"The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great; consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal Constitutions were framed to protect."  

Hardly any area of legislative reformation of the common law has provoked so much constitutional litigation as the statutes modifying the common-law marital estates. Beginning with the middle of the nineteenth century and extending past the start of the twentieth, there was a veritable flood of cases contesting one or the other aspect of the statutes which altered the property rights of husband and wife to accord with modern concepts of public policy. Much of this litigation concerned problems no longer likely to recur, but it is essential that it all be mentioned in order that the discussion shall be complete.

The courts should always take into consideration the degree to which the welfare of the state depends upon wise policies in respect to the marital relation and the property in-

interests arising therefrom. Consequently, it might be sup­posed that the courts will sustain any legislation which is equitable and works an adjustment of the husband’s and wife’s property interests which most spouses would approve. However, the courts, at least in the past, have tended to ig­nore the public interest and to concentrate exclusively on the problem of the “vested interests” of the spouses with the result that reasonable statutes have been invalidated when given retroactive force. Some of the earlier cases even found that modification of the marital estates would impair the obligation of the marriage contract. However, since the United States Supreme Court declared in Maynard v. Hill, that the marriage contract is not a contract within the constitutional prohibition against impairing the obligation of contracts, the contracts clause has been rarely resorted to as a protection against the retroactive application of legislation affecting the marital estates.

**HUSBAND’S ESTATE JURE UXORIS**

The husband’s common-law interest in his wife’s real property (and personalty) has been abrogated or substantially abolished by the Married Women’s Property Acts assur­ing to the wife the control of her property as if she were unmarried. It is thus only of academic interest now whether


The curtesy cases have almost always been made to turn on the question of “vested rights” or “due process.” Impairment of the obligation of the marriage contract has rarely been injected into the discussion. However, in the dower cases the courts sometimes have held that marital rights are contractual in nature. See cases discussed infra note 42.

3 125 U. S. 190 (1888).

4 2 Powell, Real Property, ¶ 214. For a list of the statutes see 3 Vernier, American Family Laws, pp. 171–185 (1935). For a history of the estate jure uxoris see Haskins, “The Estate by the Marital Right,” 79 U. of Pa. L. Rev. 345 (1949). Prof. Haskins suggests that an occasional relic of the old rules appears in those jurisdictions which require the wife to obtain her husband’s
the husband’s estate *jure uxoris* might be abolished by the legislature, but a century ago the question was vital.

The common law gave to the husband a life estate during coverture in all the freehold estates of inheritance which his wife had at the time of the marriage and which she subsequently acquired during coverture. He was entitled absolutely to the rents and profits; his right to possession was exclusive. He could convey his estate without the consent of his wife. He became the owner of her personalty. For certain purposes he also became owner of her chattels real. In brief, the husband’s power over his wife’s property was very considerable. The Married Women’s Property Acts, when applied in case of existing marriages and property already acquired by the wife, were often held to be unconstitutional consent in order to make an effective conveyance of her separate real property.

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6 2 Blackstone, *Commentaries*, sec. 434. He also had the power to bring suit in his own name to recover personalty to which his wife was entitled. Jackson’s Adm’rs v. Sublett, 10 B. Mon. 467 (Ky. 1850); Leete v. State Bank, 115 Mo. 184, 21 S. W. 788 (1892); Westervelt v. Gregg, 12 N. Y. 202 (1854); Dilley v. Henry’s Ex’t; 25 N. J. L. 302 (Sup. Ct. 1855). If he recovered, the property belonged to him absolutely. Leete v. State Bank; Westervelt v. Gregg. Only if he died before reducing the chattel to possession, his wife surviving him, could she claim the chattel. Leete v. State Bank; Dilley v. Henry’s Ex’t; Westervelt v. Gregg.

7 He could dispose of them during his lifetime without her consent. They were liable for his debts. The rents and profits belonged to him. After her death the chattels real became his absolutely. However, if she survived him, and he had not disposed of them during his life, they belonged to her. 2 Tiffany, *Real Property*, sec. 484 (3d ed.).

8 However, courts of equity permitted property of every kind to be settled upon the wife to her own separate use free from control by the husband, and free from liability for his debts. Although at one time it was thought that the legal title had to be vested in trustees for this purpose, it became settled that if property was given or devised to a married woman for her separate and exclusive use, even without the intervention of trustees, her interest would be protected from the claims of her husband and his creditors. 2 Tiffany, *Real Property*, sec. 485 (3d ed.). While at law the husband might have been deemed to have an estate in his wife’s separate property, it is manifest that the legislature could have constitutionally abolished such an estate, inasmuch as the husband was a mere trustee, the beneficial interest being in the wife.
so far as they purported to deprive the husband of the valuable privileges accorded him by the common law. It was held that to allow the wife to convey her land without her husband's consent would deprive him of property without due process. The husband's privilege to sue in his own name to

9 It was held that the husband had a vested property right in his wife's personal property where the marriage and acquisition occurred prior to the Married Women's Statute and that this interest could not be taken from him without his consent, except in violation of constitutional provisions against the taking of private property without due process. Buchanan v. Lee, 69 Ind. 117 (1879); Holmes v. Holmes, 4 Barb. 295 (N. Y. 1848).

The cases were not in accord as to whether the husband's power to reduce his wife's chattels to possession was a vested interest which could not be taken from him without his consent. Some cases proceeded on the theory that the marriage contract clothed the husband with the power to reduce his wife's chattels to possession and that therefore the Married Women's Act could not be applied where the marriage occurred prior to the statute. Sperry v. Haslam, 57 Ga. 412 (1876); Jackson's Adm'rs v. Sublett, 10 B. Mon. 467 (Ky. 1850); Dunn v. Sargent, 101 Mass. 336 (1869); Leete v. State Bank, 115 Mo. 184, 21 S. W. 788 (1892); Westervelt v. Gregg, 12 N. Y. 202 (1854); Norris v. Beyea, 13 N. Y. 273 (1855); O'Connor v. Harris, 81 N. C. 279 (1879).

The opposing line of cases was based upon the proposition that the marriage contract did not give the husband any interest in his wife's chattels; but all that he had before the statute took effect was a power which the common law gave him to acquire an interest by taking the necessary steps if he chose to do so. Price v. Sessions, 3 How. 624 (U. S. 1844); Percy v. Cockrill, 53 Fed. 872 (8th Cir. 1893); Clarke v. McCreary, 12 Smedes & M. 347 (20 Miss. 1849); Dilley v. Henry's Ex'r, 25 N. J. L. 302 (Sup. Ct. 1855); Goodyear v. Rumbaugh, 13 Pa. 480 (1850); Mellinger v. Bausman, 45 Pa. 522 (1863); Alexander v. Alexander, 85 Va. 353, 7 S. E. 335 (1888); Keagy v. Trout, 85 Va. 390, 7 S. E. 329 (1888); Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570 (1890).

