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Notes

INCHOATE DOWER—AN IDEA WHOSE TIME IS PAST

INTRODUCTION

John and Mary Jones have been happily married for 20 years. John owns a farm in Anytown, Kentucky. One night they have an argument over whether Mary has been seeing another man. Unfortunately John's timing was bad because the very next day he receives an offer to sell the farm which he inherited from his father at a substantial profit. He goes to his attorney and the deed is prepared but Mary, still pouting over John's accusation, refuses to sign the deed and the chance for the profit is destroyed because the buyer refuses to buy the property subject to Mary's inchoate dower rights.¹

John and Mary Smith have been happily married for 20 years. He owns personal property in the form of stocks. One day John and Mary argue about whether they should retain the stock. The next day John sells the stock because the market price jumped \$20 a share overnight. Since Mary has no inchoate dower rights in the personal property John was able to sell the stock without her signature.

Inchoate dower does not apply to personal property and it no longer is necessary to protect surviving spouses from becoming destitute. As our society becomes more urban most estates are largely made up of personal property. Inchoate dower was necessary when a sizable amount of our wealth was in the form of land. It was a good idea, but its time has past and now its protective function has become a restraint on alienation of land. No matter the price the buyer is willing to pay, John Jones cannot pass a "clear" title to the farm without Mary's signature on the deed.

HISTORICAL FUNCTION OF DOWER

Modern estates of dower had their origins when land was the principal form of wealth and functioned to protect the widow and prevent her from becoming a burden on society.²

¹ Inchoate dower is the wife's interest in the lands of her husband during his life, which may become a right of dower upon his death. *See Smith v. Shaw*, 22 N.E. 924 (Mass. 1889).

² Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299, 305 (1969).

Dower is very ancient. Its origin is so remote that neither Coke nor Blackstone could trace it, and it is said to be as widespread as the Christian religion and to enter into the contract of marriage among all Christians. Dower is thus one of the most ancient institutions of the English common law. Even in Anglo-Saxon times it seems to have existed substantially in the form it bears in the later common law, possibly as the relic of a Danish custom. There is no question that dower was recognized and provision made therefor in Magna Carta in 1215 and in charters thereafter in 1216 and 1217.³

Dower at early common law was principally of two kinds: *ad ostium ecclesiae*, or at the church door, and *ex assensu patris*, or by the consent of the father. Dower *ad ostium ecclesiae* was given openly at the time of the marriage ceremony. The influence of the church is quite evident in this form of dower which required a formal marriage ceremony. Informal or clandestine marriages did not confer any legal protection upon the widow. Deathbed endowments were not recognized by the common law. Also there was a requirement that the husband could only confer dower out of the land which he held in fee at the time of the marriage.⁴ At the time of the husband's death, such properly granted dower could be entered upon by the widow without further ceremony.⁵

Dower *ex assensu patris* also was given at the church door after a formal marriage ceremony. Here the husband endowed his wife with the land upon which she might enter upon his death without further ceremony, but it was the father of the bridegroom who was seized in fee of the lands so endowed. Therefore the consent of the father was necessary. Once the consent was expressly given the wife could enter upon her dower after the death of her husband even though the father was still alive.⁶ Both of these estates were later abolished by statute in England.⁷

Other types of dower included dower prescribed by law, dower by the custom, and dower *de la plus beale*. Dower prescribed by law differed from the two major types discussed above in that it was not founded upon contract but upon the law.⁸ In dower by the custom

³ AM. JUR. 2d *Dower* § 14 (1966). The common law provision that endowed the wife with one-third of the husband's property appears to have had its origin in the Magna Carta. See F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 421 (2d ed. 1911).

⁴ T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 566 (5th ed. 1956). See also POLLOCK & MAITLAND *supra* note 3, at 420-428.

⁵ *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 138 (1875).

⁶ *Id.*

⁷ 3 & 4 Will. 4, c. 105 (1833).

⁸ *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137 (1875).

the widow was entitled to a peculiar and unusual allotment of dower varying with the particular locality.⁹ Dower *de la plus beale*

. . . existed where the husband held a portion of his lands by knight service, and a portion in socage,¹⁰ and died leaving a widow and a son within the age of 14 years, and the lord of whom the land was held in knight's service entered upon that portion as guardian in chivalry during the nonage of the infant, and the widow entered upon and occupied the residue as guardian in socage. If, in such case, the widow brought a writ to be endowed of the whole premises, she was compelled to endow herself *de la plus beale*, that is, of the fairest portion of the tenements held by her guardian in socage.¹¹

In England today dower has ceased to be of practical importance.¹² However, dower is a significant source of estates for life in many American jurisdictions. The English distrust of dower is evidenced by the fact that some American colonies enabled a husband to defeat dower simply by a deed or a will. Nevertheless the early distrust of dower gave way to the stricter rule of the common law. In many states the institution of dower is still a significant source of estates for life.¹³

DOVER AS IT EXISTS IN KENTUCKY

Statutory dower is the only remnant of common law dower extant in Kentucky. Kentucky Revised Statutes [hereinafter KRS] 392.020 states:

[The surviving spouse] shall have an estate for his or her life in one-third of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished.¹⁴

⁹ State Corp. Comm'n v. Dunn, 94 S.E. 481, 487 (N.C. 1917) (dissenting opinion).

¹⁰ Socage was a type of tenure whereby the tenant held certain lands in consideration of certain inferior services of husbandry to be performed by him to the lord of the fee. BLACK'S LAW DICTIONARY 1561 (rev. 4th ed. 1968).

¹¹ State Corp. Comm'n v. Dunn, 94 S.E. 481, 487 (N.C. 1917) (dissenting opinion).

¹² See 3 & 4 Will. 4, c. 105 (1833).

¹³ Alabama, Alaska, Arkansas, Delaware, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, New Jersey, Ohio, Rhode Island, Tennessee, Virginia, West Virginia and Wisconsin. 2 R. POWELL REAL PROPERTY § 213 (1971). Georgia and Oregon in the above list have abolished dower since 1967. *Id.* (Supp. 1970). Maryland has also abolished dower Code 1957, Art. 93, § 3-202 (1969).

¹⁴ It is necessary to point out that Kentucky defines dower as anything the surviving spouse takes under Ky. REV. STAT. [hereinafter cited as KRS] § 392.020.

(Continued on next page)

In Kentucky dower gives the widow a life estate in one-third of the land whereof the husband was seised in his own right at any time during coverture and which would be inherited by any child born of the marriage.¹⁵ However, it is not necessary that there should actually be a child born.¹⁶ Although most definitions of dower are couched in terms of the wife, in Kentucky the husband also is granted an equivalent interest in the estate of the wife.¹⁷

The prerequisites for dower are (1) a valid marriage of the parties and (2) the deceased spouse must have been seised of an estate of inheritance during coverture.

A valid marriage was a very real problem in early English law due to conflicts between the jurisdictions of lay and ecclesiastical courts.¹⁸ In the United States the problem has not been one of jurisdiction, but one of a defect in the marriage itself. Examples of marital defects that would bar the estate of dower in the surviving spouse are marriage to an incompetent, incestuous marriages, and bigamous marriages. The surviving spouse is not entitled to dower if at the time of the marriage the decedent was insane.¹⁹ Likewise, incestuous marriages such as between testator and niece²⁰ and between first cousins²¹ serve to defeat dower in the surviving spouse. The effect of a bigamous marriage depends upon the sex of the violator.²² If the violator is the husband the first wife is still protected, whereas if the violator is the wife she forfeits her claim to dower in her first husband's estate.²³

The second requirement for the surviving spouse to take dower is that the other spouse must have been seised of an estate of inheritance during coverture. This second prerequisite can best be explained by

(Footnote continued from preceding page)

It will be necessary to abolish only the clause that gives the surviving spouse a life estate in one-third of all real estate conveyed during coverture to effectuate the changes suggested by this Note.

