouses *must* join in any conveyance.

35. Issuance of the decree is based upon the "character, habits, capacity, competency, and qualification of such married woman to take charge of and manage her own estate and property and to become a free dealer." FLA. STAT. § 62.43 (1963).

36. FLA. STAT. ch. 731 (1963).

37. See Herzog v. Trust Co., 67 Fla. 54, 64 So. 426 (1914).

38. FLA. STAT. § 731.23 (1963).

39. FLA. STAT. ch. 731 (1963). Note that the husband is an heir of his intestate wife under the statute of descent and distribution. But he is not a forced heir, for she can disinherit him completely by her will. This power is not correlative, for he cannot disinherit her. Herzog v. Trust Co., 67 Fla. 54, 64 So. 426 (1914); Colcord v. Conroy, 40 Fla. 97, 23 So. 561 (1898).

40. See generally Haskins, *Curtesy at Common Law: Historical Development*, 29 B.U.L. REV. 228 (1949); Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345 (1948).

41. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 326 (2d ed. 1898). Some very early formal recognition of dower can be found in GLANVILLE, DE LEGIBUS VI 1, 2 (Woodbine ed. 1932).

42. Dower *ex assensu patris* was the grant of a dower interest to the bride in certain named lands belonging to the family of the groom. The grant was actually made by the head of the groom's family, hence the name. GLANVILLE, DE LEGIBUS VI 17 (Woodbine ed. 1932). Dower *ad ostium ecclesiae* was an endowment of the bride, by the groom, at the time of their ecclesiastical marriage, that is, at the church door. GLANVILLE, DE LEGIBUS VI 1 (Woodbine ed. 1932); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 372-73 (2d ed. 1898).

be cast adrift if she did not have legally enforceable rights in some realty. The interest in the husband's lands of which the wife became endowed was early recognized to be free of the debts of her husband.[43] However, the principles of dower were generally opposed to the principles of feudalism and its military tenure backbone. It was desirable to keep the estates intact and to have a sole owner responsible for feudal obligations. To the extent that land devoted to the support of non-combatant widows would yield no military strength and render it burdensome for the respective heirs (primogeniture was the rule of inheritance) to fulfill their duties, the entire structure would be threatened. Thus, the feudal overlords were not in favor of dower.[44] The dower interest conflicted with still another trend of the times. A divergent anti-feudal concept favored free alienability of lands. This could not be accomplished as long as lands were held in military tenure of the overlord, since his approval was necessary for all transfers. Thus, as interests in land came to emerge from the feudal restrictions on alienation, a new restraint in the form of the clog of dower came into being. Despite the opposition of the feudal forces, and the opposition of those who favored free alienation, dower still came to be recognized as an inherent part of the common law, and its extent was fixed at one-third for the life of the widow.[45]

Once the skeleton was etstablished, the flesh was soon placed upon the frame, and further rules developed. Seisin of the husband was required, and hence, dower did not apply to non-freehold interests of the husband,[46] nor to reversionary interests following freehold interests held by others.[47] The wife's inchoate right was recognized, and she was permitted recovery against a feoffee of her deceased husband, if her consent[48] had not been obtained to the transfer. Her interest was recognized as derivative, and if the estate was forfeited due to felony or treason of the husband, her dower interest was also forfeited.[49] Of course, dissolution of the marriage by judgment of divorce due to her miscon-

43. MAGNA CARTA c. 11 (1215). This freedom from the debts of the husband did not, of course, extend to debts that were due to the Crown. Today, estate tax liabilities are superior to the widow's dower. INT. REV. CODE OF 1954, § 6324(a)(1). *But see,* United States v. Ettelson, 67 F. Supp. 257 (E.D. Wis. 1946).

44. That dower ran counter to strict feudal notions, see: PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 567 (5th ed. 1956); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 424 (2d ed. 1898).

45. MAGNA CARTA c. 7 (1217).

46. But certain freeholds of the husband to which one might expect dower to attach, were also excepted. An example was the life estate *pur autre vie.* Another was the joint estate. CO. LITT. 36a.

47. Hopkins v. Magruder, 122 F.2d 693 (4th Cir. 1941); Geldhauser v. Schultz, 93 N.J. Eq. 449, 116 Atl. 791 (Ct. Err. & App. 1922).

48. This consent was usually obtained via the levy of a fine before a judge. See note 53 *infra.*

49. BRITTON 551 (Nichols ed. 1901).

duct also terminated the dower interest.[50] The statute *De Donis*[51] permitted the creation of the fee tail, and provided that the conditions of the entail were met, the wife was granted dower in the estate.[52] In the same year, a statute was enacted[53] which eliminated the previously possible divestiture of dower by a collusive suit brought at the behest of the husband. This further protected the wife against the possible alienation of the lands by her husband during his lifetime without her joinder.

In the United States, dower has developed further. The seemingly simple common law rules and principles have become subject to a multitude of exceptions and exclusions. As a result it would seem questionable whether dower as it was can be harmonized with complex modern fact situations. It is philosophically obvious that when a principle becomes riddled with exceptions and incongruities, it is time for a reappraisal of its utility as a principle. Some of these curiosities are here illustrated. The early views required a ceremonial marriage to be performed by the ecclesiastical authorities,[54] but this requirement obviously has no force in states where the dower interest results from statute, and where non-ceremonial common law, or consensual, marriages are recognized, as in Florida. There can be no dower during the continuance of a joint estate with right of survivorship.[55] Further modification of comomn law rules is seen in relation to the status of a mortgagee's wife. In states that follow the title theory of mortgages, the mortgagee is the legal titleholder and is deemed to be seised of the property.[56] The mortgagee's wife would seem entitled to a dower in-

50. GLANVILLE, DE LEGIBUS VI 17 (Woodbine ed. 1932). Statute of Westminster II, 1285, 13 Edw. 1, c. 34. "[I]f a wife willingly leave her husband and go away, and continue with her advouterer," she would be barred of dower, unless her husband forgave her later. Followed in Daniels v. Taylor, 145 Fed. 169 (8th Cir. 1906). This statute held *not* to be in force in Florida. Wax v. Wilson, 101 So.2d 54 (Fla. 3d Dist. 1958).

51. Statute of Westminster II, 1285, 13 Edw. 1, c. 1.

52. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 193 (4th ed. 1935).

53. Statute of Westminster II, 1285, 13 Edw. 1, c. 4. See generally Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948). The *fine* was a conveyancing device using an amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. BLACK, LAW DICTIONARY (4th ed. 1951). The use of the fine continued for other purposes unconnected with dower until its total abolition by the Fine and Recovery Act, 1834, 3 & 4 Will. 4, c. 74.

54. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 622 (4th ed. 1935); Thompson v. Thompson, 114 Mass. 566 (1874).

55. Johnson v. Muntz, 364 Ill. 482, 4 N.E.2d 826 (1936). Of course, there will be dower to the wife of the last surviving tenant, for he will clearly hold sole seisin. An alternative rationale for the denial of dower to the wife of a joint tenant is based on priorities of interest. The joint seisin of the joint tenants is subject to the superior right of survivorship, to which the dower rights of any individual tenant's wife must be subordinated. It is absurd to contemplate dower in lands held by entireties. There is dower in lands held by the husband as tenant in common, since in that case he is seised of an estate of inheritance as to his undivided portion.

56. Lightcap v. Bradley, 186 Ill. 510, 58 N.E. 221 (1900).

terest, but the rule obtaining in title jurisdictions does not follow to that logical conclusion. Instead, the general rule is that the mortgagee's wife is not entitled to dower, whereas the mortgagor's wife is, exactly as she would be entitled in a lien theory jurisdiction[57] where the question would not arise. In states that have enacted the Uniform Partnership Act[58] there is no dower interest attached to any realty owned by the partnership.[59] In those states that have not adopted this act, but which follow the "out-and-out personalty" view,[60] there is also no dower granted to partners' wives. In the other states that do not have the Uniform Partnership Act, and which follow the "pro-tanto" view, dower can attach to partnership property.[61] Of course, when the partnership is dissolved, then dower will attach, as thereafter the ex-partners hold what had been partnership property as tenants in common.

Rights to dower in specific property will be governed by the law of the place where the property is located. It is not controlled by the law of the domicile of the parties, nor by the law of the place where the marriage was solemnized.[62] A point rarely à propos, is the citizenship of the wife. The common-law view denied an alien the capacity to take dower.[63]

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57. As an example, Illinois, in the *Lightcap* case, *supra* note 56, professed to follow the title theory. But it hedged on this point of dower to the mortgagee's wife, holding that there was none, on the rationale that while the mortgagee has title, it is only for the protection of *his* interest. In Sturges & Clark, *Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691, 707-08 (1928), it is stated that while under the title theory, an inevitable logical conclusion would seem to demand that a mortgagee's wife have a dower interest due to his seisin, no American case has so held.

58. As of 1962, this act has been adopted in forty states plus the District of Columbia, but not in Florida.

59. "A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs or next of kin." UNIFORM PARTNERSHIP ACT § 25(2)(e).

60. The interest of each partner in the partnership is treated as personal property "out-and-out," even though the partnership may own realty only. By thus viewing the partner's interest as personalty, both dower rights and rules of descent are established, and the fact that realty may be involved is simply ignored. See generally CRANE, PARTNERSHIPS 170 (1938). B. A. Lott, Inc. v. Padgett, 153 Fla. 308, 14 So.2d 669 (1943), it was held that a partner's interest in firm assets could be sold under execution; and Loubat v. Nourse, 5 Fla. 350 (1853), held that dower would not be enforced against a former creditor of the firm who took a conveyance in satisfaction of the debt, the court following the "pro tanto" theory and stating that a partner's interest in realty descends to the heir, and the widow may have dower, but that both rights are subject to the claims of the firm creditors.

61. Faust v. Heckler, 359 Pa. 19, 58 A.2d 147 (1948); Estate of Ostler, 4 Utah 2d 47, 286 P.2d 796 (1955).

62. Dowling, *Dower in Florida*, 31 FLA. B.J. 345 (1957).

63. Countess De Conway's Case, 2 Knapp 364, 12 Eng. Rep. 522 (P.C. 1834). Schoellkopf v. DeVry, 366 Ill. 39, 7 N.E.2d 757 (1937) permitted an alien wife to have dower, but the Illinois statute specifically authorized this. Annot., 110 A.L.R. 520 (1937). All states now permit aliens to take. See, *e.g.*, FLA. STAT. § 731.28 (1963); California, which abolished dower in 1872 (community-property state), CAL. CIVIL CODE § 173, has limited the real property rights of aliens, CAL. PROBATE CODE § 259, to permit aliens to inherit only if their country would permit a U.S. citizen to inherit land located there —in short, requiring reciprocity. In that sense—of reciprocity—an alien's rights are limited. *In re* Knutzen's Estate, 31 Cal. 2d 573, 191 P.2d 747 (1948); *In re* Nersisian's Estate,

Classically, dower attached to lands of which the husband had been seised during the marriage.[64] This also has been subject to some modifications. In some states an early view was that there is no dower to the wife in uncultivated lands of the husband.[65] The rationale is that to grant dower would render the lands unmarketable in part, and that there is really no useful function to dower in such lands, since they cannot be used to support the widow because of their uncultivated state, and a life interest in one-third would be an empty grant. This view persists in some states.[66] Conversely, a dower interest could be had in mines owned by the husband, even though the husband may not have had seisin, provided only that the mines had been open and worked during the lifetime of the husband.[67] No dower could be had in future interests because of the seisin requirement,[68] but this situation has been modified by statute in some states.[69] In addition, statutes now grant dower in estates for years held by the husband, provided that the term is sufficiently long.[70] Although a divorce will generally terminate dower rights, in some instances, such as when the divorce is awarded to an "innocent" wife, she may continue to have dower rights in the lands of her ex-husband.[71]

Attempts at simple generalizations as to the extent of the dower interest are complicated by the concept of equitable conversion. This operates to treat some realty as personalty not entitled to dower, and conversely, to treat some personalty as realty entitled to dower.[72] Intrusion of this principle of equitable conversion creates a number of technical problems for the title examiner, which by virtue of their complex nature, adversely affect marketability. In view of the extent of the problems created, one may wonder whether the utility of the dower interest is worth retaining.