Where the wife's title to the personalty accrued subsequent to the statute (although the marriage occurred prior thereto), the cases were in accord that the husband had no right to the chattel. Winn v. Riley, 151 Mo. 61, 52 S. W. 27 (1899); Holliday v. McMillan, 79 N. C. 315 (1878).

10 Hubbard v. Hubbard, 77 Vt. 73, 58 Atl. 969 (1904). The statute purported to authorize the court of chancery, in its discretion, upon the petition of a married woman, to empower her to convey her real estate by separate deed as effectively as if the deed were executed by herself and her husband. The petitioner was no longer living with her husband because of his fault, but they were not divorced. Held: Statute violated the Fourteenth Amendment. "We are not aware of any instance where the law has attempted to subject the right of a person to retain his estate to the decision of a magistrate unguided and unregulated save by his own sense of fairness and justice. The grant of discretionary power in the legal sense apparently implies the existence of certain well-understood principles within which it should be exercised.
recover possession of real property of his wife was declared to be a vested right. ¹¹ The right to rents and profits was held not to be divestible by the legislature. ¹² One court even went so far as to hold that land which the wife owned at the time of marriage could not be regarded as her property within the meaning of the Married Women's Act; the land must rather be considered to belong to her husband by virtue of the marriage and so not within the scope of the statute. ¹³

But when a statute declares that a husband's property may be taken from him and bestowed upon his wife in the discretion of the chancellor, what are the well-understood principles which are to govern him in the exercise of his discretion?" (77 Vt. 73, 78, 58 Atl. 969, 970.)

Erwin v. Puryear, 50 Ark. 356, 7 S. W. 449 (1887). This was a suit brought by the husband and wife to recover land from a grantee of the husband on the ground that the husband had no interest to convey because the common-law marital interest had been excluded. Held: Vested rights cannot be taken away.

Beale v. Knowles, 45 Me. 479 (1858). But see Peck v. Walton, 26 Vt. 82 (1853). This was a bill to foreclose a mortgage upon land belonging to the wife, the mortgage being executed by the husband alone since the passage of a statute which provided inter alia that no conveyance made during coverture by the husband of any interest in real estate belonging to his wife shall be valid, unless the wife join in the deed. The statute was held to be applicable here and that it was not unconstitutional as so applied. "But we do not regard this statute as having deprived the husband of any rights, which were not clearly subject to the control of the legislature. The husband is not in any sense deprived of the estate, which he might have in any of his wife's property, or of the right to any estate in her prospective acquisitions. The statute only provides a special mode of conveying this particular estate. And of this no man can complain. The legislature may at all times prescribe the mode of conveying property, and especially real property." (26 Vt. 82, 86.)

¹¹Arnold v. Willis, 128 Mo. 145, 30 S. W. 517 (1895); Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687 (1902).


¹³Van Note v. Downey, 28 N. J. L. 219 (Sup. Ct. 1860). This was an action for trespass for taking cranberries from plaintiff's land. Defendant relied upon a license from plaintiff's wife. The premises in question belonged to her at the time of her marriage to plaintiff. She was no longer living with him because of his cruelty, but was not divorced.
There were a few courts which held that the husband's right to future rents and profits from land owned by the wife at the time of the statute was a mere possibility or expectancy which might never accrue and hence which could be defeated by legislation any time before accrual. One of these cases, however, was decided in 1915, by which time several previous statutes in this state had left nothing of the husband's estate *jure uxoris* except the power as head of the family to rent out his wife's lands and to collect the rents for the benefit of the family. In another of these cases, the person contesting the legislation was not the husband, but a creditor of the husband who sought to attach crops on the wife's land in satisfaction of the husband's debt. The court declared that:

"Statutes of this class rest upon the right of the state to regulate the marriage relation, and are liable to be altered


15 Parlow v. Turner: "We deem it unnecessary to consider how far the matter may properly rest upon the extraordinary power which the legislature possesses over the marriage relation and the property rights of the pair inter se, for the public good . . . It may be that the husband, by living apart from his wife, without her fault, abandoned his powers and duties as governor of the family, and hence his right to either rent out the land, or to collect the rents; but we do not decide this question, preferring to rest our judgment upon the broader ground." (132 Tenn. 339, 348, 178 S. W. 766, 768 (1915).) In the earlier case of Taylor v. Taylor, there was also grave doubt expressed that the husband had a vested right before the passage of the statute in question to the rents and profits of his wife's land. It was thought that an earlier statute had substantially destroyed the estate *jure uxoris* in the rents and profits.

16 Niles v. Hall, 64 Vt. 453, 25 Atl. 479 (1892).

The weight of authority was that the Married Women's Statutes exempting the wife's land from the debts and liabilities of the husband could not be applied in case of debts contracted by the husband before the passage of the statute. It was held that to do so would impair the obligation of the creditor's contract. Cunningham v. Gray, 20 Mo. 170 (1854); Bouknight v. Epting, 11 S. C. 71 (1878). But as to debts contracted subsequent to the statute, it was held that there was no impairment of the obligation of the creditor's contract to apply the statute. Hitz v. National Bank, 111 U. S. 722 (1883); Peck v. Walton, 26 Vt. 82 (1853). (A subsequent creditor acquires no such interest in the husband's vested rights in his wife's property, or future acquisi-
whenever the good of that relation is thought to require it. It would seriously abridge this beneficent control of the state to hold that a creditor of the husband has an interest in the prospective products of the wife's realty which cannot be taken away by legislation." 17

That the legislature might have a paramount interest in altering some of the incidents of the common-law marital estate, however, was rarely conceded in the jure uxoris cases.

The decisions were in accord that the husband had no interest by virtue of the marriage contract in the future acquisitions of the wife. Hence, it was held that the Married Women's Act could be applied in case of land acquired by the wife subsequent to the statute although the marriage had occurred prior thereto. 18

CURTESY

Upon the birth alive of a child capable of inheriting the land of which the wife is seized during coverture in fee simple or fee tail, the husband at common law acquires an estate for his own life in his wife's land known as curtesy initiate. 19

The estate jure uxoris terminates with the death of the wife, whereas the estate of curtesy initiate, upon the death of the...
wife (the husband surviving), merely changes its name to curtesy consummate and continues to endure for his lifetime.