¹⁵ *Casky v. Casky*, 5 Ky. Law Rep. 769 (1884); *Wigginton v. Leech's Adm'x.*, 149 S.W.2d 531 (Ky. 1941), held that a widow's right of dower is not merely a lien but is an individual interest, which vests at the time of the marriage, or as to subsequently acquired property, at the time of acquisition by the husband and is a "vested interest" which can be released or extinguished when she pursues the law in that regard.

¹⁶ *Id.*

¹⁷ Ky. Rev. Stat. § 392.010 (1971). With regard to the discussion of dower in Kentucky, the terms husband and wife are relatively interchangeable.

¹⁸ 2 R. POWELL *supra* note 12, at § 209(1).

¹⁹ *Jenkins v. Jenkin's Heirs*, 32 Ky. 102 (1834).

²⁰ *McIlvain v. Scheibley*, 59 S.W. 498 (Ky. 1900).

²¹ *Ex parte Bowen*, 247 S.W.2d 379 (Ky. 1952). KRS § 402.010 (1971) prohibits incestuous marriages.

²² KRS § 436.080 (1971).

²³ KRS § 392.100 (1971). See also *Bates v. Meade*, 192 S.W. 666 (Ky. 1917); *Powell v. Calvert*, 5 Ky. Law Rep. 769 (1884); *Donnelly v. Donnelly Heirs*, 47 Ky. (8 B. Mon.) 113 (1847).

examining its three essential components. *Seisin, Estate of Inheritance, and Land Held During Coverture.*

Seisin

There can be no dower in land which the husband, during coverture, was not actually seised,²⁴ or had no right to seisure.²⁵ It is not essential to the surviving spouse's right of dower that the deceased was in fact in possession of the land at any time during coverture, the right to possession being sufficient.²⁶ However, it is necessary that the seisin be in fee.²⁷ Thus, the Kentucky Court has held an occasional cutting of timber and tanbark by the husband upon an unenclosed tract of wild land, and the listing of the land for taxation in his name, was not sufficient evidence of seisin to vest in him the fee, so as to entitle the wife to dower.²⁸

Estate of Inheritance

At common law a requirement for dower was that the estate of the husband during coverture be an estate of inheritance. In Kentucky the statutory dower requires that the "other spouse [be] seised of an estate in fee simple."²⁹ As a result there is no dower right in a life estate held by the deceased spouse.³⁰ Thus if a spouse conveys real estate to a trustee to be held in trust for the benefit of a child during its life, and then to its lawful heirs, with no power of the child to sell or dispose of the property, the child has only a life estate and the child's widow could not claim dower.³¹ Moreover if the deceased spouse held only equitable title to the real estate, as in trust, no dower rights may be claimed.³²

Where the deceased spouse has an interest in land as a joint tenant³³ or tenant in common, the surviving spouse is entitled to dower. However, where the deceased spouse held partnership property, the real estate is treated as a partnership fund and the surviving spouse

²⁴ *Walters v. Anderson*, 361 S.W.2d 31 (Ky. 1962) (executive sale effectively deprived husband of seisin).

²⁵ *Hall v. Campbell*, 5 Ky. Law Rep. 246, 12 Ky. Opin. 673 (1883). See 2 R. POWELL *supra* note 13, § 209(1) for a more detailed discussion of seisin.

²⁶ *Ferguson v. Ferguson*, 156 S.W. 413 (Ky. 1913).

²⁷ KRS § 392.020 (1971). See also *Chalk v. Chalk*, 165 S.W.2d 534 (Ky. 1942).

²⁸ *Smallridge v. Hazlett*, 66 S.W. 1043 (Ky. 1902).

²⁹ KRS § 392.020 (1971).

³⁰ *Ford v. Yost*, 190 S.W.2d 21 (Ky. 1945); *Bodkin v. Wright*, 100 S.W.2d 824 (Ky. 1937).

³¹ *Bodkin v. Wright*, 100 S.W.2d (Ky. 1937).

³² *Tevis v. Steele*, 20 Ky. (4 T.B. Mon.) 339 (1827).

³³ *Davis v. Logan*, 39 Ky. (9 Dana) 185 (1839).

of the deceased partner is not entitled to dower until the partnership debts are paid.³⁴ In addition, where a part of the purchase money is due and the administrator sells the land under court order and applies the proceeds to payment of the balance, the dower of the surviving spouse is limited to a share of the residue.³⁵

In addition to the problem of whether the deceased spouse held the necessary interest in real estate for dower to be claimed there are also problems as to what types of property may be classified as real estate and thus subject to dower. It has been held that stock in a railroad company is real estate to which dower attaches.³⁶ Oil wells and other mines which a deceased spouse opened on the land during his life or which he was under a binding contract to open at the time of his death, have been held real estate. A distinction has been made with regard to opened and unopened mines.³⁷ However, with respect to unopened mines, dower has been denied.³⁸ Dower may also be claimed in royalties accruing from oil and other minerals taken from the real estate.³⁹ In the event that the decedent's estate is an oil or gas leasehold, it is less than a fee simple and therefore not subject to dower.⁴⁰

Land Held During Coverture

Another requirement for dower is that the land be held during coverture. This requirement though simple on its face has been complicated by: (1) the problems and issues created by conveyances before marriage; (2) property acquired during coverture that is subject to encumbrances; and (3) such devices as antenuptial or post-nuptial agreements. A deed executed by a husband, on the day of his marriage, selling his land does not deprive the wife of dower.⁴¹ However, if before the marriage an option is given to purchase land,

³⁴ *Bennett v. Bennett*, 121 S.W. 495 (Ky. 1909); *Ellis v. Johnson*, 4 Ky. Law Rep. 991, 12 Ky. Opin. 163 (1883). Where no partnership exists when the land is purchased, a subsequent appropriation of the property for partnership purposes will not bar the widow of one of the partners from her dower. *Bowler v. Blair*, 6 Ky. Law Rep. 666, 13 Ky. Opin. 324 (1885).

³⁵ *Brewer v. Vanarsdale's Heirs*, 36 Ky. (6 Dana) 204 (1838).

³⁶ *Copeland v. Copeland*, 70 Ky. (7 Bush) 349 (1870). *Price v. Price's Heirs*, 36 Ky. (6 Dana) 107 (1838). It does not make any difference that a portion of the amount due on the stock has been paid since the death of the holder.

³⁷ *Crain v. West*, 229 S.W. 51 (Ky. 1921).

³⁸ *Daniels v. Charles*, 189 S.W. 192 (Ky. 1916); *Whitaker v. Lindley*, 3 S.W. 9 (Ky. 1887). See also *Roberts, Dower Rights Under Oil and Gas Leases*, 13 WASH. & LEE L. REV. 15 (1958).

³⁹ *Bartlett's Adm'r v. Buckner's Adm'r*, 54 S.W.2d 25 (Ky. 1932).

⁴⁰ *Buehrer v. Gates*, 411 S.W.2d 676 (Ky. 1967). This case seems to be inconsistent with Kentucky's previously unique rule as to mineral leases as stated in *Pursifull's Adm'r v. Pursifull*, 184 S.W.2d 967 (Ky. 1945).

⁴¹ *Stewart's Lessee v. Stewart*, 26 Ky. (3 J.J. Marsh) 48 (1829).

the surviving spouse may not claim dower if the option is exercised within the time prescribed in the option agreement.⁴² In addition, where a contract is made to sell realty before the marriage, although the conveyance is not made until after the marriage, the surviving spouse is not entitled to dower.⁴³

Since an estate of dower partakes of the nature of the estate of the decedent,⁴⁴ if the decedent held the property subject to encumbrances the dower will also be subject to the encumbrances. If the land is held subject to a vendor's lien for the purchase money the right to dower is subordinate to the vendor's lien.⁴⁵ The right to dower is also subordinate to tax liens. Absent a lien or its equivalent, however, the right to dower is not subject to the debts of the surviving spouse.⁴⁶ Even where the executors have transferred property to the surviving spouse in lieu of a claim for dower it has been held that (absent collusion) such agreement and conveyance bind the creditors and the conveyance is not voidable by the creditors even though it was not a good bargain with regard to the surviving spouse.⁴⁷

Generally it has been held that dower may be relinquished by an antenuptial agreement. However, the agreement must be made in the absence of fraud, the spouse must be *sui juris*,⁴⁸ and the agreement must clearly show an intention to make provision therein in lieu of dower.⁴⁹ Thus, where a husband entered into an antenuptial agreement, conveyed all his lands to his children and died without making provisions for his widow, the Court subjected the conveyances to the terms of the antenuptial agreement.⁵⁰ Also, where a wife has knowledge of the extent of the husband's estate and is *sui juris* generally she will not be allowed to disclaim the antenuptial agreement.⁵¹ Post-nuptial agreements have also been held to be valid. Where a spouse, for consideration, relinquishes a right to dower the spouse cannot later repudiate the agreement and demand dower⁵² but the agreement must be an "arm's-length" transaction. Jointure agreements are valid if

⁴² Mineral Dev. Co. v. Hall, 115 S.W. 230 (1909).