Under the doctrine of equitable conversion it has been held that

155 Cal. App. 2d 561, 318 P.2d 168 (1957); *In re* Karban's Estate, 118 Cal. App. 2d 240, 257 P.2d 649 (1953).

64. Harrington v. Feddersen, 208 Iowa 564, 226 N.W. 110 (1929).

65. Ford v. Erskine, 50 Me. 227 (1862); Webb v. Townsend, 18 Mass. (1 Pick.) 21 (1822); Johnson v. Perley, 2 N.H. 56 (1819).

66. MASS. GEN. LAWS ch. 189, § 3 (1932); N.H. REV. STAT. § 560:4 (1955).

67. Stoughton v. Leigh, 1 Taunt. 402, 127 Eng. Rep. 889 (C.P. 1808); Coates v. Cheever, 1 Cow. 460 (N.Y. 1823).

68. The present requirement in Florida is only that the husband "own" the lands involved, and no longer that he must be "seised" of them. FLA. STAT. § 731.34 (1963).

69. W. VA. CODE § 4096 (1961).

70. MASS. GEN. LAWS ch. 186 (1932); MO. REV. STAT. § 318 (1959).

71. A divorce *a vinculo matrimonii* will usually bar dower rights to the divorced wife. A divorce *a mensa at thoro* (usually called a legal separation) might not bar dower rights to the wife. Specific statutes will of course govern. Stahl v. Stahl, 114 Ill. 375, 2 N.E. 160 (1885); Chrisman v. Linderman, 202 Mo. 605, 100 S.W. 1090 (1907) (construing Illinois and Missouri statutes which permitted dower to survive a divorce and be granted to the ex-wife, even though she had remarried). See also 1 AMERICAN LAW OF PROPERTY § 5.36 (Casner ed. 1952), and text accompanying note 125 *infra*.

72. See Harrington v. Feddersen, 208 Iowa 564, 226 N.W. 110 (1929).

a wife may be entitled to a dower interest from the proceeds of, or surplus remaining after, a foreclosure sale, on the theory that though the realty to which dower attached was converted to personalty by the foreclosure sale, the essential right to dower remains.[73] Further problems may arise in determining the wife's exact interest in the proceeds. (This problem is to be distinguished from those situations where her dower interest is superior to the mortgage being foreclosed, since in that case, the foreclosure will not affect her rights.)

When the mortgage being foreclosed is superior to her dower interests, or is a mortgage in which she had released her dower, difficulties arise when the husband dies prior to the disbursement of the sale proceeds. There are at least three possible methods of treating this problem. One would be to grant her a dower interest in the surplus remaining after the sale, if any.[74] Another may be to grant her so much of the surplus as will equal one-third of the entire land value.[75] Under the third method she may be granted one-third of the entire property value based on the view that her husband or his estate is the obligor of the mortgage debt, her dower being a mere surety entitled to exoneration.[76] A variant of this principle is seen in certain condemnation situations where a dower interest will be protected in the award.[77] Clearly, the dower interest does not extend so far as to make of it an estate of inheritance to which issue can succeed.[78] However, it is an interest which the courts are alert to protect.[79] When a mortgage superior to a dower interest is sought to be foreclosed, the wife holding that dower interest must be treated as a junior encumbrancer and joined to the proceedings. She therefore has the right to redeem the property from the mortgagee, and thus protect her dower interest in her husband's property.[80]

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73. Hawley v. Bradford, 9 Paige 200 (N.Y. Ch. 1841); Mandel v. McClave, 46 Ohio St. 407, 22 N.E. 290 (1889). In some states, a similar result is achieved by statute. VA. CODE § 64-30 (1950); W. VA. CODE § 4098 (1961).

74. Hewitt v. Cox, 55 Ark. 225, 15 S.W. 1026 (1891).

75. Commercial Banking & Trust Co. v. Dudley, 76 W. Va. 332, 86 S.E. 307 (1915).

76. Gwathmey v. Pearce, 74 N.C. 398 (1876); 19 N.C.L. REV. 82 (1940). See also *In re* Payne's Estate, 83 So.2d 109 (Fla. 1955); Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936); Rubin v. Rubin's Estate, 144 So.2d 527 (Fla. 3d Dist. 1962) (personalty).

77. *In re* Cropsey Ave., 268 N.Y. 183, 197 N.E. 189 (1935). See note 123 *infra,* and accompanying text.

78. Poulson v. Poulson, 70 A.2d 868 (Me. 1950). *But see* FLA. STAT. § 731.35(3) (1963). This statute now permits the widow's right to elect dower to descend, in some limited situations. See also note 187 *infra* and accompanying text.

79. "The object of the ancient right of dower was to furnish means and sustenance for the wife, and for the nurture and education of the younger children after the death of the husband and father. The courts have ever been vigilant and astute in preserving dower." Moore v. Price, 98 Fla. 276, 288, 123 So. 768, 772 (1929).

80. Evans v. Robertson, 177 Ark. 419, 6 S.W.2d 536 (1928); Bigoness v. Hibbard, 267 Ill. 301, 108 N.E. 294 (1915); Vaughan v. Dowden, 126 Ind. 406, 26 N.E. 74 (1891); Fitcher v. Griffiths, 216 Mass. 174, 103 N.E. 471 (1913); Mackenna v. Fidelity Trust Co., 184 N.Y. 411, 77 N.E. 721 (1906); McMichael v. Russel, 68 App. Div. 104, 74 N.Y. Supp. 212 (1902); Annot., 65 A.L.R. 963 (1930).

Consider the problems attendant to a mortgage foreclosure when the husband is still alive at the time of the distribution of the sale proceeds. In this instance, inchoate dower is dealt with, rather than consummate dower. There are two distinct problems to be considered. One is the extent of the interest of the wife in the proceeds, and the other is the nature of the title which the purchaser at the foreclosure sale will receive. When the mortgage is superior to her dower rights and she is properly joined, it is clear that the purchaser will take title free of any present or potential claim of the wife. An interesting incongruity arises when we note the distinction in results obtained depending on whether the mortgage obligation is enforced at law or via foreclosure in equity[81]—in those cases where the mortgage is inferior to her dower claims. In addition, it is possible that when the mortgage is inferior to her interest, she may be permitted to elect whether she will assert an immediate interest in the sale proceeds, or await the eventual determination of the joint lives of herself and her husband. If she chooses to await the eventual death of her husband, it is possible in the interim for the person in possession to waste the premises.[82] A converse situation may occur if the person in possession substantially improves the premises.[83] In the event that the wife elects to assert some immediate interest in the sale proceeds, application of the doctrine of equitable conversion logically results in the view that since her dower had attached to the realty which was converted into personalty represented by the sale proceeds, her dower ought to continue in the sale proceeds. It would seem that if the wife makes the election, the purchaser of the property ought to be free from possible later dower elections.

Questions remain as to the extent of her interest in the sale proceeds. Is her interest to attach to the entire sale proceeds, or only to the surplus remaining after the foreclosed obligation is satisfied?[84] Is

81. See text accompanying notes 136-39 *infra*. Of course, no creditor would waive the lien of the mortgage and sue at law if there were other creditors or homestead protection were involved.

82. The general rule is that the wife of the vendor has no standing to enjoin the vendee from committing waste on the property, even though she may not have released her inchoate dower interest. The inchoate interest is held to be an insufficient right or interest in the property to protect against waste. Rumsey v. Sullivan, 166 App. Div. 246, 150 N.Y. Supp. 287 (1914). *Contra*, Brown v. Brown, 94 S.C. 492, 78 S.E. 447 (1913).

83. Increases in the value of the premises may be substantial over a period of years. Inflation or land appreciation due to urbanization of the surrounding area may add to the value of the premises. In such instances the wife's dower interest is limited to the value of the property as of the time of the sale by her husband. Coleman v. Davis, 120 So.2d 56 (Fla. 1st Dist. 1960); Gridley v. Wood, 344 Ill. 153, 176 N.E. 356 (1931); Annot., 74 A.L.R. 1168 (1931).

84. State Bank v. Hinton, 21 Ohio St. 509 (1871) and Kling v. Ballentine, 40 Ohio St. 391 (1883). In *Hinton* the widow was held dowable in the surplus only; in *Kling* she was held dowable in the entire proceeds. Since the husband is still alive, the wife holds only an inchoate interest. That inchoate interest ought to attach to the *entire* sale proceeds. Her dower interest is free of debts, and therefore, the mortgage debt is to be paid out of the husband's share of the proceeds, with her third chargeable for any deficiency remaining.

she to be paid the value of her expectancy in cash, or should a portion of the funds be set aside and invested for her possible benefit, to be released to her only in the event she outlives her husband, and conversely, disbursed to the purchaser if the husband should outlive her?[85] The problem is dealt with by statute in several states.[86] These statutory procedures are available in instances of voluntary intervivos conveyances, in addition to foreclosure sales. Thus, under such statutes, the husband can convey to a purchaser a marketable title, judicially freed of the wife's inchoate dower interest, provided he makes provision for the wife out of the proceeds of the voluntary sale in the same manner as would be done if the sale were judicial and involuntary.[87]

Problems respecting the inchoate interest of a spouse also arise in partition or exchange situations. When the husband's land is partitioned in kind,[88] her dower interest will attach to the lands, eventually awarded in fee.[89] However, if the husbands of two wives exchange property having the same value, their wive's inchoate dower will attach only to the parcel received. The dower will be considered divested from the parcel conveyed.[90] Since the wife's inchoate dower interest attaches upon acquisition of title to the property by her husband, a dower interest will also attach to lands acquired by adverse possession.

The conveyancer will require release of the inchoate interest by the wife of the owner in all conveyancing transactions. The requirement that both parties join has the same clogging effect upon alienability and marketability as if the land were actually held in joint ownership.[91] The

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Thus it can be seen that under this concept, if the property were mortgaged for $6,667 and it sold for $10,000, thereafter, the $3,333 surplus represents, under present Florida law the wife's entire expectancy. Following that argument logically, it could not be disbursed to the husband, but would probably have to be invested for the wife's benefit.

Only a minority of states will grant the wife any interest at all in the surplus proceeds. The majority will treat the proceeds as personalty, in which there simply is no inchoate dower interest. See text accompanying notes 74-76 *supra*. See also 10 TENN. L. REV. 135 (1932).

85. Brown v. Brown, 94 S.C. 492, 78 S.E. 447 (1913); Wannamaker v. Brown, 77 S.C. 64, 57 S.E. 665 (1907).

86. W. VA. CODE § 4101 (1961). See also IND. STAT. § 6-2337-41 (1951); ME. REV. STAT. ch. 89, § 19 (1954).

87. W. VA. CODE § 4101 (1961).

88. FLA. STAT. ch. 66 (1963).

89. 1 AMERICAN LAW OF PROPERTY § 5.33 (Casner ed. 1952). However, a statutory partition by sale will result in the conversion of the realty into personalty in the form of the proceeds of that sale. The same theoretical conflict as to whether there can be a dower interest in those proceeds will arise in this situation as well as in the case of proceeds remaining after foreclosure of a mortgage. See text accompanying note 73 *supra*.

90. She is given the election to have her dower in either the lands given, or in the lands taken in exchange, but not in both. Fleming v. Morningstar, 4 Ohio N.P. (n.s.) 405 (1904), *aff'd*, 72 Ohio St. 647, 76 N.E. 1124 (1905); Wilcox v. Randall, 7 Barb. 633 (N.Y. Sup. Ct. 1850); 2 BLACKSTONE, COMMENTARIES *323.