Curtesy initiate as it existed at common law before the universal statutory modifications did not confer a very much greater power of control over the wife’s property while she was alive than did the estate *jure uxoris*. The husband had by virtue of marriage quite ample powers of disposal as it was. But a distinction was made between the two estates. It was said that before the birth of issue the husband had an estate through the right of his wife, but that after the birth of issue he held in his own right as if his wife had conveyed the estate to him for a valuable consideration.²⁰

The courts would not allow the Married Women’s Act to divest the husband of the valuable incidents of the estate by the curtesy initiate, which had vested before the passage of the Act,²¹ as depriving him of the sole power to bring suit to recover the wife’s lands,²² or as depriving him of the right to the rents and profits.²³ It was also held that creditors could not be divested of the right to look to the husband’s estate by curtesy initiate for satisfaction of the husband’s debts.²⁴

The husband’s interests in the wife’s land were protected to a truly remarkable degree. In *White v. White*²⁵ the plaintiff instituted proceedings against her husband to establish what she claimed were her rights in relation to certain land she had inherited prior to the Married Women’s Act, and to restrain the defendant from interfering with the same. She alleged in her complaint that the defendant had ejected her from the premises by force and refused to allow her to re-

²⁰ Shortall v. Hinckley, 31 Ill. 219 (1863); Rose v. Sanderson, 38 Ill. 247 (1865); Wyatt v. Smith, 25 W. Va. 813 (1885).
²¹ Junction R. R. Co. v. Harris, 9 Ind. 184 (1857).
²² Noble v. McFarland, 51 Ill. 226 (1869).
²³ White v. White, 5 Barb. 474 (N. Y. 1849).
²⁴ Wyatt v. Smith, 25 W. Va. 813 (1885); Rose v. Sanderson, 38 Ill. 247 (1865).
²⁵ 5 Barb. 474 (N. Y. 1849).
turn and that he was in possession enjoying the rents and profits. Nevertheless, it was held that the Married Women’s Act could not be applied here for to do so would violate the Constitution of New York which says that no one shall be deprived of any rights or privileges unless by the law of the land.  

“I do not hesitate, in conclusion, to declare that the people of the state of New York have never delegated to their legislature the power to divest the vested rights of property legally acquired by any citizen of the state, and transfer them to another, against the will of the owner. The legislature of this state can only lawfully exercise such powers as have been confided to it by the sovereign will of the people; and when it usurps powers not intrusted to it by the sovereign power, its acts are as utterly void as those of the most inferior magistrate in the land, in a case where he has transcended his jurisdiction.”

However, since marriage, seizin of the wife, and birth of issue are all requisite to create an estate by the curtesy initiate, it was held that marriage and birth of issue alone could not vest the husband with an interest in the future acquisitions of his wife. Hence it was deemed to be permissible for the legislature to provide that all property thereafter acquired by a married woman shall constitute her separate estate free from control by her husband.

The Married Women’s Acts have relegated to history the valuable common-law privileges which the tenant by the curtesy initiate enjoyed in his wife’s land during her lifetime. The institution of curtesy itself has ceased to be a source of estates for life in a majority of states, and even in those states where curtesy is still recognized, statutes have made great

27 5 Barb. 474, 485 (N. Y. 1849).
28 Allen v. Hanks, 136 U. S. 300 (1889) (‘‘. . . that such regulations do not take away or impair any vested right of the husband, is, in our judgment, a proposition too clear to require argument or the citation of authorities to support it.’’ p. 310).
changes in the common law. The trend of legislation is definitely toward the abolition of curtesy. Can a statutory change be applied so as to affect the rights of a man whose wife dies subsequent to the effective date of the statute?

The cases are in agreement that if no child has been born of the marriage at the time of the act abolishing curtesy, the husband has no vested right to an estate for life in the lands of his wife if he survive her. The statute is valid to the extent that it abolishes the right of curtesy and gives him a dower share or gives him curtesy subject to a power of his wife to will all of her property.

It is also held that the husband does not acquire any vested rights to a tenancy by the curtesy in lands acquired by the wife subsequent to legislation abolishing curtesy, although marriage and birth of issue occurred before the passage of the statute.

29 Powell, Real Property, ¶ 218. Powell states (as of Jan. 1, 1952) that curtesy has completely ceased to exist in twenty-nine states and Alaska. He groups these states as follows: eight community property states, Ariz., Cal., Idaho, La., Nev., N. M., Tex., Wash.; twelve states, including Alaska in which the surviving husband takes a distributive share in his wife's property, Colo., Ga., Mich., Miss., Mont., N. D., Okla., S. C., S. D., Utah, Vt., Wyo.; nine states in which the husband has an interest in land owned by the wife during coverture, but this interest is defined in terms of some fraction of fee ownership, Fla., Ill., Ind., Iowa, Kan., Me., Minn., Neb., Pa. Four states are listed in which the institution of curtesy is only an indirect or infrequent source of life estates, Conn., Mo., N. H., N. Y. Seventeen jurisdictions remain in which the institution of curtesy is still a potential source of estates for life, Ala., Ark., Del., D. C., Hawai'i, Ky., Md., Mass., N. J., N. C., Ohio, Ore., R. I., Tenn., Va., W. Va., and Wis. In Del., N. J., Ore., and Va. the prerequisite of issue born alive has been abolished. In twelve of these jurisdictions the estate given to the husband applies only to a fraction (usually one-third) of the wife's lands, instead of to all of them, Ark., Del., Hawai'i, Ky., Md., Mass., N. J., Ohio, Ore., Va., W. Va., Wis. In Tenn. and Hawaii the wife can bar curtesy by inter vivos conveyance, and by either inter vivos or testamentary conveyances in Ark., D. C., and Wis. In the remaining eleven states, the husband's curtesy cannot be barred by either deed or will of the wife, without the husband's consent.

30 Henson v. Moore, 104 Ill. 403 (1882); Phillips v. Farley, 112 Ky. 837, 66 S. W. 1006 (1902); Hathon v. Lyon, 2 Mich. 93 (1851); Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510 (1909).

31 Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929); Jackson v. Jackson, 144 Ill. 274, 33 N. E. 51 (1893);
When we come, however, to the cases wherein the husband is a tenant by the curtesy initiate when the statute abolishing curtesy goes into effect (i.e., acquisition of the property by the wife and birth of issue occurred before the statute), we find the authorities in discord. Some cases hold that a tenant by the curtesy initiate cannot be deprived of curtesy consummate. The dearth of reasoning in these cases makes it difficult for one to see how the expectancy of the husband to have a life estate in his wife’s land if he should outlive her can be considered a vested right. The explanation must lie in the theory that upon birth of issue, the husband acquires a life estate for his life, an estate which is perfected without regard to the wife’s death and in no way enlarged by her death. Yet this reasoning seems entirely too anachronistic to account for the holding in the New Jersey cases cited below, which, it will be observed, were decided quite recently. Curtesy consummate was not abolished in that state until 1927, but the husband’s estate of freehold during his wife’s lifetime was abolished by the Married Women’s Act of 1852. By 1927, then, curtesy in New Jersey differed from dower only in the respect that the husband was entitled to a life estate in all the lands of which his wife died seized rather than in one-third of land which was seized during marriage.