⁴³ Gully v. Ray, 57 Ky. (18 B. Mon.) 107 (1857).

⁴⁴ Porter's Heirs v. Robinson, 10 Ky. (3 A.K. Marsh) 253 (1821).

⁴⁵ KRS § 392.040 (1971); McMurray v. McMurray, 410 S.W.2d 139 (1966); Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942); Matney v. Williams, 89 S.W.678 (Ky. 1905).

⁴⁶ KRS § 92.590 (1971), KRS § 134.420 (1971); Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942).

⁴⁷ Wyrick v. Wyrick, 243 S.W.2d 1004 (Ky. 1952); Maryland Cas. Co. v. Lewis, 124 S.W.2d 48 (Ky. 1939).

⁴⁸ Harrow v. Johnson, 60 Ky. (3 Metc.) 578 (1861).

⁴⁹ Forwood v. Forwood, 5 S.W. 361 (Ky. 1887).

⁵⁰ Hardesty v. Hardesty's Ex'r, 34 S.W.2d 442 (Ky. 1931).

⁵¹ Garrard v. Garrard, 70 Ky. (7 Bush.) 436 (1870).

⁵² Forwood v. Forwood, 5 S.W. 361 (Ky. 1887).

they are in satisfaction of dower. Jointure is generally a competent livelihood for the wife in the husband's property to take effect after his death and is conveyed or devised to the wife in lieu of dower.⁵³ It may consist of either real or personal property.⁵⁴

RELINQUISHMENT OF DOWER IN KENTUCKY

A spouse has no power to defeat the inchoate right of dower without the other spouse's consent. A spouse can only lose dower by selling it, forfeiting it or by death.⁵⁵ Dower can be relinquished by alienation only in the statutory modes, that is, by the execution of a deed with his or her spouse (or by separate deed if he has already conveyed) and by privy acknowledgment before a proper officer.⁵⁶ A dower interest in land cannot be relinquished or transferred by a mere verbal declaration, however formal the manner in which it may be made or certified.⁵⁷ In order to effectively relinquish dower the name of both spouses must appear in the body of the deed and thus a mere signing and acknowledgment of the instrument by one spouse will not operate to convey the dower rights in the property.⁵⁸ However, the failure of a deed to include a spouse's name in the caption or granting habendum clause has been held not fatal in relinquishing dower.⁵⁹ In the event that a wife releases her dower rights in the manner provided by statute (by joining with her husband in conveyance of the property) it is not essential for the conveyance to operate that she should receive a separate and independent consideration.⁶⁰

The husband's title to land sold under decree may be acquired, but this does not divest the wife of her right to dower therein.⁶¹ Where land is sold at judicial sale subject to dower, the purchaser or his vendees having knowledge of the dower interest hold the land subject to the dower right.⁶² However, a wife's consent to a judicial sale of her husband's land and her acceptance of a part of the pur-

⁵³ *Loud v. Loud*, 67 Ky. (4 Bush.) 453 (1869); *Morgan v. Sparks*, 108 S.W. 233 (Ky. 1869).

⁵⁴ *Maynard's Adm'r v. Maynard*, 140 S.W.2d 343 (Ky. 1941); *Tevis' Ex'r v. McCreary*, 60 Ky. (3 Metc.) 151 (1800).

⁵⁵ *Rowe v. Ratliff*, 104 S.W.2d 437 (Ky. 1937).

⁵⁶ *Hanna's Assignees v. Gay*, 78 S.W. 915 (Ky. 1904).

⁵⁷ *Worthington v. Middleton*, 36 Ky. (6 Dana) 300 (1838).

⁵⁸ *Beverly v. Walker*, 74 S.W. 264 (Ky. 1903) (mortgage); *Measels v. Martin*, 18 S.W. 359, *rev'd*, 18 S.W. 1029 (Ky. 1890); *Buford's Adm'r v. Guthrie*, 77 Ky. (14 Bush.) 690 (1879).

⁵⁹ *Hackney v. Smith*, 273 S.W. 476 (Ky. 1925).

⁶⁰ *Moore v. Hudson*, 240 S.W. 383 (Ky. 1922).

⁶¹ *Myers v. Happeron*, 3 Ky. Opin. 623 (1868).

⁶² *Young v. Strother*, 3 Ky. Law Rep. 695, 11 Ky. Opin. 575 (1882).

chase money estops her from asserting her inchoate right of dower.⁶³ But, a wife cannot by her acts and declarations be estopped from asserting dower unless to permit her to do so would operate as a fraud.⁶⁴ Thus for example, a public announcement by a wife at the commissioner's sale of her husband's land that she will not claim dower against any person who shall become the purchaser estops her from asserting dower against one purchasing in reliance on such a declaration.⁶⁵

The wife can pass a dower interest by deed and her creditors can have the dower allotted and subjected to their claims.⁶⁶ But if the husband executes an assignment for creditors, and the wife does not join, the assignment has no effect on her dower interest.⁶⁷ A mortgage properly executed by husband and wife waives dower rights under Kentucky law but only as to the mortgage creditor.⁶⁸

A spouse in certain instances may lose the right to dower as a consequence of misconduct. It has been held that where a wife leaves her husband voluntarily to live in adultery she forfeits her right to dower⁶⁹ but a subsequent reconciliation would appear to reinstate her rights.⁷⁰ A promiscuous wife who wishes to have her cake and eat it too must continue to live with her husband while engaging in the adulterous relationship if she wishes to retain her claim to dower in her husband's estate.⁷¹ If the misconduct of a spouse is wrongful killing, the rights to dower are not forfeited by such action.⁷² Termination of the marital relationship by divorce cuts off the estate of dower. However a divorce from bed and board does not bar the right to dower,⁷³ and a divorce obtained in another state does not affect the right to dower in real estate situated in Kentucky.⁷⁴ The right to have dower assigned⁷⁵ ends at the death of the surviving husband or wife, and does

⁶³ *McIlvain v. Moss*, 3 Ky. Opin. 508 (1869).

⁶⁴ *Syck v. Hellier*, 131 S.W. 30 (Ky. 1910).

⁶⁵ *Connolly v. Branstler*, 66 Ky. (3 Bush.) 702 (1868). See also *Walters v. Anderson*, 361 S.W.2d 31 (Ky. 1962); *Oldham v. McElroy*, 121 S.W. 414 (Ky. 1909); *Craddock v. Tyler*, 66 Ky. (3 Bush.) 360 (1868).

⁶⁶ *Wintersmith v. Goodin*, 4 Ky. Opin. 67 (1871).

⁶⁷ *Hanna's Assignees v. Gay*, 78 S.W. 915 (Ky. 1904).

⁶⁸ *In re Gish*, 32 F.2d 322 (1929).

⁶⁹ *McQuinn v. McQuinn*, 61 S.W. 358 (1901). See also *Ferguson v. Ferguson*, 156 S.W. 413 (Ky. 1913); *Bond v. Bond's Adm'r*, 150 S.W. 363 (Ky. 1912).

⁷⁰ *Id.*

⁷¹ *Sergent v. North Cumberland Mfg. Co.*, 66 S.W. 1036 (Ky. 1902).