91. This clogging effect is long lived. Thirty years must pass before an outstanding dower interest may be quieted away, and then only as to a bona fide purchaser for value who relied upon the vendor-husband's assertions of bachelorhood. FLA. STAT. § 66.25

most common situation in which this pseudojoint ownership is felt occurs when the husband has entered into an executory contract for the conveyance of certain of his individual lands, but his wife refuses to release her inchoate dower interest to that property. Clearly, his contract with his prospective vendee is valid. The problem is whether it can be specifically enforced, or whether only damages for its breach can be awarded. The common law solution was to decree specific performance against the vendor, and then jail him for contempt upon his failure to obey. It made no difference that it was impossible for him to comply with the order because of the refusal of his wife to make the necessary joinder.[92] At the other extreme, the land could be offered to the vendee as is, subject to the possibility that the inchoate dower interest of the recalcitrant wife might ripen into a consummate dower claim.[93] This approach thrusts the risk upon the vendee, and does not give him what he had contracted for, since the title to the lands in question remains unmarketable.[94] Because of the obvious equities of the vendee seeking the land, and the helplessness of the husband, the need for a compromise is apparent.

Effectuating a compromise requires placing a cash value upon the inchoate interest of the wife.[95] Once this value is ascertained, it is simply deducted from the purchase price. In this manner, the vendee will be compensated for the risk he must bear. Alternatively, its value can be paid into court by the vendee[96] to enable himself to gain clear title to the property. The court will hold the fund pending determination of the joint lives of husband and wife and payment to the survivor.[97] Choice of the remedy to adopt will usually depend upon the capriciousness of the refusal of the wife to join and the culpability of the husband

(1963). This section may be slightly redundant now, in view of the recent adoption of the Marketable Title Act, with its thirty-year root of title. FLA. STAT. §§ 712.01-.10(1963).

92. Horack, *Specific Performance and Dower Rights*, 11 IOWA L. REV. 97 (1926). See also 96 U. PA. L. REV. 677 (1948); 29 MINN. L. REV. 280 (1945).

93. *Ibid.*

94. In addition to being unmarketable, an unreleased inchoate dower interest is a breach of the covenant against incumbrances. Gore v. General Property Corp., 149 Fla. 690, 6 So.2d 837 (1942); 2 SCRIBNER, DOWER § 4.5 (2d ed. 1883).

95. Valuation of this interest, which is of course a mere expectant possibility at the time, is exceedingly problematical. Recourse can only be had to actuarial tables. West Virginia has adopted a statutory method of computing the value of an inchoate right of dower. W. VA. CODE § 4118 (1961). Case law has stated that

> [t]he proper rule for computing present value of the wife's contingent right of dower, during the life of her husband, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between those two sums will be the present value of her contingent right of dower. Jackson v. Edwards, 7 Paige 386, 408 (N.Y. Ch. 1839).

See also Annot., 34 A.L.R. 1021 (1925).

96. See text accompanying notes 85 & 86 *supra.*

97. Minge v. Green, 176 Ala. 343, 58 So. 381 (1912); Holly Hill Lumber Co. v. McCoy, 203 S.C. 59, 26 S.E.2d 175 (1943).

in procuring her refusal. Another factor considered will be the knowledge of the vendee, that there is a wife whose approval is necessary. Under the approach whereby the dower interest is evaluated and then sequestered, the net effect is a judicial divestiture of the wife's inchoate interest in the property.[98] In states still following the common law, her consummate interest is possessory in one-third of the lands for her own life. Therefore, forcing her to accept a cash settlement in lieu of that potential possessory right may not be in her best interests, as she may prefer to await the determination of the joint lives, for if she does outlive her husband, she may then have a real need of the possessory right granted by the common law.

IV. FLORIDA POSITION

The Florida position is somewhat anomalous. Florida has abrogated the common law position with respect to dower and has substituted a statutory interest.[99] This statutory interest in favor of the wife[100] is called dower, and it partakes of many of the same attributes as did dower at common law. It has been enlarged by Florida in that now the one-third interest is granted to the wife in fee, rather than only for life. As with dower at common law, this interest descends to the wife free of the debts of the estate.[101] In addition, Florida's statutory dower is granted in the personal property owned by the husband at the time of his death, an extension unknown at common law.

Thus, the Florida widow will always have two choices. One will be to accept the provision made for her under the will, or if there is no will, then by the statute of descent and distribution.[102] The other choice

98. *Cf.* FLA. STAT. § 708.07 (1963). This statute permits specific enforcement of an executory land contract for the sale of property of the husband, in which the wife has joined as a party to the contract. In 1947, this statute was amended to its present form. Previously it required that specific performance against the wife could be had only if the wife's joinder to the land contract had been acknowledged in the form required for conveyances. The distinction is, of course, that this provision applies *with* the consent of the wife, and not against her wishes, as expressed in her assent to the land contract.

99. Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one third in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one third part absolutely of the personal property owned by her husband at the time of his death . . . . FLA. STAT. § 731.34 (1963).

100. At common law neither spouse was an *heir* of the other. Today, the statutes of descent and distribution do make the spouses heirs of each other. In the case of the husband, his wife has power by her will to deny him his share as heir, but he does not have the correlative power to deny her from participation in his estate. Herzog v. Trust Co. 67 Fla. 54, 64 So. 426 (1914).

101. Except in the peculiar situation where the widow's election to take dower may increase the federal tax liabilities of the estate. In that case her dower is burdened with a pro rata share of the increase in federal estate tax liabilities. FLA. STAT. § 731.34 (1963) note 99 *supra*. *But see* United States v. Dahlberg, 115 So.2d 86 (Fla. 3d Dist. 1959).

102. FLA. STAT. § 731.23 (1963). Of course, a decedent may be found to be testate as

will be an election to take this statutory dower against either the will or the intestate share as the case may be. Certain articles are not included as part of the estate and pass to the widow directly.[103] Thus, it must be borne in mind that although there is a similarity in name, the Florida position is actually a grant to the widow of a statutory heirship, together with an option to accept either that statutory share, or the benefits under the will or intestacy, as applicable. It is simply a statutory distributive share of her husband's estate.

The problem at which this paper is directed would be largely moot if the Florida position were limited to a strict statutory share of property owned by the husband at his death. The one attribute of common law dower which causes all the problems is retained by Florida. That is the right of *inchoate* dower. This right must be released in any conveyance made by the husband, for if it is not released, it may be asserted upon the death of the husband, since at that time it becomes consummate and vests. The only procedural requirement is that the widow must affirmatively elect to assert her statutory dower interest.[104] She may assert an interest not only in the real and personal property which he owned at the time of his death, but also in any real property which he had previously owned and conveyed in which she had not released her inchoate interest.[105]

The problems presented by this spectre are myriad. The lurking nature of inchoate dower is inherent in the fact that it is not until the

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to some of his property, and intestate as to other property. In that case, the testate property will go to the persons named in the will, while the intestate property will go to the persons designated by the statute.

103. The widow of an intestate shall be entitled to receive and retain all wearing apparel and such household goods and farming utensils, provisions and clothing as may be necessary for her maintenance and that of the family . . . . Such articles shall not be considered as part of the widow's dower or inheritance in any case. FLA. STAT. § 731.36 (1963).

104. In order to take dower, a widow must so elect by an instrument in writing, signed by her and acknowledged or sworn to by her before any officer authorized to take acknowledgements or to administer oaths, and filed, within nine months after the first publication of the notice to creditors, in the office of the county judge . . . . FLA. STAT. § 731.35 (1963).

But see Bibb v. Bickford, 149 So.2d 592 (Fla. 1st Dist. 1963); *In re* Aron's Estate, 118 So.2d 546 (Fla. 3d Dist. 1960).

105. "The widow may in addition file her extraordinary petition or petitions for assignment of dower in the county judge's court of any county or counties in this state where any lands lie which her husband had before conveyed, whereof she had not relinquished her right of dower as provided by law." FLA. STAT. § 733.11 (1963). This statute is the heart of the conveyancer's and title examiner's problems with the inchoate right of dower. The petition may possibly be filed after the estate of the deceased husband has been closed so that thereafter the owner of the property against whom this petition is filed will be left without a remedy, since after its closing, the estate of the deceased husband can no longer be held liable upon his warranties of title, assuming that they were made. However, equity may estop the exercise of this right if the widow had participated in the estate, and if to enforce her extraordinary right would be unconscionable. Johnson v. Hayes, 52 So.2d 109 (Fla. 1951). Her right to claim dower may also be barred by her laches. Pingree v. DeHaven, 90 Fla. 42, 105 So. 147 (1925) (17 years).

death of the husband that it becomes consummate. Consummate dower, or the equivalent Florida statutory status, is a vested interest. Although inchoate dower is contingent, it easily attaches,[106] and even though it is problematical whether or not it will ever ripen into consummate dower and vest, it must be treated as a real interest by the prospective title examiner. Dower will not be subject to statutes of limitation except after it is consummate. It is not affected by curative acts, but the recent marketable title legislation may affect inchoate dower.[107] Consequently, the title examiner must be satisfied that every *possible* dower claimant has released her inchoate dower interest. If the title examiner fails to do this, the title which he passes may be subject to a later claim of dower. Further, an outstanding inchoate dower claim is an encumbrance within the covenant against encumbrances, so his client may become liable to a remote purchaser if a dower claim is later asserted. At common law, inchoate dower could be released by the arduous process of the fine and common recovery.[108] Today, release of the inchoate dower interest is simply accomplished by a joinder of the wife in any instrument executed by the husband. It is when this expectancy is not released that the problems arise against which the title examiner must guard.[109]

An extension of the privilege of dower to those other than the wife is presented by a unique Florida statute.[110] In cases where the widow is incompetent, or dies soon after the husband's death but prior to her having made any election to take dower in his estate, the right to elect will pass to "any person who has a beneficial interest in the estate of such deceased widow . . . ."[111] This statute indicates a trend in the policy of Florida which will be treated in the conclusion of this article. At this point, however, it can be seen that the statute is indicative of the fact

106. One embarrassing attachment of dower may occur in a situation where the grantee is specifically identified as the trustee for a specific trust. Generally, he will be deemed to hold a bare legal title as trustee only, and there will be no dower interest to his wife. But, *if* the conveyance fails to indicate the specific trust, and instead merely adds the single word "trustee" after the name of the grantee, this will be insufficient notice of the existence of the trust, and the grantee will be deemed to hold the entire estate, in which case his wife may have dower. FLA. STAT. §§ 689.07, 708.04 (1963). See Foxworth v. Maddox, 103 Fla. 32, 137 So. 161 (1931); FLA. STAT. ANN. ch. 689 Appendix (Supp. 1962); FLA. TITLE STANDARDS § 13.1, 13.2; BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 14.15 (1961); 33 FLA. B.J. 221 (1959).

107. FLA. STAT. §§ 712.01 -.10 (1963). An inchoate dower interest presently may require filing. If it attached subsequent to the root of title, or is otherwise not shown on the root of title muniment, the owner has a marketable record title after the thirty-year period has run, and can deal with it as though he were unmarried, unless the inchoate dower interest was preserved by filing. See generally Boyer and Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. MIAMI L. REV. 103 (1963).

108. 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 195-6 (5th ed. 1942); see also text accompanying notes 53 *supra* and 142 *infra*.

109. In addition, since the title examiner cannot guard against eventualities like impersonation or forgery, title insurance is strongly advisable.

110. FLA. STAT. § 731.35 (1963).

111. FLA. STAT. § 731.35(3) (1963). See note 187 *infra* and accompanying text.

that dower is not necessarily a right personal to the widow, but is rather, in a sense, a "vested" transferrable estate.[112]

V. EXTINCTION OF DOWER

It is possible in a variety of ways to extinguish this unwelcome inchoate interest. The levy of a fine, or a divorce due to her own misconduct could divest the wife's inchoate rights at early common law.[113] At the present time, extinction of the inchoate interests of a wife in her husband's property can be accomplished in a variety of ways.[114]

A fair and just ante- or post-nuptial agreement[115] between the parties in which the wife receives a setlement in lieu of her dower interest, will be effective. Alternatively, even if the portion granted to her by the agreement is unjust, it will be upheld if she either knew of her own information, or was told by her husband, of the size of his then existing estate. Usually, the wife must have competent independent counsel, for the burden will be upon the husband or his representative to show that all the circumstances of the agreement were fair and just.[116] If there is such an agreement, thereafter the husband can convey his property free of his wife's dower. However it might be difficult to persuade a buyer's attorney to approve such a title as being marketable. If she accepts the provisions made for her under the will,[117] or an intestate share, and does not dissent from either, then the effect will be to bar her dower rights.[118] Thus, she can waive her statutory dower rights simply

112. Bibb v. Bickford, 149 So.2d 592 (Fla. 1st Dist. 1963).

113. GLANVILLE, DE LEGIBUS VI 17 (Woodbine ed. 1932); 1 AMER. LAW OF PROPERTY 711 (1952). See note 108 *supra* and note 137 *infra*.