Mitchell v. Violett, 104 Ky. 77, 47 S. W. 195 (1898); Thurber v. Townsend, 22 N. Y. 517 (1860); In re Curtis’ Will, 61 Hun 372, 16 N. Y. S. 180 (1891); Moninger v. Ritner, 104 Pa. 298 (1883).

32 Anastasia v. Anastasia, 138 N. J. Eq. 260, 47 A. 2d 879 (Ch. 1946); Walker v. Bennett, 107 N. J. Eq. 151, 152 Atl. 9 (Ch. 1930). N. J. Pamph. Laws 1927, p. 128, as amended by Pamph. Laws 1928, p. 380, provides that the husband of a woman who dies intestate, or otherwise, shall be endowed for life of one-half of the land of which his wife “was seized of an estate of inheritance, at any time during coverture” whether issue is born alive or not. N. J. Rev. Stat. 1937, 3:37-2.

Jackson v. Jackson, 144 Ill. 274, 33 N. E. 51 (1893) (surviving husband given a life estate in one-third of land of which wife was seized during coverture); Mitchell v. Violett, 104 Ky. 77, 47 S. W. 195 (1898) (surviving husband given life estate in one-third of land which was seized during marriage).

33 Laws 1852, p. 407.
than in one-third. However, New Jersey is the only state in which it is held that inchoate dower is a constitutionally indivestible interest. New Jersey seems to have greater regard for property interests emanating from the marital estate than do her sister states.

An opposing line of cases maintains that the legislature may pass an act which will prevent the accrual of curtesy consummate on the wife’s death. These holdings are based upon the proposition that the Married Women’s Acts have divested curtesy initiave of all its valuable privileges, leaving only an uncertain interest, a bare expectancy, very much like dower. In Day v. Burgess the Tennessee Supreme Court described the husband’s right to curtesy as an heritage of the feudal age, having no basis in natural or moral right. The Supreme Court of Pennsylvania has concluded curtesy and dower are equally subject to legislative modification.

34 Walker v. Bennett, 107 N. J. Eq. 151, 152 Atl. 9 (Ch. 1930).
35 McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681 (1892) (surviving husband limited to dower); Hill v. Chambers, 30 Mich. 422 (1874); Duncan v. Duncan, 324 Mo. 167, 23 S. W. 2d 91 (1929); Day v. Burgess, 139 Tenn. 559, 202 S. W. 911 (1918).
36 139 Tenn. 559, 202 S. W. 911 (1918) supra note 35.
37 Moninger v. Ritner, 104 Pa. 298 (1883). This case concerned a statute which provided that a married woman, who has been deserted by her husband, and who has been decreed to have the privileges of a feme sole trader, may convey, without her husband’s joining in the deed, a good title to her separate real estate which she acquires during coverture, free from any subsequent claim by her husband as tenant by the curtesy. Pa. Act of 1855, P. L. 430. The husband in the case, who deserted his wife in her lifetime, came back after her death to claim his curtesy from the remote grantee of his wife. As a violator of the marriage contract he was not in a very good position to rely on the sanctity of the contract and the rights flowing from it. “It is, therefore, a curious travesty on the constitutional powers of this Commonwealth to say that the legislature can make no provision for the support of an abandoned wife, if such provision happens to impinge upon some marital right of the derelict husband,” said the court.

In a decision rendered by the Pennsylvania Supreme Court in 1929, involving a constitutional problem similar to that in Moninger v. Ritner, it was declared that marriage is not such a contract as is contemplated by the constitutional provisions, and that the property rights arising solely by reason
The problems in regard to the abolition of curtesy could be resolved without difficulty if the husband were held to take curtesy consummate by inheritance. However, it is firmly established at common law that the husband is not an heir of his wife. There is really no reason, even so, why a court today should have any difficulty in sustaining the statute abolishing curtesy. Conceding that the husband has a present interest in the expectancy of an estate in his wife's land upon her death, this interest stands no better in modern law than does dower, which the courts have always held to be subject to legislative control. Where the requirement of issue has been abolished (which is true in a number of jurisdictions still recognizing curtesy) there is no difference at all between curtesy and dower except perhaps as to the portion of the land of the decedent spouse subject to the respective estate. Curtesy has outgrown its usefulness as an institution with the decline of the dominance of the male.

After the death of the wife, it is probably too late to apply the statute abolishing curtesy. Although there are no cases involving curtesy, this is the result indicated in the dower cases, where the husband's death preceded the effective date of the statute.

**Dower**

Quite unlike the solicitude which the courts have felt for the common-law interests of the husband in his wife's land of marriage are within legislative control. Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929).


Professor Powell suggests that the states still having traces of curtesy would do well to substitute a distributive share in the wife's assets as the proper provision for the surviving husband, giving this share such protection against destruction by will of the wife as social policy may dictate. 2 Powell, *Real Property*, ¶ 219.
is their attitude towards dower. Dower, it is professed, is a sacred institution, yet it seems that only after the husband's death does dower rise to the dignity of a vested estate which cannot be divested by the legislature. Inchoate dower is subject to legislative diminution and may even be abolished without any estate at all allowed to the widow in her husband's property. With almost monotonous uniformity, the cases declare that it is competent for the legislature to modify the law on the subject of dower in a manner unfavorably affecting the wife, even after the acquisition by the husband of the land in which dower is claimed. In doing so, the legislature does not impair the obligation of a contract nor deprive the wife of any right of property vested in her. 40

40 Randall v. Krieger, 23 Wall. 137 (U. S. 1874) (sustaining a curative statute which validated a void power of attorney); Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of a substantial federal question, 314 U. S. 572 (1941); Fletcher v. Felker, 97 Fed. Supp. 755 (W. D. Ark. 1951); Boyd v. Harrison, 36 Ala. 533 (1860); Ware v. Owens, 42 Ala. 212 (1868); Steinhagen v. Trull, 320 Ill. 382, 151 N. E. 250 (1926) (widow required to elect between dower and a statutory portion in lieu of dower); May v. Fletcher, 40 Ind. 575 (1872); Sturdevant v. Norris, 30 Iowa 65 (1870); Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137 (1891); Magee v. Young, 40 Miss. 164 (1866); In re Lawrence's Will, 1 Redf. Sur. 310 (N. Y. 1848); Ruby v. Ruby, 112 W. Va. 62, 163 S. E. 717 (1932); Bennett v. Harms, 51 Wis. 251, 8 N. W. 222 (1881). In support of the proposition that dower is not an interest based on contracts see Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S. W. 2d 314 (1930); Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929); Noel v. Ewing, 9 Ind. 37 (1857); Lucas v. Sawyer, 17 Iowa 517 (1864).