⁷² *Eversole v. Eversole*, 185 S.W. 487 (Ky. 1916).

⁷³ *Lively v. Lively*, 7 Ky. Law Rep. 838 (1886).

⁷⁴ *Hawkins v. Ragsdale*, 80 Ky. 353, 4 Ky. Law Rep. 184 (1882).

⁷⁵ Assignment of dower is the act by which the share of a widow in her deceased husband's real estate is ascertained and set apart to her. BLACK'S LAW DICTIONARY 153 (rev. 4th ed. 1968).

not pass to the personal representative of the surviving spouse.⁷⁶ If dower is assigned to the surviving spouse since it is only a life estate the decedent has no interest which can be inherited.

RIGHTS AND REMEDIES OF THE SURVIVING SPOUSE IN KENTUCKY

The right to dower, until it is assigned, is a right resting in action only. It can be released, but not transferred so as to invest another with the right to an action for it, and moreover an award of dower will extinguish the action for it.⁷⁷ After the death of the decedent and before the assignment of dower to the surviving spouse, the surviving spouse is entitled to possession of the decedent's land in which the dower rights exist.⁷⁸ The surviving spouse is treated as a "tenant at will"⁷⁹ until dower or homestead is assigned and after that as a "tenant for life."⁸⁰ In addition, the surviving spouse is not chargeable with rent for use and occupancy of a house prior to the assignment of dower.⁸¹

The surviving spouse must elect whether to take dower or homestead since they are mutually exclusive.⁸² The mere fact that the widow remains in the house of her husband for a few years after his death does not establish conclusively that she has elected to take homestead instead of dower.⁸³ However after the lapse of a reasonable time, where no election has been made, it will be conclusively presumed that the surviving spouse took the estate or right which was most beneficial.⁸⁴ In addition, a court may elect homestead or dower for the surviving spouse where no election has been made, but it is incumbent on the court to elect the estate that is the most beneficial to the surviving spouse.⁸⁵

If the spouse's choice is dower rather than homestead he or she may elect to take the present cash value of the dower right in lieu of the one-third life estate. Under Kentucky law, a widow is entitled to an assignment of a life interest in one-third of husband's real estate by

⁷⁶ Cain's Adm'r v. Ky. & Ind. Bridge & R. Co., 99 S.W. 297 (Ky. 1907).

⁷⁷ Shield's Heirs v. Batts, 28 Ky. (5 J.J. Marsh.) 12 (1830).

⁷⁸ Robinson v. Miller, 40 Ky. (1 B. Mon.) 88 (1840).

⁷⁹ Jordan v. Sheridan, 149 S.W. 1028 (Ky. 1912).

⁸⁰ Wilson v. Devasher, 264 S.W. 1057 (Ky. 1924).

⁸¹ Hall v. Hall, 328 S.W.2d 541 (Ky. 1959).

⁸² *In re* Gibson, 33 F. Supp. 838 (E.D. Ky. 1940); James v. Reeves, 215 S.W. 66 (Ky. 1919); Cryer v. McGuire, 146 S.W. 402 (Ky. 1912); Middleton v. Fields, 134 S.W. 180 (Ky. 1911); Jones v. Green, 83 S.W. 582 (Ky. 1904); Redmond's Adm'r v. Redmond, 66 S.W. 745 (Ky. 1902); Kimberlin v. Isaacs, 62 S.W. 494 (Ky. 1901); Freeman v. Mills, 59 S.W. 3 (Ky. 1900).

⁸³ Phillips v. Williams, 113 S.W. 908 (Ky. 1908).

⁸⁴ Campbell v. Whisman, 209 S.W. 27 (Ky. 1919).

⁸⁵ Wilson's Adm'r v. Wilson, 156 S.W.2d (Ky. 1941).

deed or conveyance if the real estate can be partitioned and divided. However, if the real estate cannot be divided without materially impairing its value or the value of the widow's interest therein, the widow has a right to have the real estate sold free of dower and to obtain a reasonable compensation out of the proceeds.⁸⁶ In calculating the present cash value of a widow's dower right in lieu of a life estate the four percent maximum interest rate and life expectancy as shown by the United States life tables and interest schedules published in the latest edition of Kentucky Revised Statutes should be used.⁸⁷ The Kentucky Court has also considered such variables as health, vigor, and age of the widow in calculating the value of her dower rights.⁸⁸ The debts of the decedent and the expenses of administration⁸⁹ may not be deducted from the proceeds of the sale of land before computing the value of the widow's dower interest.⁹⁰

In the event that there is controversy concerning the election of dower by the surviving spouse the claim for dower is assertible against decedent's heirs and not his personal representative.⁹¹ The county court has no right to appoint commissioners to assign dower, except in cases where the husband died seised of the land. In cases where the husband alienated lands⁹² before his death, the circuit court has jurisdiction. In addition, the county court has no authority to allot dower unless the allotment is uncontested.⁹³ A widow's right of action to recover dower does not accrue until the death of her husband and hence the statute of limitations does not begin to run against her until that time.⁹⁴ The cause of action for dower has been classified as an action for the recovery of real property, consequently a fifteen year statute of limitations applies.⁹⁵

THE "FORCED SHARE"

Many states feel a compelling interest in requiring that the surviving spouse be allowed to share in the deceased's estate. The

⁸⁶ KRS §§ 381.135, 389.050 (1971); *Moore v. United States*, 214 F.Supp. 603 (Ky. 1963).

⁸⁷ KRS § 386.060 (1971); *Morris v. Morris*, 293 S.W.2d 243 (Ky. 1956).

⁸⁸ *Alexander's Ex'x v. Bradley*, 66 Ky. (3 Bush.) 667 (1868).

⁸⁹ *Mill's Adm'x v. Mills*, 265 S.W.2d 458 (Ky. 1954).

⁹⁰ Additional procedural and evidentiary problems will be discussed *infra*.

⁹¹ *Clore's Adm'r v. Clore*, 284 S.W. 385 (Ky. 1926).

⁹² *Rintch v. Cunningham*, 7 Ky. (4 Bibb.) 462 (1816).

⁹³ *Garris' Heirs v. Garris*, 46 Ky. (7 B. Mon.) 461 (1847); *Murphey's Heirs v. Murphey*, 46 Ky. (7 B. Mon.) 232 (1846); *Stevens' Heirs v. Stevens*, 33 Ky. (3 Dana) 371 (1835); *Williams v. Williams*, 24 Ky. (1 J.J. Marsh) 105 (1829).

⁹⁴ *Smith v. Myers*, 7 Ky. Law Rep. 443, 13 Ky. Opin. 830 (1885).

⁹⁵ *Winchester v. Keith*, 70 S.W. 664 (1902); *Anderson's Trustee v. Sterritt*, 79 Ky. 449, 3 Ky. Law Rep. 277 (1881).

decision to guarantee the surviving spouse a share in the estate of the other regardless of the desires of the decedent is based on various policy considerations aimed at protection of the family unit; *i.e.*, the obligation of support, the presumed contribution of the survivor's family, and the state's interest in protection from the burdens of indigents as well as those policies favoring equality of the sexes, economy in transmission of property, and fairness among beneficiaries.⁹⁶ "Giving effect to these concepts, however, frustrates other such policies as freedom of testamentary disposition, protection of creditors, and alienability of land, all of which militate against nonbarrable shares for the surviving spouse."⁹⁷

Eight community property states and Louisiana, a civil law state, protect the surviving spouse primarily by providing for a form of shared inter vivos ownership of marital property.⁹⁸ Of the remaining forty-one states, thirty-nine permit the surviving spouse to claim a share in the estate of the deceased spouse,⁹⁹ while only two states leave the testator's wishes unfettered by inchoate dower.¹⁰⁰ Therefore, most states, including those that have abolished dower, attempt to protect the surviving spouse against disinheritance by giving that spouse an election to take against the will (the "forced share"). One example is the Model Probate Code which reads as follows:

The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [\$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [\$5,000], one-half the estate that would have passed to him had the testator died intestate.¹⁰¹

The Uniform Probate Code also allows for the surviving spouse's election against the will.¹⁰²

⁹⁶ Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 UNIV. CHI. L. REV. 681 (1966). See also Wren, *The Widow's Election: Drafting and Tax Considerations in Community and Common Law States*, 100 TRUSTS & ESTATES 13 (1961).