114. 1 REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA § 252 (3d ed. 1957).

115. Compare ante-nuptial agreements between the prospective spouses with unilateral dispositions made by one prospective spouse with the intent to deprive the other of any rights. A conveyance made by a husband in contemplation of marriage without the knowledge or consent of the intended wife and for the purpose of depriving her of dower in the property is voidable and may be set aside by her. Davis v. Davis, 98 So.2d 777 (Fla. 1957). *Contra,* McLawhorn v. Smith, 211 N.C. 513, 191 S.E. 35 (1937).

116. Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962); Johnson v. Johnson, 140 So.2d 358 (Fla. 2d Dist. 1962); Kyle v. Kyle, 128 So.2d 427 (Fla. 2d Dist. 1961), *cert. dismissed,* 139 So.2d 885 (Fla. 1962); *In re* Knight's Estate, 155 Fla. 869, 22 So.2d 249 (1945); Horney v. Rhea, 152 Fla. 817, 12 So.2d 302 (1943); Northern Trust Co. v. King, 149 Fla. 611, 6 So.2d 539 (1942); Tavel v. Guerin, 119 Fla. 624, 160 So. 665 (1935).

117. Some states clearly permit the surviving widow both to take under the will of her husband, and in addition, to assert a dower interest in lands previously conveyed by her husband, in which she had not released her dower interests. Stevenson, *Does Dower Still Lurk in Elections to Take Under the Will?,* 30 U. CINC. L. REV. 172 (1961); 10 U. PITT. L. REV. 223 (1948). The election will have to be made according to the statutory requirements. See note 104 *supra*.

118. It is unclear whether this election by failing to elect, will have the effect of barring a Florida widow from filing her "extraordinary petition . . . for assignment of dower in . . . any lands . . . which her husband had before conveyed, whereof she had not relinquished her right of dower . . . ." FLA. STAT § 733.11 (1963). There seems to be no reason why a widow may not have benefits both under the will and also under this statute. The

by failing to make the election within the allotted time. Her inchoate interest will be effectively released by a simple joinder[119] in any conveyance or encumbrance made by her husband. It can also be released by her deed to the grantee of the husband both before or after his death.[120]

There are several methods whereby the wife's inchoate dower interest in lands owned by her husband can be *involuntarily* divested. Divorce *a vinculo matrimonii* will divest dower.[121] An odd application is noted in cases of dedication of land or conveyances to a government. In these instances, the inchoate dower interest of the wife is divested, despite the fact that she may have dissented to the gift.[122] Analogous to dedication, is condemnation. The taking of property by eminent domain clearly divests inchoate dower rights.[123] Further, the wife generally

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origin of the doctrine of election arose from the early view that it was necessary for there to be a specific bequest to her before she could take any personal property of the decedent, since the dower right as at common law extended only to realty. Thus it doubtless was rather common for the will to name specific bequests of personalty to the widow, and to be silent as to the disposition of the realty of the decedent, since the widow can assert a dower claim against the realty and be thus protected, while at the same time also receive and keep benefits of personalty under the will. However modern statutes, such as that of Florida, have extended the "dower" interest to personalty of the decedent. Therefore, the doctrine of election has arisen so that a widow may not take both dower and also under the will, but must elect one or the other. Thus, it has been held that either a formal election to take under the will, or acceptance of benefits thereunder, will bar a later assertion of dower. *In re* McMillan's Estate, 158 Fla. 898, 30 So.2d .534 (1947). However, this election apparently is not irrevocable, as the widow can take benefits under the will, and then later elect to assert dower, providing that she tenders back the benefits received under the will. Taval v. Guerin, 119 Fla. 624, 160 So. 665 (1935). The court can also *require* her to return those benefits accepted under the will before she can elect dower. Griley v. Griley, 43 So.2d 350 (Fla. 1949). But from the title examiner's or conveyancer's viewpoint, this means that titles can remain unsettled for the statutory nine-month period, as the widow may claim her dower anytime during that period. Therefore, the solution usually employed will be to have the widow join in any conveyance made by the estate during that nine-month period. But quaere: will it not be necessary for there to be some consideration flowing to her for this joinder, since the marital relation has now ended, or can it be gratuitous?

119. FLA. STAT. § 693.02 (1963). This is not to be confused with "jointure" which was a form of marriage settlement upon the wife, intended to be in lieu of dower, and to take effect upon the death of the husband. It was a form of joint tenancy. 2 BLACKSTONE, COMMENTARIES *137.

120. Raulerson v. Peeples, 79 Fla. 367, 84 So. 370 (1920) (dictum); Inchoate dower cannot be transferred as a separate interest to a third party, and even a transfer of consummate dower prior to specific assignment of the land to the widow confers no right to possession of specific property. *Id.*

121. Horney v. Rhea, 152 Fla. 817, 12 So.2d 302 (1943); North v. Ringling, 149 Fla. 739, 7 So.2d 476 (1940).

122. There is a slight conceptualistic conflict in the rationales applicable to these situations. The general view is that such dedication *extinguishes* the dower rights of the wife. Caldwell v. City of Ottumwa, 198 Iowa 666, 200 N.W. 336 (1924). Under this view the husband can sell his land to the public and pocket the entire proceeds free of his wife's dower claim, a feat he could not manage with a non-public grantee. The better view seems to be that in such instances the wife's dower interest is not extinguished, but is merely *suspended*, and is unenforceable against the public. Thus, if the land reverts, or otherwise returns to private ownership, perhaps she could then enforce her dower rights. Harris v. Kansas City, 293 Mo. 572, 239 S.W. 1077 (1922).

123. Moore v. City of New York, 8 N.Y. 110 (1853).

is not a necessary party to the condemnation suit.[124] Upon the conversion of the realty to the personalty represented by the condemnation award, the usual problems arise as to the proper disposition and apportionment of the proceeds.[125] It has been noted that in some jurisdictions the court will award a decree of specific performance in favor of a vendee in situations where the wife of the vendor refuses to join.[126] In these instances, the wife's dower interest is protected in the proceeds. The interesting point is that this is another instance where the inchoate dower rights of the wife are judicially divested without her consent, conditioned only upon proper provision being made for her benefit. Another instance is seen in partition suits. The general view is that although an inchoate dower interest has atttached to the undivided interest owned by the husband, he is still entitled to a decree of partition. If the lands are physically partitioned by metes and bounds, then the wife's inchoate interest will attach to the portion ultimately awarded to the husband in fee. If the lands are sold, and the proceeds divided, then the usual rule is that the proceeds will be treated as mere personalty, with the result that the wife's interest is effectively divested.[127] It would seem that the wife ought to be joined as a party to the partition suit.[128] Still another way in which inchoate dower rights can be divested is via adverse possession in those states which view dower as a derivative interest. Thus, when the interest of the husband is determined, the inchoate dower interest of the wife will be determined also.[129]

124. *In re* Cropsey Ave., 268 N.Y. 183, 197 N.E. 189 (1935); Long v. Long, 99 Ohio St. 330, 124 N.E. 161 (1919). See also FLA. STAT. § 73.02 (1963), which statute expressly provided before a 1959 amendment that a married woman was not to be made a party defendant in respect to inchoate dower, but this provision was deleted at that time.

125. Some states will grant the wife an interest in the proceeds. In New York, one-third will be invested for her, pending eventual determination of her right to that third. *In re* Cropsey Ave., 268 N.Y. 183, 197 N.E. 189 (1935); *contra*, Salvatore v. Fuscellaro, 53 R.I. 271, 166 Atl. 26 (1933) (treated as personalty, and therefore no interest at all to the wife). This problem is rapidly becoming moot in New York due to the abolition in that state of all inchoate dower interests accruing after 1930. The majority view grants nothing to the wife of the condemnee. United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942).

126. See text accompanying note 92 *supra*.

127. Dure v. Sharpe, 12 Del. Ch. 1, 114 Atl. 207 (1910); *contra*, Cole v. Cole, 292 Ill. 154, 126 N.E. 752 (1920) (wife's inchoate dower interest is divested, but is transferred to the proceeds).

128. If the state follows the derivative view of dower, her joinder to a *partition* suit is unnecessary. Turner v. Turner, 185 Va. 505, 39 S.E.2d 299 (1946). If the state regards dower as more than a merely derivative interest, it will usually require her joinder, at the very least, to permit her to urge that the partition be in severalty, and not by sale. Note the dissimilarity to a *condemnation* suit, to which her joinder has been held unnecessary. *In re* Cropsey Ave., 268 N.Y. 183, 197 N.E. 189 (1935). This distinction is due to the concept that dower can attach only subject to superior interests, and the right of a co-tenant to demand partition is one of the rights inherent in co-tenancy, and hence, is superior to a dower claim by the wife of one co-tenant. 28 C.J.S. *Dower* § 18 (1941).

129. Some states take the view that adverse possession will not cut off the inchoate dower interest of the wife of the record owner, since, as to her, there is no right of action during her husband's lifetime. Of course, adverse possession can begin to run against her

Florida has a statute which forbids a murderer to inherit from his victim.[130] If "inherit" could be interpreted to include the right of dower, or of unreleased inchoate dower in previously conveyed property, then the application of this statute could be an additional method of involuntarily divesting a wife's dower rights.[131] A clear instance of an involuntary divestiture of inchoate dower is seen in the foreclosure of a mortgage placed on the property prior to the attachment of the wife's inchoate dower interest.[132] Desertion by the wife *may* be sufficient cause to deprive her of inchoate dower rights.[133] Clearly, it is difficult for a

after that time. Other states take the view that dower is simply a derivative estate or interest, and hence, when the estate of the record owner is cut off due to an adverse possessor, so too is the right of his wife to dower cut off. Either view is defendable, even though it may be possible to find that two wives have dower in the same property. 1 AMERICAN LAW OF PROPERTY § 5.33 (Casner ed. 1952).

130. No murderer can "inherit . . . or . . . take . . . as a legatee or devisee." FLA. STAT. § 731.31 (1963). A conviction of the crime is essential to invocation of the statute. Carter v. Carter, 88 So.2d 153 (Fla. 1956). Hence an insane act of the wife in killing her husband cannot bar her dower interest in her husband's estate, since she could not be convicted of murder. Hill v. Morris, 85 So.2d 847 (Fla. 1956). In addition, it is arguable whether the dower right obtains via "inheritance." It usually is viewed as a separate interest of the wife, akin to a joint tenancy wherein the ultimate fee ownership does not vest in the survivor via "inheritance." Of course it is always possible for the familiar constructive trust to be raised to prevent her profiting from the wrongful act of causing her husband's death.

131. At common law, the murder of a husband by his wife did not forfeit her dower rights. Hill v. Morris, 85 S.2d 847 (Fla. 1956) (dictum). The use of the word "inherit" in FLA. STAT. § 731.31 (1963) does *not* include dower. See Shea, *In Bar of Dower: Homicide*, 14 FLA. L.J. 19 (1940). Further, the word "inherit" has been interpreted in Florida so as not to include passage of an estate held by entireties to a murderous husband. Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951); 4 U. FLA. L. REV. 273 (1951). The *Ashwood* case held, however, that the murderer could not benefit from his wrong, that the murderer terminated the entireties estate, and that the respective parties or their successors became tenants in common. See also Hogan v. Martin, 52 So.2d 806 (Fla. 1951); 7 MIAMI L.Q. 524 (1953). Some states have statutes expressly providing for dower forfeiture upon the felonious homicide of the husband by his wife. N.C. GEN. STAT. § 31A(4) (1961). But since the penalty in Florida for the homicide is stated in the murder statute, and dower forfeiture is not mentioned, it presumably is not intended. Shea, *supra*.