As of Jan. 1, 1952, dower has completely ceased to exist in twenty-six states and is of comparatively little significance in seven more. 2 Powell, Real Property, § 217. Powell groups the twenty-six states as follows: eight community property states, Ariz., Cal., Idaho, La., Nev., N. M., Tex., and Wash.; seven states in which the wife receives a distributive share in the assets owned by the deceased husband at death, which share is in no instance restricted to an estate for life, Colo., Miss., N. D., Okla., S. D., Vt., Wyo.; ten states in which the wife has a considerably protected "dower" interest in land owned by the husband during coverture, but this interest is defined in terms of some fraction of fee ownership, Fla., Ill., Ind., Iowa, Kan., Me., Minn., Neb., Pa., and Utah. In five of the seven states wherein dower is of greatly lessened significance, the surviving spouse is given the power to elect an intestate share which in the vast majority of cases is so much more valuable than the dower estate for life that dower is seldom taken, Mich., Mo.,
This postulate would not be astounding if in lieu of inchoate dower the wife were always assured of at least some estate in her husband’s land for support during widowhood, but in many cases the constitutionality of the statute was sustained even though the application to the given case deprived the wife of all interest whatsoever in her husband’s estate.  

Mont., N. H., and S. C. The nineteen jurisdictions in which dower is still significant are Ala., Alaska, Ark., Del., D. C., Ga., Hawaii, Ky., Md., Mass., N. J., N. C., Ohio, Ore., R. I., Tenn., Va., W. Va., and Wis. In eleven of these jurisdictions dower still consists (as at common law) of an estate for life in one-third of the lands in which the husband had an estate of inheritance during coverture, Ark., Del., D. C., Hawaii, Md., Mass., N. C., R. I., Va., W. Va., and Wis. In three jurisdictions the estate for life has been enlarged so as to exist in more than one-third of the husband’s lands, Ala., N. J., Ore. In three jurisdictions the widow has an estate for life only in respect to land owned by the husband at time of death, Alaska, Ga., Tenn.

In Strong v. Clem, 12 Ind. 37 (1859) the widow got neither dower nor the statutory interest which had been substituted for dower. The husband conveyed his land, the wife not joining, when common-law dower was still recognized in that state. The purchaser, of course, took subject to the wife’s inchoate dower. The husband died after a statute which abolished dower and gave the widow instead a one-third interest in fee in the lands of which her deceased husband was seized during coverture. It was held that the legislature had abolished dower without preserving rights already existing and furthermore that the widow in the instant case could not claim a fee interest because when the land was sold it was encumbered only by the right of the wife to a life estate in one-third in case she should outlive her husband. The legislature could not enact that one-third of the fee purchased and paid for should be divested out of the purchaser and given to the widow of the deceased grantor. Accord, Wiseman v. Beckwith, 90 Ind. 185 (1883); Carr v. Brady, 64 Ind. 28 (1878); Frantz v. Harrow, 13 Ind. 507 (1859). Approved, Logan v. Walton, 12 Ind. 639 (1859); Giles v. Gullion, 13 Ind. 487 (1859).

The same result as in Strong v. Clem was reached on similar facts in Morrison v. Rice, 35 Minn. 436, 29 N. W. 168 (1886). The courts in other jurisdictions have avoided the result reached in Strong v. Clem by construing the statute as abolishing the name of dower merely but not the existing rights. Hilton v. Thatcher, 31 Utah 360, 88 Pac. 20 (1906).

Strong v. Clem is not extraordinary in holding that there is no deprivation of constitutional rights in taking away the wife’s inchoate dower and giving her nothing in return. The courts have sustained statutes which defined dower in terms of the land of which the husband died seized, thus extinguishing the inchoate interest of the wife in lands which her husband conveyed without her joinder at the time when dower was defined as at common law. Hatcher
Retroactive Land Legislation

Only a handful of cases are to be found in which it is held, or even intimated, that there is any inhibition upon the power of partition in kind, the wife’s inchoate dower in her husband’s undivided interest is wiped out, Turner v. Turner, 185 Va. 505, 39 S. E. 2d 299 (1946) (this, however, is the law in many jurisdictions even in the absence of statute, see infra note 49); a statute providing that the wife shall not have dower in lands divested by execution sale, or sale under decree of a court, or by deed of assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, aff’d 113 N. W. 382 (1907); Lucas v. Sawyer, 17 Iowa 517 (1864); a statute barring dower unless the widow perfect her right by filing within a designated time an instrument declaring her intention to take dower, Classen v. Heath, 389 Ill. 183, 58 N. E. 2d 889 (1945); a statute simply abolishing dower, Hamilton v. Hirsch, 2 Wash. Ter. 223, 5 Pac. 215 (1884); Richards v. Bellingham Bay Land Co., 54 Fed. 209 (9th Cir. 1893); a statute denying dower to a wife who kills her husband, Hamblin v. Marchant, 103 Kan. 508, 175 P. 678, aff’d 104 Kan. 689, 180 P. 811 (1919); a statute barring dower when the wife leaves her husband without such cause as would entitle her to divorce, Thornburg v. Thornburg, Adm’r, 18 W. Va. 522 (1881).

In Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S. W. 2d 314 (1930), the statute read: “The inchoate right of dower of any married woman in any real estate in the State of Arkansas is hereby barred in all cases when the husband has been barred of his title, or of any interest in said property for fifteen years or more, and also in real estate or interest therein conveyed by the husband, but not signed by his wife when such conveyance is made fifteen years ago or more. This act shall affect her inchoate right of dower in real estate only when the husband has now been barred fifteen years or more, or, when a conveyance by him without her signature has been made fifteen years or more prior to the passage of this act.” Ark. Acts 1923, p. 250; now, with modifications, Ark. Stat. 1947, sec. 62-66. The conveyance in question was made forty-five years prior to the statute so the wife’s interest was immediately extinguished when the statute went into effect. Held: The statute did not violate any constitutionally protected interests in cutting off the interests of the nonjoining wife.

In Ruby v. Ruby, 112 W. Va. 62, 163 S. E. 717 (1932), the statute provided: “If the owner of real estate contracts to sell the same, and the spouse of such owner refuses to release his or her dower interest therein, such owner, or the person contracting to purchase, may institute suit in chancery for the purpose of having the dower interest released and the contract consummated. The court on the hearing may, in its discretion, and if satisfied that the contract of sale was made in good faith and without design to force such spouse to part with his or her dower interest, approve the sale and price, and cause to be paid to such spouse such gross sum, ... as shall represent the present value of his or her inchoate dower right. Upon such payment as aforesaid the court shall order a release of the dower interest, by such spouse, or if he or she refuses to execute the release, then by a special
of the legislature to abolish inchoate dower.\textsuperscript{42} Most of these cases, moreover, are contradicted by other cases in the same

commission to be appointed by the court for the purpose, which release shall be effectual to pass the property to the purchaser free of such right of dower." W. Va. Rev. Code 1931, sec. 43–1–6; W. Va. Code 1949, sec. 4101 (1951 Supp.). Held: The statute makes the inchoate dower more valuable. Formerly the value of such right was entirely contingent upon the wife surviving her husband. Now, its present value may be ascertained and decreed to her.