⁹⁷ Plager, *supra* note 96, at 681.

⁹⁸ *Id.* Arizona, California, Idaho, Nevada, New Mexico, Oklahoma, Texas, and Washington.

⁹⁹ *Id.* Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. South Carolina gives the surviving wife common law dower. The District of Columbia gives the surviving spouse the right to choose by statute.

¹⁰⁰ *Id.* North Dakota and South Dakota.

¹⁰¹ SIMES, MODEL PROBATE CODE § 32a (1946).

¹⁰² UNIFORM PROBATE CODE § 2-201 *et. seq.* (1969).

Kentucky allows the surviving spouse to renounce the will as provided in KRS:

(1) When a husband or wife dies testate, the surviving spouse may, though under full age, release what is given to him or her by will, if any, and receive his or her share under KRS 392.020 as if no will had been made, except that in such case the share in any real estate of which the decedent or anyone for the use of the decedent was seised of an estate in fee simple at the time of death shall be only an estate for the surviving spouse's life in one-third of such real estate. Such relinquishment shall be made within twelve months after the probate, and acknowledged before and left for record with the clerk of the court where probate was made, or acknowledged before a subscribing witness and proved before and left with the clerk. If, within those twelve months, an appeal is taken from the judgment probating the will, the surviving spouse need not make such relinquishment until within the twelve months succeeding the time when the appeal is disposed of.

(2) Subsection 1 does not preclude the surviving spouse from receiving his or her share under KRS 392.020, in addition to any bequest or devise to him or her by will, if such is the intention of the testator, plainly expressed in the will or necessarily inferable from the will.¹⁰³

In Kentucky, there exists a legal presumption that a devise to the wife is in lieu of dower, and she is compelled to elect between the two, unless a contrary intention is plainly expressed in the will or necessarily inferable therefrom.¹⁰⁴ The share the surviving spouse may elect (or "force"), regardless of the terms of the will, is a life estate in one-third of any real estate of which the decedent was seised in fee simple at the time of death, an absolute estate in one-half of the surplus personalty left by the decedent, and a one-third life estate in any real estate of which the other spouse was seised in fee simple during the coverture but not at the time of death.¹⁰⁵

Thus, the Kentucky statutes give the surviving spouse who elects against the decedent's will a share less than what she would have received in intestacy.¹⁰⁶ In the case of intestacy, the wife is entitled to one-half of the real estate owned at death in fee. However, if she elects against a will, she is entitled only to a life estate in one-third

¹⁰³ KRS § 392.080 (1971).

¹⁰⁴ *Wilson v. Fisher*, 184 S.W.2d 104 (Ky. 1944); *Huhlien v. Huhlien*, 8 S.W.260 (Ky. 1888). See also Note, 9 So. CAR. L.Q. 277 (1957).

¹⁰⁵ KRS §§ 392.020, 392.080 (1971). Kentucky labels everything given to the surviving spouse under these sections "dower."

¹⁰⁶ 25 AM. JUR.2d, *Dower & Curtesy* § 169 (1966). Generally states allow spouse's electing against the will to receive a share equivalent to what they would have taken in the event of intestacy. See also, Note, 47 Ky. L.J. 243 (1959).

of the real property and the latter applies even though the will omits her entirely.¹⁰⁷

A right to elect against the will is a personal right of the surviving spouse. If the election is made according to statute, it is not contestable by devisees, legatees, heirs, or creditors.¹⁰⁸ However, there is some authority to the effect that the privilege to elect may be delegated to an agent during the lifetime but after the death of the elector no such authority would be recognized in an agent or attorney.¹⁰⁹ If the surviving spouse is incompetent, the general rule is that a guardian or committee cannot make the election. It must be made by a court of competent jurisdiction, usually the court having care of the incompetent. However, some decisions indicate that not even a court has the authority to make the election for the incompetent surviving spouse.¹¹⁰

The Kentucky election statute stipulates a definite period (twelve months) within which an election between the will or the statutory share must be made. It has been held that failure to elect within the required period operates as a release of dower and an acceptance of the bequest.¹¹¹ However, where due to the condition of the estate, it is impossible for the surviving spouse to make an intelligent election, the court may extend the time to elect beyond twelve months.¹¹² An election to take contrary to the will, made with knowledge of the facts and not induced by fraud, cannot be withdrawn or revoked, even within the time allowed for making renunciation, without an order of the court.¹¹³ However, a revocation of the election may be obtained where such election was procured through fraud or duress.

Dower, though inchoate during marriage, becomes absolutely vested upon the death of a spouse. Testamentary provisions cannot deprive a surviving spouse of dower unless consented to. If a will either expressly or impliedly makes provision for a surviving spouse in lieu of dower and that spouse elects to take under the will, the spouse may not subsequently claim dower.¹¹⁴ "If in construing a will, there be anything ambiguous or doubtful, and if the court cannot say that it

¹⁰⁷ Hedden v. Hedden, 312 S.W.2d 891 (Ky. 1958).

¹⁰⁸ 25 AM. JUR.2d, *Dower & Curtesy* § 162 (1966).

¹⁰⁹ *Id.*

¹¹⁰ 25 AM. JUR.2d, *Dower & Curtesy* § 163 (1966).

¹¹¹ Georgetown Nat'l Bank v. Ford, 285 S.W. 218 (Ky. 1926).

¹¹² Mann v. Peoples-Liberty Bank & Trust Co., 256 S.W.2d 489 (Ky. 1953); Brewer's Ex'r v. Smith, 45 S.W.2d 1036 (Ky. 1932).

¹¹³ Craven v. Craven, 205 S.W. 406 (Ky. 1918) (the widow must show good cause to the court and cannot revoke at her pleasure).

¹¹⁴ Note, *supra* note 104, at 277.

was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported."¹¹⁵

From the foregoing it is evident that the surviving spouse is sufficiently protected from disinheritance and becoming a ward of the state by the "forced share" statutes. Dower cannot be effectively defeated by will, although the surviving spouse may be forced to choose between the will and dower. In addition to this protection, surviving spouses are also protected by "motive tests" which prevent the depletion of surviving spouses' estates by unreasonable inter vivos transfers.

FRAUDS ON THE MARITAL SHARE

There appears to have developed three general lines of reasoning or tests with variations used by courts as regards attempted evasions of the marital share. One doctrine espoused by the courts is that of "illusory transfers." The leading case in this area is *Newman v. Dore*¹¹⁶ where the husband, three days before his death, with the intent to defeat the widow's statutory right created an inter vivos trust of all his property. He retained the power to revoke the income for life. The trustees were made subject to the settlor's control during his life and could exercise their powers only as the settlor directed. The New York Court of Appeals sustained the widow's attack on the trust and stated that the essential test was whether the transfer was real or *illusory*, that is, whether the husband in good faith divested himself of ownership.¹¹⁷ "In sum, excessive control is decisive; intent (motive) is immaterial."¹¹⁸ Thus, where the transfer is "illusory" the courts will allow the marital share.¹¹⁹ In addition, trusts that are deemed testamentary may be held an invalid disposition and thus, the trust property would form part of the decedent's estate.¹²⁰

Another test is one based on the "reality" of the transfer. A transfer has the requisite "reality" if it is in fact a valid inter vivos transfer. In theory, the rights of the widow are not considered; the only transfers which the widow may successfully attack are testamentary transfers and sham transfers. Therefore, if the transfer is complete¹²¹ or the

¹¹⁵ *Id.* at 277. Note that in Kentucky the devise in the will is presumed to be in lieu of dower.

¹¹⁶ 9 N.E.2d 966 (N.Y. 1937).

¹¹⁷ *Id.* at 969.

¹¹⁸ W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 75 (1960) [hereinafter cited as MACDONALD].