132. Hatch v. Trabue, 99 Fla. 1169, 128 So. 420 (1930). Although that issue is commonly decided on the basis of priority, it is worthy of note that the dower interest has attached, albeit as junior to the prior incumbrance. A vendor's lien, or purchase money mortgage is obviously senior to the attachment of dower to a later-married wife of the grantee. Where the married couple place a mortgage on property which was previously unencumbered, with the wife joining, strict terminology would say that she has *released* her dower interest in favor of the mortgagee, rather than to say that the mortgage is *senior* to her dower rights. Roan v. Holmes, 32 Fla. 295, 13 So. 339 (1893). Note, too, that the joinder is a conditional release only, the condition being the *actual* foreclosure of the "joined-in" mortgage. See also the doctrine of *In re* Hester's Estate, 158 Fla. 170, 28 So.2d 164 (1946).

133. The usual reason given is the operation of the Statute of Westminster II, 1285, 13 Edw. 1, c. 34; see note 50 *supra*. This statute has been held inapplicable in Florida. Wax v. Wilson, 101 So.2d 54 (Fla. 3d Dist. 1958). However, that case left open the question of precluding her assertion of dower by estoppel or by other inequitable conduct of the deserting wife. In a recent case, the parties had been separated for over thirty-two years and the wife had contracted an innocent but bigamous marriage in the interim. She was held *not barred* of her dower. Robison v. Krause, 136 So.2d 373 (Fla. 2d Dist. 1962). *Contra*, Minor v. Higdon, 215 Miss. 513, 61 So.2d 350 (1952). The Florida view is apparently the majority view. See Estes v. Merrill, 121 Ark. 361, 181 S.W. 136 (1915); Brown v. Parks, 169 Ga. 712,

husband whose wife has deserted him to procure her joinder in his deeds in order to release her dower interest. Therefore, some states will permit a husband who has been deserted to convey good title despite the non-joinder of his absent wife.[134] Florida takes a slightly different tack, permitting a very old dower interest to be quieted.[135]

It would appear that upon the foreclosure of the state's lien for unpaid real property taxes, any inchoate interests of the taxpayer's wife would be divested, the general rule being that the state's tax interest is superior to all others.[136] In addition to the foregoing, there is one most interesting method whereby the inchoate dower interest of the wife may be divested without her consent. At common law, a fine and common recovery[137] was the method used. Today, Florida, has updated the procedure, but in effect, has perpetuated this method.[138]

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151 S.E. 340 (1930); Cox v. Cox, 95 Okla. 14, 217 Pac. 493 (1923); Swift v. Reasonover, 168 Tenn. 305, 77 S.W.2d 809 (1935). See also Kreisel v. Ingham, 113 So.2d 205 (Fla. 2d Dist. 1959); *Adultery as Bar to Dower*, 13 U. MIAMI L. REV. 83 (1958).

134. 1 AMERICAN LAW OF PROPERTY § 5.35 (Casner ed. 1952) and cases cited. An Ontario statute permits a husband to make an inter-vivos conveyance of his realty free of his wife's dower interest, if she is incompetent or cannot be found, and if he deposits her dower share into court to await final determination. The Dower Act, R.S.O. 1960, c. 113, § 13(4).

135. FLA. STAT. § 66.25 (1963). Under this statute a thirty-year separation is required, plus a sale to a bona fide purchaser who relied upon the assertions of the vendor that he was unmarried. Applicability of this section may be superceded by the new Marketable Title Act.

136. FLA. STAT. § 192.21 (1963). There has been some question whether the foreclosure of an *ad valorem* tax lien will cut off specific utility easements, joint interests, remainder and reversion interests, and interests like dower which are as yet only contingent. There is an irreconcilable split in the jurisdictions. Some deem a tax foreclosure to be an assertion of the state's prior lien interest as against all the world, *in rem* as it were. Following this view, the foreclosure of such lien effectively wipes out all interests in the property, leaving only a new and perfect title in the state. This is the view of about half the states. Baird v. Stubbins, 58 N.D. 351, 226 N.W. 529 (1929). The other theory treats tax sales as proceedings *in personam*. According to this view a tax deed vests in the purchaser only the interests of the persons against whom the tax was assessed or who were joined to the foreclosure proceedings. Anderson v. Daugherty, 169 Ky. 308, 183 S.W. 545 (1916). Florida has various types of tax lien foreclosure proceedings. Where the tax title is based on foreclosure proceedings the deed has been held invalid as to an interest omitted, thus following the *in personam* rationale. Lynch v. Welan Inv. Co., 126 So.2d 148 (Fla. 3d Dist. 1961). But where the tax deed is based on a valid administrative tax deed, it has been held that such acquisition did wipe out mineral rights to the subject property, thus following the *in rem* view. Lee v. Carpenter, 132 So.2d 433 (Fla. 2d Dist. 1961). See FLA. STAT. §§ 194.15, 194.53 (1963). BOYER, FLORIDA REAL ESTATE TRANSACTIONS ch. 31 (1960). The statutory procedures for foreclosure of an *ad valorem* tax lien must be complied with exceedingly strictly.

137. The fine and common recovery is barred in Florida by FLA. STAT. § 689.08 (1963).

138. This perpetuation provides a method whereby an owner-husband can still get around a refusal of his wife to join with him in a conveyance of his lands to a prospective vendee and thereby release her dower rights in those lands so that the prospective vendee will secure a title clear as to her dower rights. The availability of this method to divest involuntarily the dower interest of the wife renders meaningless the pious protestations of the courts and legislature that they are concerned with the preservations of the rights of helpless widows. Therefore, the modern method to be employed in case of a recalcitrant wife, simply is to have the prospective vendee sue the defaulting vendor, and then levy upon the subject property to satisfy the resulting judgment. Upon the execution sale, the purchaser at the sale, who normally will be the plaintiff, will receive the property free of the claims of dower

It can be argued that the preference of the dower interest above general debts of the estate is discriminatory to creditors.[139] The situation becomes ludicrous when notice is taken of the Florida attitude towards execution sales. As a general rule, a voluntary conveyance by the husband will not divest the inchoate dower interest of his wife. There are some involuntary conveyances from the husband which will divest it, as we have seen in the cases of condemnation, partition, or foreclosure of a superior interest. It is generally held that a purchaser at an execution sale takes no better title than the person against whom the sale is held could have conveyed to him in a voluntary inter vivos transaction.[140] The selling sheriff is treated as an agent of the debtor. His deed is usually held to have no greater power than would the deed of the debtor. Florida[141] takes a contrary view,[142] and holds that a sheriff's execution deed *will* convey the lands of the debtor *free of* the inchoate interest of the debtor's wife.[143] Therefore, if a creditor is alert enough to reduce his claim to judgment and levy upon the lands of the debtor prior to the death of the debtor, those lands will be sold free of the dower interest of the debtor's wife. If that same creditor is a little slow, and fails to levy execution prior to the death of the debtor whose wife then elects dower, her dower may well exhaust the net estate, leaving nothing for the debts due to the creditors. It becomes simply a race to the courthouse. Some states permit the owner of lands subject to an inchoate dower interest to remove the interest as a cloud upon the title.[144]

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of the defendant's wife. *In re* Hester's Estate, 158 Fla. 170, 28 So.2d 164 (1946). Thus, it is in effect, the levying of an involuntary fine against the wife (to be compared with the suffering of a common recovery, used for disentailing). WILLIAMS & EASTWOOD, REAL PROPERTY § 143 (1933).

139. "[I]n all cases the widow's dower shall be free from liability for all debts of the decedent and all costs . . . of administration." FLA. STAT. § 731.34 (1963). *But see* United States v. Dahlberg, 115 So.2d 86 (Fla. 3d Dist. 1959), note 101 *supra.*

140. Wildwood Crate & Ice Co. v. Citizens' Bank, 98 Fla. 186, 123 So. 699 (1929); Money v. Powell, 139 So.2d 702 (Fla. 2d Dist. 1962).

141. Florida is joined by Pennsylvania and Delaware. *In re* Kligerman, 253 Fed. 778 (E.D. Pa. 1918) granted the same effect to a conveyance by a trustee in bankruptcy under the Bankruptcy Act § 47(a)(2), ch. 541, 30 Stat. 557 (1898), amended by 36 Stat. 840 (1910), amended by 52 Stat. 880 (1938), as amended, 11 U.S.C. § 110(a)(5) (1958), which decreed that the trustee is treated as being "vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied . . . ." The Kligerman case construed what is now PA. STAT. tit. 69, § 141 (1931). DEL. CODE tit. 133, § 4831 (1953).

142. It is easily seen that the view which will permit involuntary divestiture of dower by execution sale against the husband must rest upon the foundation that dower is but a *derivative* interest, and is *not* indefeasably vested (even in expectancy) in the wife. If this derivative interest view were more consistently applied, there would be less confusion over the extent of present dower rights, and less necessity for sweeping reform. *In re* Hester's Estate, 158 Fla. 170, 28 So.2d 164 (1946); 21 FLA. L.J. 152 (1947); 1 MIAMI L.Q. 46 (1947).

143. *In re* Hester's Estate, 158 Fla. 170, 28 So.2d 164 (1946).

144. N.Y. REAL PROP. LAW § 190(a), conditioned upon the payment to the wife in cash, or of the funds into court for her benefit. ME. REV. STAT. ch. 89, § 19 (1954); W. VA. CODE § 4101 (1961).

VI. PREVENTING INCHOATE DOWER FROM ATTACHING

In addition to the various methods for the divestiture of inchoate dower, the same result can be obtained by arranging the purchase of the property in such manner so as to prevent any inchoate dower interest from attaching in the first place. Preventing inchoate dower from attaching renders the property more freely alienable since the wife's release would not be required. This event is to be clearly distinguished from the vesting of consummate dower after the death of the husband which by statute[145] grants the widow an heirship of one-third of both realty and personalty owned at the time of death.

If at the time of acquisition there is in existence a valid ante- or post-nuptial agreement by the wife to release her dower interest, no inchoate dower will attach.[146] Historically, due to the requirement for seisin in the husband as a prerequisite to the attachment of a dower interest in the property, there was no dower in equitable interests of the husband. Therefore, the taking of a use interest prevented the accrual of any dower to the wife. Somewhat the same principle is still operative today in that there will be no inchoate dower rights in property held in trust for the benefit of the husband.[147] Similarly, no inchoate dower interest could accrue to a wife in property owned by a corporation in which her husband held stock,[148] since the property is not subject to any equitable estate in favor of her husband.[149] Other devices could be used to prevent the attachment of an inchoate dower interest. The taking of title in joint tenancy is a bar to inchoate dower.[150] Of course, if the husband turned out to be the last survivor of the joint tenancy, dower would attach as of that time. It can be seen how easy it would be for a husband who wished to prevent an inchoate dower interest

145. FLA. STAT. § 731.34 (1963).

146. See note 116 *supra* and accompanying text.

147. Walker v. Close, 98 Fla. 1103, 125 So. 521 (1929), *aff'd on rehearing*, 98 Fla. 1125, 126 So. 289 (1930). *But see* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); Harris v. Harris, 147 Ohio St. 437, 72 N.E.2d 378 (1947) involving the problem of the husband-created trusts being illusory and ineffective to divest the widow's interest because of the retention of too much control by the husband-settlor. The *Harris* case was overruled in Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961). The new Florida Land Trust Act will presumably foster creation of more trusts as the vehicle for syndications. FLA. STAT. § 689.071 (1963). It permits the trustee to convey freely, without the joinder of either beneficiaries or spouses.

148. McDougald v. Hepburn, 5 Fla. 568 (1854); Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949); Frank v. Frank's Inc., 9 N.J. 218, 87 A.2d 724 (1952) (Vanderbilt, Ch. J.); Annot., 32 A.L.R.2d 705 (1952).