In keeping with its broad powers over inchoate dower, the legislature need not treat all widows alike. Reasonable classifications may be made. The Florida Stepmother Act, Fla. Gen. Acts 1939, c. 18999, provided that when a decedent is survived by his widow and lineal descendants and none of such lineal descendants is the lineal descendant of such widow, dower shall be limited to a child's part. It was contended in Adams v. Adams, that this statute contravened the equal protection clause of the Fourteenth Amendment. 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of substantial federal question, 314 U. S. 572 (1941). The widow in this case was not the mother of the children of the decedent, of which there were several. The marriage occurred prior to the effective date of the statute; the death of the husband was subsequent thereto. Said the court: "Having been accustomed to think of dower in terms of one-third of the husband's estate, it is at first blush somewhat shocking to our traditional concepts to see it reduced to a child's part for the childless widow, but we find no reason to hold that such a change violates any constitutional mandate. Neither can we say that such a classification is not based on a fair and reasonable economy. Since the basis of it is bread for the widow and children, it cannot be said that the needs of the childless widow are the equivalent of those of the widow on whom there are dependent children. There is no sounder basis for classification than economic considerations." (147 Fla. 267, 272, 2 So. 2d 855, 857.)

The statutes of a number of states limit the interest of the widow who was a nonresident of the state during coverture to the lands of which her husband died seized, while giving to the widow who was a resident during coverture an interest in all the real estate of which the husband was seized at any time during the marriage. E.g., Kan. Gen. Stat. 1949, sec. 59–505, infra note 59. Where such exceptions occur, the husband may transfer good title without the signature of the nonresident wife. The fact that the wife does not accompany her husband to the state, or has abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of title in many cases, may be deemed a sufficient reason for prescribing a different rule of conveyance where the wife is nonresident than where she is resident. Ferry v. Spokane, Portland and Seattle R. R. Co., 268 F. 117, aff'd 258 U. S. 314 (1921); Thornburn v. Doscher, 32 Fed. 810 (C. C. D. Ore. 1887); Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137 (1891). Statutes of this sort have been held applicable in cases where the marriage and acquisition of the land occurred before the statutes made any distinction between the rights of resident and nonresident wives. Miner v. Morgan, 83 Neb. 400, 119 N. W. 781 (1909); Bennett v. Harms, 51 Wis. 251, 8 N. W. 222 (1881).

\textsuperscript{42}Walker v. Bennett, 107 N. J. Eq. 151, 152 Atl. 9 (Ch. 1930); In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817 (Ch. 1894); Lawrence v. Miller,
state adhering to the majority view, that is, that the inchoate right of dower which a wife has in her husband's real estate in his lifetime is not a vested interest but a mere expectancy of property in the future and may be changed, modified, or

2 Comst. 245 (N. Y. 1849) (intimates that a statute extinguishing dower right where marriage and seizin occurred prior to the statute would be invalid as impairing the obligation of the marriage contract); Williams v. Courtney, 77 Mo. 587, 588 (1883) ("The right of a married woman to dower in the land of her husband rests on as secure a foundation as does the fee of the husband in such land. From the moment the facts of marriage and seizin concur, the right of the wife in this regard becomes a title paramount to that of any person claiming under the husband by subsequent act." "The Act of the legislature authorizing the guardian of plaintiff's deceased husband to sell the land in question, does not profess to confer any authority on such guardian to dispose of plaintiff's dower right, and if it did, it would violate that constitutional provision which forbids that any one be deprived of property 'without due process of law,' and would be a legislative attempt to take the property of one person and bestow it upon another."); Russell v. Rumsey, 35 Ill. 362 (1864) (declaring unconstitutional a curative statute insofar as it purported to validate a defective release of dower); O'Kelley v. Williams, 84 N. C. 241 (1881); Grove v. Todd, 41 Md. 633 (1874) (declaring invalid a curative statute as applied to a defectively executed release of dower).

O'Kelley v. Williams, 84 N. C. 241 (1881) supra was an action to recover land. The defendant acquired the fee in 1867 at which time the statute gave a widow dower in one-third in fee of all the land of which her husband was seized at any time during coverture. This statute was repealed in 1869. In 1876 defendant mortgaged the land, his wife not joining. The land was sold on default to plaintiff. Held: Wife is entitled to dower according to the statute in effect when the land was acquired. When defendant acquired the land he took it subject to the laws existing at the time, for laws which subsist at the time and place form part of the contract, as if they were expressly referred to or incorporated into its terms. The wife's dower was vested before the repealing statute and was not affected thereby, for a "vested right" cannot be destroyed by a subsequent repealing statute. "'We by no means subscribe to the doctrine that a right vested by operation of law is less inviolable than when it arises from contract; where it once exists, no matter how, it is inviolable.'" (84 N. C. 244, quoted from Reade, J. in Sutton v. Askew.)

In Green v. Estabrook, 168 Ind. 123, 79 N. E. 373 (1907) it was remarked that "marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage.'" This case had to do with a statute providing that in cases of judicial sales of real property in which a married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed to be barred by virtue of such sale, such interest shall become absolute and vested in the wife in the same manner as if her husband were to die.
abolished by legislative action. Only the New Jersey courts have adhered consistently to the proposition that a statute unfavorably affecting the wife’s inchoate dower may not be applied to cases where the marriage and the acquisition of the land by the husband occurred before the passage of the act.

In *Russell v. Rumsey*, the Illinois Supreme Court said:

“Dower, although its enjoyment is contingent, is as much a vested right as a contingent remainder or reversion, and it would not be contended that they are not vested rights although not vested estates. Although the estate is contingent the right to dower is vested and absolute.”

Why has not this view commended itself to more courts? Inchoate dower does in many respects resemble a contingent remainder. It is a present interest which may possibly vest in possession upon the happening of certain events. It attaches upon the husband’s land upon marriage or as soon

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44 In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817 (Ch. 1894), *supra* note 42, the court refused to give retroactive application to a statute providing: “That whenever it shall appear to the satisfaction of the chancellor that any person entitled to an inchoate right of dower in any lands or premises is incapacitated, by mental infirmity or disease, from executing a valid release or relinquishment of the same, and that the interests of the owner of such lands and premises require and would be promoted by a sale of the same, it shall be lawful for the chancellor to direct such release or relinquishment to be made by any master of the court of chancery, whose deed or deeds executed in behalf of such person shall release and bar all the dower, or right, or estate in dower, to which such person may be entitled or would at any time succeed or become entitled to in the lands and premises therein mentioned.” N. J. Laws 1878, p. 193; covered now, N. J. Rev. Stat. 1937, 3:40-1.