¹¹⁹ See, Note, *Trusts—Will The Creation of a Trust Defeat a Spouse's Statutory Allowances?* 34 Ky. L.J. 296 (1946), for the effect of the creation of an inter vivos trust on a spouse's statutory allowance.

¹²⁰ MACDONALD at 69-73.

¹²¹ *In re Halpern's Estate*, 100 N.E.2d 120 (N.Y. 1951).

transferee obtained a present interest¹²² as soon as the transfer was made, the transfer becomes invulnerable to the widow's attack.¹²³

The third test is based on the "intent" of the transferor in making the transfer. If the intent was to deprive the surviving spouse of the marital share, the transfer will be subject to the rights of the surviving spouse. If, on the other hand, the intent was something other than to deprive the spouse of a marital share, the transfer will be upheld.¹²⁴

Kentucky seems to have adopted a variation of the intent or motive doctrine. Thus, where a man who has an estate acquired largely through the skill and industry of his first wife, now deceased, conveys land worth \$9,000 to three children by the first wife pursuant to promises made to her, the conveyance is considered reasonable when made in good faith, without an intent to defraud. The conveyance will usually be upheld against the second wife's claim for dower in the lands.¹²⁵ However, if the gift of property is made with the expressed "intent" of depriving his widow of her share, the gift will be set aside as a fraud on the widow even though the widow's dower in the remaining land is sufficient to afford her support.¹²⁶ In determining intent:

The court must look to the condition of the parties, and all the attending circumstances, in judging of the transaction. It should take into consideration the amount of the husband's estate, the value of the advancements, the time within which they are made, and all other *indicia* which will serve to determine the intention accompanying the transaction. If, however, a gift or voluntary conveyance of all or the greater portion of his property be made to his children by a former marriage without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises; and it rests upon the beneficiaries to explain away such presumption.¹²⁷

Following this rationale, the Court in *Wilson v. Wilson*¹²⁸ set aside as a fraud on the marital rights, a gift of bank shares and a note to the children which if allowed to stand, would have left the widow destitute. In contrast, a husband's gift *causa mortis* of money which he had on deposit in a bank was held not to be a fraud on the wife where the proceeds of a life insurance policy and the amount given

¹²² *Pruett v. Cowsart*, 72 S.E. 30 (Ga. 1911).

¹²³ *MACDONALD* at 120-28.

¹²⁴ *Id.* at 103-08.

¹²⁵ *Fennessey v. Fennessey*, 2 S.W. 158 (Ky. 1886).

¹²⁶ *Manikee's Adm'x v. Beard*, 2 S.W. 545 (Ky. 1887).

¹²⁷ *Murray v. Murray*, 13 S.W. 244, 246 (Ky. 1890).

¹²⁸ 64 S.W. 981 (Ky. 1901).

her were equal to one-half of the money, and was all that she was entitled to under the dower statute.¹²⁹

In *Payne v. Tatem*,¹³⁰ the Court reiterated that the burden of proving that the intent was not to deprive the spouse of her marital share was on the donee. In addition, the Court indicated that the presumption might be overcome by showing a promise to the first wife to provide for the children, reasonable gifts or advancements by a husband to his children by former marriage, or a showing of the former wife's assistance in compiling the husband's estate.¹³¹ Again in 1937, the court stated that where a husband makes a gift of all or a greater portion of his property without his wife's consent a *prima facie* case of fraud arises and beneficiaries have the burden to explain away such presumption.¹³² Likewise, where a man reduced his estate from \$100,000 to \$500 by a series of ingenious transfers to his children by a former marriage¹³³ and also where immediately before the marriage a man voluntarily transferred his entire estate to his sister,¹³⁴ such transfers were held to be frauds on the wife's marital rights. In *Benge v. Barnett*,¹³⁵ the Kentucky Court found a fraud on the marital rights where a husband made a transfer to his brothers and sisters of 45 percent of his personalty. The court found the husband's intention by looking at his acts and deeds, especially the fact that in his will executed one month before his death, he sought to deprive his widow of any interest in the personalty owned at his death.

The courts have fashioned a body of case law which enables a surviving spouse to attack in some instances attempted evasion of marital share. Through use of the aforementioned tests, the courts have often been able to prevent the serious inequities which flow from the disinheritance of the spouse. However, even under the close scrutiny of the courts, methods have been devised to prevent a spouse's inchoate dower from attaching as discussed below.

It has been suggested that the marital share could be defeated by a contract to make a will. For instance, where one spouse executes a contract to make a will with another person, then fails to carry out his part of the bargain it is conceivable that the latter could become a judgment creditor and thus participate in the decedent's estate before

¹²⁹ *Weber v. Salisbury*, 148 S.W. 34 (Ky. 1912).

¹³⁰ 33 S.W.2d 2, 3 (Ky. 1930).

¹³¹ See *Goff v. Goff's Ex'rs*, 193 S.W. 1009 (Ky. 1917); *Fennessey v. Fennessey*, 2 S.W. 158 (Ky. 1886).

¹³² *Rowe v. Ratliff*, 104 S.W.2d 437 (Ky. 1937).

¹³³ *Cochran's Adm'x v. Cochran*, 115 S.W.2d 376 (Ky. 1938).

¹³⁴ *Martin v. Martin*, 138 S.W.2d 509 (Ky. 1940).

¹³⁵ 217 S.W.2d 782 (Ky. 1949).

the surviving spouse. However, in Kentucky, such contracts would seem to come under the close scrutiny of the "intent" test.

METHODS TO PREVENT INCHOATE DOWER FROM ATTACHING

Although the courts and statutes have attempted to protect the surviving spouse, several methods have been devised to prevent inchoate dower from attaching. It is not intended that this discussion be all inclusive. Only examples will be discussed to demonstrate that inchoate dower may be prevented from attaching and thus the policy of the dower statute¹³⁶ nullified.

One method of preventing the attachment of inchoate dower is the acquisition of real estate by a wholly owned corporation.¹³⁷ "If real estate is conveyed to a corporation, the stock of the corporation is personal property and not subject to dower even if the corporation is solely owned by the husband. Thus, if the husband incorporates his real estate at the time of acquisition, he can prevent his wife from exercising any control over its transfer."¹³⁸

A second method of preventing the attachment of inchoate dower is the creation of a survivorship device such as a joint tenancy with right of survivorship. One of the prerequisites in order for dower to attach is that the husband be seised of an estate of inheritance.¹³⁹ The husband will not be "seised of an estate of inheritance" if the real estate is conveyed to himself and another with right of survivorship.¹⁴⁰ Although this device may be impossible in some states, it is still possible in most states.¹⁴¹ Kentucky allows creation of joint tenancies with survivorship but the instrument must express that intention *clearly*.¹⁴² Likewise, real estate used as partnership property is not subject to dower rights of the surviving spouse of a deceased partner.¹⁴³

Thirdly, inchoate dower does not attach to life estates and therefore dower may be defeated by a life estate with an unrestricted power of

¹³⁶ KRS § 392.020 (1971).

¹³⁷ MD. ANN. CODE, Art. 93, § 3-202, Comment (1969).

¹³⁸ Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 UNIV. RICH. L. REV. 299, 306 (1969). See also R. MINDER, REAL PROPERTY, § 255 (2d ed. 1928).

¹³⁹ See Part II, *supra*.

¹⁴⁰ Lewis, *supra* note 138, at 306.

¹⁴¹ MACDONALD at 212-14.

¹⁴² KRS § 381.120 (1971) and KRS § 381.130 (1971). See *Osborne v. Hughes*, 292 S.W. 748 (Ky. 1927). But see *Davis v. Logan*, 39 Ky. (9 Dana) 185 (1839) where a widow was allowed dower interest in land which her husband held as a joint tenant (the deed did not clearly show a right of survivorship by the other joint tenants).