149. If the husband is the sole or major shareholder, and the corporation acquires title to the realty as a sham or subterfuge intended to defraud the wife of her dower interests, then the husband will be deemed to be the owner of the realty, despite the corporate format, and dower may be awarded. Telis v. Telis, 132 N.J. Eq. 25, 26 A.2d 249 (1942); 28 CORNELL L.Q. 84 (1942).

150. Laterza v. Murray, 2 Ill. 2d 219, 117 N.E.2d 779 (1954); Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945); Johnson v. Muntz, 364 Ill. 482, 4 N.E.2d 826 (1936); Weisel v. Revitz, 341 Ill. App. 248, 93 N.E.2d 152 (1950).

from attaching in favor of his wife, to take title together with several joint tenants, upon properly securing their cooperation. Another device is for the husband to take only a life interest in the property together with a general power of appointment.[151] In this manner, no inchoate dower can attach, as the requirement that the estate be one of inheritance is not met. The inheritable interest in this case is the reversion which remains in the grantor. In fact, there is no apparent reason why a posterity-minded husband could not simply take a conveyance to himself for life, remainder over to his heirs. This action would preclude attachment of an inchoate dower interest in favor of his wife for the same reason, but yet would provide for the property's disposition after his death. Florida has abrogated the rule in *Shelley's Case*[152] which would have been applicable. States which have not repudiated this rule would, of course, find that the grantee under the deed takes a fee, to which an inchoate dower interest would naturally attach.

There has been some statutory activity in this area. An example is the Uniform Partnership Act,[153] which specifically provides that no dower or curtesy interests shall attach to property owned by the partnership. Thus, a specific statutory command prevents the attachment of inchoate dower interests. There is an additional situation in which a dower interest that seemingly ought to attach, does not. When husband and wife have executed mutual wills of their joint property in favor of a named beneficiary, usually their children, and the wife dies, a subsequent remarriage of the surviving husband will not grant a dower interest in his lands to his second wife. It would appear that at the time of the remarriage, he is the sole owner of the lands and hence, his new wife ought to be granted a dower interest. Florida courts have denied this interest,[154] however, and treat the situation as though the knowledge of the second wife of the fact of the mutual will, and that her prospective husband is holding property thereunder, is an effective waiver of her dower interests. This view also can be analogized to a trust situation, in that the husband is deemed to be holding the property in trust for the named beneficiary. Thus, if a trust situation exists, then clearly, no inchoate dower interest can attach. Under this view, the knowledge of the second wife of the previous mutual wills would be unnecessary.[155]

151. Pope v. Safe Deposit & Trust Co., 163 Md. 239, 161 Atl. 404 (1932); Alexander v. Cunningham, 27 N.C. 304 (1845); Ray v. Pung, 5 Barn. & Ald. 561, 106 Eng. Rep. 1296 (K.B. 1822).

152 FLA. STAT. § 689.17 (1963) (first enacted 1945).

153. See text accompanying notes 58-60 *supra*.

154. Tod v. Fuller, 78 So.2d 713 (Fla. 1955); Fuller v. Tod, 63 So.2d 316 (Fla. 1953). See also Leffler v. Leffler, 151 Fla. 455, 10 So.2d 799 (1942).

155. The Florida view apparently turns upon the knowledge of the second wife, and will grant dower to the second wife if she had no knowledge of the prior mutual wills. *Ibid.* A harsher view, that there simply cannot be any dower to the second wife regardless of her lack of knowledge, obtains in other states. Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910); Mosloski v. Gamble, 191 Minn. 170, 253 N.W. 378 (1934). See Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941).

Alternatively, this waiver view can be analogized to an ante-nuptial agreement by the new spouse, even though no consideration for her waiver is given.[156]

VII. SUGGESTIONS FOR IMPROVEMENT

As long as the inchoate dower interest is recognized by the law, the careful title examiner will have to remain alert for it. Assuming that the policy of the law still favors retention[157] of the dower interest,[158] perhaps amendments of existing law could simplify ascertainment of outstanding dower interests. A desirable requirement might be for all marriages to be registered with the Secretary of State with an estoppel created against assertion of non-registered interests as against a purchaser without notice of the interest.

In the absence of legislation, it is possible for the legal profession to agree cooperatively upon standard title examination procedures. The Real Property, Probate and Trust Law Section of the Florida Bar has adopted a series of title standards[159] dealing with the problems attendant to dower.[160] Success of title standards depends entirely upon the

156. Curiously, this mutual will situation can be roughly analogized to the common-law rule that there can be no dower to a second wife of lands held by her husband in fee tail special, the special limitation being to the issue of his first wife. In this instance, he clearly does not hold an estate capable of inheritance by the issue of his new marriage. Y.B. 5 Edw. 2 (1311), in 63 SELDEN SOC. PUB. 274 (1944).

157. This is the critical assumption. The English, who have been wrestling with this problem at length since it was first invented, had expanded the common law, and granted dower in equitable interests of the husband. The Dower Act, 1833, 3 & 4 Will. 4, c. 105. "[T]he Lord gave, and the Lord hath taken away . . . ." *Job* 1:21. And that same act also permitted a husband unilaterally to defeat the dower rights of his wife by a simple declaration to that effect, at the time of the taking of title to the property, or by declaration in his will, or in pais by his act of conveying it during his lifetime. There simply was no need for the joinder of a wife in her husband's conveyance in order to release her dower interests. Later acts simply abolished dower completely, eliminating the problem at its root. Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 45. Apparently, this act is a formulation of English policy against the retention of dower, even though it could be divested quite easily under the state of the law existing at that time.

158. The courts have used such turgid prose as: "the law favored three things: life, liberty, and dower." Moore v. Price, 98 Fla. 276, 288, 123 So. 768, 772 (1929); "such right of dower is perhaps the most highly and widely cherished property right resulting from marriage and one which the courts have been alert to protect from fraudulent destruction. . . ." Byrnes v. Owen, 24 N.Y. 211, 216, 153 N.E. 51, 52 (1926).

159. FLA. STAT. ANN. ch. 689 Appendix (Supp. 1962); BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 14-15 (1961); 33 FLA. B.J. 221 (1959).

160. Title Standard 2.5: A conveyance by the trustee in bankruptcy of the bankrupt's property without the joinder or release of the bankrupt's spouse will convey the bankrupt's title free from any dower or statutory rights of the spouse.
Title Standard 3.5: Notwithstanding the designation of a grantor as a single man, as an unmarried man, or as a widower, if the chain of title indicates that said grantor was a married man at any time during the period of his ownership, an examiner should require satisfactory record evidence of the disposition of the wife's dower interest by death, divorce or otherwise.
Title Standard 3.9: Whenever possible and in conformity with the standards promulgated here, the examiner should accept and rely on an affidavit which negatives a possible defect in an otherwise marketable title. Example given is the absence of a recital of celibacy of a person in the chain of title. Suggestion is that an affidavit

cooperative attitude of the members of the bar in their utilization and in the Bar's rejection of Gresham's Law[161] as applied to marketable titles. These title standards now supplement Florida's recently enacted Marketable Title Act.[162]

The basic thrust of this act[163] is to eliminate the need to search the title back to its literal root. Instead, an arbitrary period of thirty years[164] is selected for the title examiner to check. The title would remain subject to whatever outstanding interests are shown by the record within that "root" period. It further provides for the recordation of "notices" of outstanding interests, and re-recordation as necessary, in order to keep such interests within the current "root" period. This act has the effect of eliminating "stale" marital interests from the perusal of the title examiner. Thus, where it appears that a conveyance was made prior to the root period without the joinder of a spouse, the

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of such person as to his marital status should be accepted by the examiner.
Title Standard 3.10: The widow must join in a sale of real property by the personal representative up until the time her right to take dower is barred by law.
Title Standard 13.1: The word "Trustee" or "as trustee" following the name of the grantee in a deed or the mortgage in a mortgage which contains no other reference to the trust does not, of itself, constitute notice of a trust.
Title Standard 13.2: A conveyance to a person whose name is followed by the word trustee and nothing else creates a fee simple title in such grantee and the title thereby acquired is subject to the inchoate dower rights of the wife of said grantee.
Ibid.

161. After Sir Thomas Gresham, an English financier 1519-1579. His rule was that where there were two varieties of currency in use, equal in value as legal tender, but unequal in intrinsic value, the more valuable would be hoarded, and only the less valuable would remain in circulation. His law is commonly paraphrased: bad money drives out good. In this application the paraphrase would be: bad title practices drive out good.

162. FLA. STAT. §§ 712.01-.10 (1963).

163. The model marketable title act was prepared as the result of a research project jointly sponsored by the University of Michigan Law School, and the Real Property, Probate and Trust Law section of the American Bar Association. SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 6 (1960). A similar statute was previously enacted in Michigan. MICH. COMP. LAWS §§ 565.101-.109 (Supp. 1956). See Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47 (1958); Catsman, *A Proposed Marketable Record Title Act for Florida*, 13 U. FLA. L. REV. 334 (1960); Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139 (1960).

164. There is a danger that a too-enthusiastic embracing of marketable title legislation may lead the unwary into trouble. The act will not guarantee the validity of the title searched back to its "root" in *all* cases. There are exceptions. For example, the act would not divest the interest of the sovereign. If there had been improper or imperfect conveyances under the Swamp and Overflow Lands Act, or by the Internal Improvements Fund, then the title would still reside in the sovereign, unaffected by the Marketable Title Act. MODEL MARKETABLE TITLE ACT § 6 (Simes & Taylor 1960). The Florida statute is somewhat different in wording but the conclusion is probably valid. See FLA. STAT. § 712.04 (1963), excluding from the act any interest "of the United States or Florida reserved in the patent or deed by which the United States or Florida parted with title;" Boyer and Shapo, *supra* n.107 at p. 127 as to the applicability of the act to void deeds.

The model act set forty years as the root of title. The chairman of the Real Property, Probate and Trust Law Section of the Florida Bar has suggested thirty years, and the Florida Legislature has agreed. FLA. STAT. § 712.02 (1963). Catsman, *A Proposed Marketable Record Title Act for Florida*, 13 U. FLA. L. REV. 334 (1960). The Michigan enactment of the model act has chosen forty years as the definitive period. MICH. COMP. LAWS §§ 565.101-.109 (Supp. 1956).

examiner can disregard the marital interest held by the possible spouse of the grantor since the terms of the act[165] would eliminate the claim. In this situation, the act would apply beyond statutes of limitation or curative acts and will outlaw existing dower interests over thirty years old unless of record. It simply strengthens the reliability of *record* title. Thus, marketable title legislation eases the title examiner's problems ascertaining outstanding dower interests. Comprehensive relief might be possible through substantive changes in the law of dower itself, rather than through the recording laws.

The Model Probate Code[166] has been suggested as an *aid* to uniformity in the various states. It is not a "Uniform Act." It is not enacted nor intended to be enacted in any state. It does offer some interesting suggestions and possibilities for reform in the area of dower and curtesy. Initially,[167] it abolishes the common law estates of dower and curtesy, thus removing all problems attendant to inchoate dower. The surviving spouse is given a share in the net estate of the decedent, including both realty and personalty. This share is variable, depending on the size of the estate involved. The survivor's rights attach only to the net estate owned at the time of death. The decedent-owner would, therefore, clearly have the power to defeat the interest of the surviving spouse if he so chose.[168] Under these circumstances, with the inchoate dower interest eliminated, and survivor's rights limited to the net estate owned *at the time of death*, the interest of the surviving spouse could easily be defeated by any conveyance of the property prior to the death of the owner.