45 35 Ill. 362 (1864), *supra* note 42.

46 35 Ill. 362, 374 (1864).

In Tatum v. Tatum, 174 Ark. 110, 295 S. W. 720 (1927) it was held, on the view that inchoate dower is very much like the interest of a contingent remainderman, that a wife’s interest in oil and gas being extracted from land which the husband had conveyed without his wife’s joinder would be protected by impounding a sufficient portion thereof.
thereafter as the husband becomes seized, and it cannot be
discharged by the husband without his wife’s concurrence. 47

It is true that at common law inchoate dower cannot be
transferred to one having no interest in the land, or attached
for the wife’s debts, and that it entitles the wife to no control
over her husband’s land. 48 But neither can a contingent re­
mainder generally be sold or attached for debts at common
law, nor can the owner of a contingent remainder by virtue
of his ownership exercise any extensive control over the land.
Even so, a contingent remainder may not be divested by the
legislature.

In a number of respects inchoate dower is regarded as a
valuable interest, which the law will recognize and protect at
the instance of the wife. 49 The cases which hold that inchoate

47 2 Tiffany, Real Property, sec. 507 (3d ed.).
A conveyance by the husband before marriage will bar the wife’s dower,
since seizin or title during coverture is then wanting. But this general rule
is subject to an exception in America in case the conveyance by the prospective
husband is in fraud of dower, that is, intended to deprive the wife of dower.
Then she is entitled to dower as if the deed had not been made. 2 Tiffany,
Real Property, sec. 506 (3d ed.).

48 See generally 2 Tiffany, Real Property, sec. 533 (3d ed.); 2 Thompson,
Real Property, secs. 894, 898 (Perm. ed.).

49 See generally 2 Tiffany, Real Property, sec. 533 (3d ed.).
The wife’s inchoate dower has been regarded as a sufficient interest to
enable her to redeem from a mortgage. Tuller v. Detroit Trust Co., 259
Mich. 670, 244 N. W. 197 (1932). When the husband fraudulently alienates
his land in order to deprive her of dower, or by fraud induces her to release
her right, the law will protect her rights at her instance. Clifford v. Kampfe,
147 N. Y. 383, 42 N. E. 1 (1895); Bonfoey v. Bayne, 100 Mich. 82, 58 N. W.
620 (1894). A wife has been granted an injunction against waste by an
alience of the husband. Brown v. Brown, 94 S. C. 492, 78 S. E. 447 (1913);
Tatum v. Tatum, 174 Ark. 110, 295 S. W. 720 (1927). The release of
dower is a valuable consideration which will support a transfer to, or contract
with the wife. Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650 (1898); In re
Alexander, 53 N. J. Eq. 96, 30 Atl. 817 (Ch. 1894). The husband’s trustee
in bankruptcy cannot sell the husband’s property free of the wife’s dower
right without the wife’s consent. In re Macklem, 28 F. 2d 417 (D. Md. 1928).

On the other hand according to the weight of authority the inchoate dower
interest of the wife of a cotenant is barred by a sale in partition proceedings.
Lee v. Lindell, 22 Mo. 202 (1855); Holley v. Glover, 36 S. C. 404, 15
S. E. 605 (1891); Turner v. Turner, 185 Va. 505, 39 S. E. 2d 299 (1946).
This view is apparently not based upon any concept that inchoate dower is
dower is entirely within legislative control seem somewhat inconsistent with the regard which the courts generally have for the wife’s interest. This apparent inconsistency would not be of any great significance, to be sure, if only the courts had not gone so far out of the way to protect the marital interests of the husband from legislative impairment. The marital estates, being conceived for the social welfare, should not be beyond reasonable legislative alteration. But in comparison with the husband, the wife has indeed been treated shabbily by the courts. Few courts have felt the necessity for examining into the reason why curtesy and the estate jure uxoris were frequently deemed to be “vested rights” while dower was, and is, treated as a mere encumbrance on the husband’s power of alienation whenever the wife seeks to assert constitutional rights in her marital estate.

That dower is not within the protection of the constitutional guarantees has usually been accepted without question. When the earliest of the cases dealing with the constitutionality of legislation altering the marital property interests were decided, a married woman did not have a legal personality. Consequently, it was assumed that she could have no constitutionally protected rights in the land of her husband. The pattern of the law having been established by those cases has carried under juridical inertia to the present. The law reflects the former predominance of the male.

This is what some courts have said in rationalization of the doctrine that inchoate dower is not a constitutionally protected interest:

“The wife has no property in the husband’s lands, pending the coverture. Three things are necessary to the perfection not a property interest, but upon the broad ground that the right of the tenants to have partition of the common property is paramount to the rights of the wife. Unless the purchaser takes free of dower claims, a sale of the land at its actual value will be difficult if not impossible.
of the right of dower. These three things are, marriage, seizin, and the husband's death. Before the husband's death, the wife has not a contingent right. Her attitude is that of a party in whose favor two prerequisites to the existence of a right have occurred, and a remaining one is wanting. She has a mere expectancy, resting upon the probability that the remaining requisite may, at some future time, come into existence."  

"Many reasons might be adduced to show the propriety and soundness of these decisions, as that marriage and the rights incident thereto are public matters, to be regulated and governed by law; that the obligations arising are, for the most part, created by the public law and subject to the public will, and not to that of the parties; that it is a connection of such a solemn character, and one upon which the public welfare so greatly depends, that the society and the public have as great an interest in its regulation as the parties themselves; that its rights and obligations are derived rather from the law than from the contract itself; that it is not strictly a contract, but a status, resembling rather the relation of father and child, than that of a contract between two parties; that, by the common law, the legal existence of one of the parties is merged into that of the other; that, as a status, it is essentially dependent upon the sovereign will, and is not embraced in the constitutional interdict or acts impairing the obligations of contracts ..."  

"In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil policy. Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate."  

"If marriage itself can be ... dissolved at the discretion of the sovereign power, whether by general or special statute

50 Boyd v. Harrison, 36 Ala. 533, 538 (1860).
51 Lucas v. Sawyer, 17 Iowa 517, 522 (1864).
52 Noel v. Ewing, 9 Ind. 37, 50 (1857).
matters not, surely the mere incident of marriage—property—is not higher or more sacred than the principal thing itself. The support of the wife is an incident of the marriage. The legislature can vary that at pleasure." 53

"It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away." 54

**Dower Consummate**

Upon the death of the husband the wife’s inchoate dower matures and becomes a right to possession. The cases are in accord that the widow’s dower right cannot be detrimentally affected by a statute enacted after her husband’s death. 55 The widow’s right is held not to be subject to legislative impairment even though at the time the statute went into effect the widow had not yet been assigned her dower. 56 The difference is merely between the right of possession, and the right to be in possession.