¹⁴³ See cases cited *supra* note 34.

disposition.¹⁴⁴ For example, a husband can have land conveyed to him as life tenant with a general power of appointment with the remainder interest reserved for his children upon his death if the power of appointment is not exercised.¹⁴⁵ However, a conveyance giving the husband a life estate with a remainder to his *heirs* may not prevent inchoate dower from attaching in a jurisdiction where the rule in *Shelley's Case* has not been abolished.¹⁴⁶

Lastly, inchoate dower is barred where the real estate is held in trust by the surviving spouse.

If the husband wants to defeat the wife's dower and marital rights, he can have real estate purchased by him conveyed to a trust under the terms of which he retains a life interest in the trust corpus and such control thereof that he has almost as much enjoyment of and control over the property as he would have if he held the fee simple title.¹⁴⁷

As the foregoing indicates although courts have afforded dower much protection, several clever conveyances are available which may be used effectively to bar inchoate dower.¹⁴⁸ Thus, serious doubts are raised as to whether the protection afforded the surviving spouse by inchoate dower is effective.

THE CASE FOR THE ABOLITION OF INCHOATE DOWER

Obsolescence of Inchoate Dower As A Protective Device

In the times in which the estate of dower originated, the primary source of wealth was real property and dower protected the widow from being left destitute and becoming a burden on society. The primary source of wealth today, except in some rural areas, has shifted from real property to personal property.¹⁴⁹ For most individuals, today wealth is made up of social security benefits, life insurance, pensions and annuities, securities, joint bank accounts and numerous other sources of personal property. As a result of this shift in wealth, the Middle Age concept of dower has lost much of its potential as a means of protecting the surviving spouse from destitution. Today, the dower interest will represent only a small portion of the decedent's real estate

¹⁴⁴ MD. ANN. CODE, Art. 93, § 3-202, Comment (1969).

¹⁴⁵ Lewis, *supra* note 138, at 306.

¹⁴⁶ Note, *Inchoate Dower Today*, 96 UNIV. PA. L. REV. 677, 690-1 (1948). See also Note, *Powers of Appointment in Virginia*, 47 VA. L. REV. 711 (1961). The Rule in *Shelley's Case* has been abolished in Kentucky. See KRS § 381.090 (1971).

¹⁴⁷ Lewis, *supra* note 138, at 307.

¹⁴⁸ Note, *Inchoate Dower Today*, 96 UNIV. PA. L. REV. 677, 690 (1948). See also, R. MINOR & J. WURTS, REAL PROPERTY §§ 272-6 (1909).

¹⁴⁹ Lewis, *supra* note 138, at 307-8.

and this is more true when the surviving spouse is of advanced age.¹⁵⁰ For example, in Kentucky the inchoate dower interest is only a life estate in one-third of the realty conveyed away during a coverture.¹⁵¹ Assume that the surviving spouse is sixty-five years old, the decedent conveyed away during the marriage real property worth one hundred thousand dollars, and the surviving spouse has a valid claim to dower. The value of the life estate is \$12,600.¹⁵² This value also assumes that a reasonable purchaser would be willing to purchase a life estate from one of the advanced age of sixty-five, and since such life estates are of questionable marketability the protection dower affords may be illusory.

Moreover, legal life estates in real property have become archaic. Fee ownership by the survivor, whatever his fractional statutory share, eliminates most of the difficulties incidental to assignment of common-law dower by simplifying joint management of the land with the children, by reducing partition problems and by doing away with the artificial valuation of the interest according to the mortality tables.¹⁵³

As a result of the factors enumerated above the ancient inchoate dower, useful in its time, lacks the vitality and effectiveness to carry out its protective purposes in the twentieth century.

Adverse Effects on Real Estate Transfers

Inchoate dower creates problems that include a clog on title and in the extreme case a restraint on alienation. As one commentator¹⁵⁴ has remarked:

To begin with, dower is an irritating fetter on inter vivos alienation of land. From the viewpoint of the seller, his wife's consent must be obtained formally. This may be difficult where the wife bears her husband ill will. She may even have left him, with her whereabouts unknown. There may be factual and legal doubts as to her mental competence, even though she may not be confined in an institution. If she is institutionalized, legal proceedings may be necessary in order to sell the land to raise money for maintenance. And, from the purchaser's viewpoint, there is always the possibility of dower being claimed by the wife of a party in the chain of title. The pos-

¹⁵⁰ See generally, REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON COMMISSIONERS OF ACCOUNTS AND FIDUCIARIES 8-9 (1967).

¹⁵¹ KRS § 392.020 (1971).

¹⁵² This figure was computed by using the "Life Interest Table" in KRS' Life Expectancy and Annuity Tables, (Vol. 1, Baldwin's ed. 1969).

¹⁵³ Matthews, *Dower, Principal and Income, Perpetuities, and Intestate Succession*, 45 KY. L.J. 111, 114 (1956).

¹⁵⁴ MACDONALD, at 62-63.

sibility may exist for an indefinite time after the death of the husband concerned. If a wife refuses to release her dower, it may mean court proceedings to compensate the purchaser or possible loss of the sale. The existence of intricate legal questions as to the existence of dower, combined with factual and legal doubts as to the validity of a particular marriage in the chain of title, may require costly title searches or title insurance. It is perhaps fair to state that inchoate dower adversely affects the price of real estate and to that extent defeats its own protective purpose.¹⁵⁵

Not only would the abolition of inchoate dower remove a restraint on the alienation of real property, from a practical standpoint the attorney's tasks would be simplified.¹⁵⁶ For example:¹⁵⁷

(1) It would no longer be necessary for the attorney to take the word of a grantor that he is unmarried or to search the court records for divorce proceedings if he says he is divorced.

(2) Frequently at a closing, one spouse appears with a deed which has already been signed by the other. It is impossible to ascertain whether or not the signature is actually that of the spouse. This would no longer be important.

(3) In examining titles in the future, when it is found that no recital has been made as to the marital status of the grantor, no question will arise. This is a major problem today even if the lack of recital occurs far back in the chain of title because adverse possession, which removes many title defects by the passage of time, possibly will not serve to bar dower. . . .

(4) A grantor's recalcitrant spouse would not be able to prevent the sale of real estate by refusal to sign the deed of conveyance.

(5) There would be no need to worry if the grantor's spouse were mentally incompetent and, therefore, unable to execute the deed.

(6) Real estate transactions could be more rapidly conducted without the need to arrange for the signing of a deed by the grantor's spouse.

(7) The attorney would not have to create a trust or corporation to which the real estate could be conveyed in a situation where the purchaser wished to prevent his spouse from having a veto power over a later conveyance of the property.¹⁵⁸

Kentucky's Existing Scheme for Protecting Surviving Spouses

Aside from the practical advantages to the attorney, there is much to be said for the pure statutory share approach today.¹⁵⁹ Moreover,

¹⁵⁵ *Id.*, See also 1 AMERICAN LAW OF PROPERTY § 5.37 (A.J. Casner ed. 1952).

¹⁵⁶ Matthews, *supra* note 153.

¹⁵⁷ Lewis, *supra* note 138, at 311.

¹⁵⁸ *Id.* As regards (5) in the text, see KRS § 392.140 (1971).

¹⁵⁹ Matthews, *supra* note 153.

as discussed above, at the present time, when so much of the wealth of a decedent is likely to be in the form of personal property, inchoate dower does allow adequate provision for the surviving spouse.¹⁶⁰ The one-third life estate granted Kentucky spouses is not *that* much protection as pointed out above. The statutory¹⁶¹ share seems to be an adequate substitute for inchoate dower, especially in the case of intestacy in Kentucky.¹⁶²

In addition to the statutory share protection granted in intestate cases, Kentucky also allows the surviving spouse to elect against the will¹⁶³ thereby thwarting the decedent's effort to totally disinherit the surviving spouse. Although the survivor's share is less than in the case of intestacy, usually it will leave the surviving spouse far from destitute. Furthermore, it is significant that surviving spouses receive one-half of the personalty *absolutely* in light of the shift in wealth from real to personal property.