Sales without joinder, inter vivos gifts, or establishments of trusts would effectively divest the surviving spouse of any interest in the property. Apparently, it was felt that complete freedom of alienation in that manner would be an invitation for dissident spouses to disinherit each other, by transfers or dissipations in contemplation of death. Therefore, the Model Probate Code contains a limitation to the effect that an owner can convey freely without joinder *only* if the conveyances were not intended to be in fraud of the survivor's rights. The apparent intent is to compromise between freedom of alienation on the part of the owner, and protection of the surviving spouse's interests. To achieve this result, the Code[169] permits the surviving spouse to set

165. FLA. STAT. §§ 712.01-.10 (1963). The act is discussed in Boyer and Shapo, *supra* n.107.

166. The Model Probate Code was the result of the work of a committee of the Probate Division of the American Bar Association. The chairman was R. G. Patton. Draftsmen of the Model Probate Code were Lewis M. Simes, Thomas E. Atkinson, Paul E. Basye. The project was financed by W. W. Cook and the University of Michigan. The Code was first published in SIMES & BASYE, PROBLEMS IN PROBATE LAW (1946).

167. MODEL PROBATE CODE § 31 (Simes 1946).

168. In this aspect, the Code belatedly follows the Dower Act, 1833, 3 & 4 Will. 4, c. 105, which permitted the husband to defeat dower in his wife. See note 157 *supra*.

169. MODEL PROBATE CODE § 33 (Simes 1946).

aside *any* conveyance made by the decedent, which is in fraud of the rights of that survivor. The question is posed as to what conveyances are in fraud of the survivor's rights. Inferentially, full consideration is required. The Code expressly provides[170] that any conveyance of realty or personalty within a two-year period prior to the death of the grantor will be considered presumptively fraudulent, and will put the grantee of the property to the burden of proof on the absence of fraud.

The result of this compromise, as with most, is unsatisfactory, and it will certainly leave titles in an unsettled situation.[171] Any property taken from a person who later dies (as he inevitably must) will be subject to attack by the surviving spouse. If the grantor shoud die within the two-year period, then the burden is upon the grantee. However, attacks can still be made beyond the two-year presumptive period, up to the limit set by the local statute of limitations. In such situations, the burden would fall upon the surviving spouse to show that there was a fraud, or that full consideration was not paid. This will leave titles to both land and personalty[172] in an impossible situation. It would complicate the title examiner's task immeasurably. He would now have to investigate the circumstances of the transfer from the decedent, to insure that full consideration was paid, and that the conveyance could not be successfully attacked by the surviving spouse. Additional complications can be visualized when one considers that this right to attack inter vivos conveyances will accrue to both spouses. This attempt to protect the expectancy of the surviving spouse illustrates the great difficulty involved, and may lead the reader to inquire whether that expectancy might not simply be dispensed with completely.[173]

A significant attack upon the dower problem has been made in New York. In 1929, legislation was introduced to abolish, prospectively, attachment of dower to real property. No inchoate dower interest could accrue to a previously married couple in lands prospectively acquired, nor to couples who married subsequent to the effective date of the act.[174]

170. *Ibid.*

171. Professor Mechem comments that § 33 is "incredible," "utterly pointless and meaningless." Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 514 (1948). See also Herriott, *Should the Estates of Dower and Curtesy be Abolished in Wisconsin?*, 1948 WIS. L. REV. 461.

172. Personalty today is freely alienable by the owning spouse, without any need for concurrence of the other spouse. The situation as to personalty may differ in those eight states where the doctrine of community property obtains. See text accompanying note 191 *infra*.

173. Adoption of the Model Probate Code is urged by Herriott, *Should the Estates of Dower and Curtesy Be Abolished in Wisconsin?*, 1948 WIS. L. REV. 461; 8 ALA. L. REV. 317 (1956). But see, Kuhns, *The Proposed Model Probate Code*, 35 NEB. L. REV. 290 (1955); Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501 (1948).

174. N.Y. REAL PROP. LAW § 190, as amended by Laws 1929, c. 229, § 12, which became effective Sept. 1, 1930. Dower which was consummate at that time was not affected, since the dower was a vested interest. Inchoate dower which had attached prior to 1930 was specifically excepted from abolition. It was soon found that existing inchoate dower still

Complementary to this elimination of dower, a statutory share was granted to the surviving spouse.[175] The act provided for an election to take under either the will or to accept the statutory share, as in intestacy.[176] One of the stated objectives of this amendment was "to eliminate the inchoate right to dower as a burdensome restraint on the conveyance of real estate."[177] Regardless of the status of the law, there will always be certain individuals who will desire to insure that their spouses do not partake of their estates. Under the New York law those persons were freed of the conveyancing restraint of dower, and its joinder requirement. Under the common law view, the wife's interest attached to the land as of the time of marriage, or acquisition of the property, whichever was later. Under the New York view, a surviving widow's interest could attach only upon the death of her husband. As previously noted, various devices were available at common law to either divest the attachment of dower, or to prevent its attachment upon acquisition of control over the property. Under the New York view, those devices are no longer needed since the determinative time is the death of the husband. It is clear that the widow can have no interest in property which her deceased husband did not own at his death. Thus, all a husband who wishes to bar any interest to his surviving widow need do, is to make sure that he dies without owning anything. He can accomplish this by a simple inter vivos conveyance. The question does remain as to the validity of merely colorable conveyances, made simply to divest the widow of any possible rights. Husbands whose interests lay in that direction could prevent the attachment of any rights to their widows by giving it all away inter vivos. Because of the loss of control over the property caused by an inter vivos gift, not too many would wish to do so. Alternatively, an irrevocable trust could be established, with independent trustees, wherein the settlor might be made life beneficiary with re-

presented the same problems of alienability and marketability which had motivated the reform initially. Section 190 was amended in 1938 to permit divestiture of then existing inchoate dower, upon payment to the wife of the ascertained value of her interest. *N.Y.* REAL PROP. LAW § 190(a). See Cummins, *Recent Reforms in the Inheritance Laws of New York*, 16 A.B.A.J. 785 (1930); Luabe, *The Revision of the New York Law of Estates*, 14 CORNELL L.Q. 461 (1929); Sullivan, *The Passing of Dower and Curtesy*, 19 GEO. L.J. 306 (1931).

175. This statutory share was also granted to the husband. It is mutual. The husband does have correlative statutory rights in his deceased wife's property. N.Y. DECED. EST. LAW § 18.

176. Florida would add an additional right to these two. Although the widow in Florida is faced with the same alternatives, she may, in addition to whichever choice she takes, file her extraordinary petition to claim dower in lands previously conveyed by her husband without her joinder. FLA. STAT. § 733.11 (1963). Thus, if there is a will, she can elect either to take under the instrument, or to take the statutory share which, in Florida, is called dower. FLA. STAT. § 731.34 (1963). If there is no will, then the widow is entitled to the statutory intestate share. This can be the entire estate, if there are no children, or a child's part, if there are children. FLA. STAT. § 731.23 (1963). This intestate share, like that under the will, is subject to the debts of the decedent. But instead of this intestate share, the widow may again elect the "dower" as provided for in § 731.34, which is free of debts.

177. Report of the Law Revision Commission for 1938. N.Y. Legis. Doc. No. 65 (1938).

mainder over to another.[178] This arrangement is clearly an irrevocable divestiture of all control over the corpus by the settlor, and cannot be called a merely colorable transfer intended to defeat the widow's possible interests.[179] Desirous of greater control, settlors soon established trusts, with themselves as one of two or more joint trustees,[180] and eventually, with themselves as sole trustee.[181] A point is soon reached when the transfer is almost illusory. This point came in the situation where, in addition to being the life beneficiary, the settlor retained power to control the actions of the trustee and to amend or revoke the trust entirely.[182] In this posture, the common law favoritism of the widow's interest reasserted itself over the legislative quiescence, resulting in a holding that this revocable living trust *may* indeed be a valid trust as against the whole world except the widow's interest.[183] This resurgence of common law solicitude for the widow was but a dying gasp, as a later decision weakened this holding that a revocable living trust was ineffective against a surviving widow's interest.[184] The result is that in those states which follow the present New York view that the widow is entitled to elect a statutory share against her husband's will only out of the property he owned at his death, the widow's rights can be defeated by the device of the revocable living trust.[185]

Aside from this hair-splitting over protection of the surviving

178. Of course, such an arrangement would remain liable for federal estate taxes under INT. REV. CODE OF 1954, § 2036.

179. West v. Miller, 78 F.2d 479 (7th Cir.), *cert. denied*, 296 U.S. 633 (1935); Smith v. Hines, 10 Fla. 258 (1863); Patterson v. McClenathan, 296 Ill. 475, 129 N.E. 767 (1921).

180. Fry v. McCormick, 170 Kan. 741, 228 P.2d 727 (1951); Johnson v. Muller, 149 Kan. 128, 86 P.2d 569 (1939).

181. Johnson v. Muller, 149 Kan. 128, 86 P.2d 569 (1939); Blades v. Norfolk So. Ry., 224 N.C. 32, 29 S.E.2d 148 (1944).

182. Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937). This involved an inter vivos trust. It is to be distinguished from the so-called Totten trusts of savings bank deposits, which are *sui generis* even though they too involve situations where the settlor of the "trust" retains considerable power over the corpus. Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904). See also *In re* Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 120 (1951); Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941); Reff v. Kanterman, 231 N.Y.S.2d 720 (Sup. Ct. 1962); *In re* Freistadt's Will, 279 App. Div. 603, 107 N.Y.S.2d 466 (1951); *In re* Zern's Estate, 138 N.Y.S.2d 894 (Surr. Ct. 1954).

183. Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); Harris v. Harris, 147 Ohio St. 437, 72 N.E.2d 378 (1947). See *infra* n.184.

184. *In re* Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 120 (1951). This case involved a Totten trust of a savings bank account, and therefore, did not squarely overrule *Newman v. Dore*, which involved an inter vivos trust other than a savings bank account. It has, however, weakened the principles enunciated in *Newman v. Dore*. See Hayes, *Illinois Dower and the "Illusory" Trust: The New York Influence*, 2 DE PAUL L. REV. 1 (1952); 33 IND. L.J. 377 (1958). Harris v. Harris, *supra* n.183 was expressly overruled by Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961).

185. This result would depend upon the trust being *bona fide*, and not one which can be found, as a matter of fact, to be illusory. The Totten trust is not illusory *per se*. *In re* Halpern's Estate, *supra* note 184. In an appropriate fact posture it may become illusory. Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941). It would seem that the Totten trust is the pluperfect example of the controllable revocable living trust. As to impregnability of a revocable trust in Ohio, see *supra* n.184.

spouse's interest, it must be noted clearly that conveyancing is greatly improved. Joinder of spouses is no longer required. The title examiner need not concern himself with possible frauds upon a spouse's interest. He need only inquire whether each conveyance was a real transfer, rather than merely illusory.[186]

VIII. CONCLUSION

Thus, we see that the original common law ironclad protection of the widow's rights has been eroded to a great extent. Many devices are recognized whereby inchoate dower rights can be divested without the consent of the wife. Other devices prevent the attachment of dower rights to the property in the first place. It is appropriate to ask whether there is any further social utility in the principle of dower?

Few will be harsh enough to assert that surviving widows are to be left at the mercy of their sometimes unappreciative husbands. The interests of society in the family stability are greater than the subjective feelings of the husband for his wife.

It can be seen that there has been a gradual shift of emphasis in the thrust of dower. It is no longer an interest intended mainly for the support and maintenance of the widow in her old age, to terminate at her death when no longer needed.[187] In addition, dower in its common law format, is a distinct handicap, as it is usually held to be a terminable interest and thus, cannot qualify for the marital deduction under the federal estate tax.[188] This can handicap estate planning.[189] The trend is distinctly towards the grant of a statutory share in the decedent's estate to the survivor.[190] This trend may be compared to the civil law concepts of community property.[191]

186. Reff v. Kanterman, 231 N.Y.S.2d 720 (Sup. Ct. 1962); *In re* Halbauer's Estate, 34 Misc. 2d 458, 228 N.Y.S.2d 786 (Surr. Ct. 1962); *In re* Zern's Estate, 138 N.Y.S.2d 894 (Surr. Ct. 1954).