In addition, Kentucky provides a third line of defense for surviving spouses. The "intent" test prevents the transfer of all or a substantial portion of an estate without proof that the transfer was not a fraud on the marital share. A *prima facie* case is made out by establishing the fact of transfer, and the burden falls upon the recipients of the transfer to prove otherwise.¹⁶⁴

The problem of estate depletion sought to be corrected by these "intent" cases might be more adequately dealt with by the addition of a statutory section dealing with inter vivos transfers. Such a statute would reclaim as part of the decedent's net estate for purposes of calculating the marital share certain inter vivos transfers thought to be a fraud on the marital share. Such transfers should include: (1) gifts *causa mortis*, (2) joint checking accounts payable to survivor, (3) money deposited in name of decedent in trust for another remaining on deposit at decedent's death, (4) joint property held by decedent with right of survivorship, and (5) revocable trusts.¹⁶⁵ Estate tax consequences tend to provide an incentive for spouses not to disinherit the other. Estates which take full advantage of the marital deduction¹⁶⁶ will generally leave the surviving spouse well provided for.

¹⁶⁰ SIMES, MODEL PROBATE CODE § 31, Comment (1946).

¹⁶¹ KRS § 392.020 (1971).

¹⁶² There seems to be no logical reason for the difference between the surviving spouse's share in the case of intestacy and the surviving spouse's share in the case of renunciation of the decedent's will. See Note, 47 Ky. L.J. 243 (1959).

¹⁶³ KRS 392.080 (1971).

¹⁶⁴ See Section VI in text.

¹⁶⁵ See e.g. N.Y. ESTATES, POWERS & TRUSTS LAW 5-11 (McKinney 1967); UNIFORM PROBATE CODE § 2-202 (1969).

¹⁶⁶ INT. REV. CODE of 1964, § 2056.

The benefits to be gained in allowing free alienation of land seems to outweigh any disadvantages that exist from abolishing inchoate dower. Kentucky's three lines of defense (1) forced share in the case of intestacy, (2) election against the will in the testate case, and (3) the "intent" or "motive" test as applied to conveyances which act as a fraud on the marital share,¹⁶⁷ offers adequate protection for the surviving spouse.¹⁶⁸

Other jurisdictions have abolished either all or part of the remnants of common law dower. At one extreme North Dakota has not only abolished dower and allowed conveyances of realty without the consent of the other spouse, but as well, a testator is allowed to dispose of his entire estate by will subject only to a homestead exemption.¹⁶⁹ Maryland has also recently abolished dower¹⁷⁰ while retaining the marital intestate share¹⁷¹ and election against the will.¹⁷² Other states have retained dower but have limited its attachment to property of which the deceased spouse was seised at death.¹⁷³ Some states have retained provisions to prevent the grantor from conveying away realty without the consent of the other spouse but have abolished dower.¹⁷⁴ In addition to providing for expanded forced shares and election against the will as discussed above, the Uniform Probate Code¹⁷⁵ and the Model Probate Code¹⁷⁶ also abolish dower.

As noted previously problems exist in the various states' definition of dower. In 1956 KRS 392.020 was amended to define dower as anything the surviving spouse takes under that provision. The troublesome provision in that statute that needs to be removed is the phrase:

[The surviving spouse] shall have an estate for his or her life in one-third of any real estate of which the other spouse or anyone for the use of the other spouse, was seised of an estate in fee simple during the coverture but not at the time of death, unless the survivor's right to such interest has been barred, forfeited or relinquished.¹⁷⁷

¹⁶⁷ Nonetheless, Kentucky's present statutory scheme in this area could be further improved, i.e., increasing the statutory share, reclamation of certain inter vivos transfers for purposes of computing the marital share by statute.

¹⁶⁸ Some additional protection is provided the surviving spouse through the homestead exemption. See KRS §§ 427.060-427.100 (1971).

¹⁶⁹ N.D. CENT. CODE § 14-0709, 56-0102 (1960); N.D. CENT. CODE § 47-18-01 (Supp. 1967).

¹⁷⁰ MD. ANN. CODE, Art. 93 § 3-202 (1969). Dower was abolished in Georgia and Oregon in 1969—GA. CODE ANN. § 31 (Note 1969); ORE. REV. STAT. § 112685 (1969).

¹⁷¹ MD. ANN. CODE, Art. 93 § 3-102 (1969).

¹⁷² MD. ANN. CODE, Art. 93 § 3-203 (1969).

¹⁷³ See Lewis, *supra* note 138, at 310.

¹⁷⁴ *Id.* at 309.

¹⁷⁵ UNIFORM PROBATE CODE § 2-113 (1969).

¹⁷⁶ Simes, MODEL PROBATE CODE § 31 (1946).

¹⁷⁷ KRS § 392.020 (1971).

This is the only existing remnant of common law dower under KRS 392.020. Without the above phrase KRS 392.020 becomes a pure statutory share provision, which adequately protects the surviving spouse in the event of intestacy while eliminating a burdensome restraint on alienation. It would appear that the only reform necessary to implement abolition of dower would be the deletion of the above quoted phrase.

Constitutionality

There appear to be no constitutional problems in abolishing the inchoate right of dower provided in KRS 392.020. Dower is a creature of statute founded on reasons of public policy, and is subject, while it remains inchoate, to such modifications and qualifications as legislative authority may see proper to impose.¹⁷⁸ Inchoate rights of dower are within the control of state legislatures and such rights are not protected from state action by the federal constitution.¹⁷⁹ As the Supreme Court of the United States has said:

[A]t most [dower] is a right which, while it exists, is attached to the marital contract of relation; and it always has been deemed subject to regulation by each State as respects property within its limits. . . . Neither § 2 of Article IV nor the Fourteenth Amendment takes from the several States the power to regulate this subject; nor does either make it a privilege or immunity of citizenship.¹⁸⁰

Also the Kentucky Constitution would present no obstacles to the abolition of dower.

The inchoate right of dower does not vest in a surviving spouse until the death of the decedent spouse who owns the land. Thus, "inchoate dower is not so vested as to be immune to statutory destruction."¹⁸¹ It has also been held that inchoate dower may be abolished retroactively. "The General Assembly could reasonably conclude, as have the legislatures of many of our sister states as well as Parliament, that the public interest required that the rights of dower be abolished retroactively."¹⁸²

CONCLUSION

Inchoate dower is no longer an effective method of protecting the

¹⁷⁸ *Goodman v. Gerstle*, 109 N.E.2d 489 (Ohio 1952).

¹⁷⁹ *Silberman v. Jacobs*, 267 A.2d 209 (Md. 1970).

¹⁸⁰ *Ferry v. Spokane P. & S. Ry. Co.*, 258 U.S. 314, 318 (1922). See also *Randall v. Kreiger*, 90 U.S. 137 (1874).

¹⁸¹ 2 R. POWELL, *REAL PROPERTY* § 213(3) (1967).

¹⁸² *Silberman v. Jacobs*, 267 A.2d 209, 221 (Md. 1970).

surviving spouse from destitution in that it lacks the vitality and efficacy to carry out its original protective purposes in today's world. Inchoate dower creates a variety of problems in the transfer of real property today and in some cases is an active restraint on alienation. In addition inchoate dower complicates the attorney's tasks in assisting clients with real estate conveyances. The adverse effects of inchoate dower seem to far outweigh any benefits that remain extant. The case for the abolition of inchoate dower is indeed a strong one and Kentucky law should be revised to effectuate the policies of today. KRS 392.020 can be revised in such a way as to abolish the remnant of common law dower present within it as is indicated by the proposed statute in the appendix. The suggested modification of the statute would be effective as to the estates of persons dying on or after the effective date of the amending legislation.

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APPENDIX

KRS 392.020 should be amended to read as follows:

After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half of the surplus real estate of which the other spouse, or anyone for the use of the other spouse, was seised of an estate in fee simple at the time of death. The survivor shall also have an absolute estate in one-half of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to "dower" or "curtesy" shall be deemed to refer to the surviving spouse's interest created by this section.

This amendment is effective as to estates of persons dying on or after, 197.....¹⁸³

¹⁸³ KRS § 392.080, the forced share statute, and other statutes that refer to KRS § 392.020 would incorporate this amendment.