187. In Florida, this right to elect dower remains even after the death of the surviving widow. It can be exercised by her guardian or heirs or by any person who has a beneficial interest in her estate. It is obviously in the nature of a vested property interest rather than a device to support her and prevent her from becoming a ward of the welfare bureau. FLA. STAT. § 731.35 (1963). The intent of this provision is simply to grant a distributive share to the widow in her husband's estate. There is no correlative distributive share to a surviving husband. See Bibb v. Bickford, 149 So.2d 592 (Fla. 1st Dist. 1963).

188. INT. REV. CODE OF 1954, § 2056.

189. In a rather complex situation, by going through certain involved procedures, dower can be qualified under the marital deduction. United States v. Crosby, 257 F.2d 515 (5th Cir. 1958).

190. In addition to other preferences, the surviving widow can be granted a family allowance of up to $1,200.00 in the discretion of the County Judge supervising the estate. This family allowance is for her support pending termination of the estate. It is not treated as an advance on her dower, nor as a debt of the estate, but instead, its award is deemed to lessen the gross estate, and thus in effect, to decrease the one-third which the widow electing dower will ultimately receive. FLA. STAT. § 733.20(1)(d) (1963); *In re* Gilbert's Estate, 160 Fla. 528, 36 So.2d 213 (Fla. 1948), criticized in 2 U. FLA. L. REV. 118, 121 (1949); *In re* Davidson's Estate, 8 Fla. Supp. 197 (Cir. Ct. 1956) (*semble*).

191. Under the influence of the civil law, community property concepts obtain in eight

It is submitted that, assuming the desirability of granting to the surviving spouse a share in the decedent's estate, the common law format of dower, or its modern statutory equivalent, is an inefficient method of securing that end. The price of retention of the chief attribute of common law dower, the inchoate right with its attendant clogging effect upon titles, is apparently too great in view of the relative ease with which the same goals can be secured through other means. The similar protection afforded to a surviving spouse's expectant statutory share by suggestions such as the Model Probate Code,[192] again serve to illustrate the restrictions on alienability which these forms of protection must inevitably generate. When there are such restrictions on alienability, the task of the title examiner and conveyancer is made more difficult. The sole meaningful argument in favor of these devices is the alleged protection which they give to the widow. This argument apparently ignores the demonstrated ease with which a determined and well-counseled husband can handle his property to prevent any rights from arising in his wife, or even to divest those rights which may have already accrued.[193] Further, in those states which follow the modern view of correlative

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states: Arizona; California; Idaho; Louisiana; Nevada; New Mexico; Texas; Washington. For example, in California there has been no dower nor curtesy since 1850. CAL. CIV. CODE § 173. "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." CAL. CIV. CODE § 687. "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse . . . ." CAL. PROB. CODE § 201. Under California law, as well as under the view of the Model Probate Code, note 171 *supra*, the wife can contest unauthorized gifts made by her husband. CAL. PROB. CODE § 201.8.

Louisiana community property laws are substantially similar to those of California, with the addition of vestiges of the civil law concept of the *legitime*. Community property dispositions illustrated by CAL. PROB. CODE § 201, relates only to community property. Not all property need be community property. Only that property which was acquired *during* marriage and to which the parties permitted the status of community property to attach, can become community property subject to the special community property descent rules. Situations may arise where, upon the death of the decedent, there is relatively little community property although there may be substantial separate property. Under such circumstances, Louisiana permits the court to award one-fourth of the decedent's separate property to the surviving spouse, upon the sole criterion of whether the decedent was "rich" as compared to the survivor. Necessity is immaterial. LA. CIV. CODE art. 2382 (West 1952). The wealth ratio apparently required by case law is five to one or more. Succession of Blackburn, 154 La. 618, 98 So. 43 (1923); Moore v. Succession of Moore, 7 So.2d 716 (La. App. 1942). In addition, LA. CIV. CODE art. 3252 (West 1952) grants to a necessitous widow the sum of $1,000, regardless of whether the husband died "rich" in the comparative sense of LA. CIV. CODE art. 2382 (West 1952).

Note Florida provisions for a "family allowance," note 186 *supra*. See generally, Vernier & Hurlbut, *Descent and Succession Under the Community Property System*, 20 IOWA L. REV. 232 (1934).

192. This protection is also evidenced by the great solicitude for the wife's expectancy, as shown by court opinions such as Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937), which restrictively interpreted legislation which could have led to liberal alienability of property. See also notes 171, 182, 184 *supra* and accompanying text.

193. For example, rights of the wife's which have already accrued may be divested by the use of the principle of *In re* Hester's Estate, 158 Fla. 170, 28 So.2d 164 (1946). See also note 142 *supra* and accompanying text.

statutory shares to the surviving spouse, the problems are doubled, for the protected surviving spouse may be either the widow or the widower.

It is suggested that the legislature take immediate[194] steps to rectify this situation, by the adoption of legislation which will forthwith prospectively[195] abolish all non-vested dower rights,[196] substituting the right to either spouse to elect to take the currently prescribed statutory share[197] in lieu of the share provided for the spouse in the will of the decedent.[198] It is further suggested that the elected statutory share

194. Immediate steps should be taken, but not too hastily. The District of Columbia, in 1957, made an attempt at such progress. Congress enacted an amendment to the District Code which purported to abolish dower and curtesy, and to substitute for it an intestate share. This intestate share was protected as was inchoate dower and could not be released without the consent of the spouse. The effect was to increase the share of the surviving spouse, either husband or wife, from the one-third for life which obtained previously, to the appropriate intestate share. This ranged from a possible taking of the entire estate in fee if there were no other relatives or descendants of the decedent, to one-third of the estate in fee, if there were many relatives or descendants still living. D.C. CODE § 18-201(b) (1961). After heated criticism of this amendment, Kane, *New Statutes of Descent and Abolishment of Dower and Curtesy in the District of Columbia*, 25 J.B.A.D.C. 194 (1958), Congress, in 1961, revised the statute to eliminate this intestate share election, and returned the statute to the prior arrangement whereby each spouse enjoyed a dower interest, now defined as "an inchoate estate for life in one-third of the real property owned by the other spouse at any time during the marriage . . . ." D.C. CODE § 18-201(a) (1963).

195. The Massachusetts legislature in 1957 and 1958 considered statutes to eliminate inchoate dower. This amendment did pass, but was twice recalled by the legislature, due to the doubts as to the constitutionality of the prospective elimination. This was partially due to the pre-1958 assumed Massachusetts view of inchoate dower, which raised the interest almost to the equivalent of a vested property right, and not the mere expectancy as it is in Florida and elsewhere. The question had never been clearly answered by a Massachusetts court, and the consensus of interpretations of existing Massachusetts opinions was that dower was a vested interest. In 1958, when the proposed abolition bill was pending before the Massachusetts Senate, an opinion was sought from the Massachusetts courts. This advisory opinion rejected the vested property interest concept, and stated instead, that it is entirely within the power of the Massachusetts Legislature to abolish inchoate dower. Opinion of the Justices to the Senate, 337 Mass. 786, 151 N.E.2d 475 (1958). Curiously, although fears of possible unconstitutionality were thus laid to rest, political problems were not. The Governor of Massachusetts objected to the abolition of dower, and the legislation was not enacted. *Report of the Legislative Committee of the Massachusetts Conveyancers Association for 1958-1959* § 1, 44 MASS. L.Q. 100, 101 (Dec. 1959).

196. Most states have abolished curtesy without feeling any qualms of either conscience or constitutionality. The usual vehicle for such abolition are the married women's property acts. *E.g.*, FLA. STAT. § 708.08 (1963).

197. This share is currently prescribed for the wife only. FLA. STAT. § 731.34 (1963). These statutory interests ought to be reciprocal, rather than for the benefit of the wife only.

198. It is submitted that abolition would not offend the due process or contract provisions of the federal constitution. It is urged that to abolish presently obtaining inchoate dower would be to deprive those wives of their "property" without due process of law. In those states where the concept obtains that inchoate dower is a vested interest, this argument will have merit. In Florida, as in most states, inchoate dower is not a vested interest, and hence, its legislative divestiture will deprive no one of any rights or property. Adams v. Adams, 147 Fla. 267, 2 So.2d 855 (1941); Opinion of the Justices to the Senate, 337 Mass. 786, 151 N.E.2d 475 (1958). See also Randall v. Kreiger, 90 U.S. (23 Wall.) 137 (1874); Moore v. City of New York, 8 N.Y. 110 (1853); Jackson v. Edwards, 7 Paige 386 (N.Y. Ch. 1839).

It is alternatively urged that the inchoate dower rights of a wife are rights arising from the marriage contract, and therefore, a legislative divestiture of those rights would be to impair the validity of a contract. Lawrence v. Miller, 2 N.Y. 245 (1849). This argument has been effectively rebutted by Maynard v. Hill, 125 U.S. 190 (1887), which held that marriage

should be inferior to the debts[199] of the decedent,[200] as is a non-elected intestate share.

That these suggestions will not materially affect the cherished rights of widows and orphans is clear from the recognized modern trend away from real property as the main basis of wealth, in favor of intangible personalty like stocks, bonds, and life insurance.[201] This personal property, though far greater in value than realty, is freely alienable without any of the restrictions now attendant to realty. In addition, another modern trend in relation to realty is that most families now take title to their home, which is usually the maximum extent of their realty holdings, in joint tenancy or tenancy by the entireties in order to secure the survivorship feature and to dispose of the property to the survivor without the necessity of a will and its attendant probate expenses. Thus, the conclusion appears obvious that dower protection as we now know it in Florida becomes of value only in an extremely small number of instances.[202] Conversely, the difficulties to the title examiner, purchaser and mortgagee remain to intrude into *each* individual real estate transaction. On balance, it seems that the largely illusory protective advantages of dower, as we know it, hardly warrant the disadvantages and difficulties thrust upon the title examiner and other persons dealing with the realty.

simply is not a "contract" within the meaning of U.S. CONST. art. I, § 10, which forbids states from passing any "law impairing the obligation of contracts . . . ."

199. Statutory dower, as we have it today, has already been partially subordinated to some debts of the estate. Federal estate taxes are creatures of federal law and are not governed by local state law with its various exemption provisions. Federal estate taxes are deducted from the gross estate and are not treated as debts of the estate, although the effect is to make them claims of first priority, superior even to dower. In certain instances where by virtue of the wife's election to take dower, the liability of the estate for federal taxes is increased, the dower portion of the widow is assessed pro-rata for the increased federal estate tax liabilities. FLA. STAT. § 731.34 (1963). In addition to dower being subordinated to federal estate taxes, it may also be postponed, in effect, to the statutory family allowance. FLA. STAT. § 733.20 (1963), note 190 *supra.*

200. This subordination or the elected statutory share would eliminate all the anomalous and unreasonable advantages to the widow who elects dower under FLA. STAT. § 731.34 (1963).

201. The report of the Comptroller shows that the total assessed valuation of non-homestead realty in Florida for 1962 was (all numbers rounded off) $10 billion, on which $120 million was collected in ad valorem taxes by the counties. At the same time, total intangible property subject to tax was $16 billion, on which $27 million was collected. REPORT OF THE COMPTROLLER OF THE STATE OF FLORIDA OF COUNTY FINANCES FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1962, 18, 62, 66 (1962). In addition, the reader knows that *all* realty is on the tax rolls and is reflected by this report, but that the enrollment of personalty and intangibles is not nearly as comprehensive, so the actual comparative values are conjectural.

202. In view of modern realities and the abundant emancipation of married women, I have long since ceased to be impressed by solemn references to the historical sanctity of dower as a perennial favorite of the law; for dower, as presently defined and implemented in Florida, too often results in gross inequity.
Any suggestion that our current version of dower is somehow firmly imbedded in righteousness and justice comes with poor grace in a state which withholds from a surviving husband reciprocal rights by way of *curtesy* in his deceased wife's estate. Dower in Florida needs a thorough reappraisal and overhauling, under the sponsorship of The Florida Bar, to remove its grave imbalances and give it a place of deserved respect in the property law of our state. Robison v. Krause, 136 So.2d 373, 375 (Fla. 2d Dist. 1962) (White, J. concurring).