**THE STATUTORY MARITAL RIGHTS**

Many states have abolished curtesy and dower as they existed at common law. 57 Where the statute which replaces curtesy or dower gives to the surviving spouse a distributive share in the real estate owned by the deceased spouse at

53 Noel v. Ewing, 9 Ind. 37, 53 (1857).
55 Burke v. Barron, 8 Iowa 132 (1859); Swartz v. Andrews, 137 Iowa 261, 114 N. W. 888 (1908); Adams v. Palmer, 51 Me. 480 (1863) (statute validating voidable release of dower); McAllister v. Dexter & P. R. Co., 106 Me. 371, 76 Atl. 891 (1910); Talbot v. Talbot, 14 R. I. 57 (1882) (statute provided that owner of fee subject to dower can be relieved of any dower charge by giving security for the payment to the widow of the annual value of the dower).
56 Burke v. Barron, 8 Iowa 132 (1859); Adams v. Palmer, 51 Me. 480 (1863). Supra note 55.
57 For a general survey of the statutes, see 2 Powell, *Real Property*, ¶¶ 217, 218. Prof. Powell’s analysis is set forth in notes 29 and 40 supra.
death, it is not probable that the courts would recognize any kind of vested interest in the continued existence of such statute. The comparatively unlimited power of the legislature to change the course of descent of property at death and to restrict the testamentary power has been discussed in Chapter 3.

But when the statute confers upon the surviving spouse an interest (often termed "dower" or "curtesy") in the land of which the deceased spouse was seized at any time during coverture, how extensive is the legislative power to repeal such statute in relation to existing marriages and property already acquired? A present interest of some kind is clearly indicated under statutes of this sort upon marriage and acquisition of land by the respective spouse. However, this interest does not carry with it any power of disposition over the property of the owning spouse during his or her lifetime. In one aspect, the marital right under the statute is merely a restraint on the power of alienation of the owning spouse

58 E.g., Vt. Stat. Rev. 1947, sec. 3027: "A widow shall be entitled in fee to one-third in value of all the real estate of which her husband died seized, and if such husband left surviving him only one heir and such heir is the issue of the widow or the heir by adoption of both the widow and husband, she shall be entitled to half in value of such real estate in fee, . . ."
Vt. Stat. Rev. 1947, sec. 3040: "A widower shall be entitled in fee to one-third in value of all the real estate of which his wife died seized. If the wife left surviving her only one heir and such heir is the issue of the husband or the heir by adoption of both the wife and husband, he shall be entitled to half in value of such real estate in fee, and his interest may be assigned and set out to him in the same manner as is provided for the severance of the interest of the widow in the real estate of her deceased husband . . ."

59 E.g., Kan. Gen. Stat. 1949, sec. 59-505: "Also, the surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election as provided by law to take under a will, except such real estate as has been sold on execution or judicial sale, or taken by other legal proceeding: Provided, That the surviving spouse shall not be entitled to any interest under the provisions of this section in any real estate of which such decedent in his lifetime made a conveyance, when such spouse at the time of the conveyance was not a resident of this state and never had been during the existence of the marriage relation."
or on his or her power of testamentary disposition. In its other aspect, that is from the point of the nonowning spouse, the right is primarily an expectancy not dissimilar to inchoate dower at common law, except as to the quantity and extent of the share which may be received. The distinction made in the cases between the divestibility of curtesy and of inchoate dower has quite clearly no application under the statutes. While under the particular statute, the share which the surviving husband receives may be greater or less than the share of the surviving wife, before the death of the owning spouse the statutory interest of the husband is not distinguishable in nature from the statutory interest of the wife. It is submitted that these interests (whether they are called dower or curtesy and whether the surviving spouse receives his or her share for life or in fee) may, at any time before they are vested in possession or ownership by the death of the owning spouse, be abolished by the legislature to the same extent that inchoate dower may be abolished. The cases touching at all on this point indicate that statutory curtesy and dower stand on the same ground as common-law dower and that interests given by the statutes may always be altered or taken away in the public interest by the same power which gave them.\(^60\)

\(^60\) Adams v. Adams, 147 Fla. 267, 2 So. 2d 855 (1941), appeal dismissed for want of substantial federal question, 314 U. S. 572 (1941) (statutory dower); Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), appeal dismissed 281 U. S. 771 (1929) (statutory curtesy); Hamblin v. Marchant, 104 Kan. 689, 180 Pac. 811 (1919) (statutory dower); Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, aff'd 113 N. W. 382 (1907) (statutory dower); Lane v. St. Louis Trust Co., 356 Mo. 76, 201 S. W. 2d 288 (1947) (statutory curtesy); Ruby v. Ruby, 112 W. Va. 62, 163 S. E. 717 (1932) supra note 41. But see O'Kelley v. Williams, 84 N. C. 281 (1881) supra note 42, which holds that statutory dower cannot be extinguished.

In Lane v. St. Louis Trust Co., 356 Mo. 76, 201 S. W. 2d 288 (1947) supra, the decedent, Mrs. Wackwitz, set up a trust the income from which was to be paid to her for life, and if she should not survive her husband, the trustee at her death, upon receipt of an agreement in writing properly executed by the husband waiving all his marital rights in her estate, was to pay the trust
The courts are often prone to speak of the homestead exemption as an "estate," but the homestead statutes and constitutional provisions do not in any true sense create marital estates. The exemption may usually be enjoyed by an unmarried person if he is head of a family. Although the statutes and constitutional provisions vary greatly from jurisdiction to jurisdiction, it may be said that in general there are two aspects to the homestead: (1) an exemption privilege to the householder, (2) an estate in the widow and children after the householder's death. 61

It is uniformly held that a debtor has no vested interest in a statute fixing exemptions, and that a retrospective effect

fund to him. In case he should refuse to execute a waiver, then the trust fund was to go to her sons. Mr. Wackwitz abandoned his wife in 1935 and was not with her at death, but shortly after her death he executed a written agreement and delivered same to the trustee claiming the trust fund and relinquishing his marital rights. The decedent's sons sought to prevent Wackwitz from claiming the res. They contended that he lost all interest by virtue of Mo. Rev. Stat. 1939, sec. 337 (Laws 1919, p. 104, now Mo. Rev. Stat. 1949, sec. 469.210) which provides that if a man leave his wife or abandon her without reasonable cause and shall continue to live apart from her for a period of one year next preceding her death, "he shall be forever barred from his inheritance, jointure, homestead, curtesy and statutory allowances in the real and personal property of the wife" unless she voluntarily becomes reconciled. At the time when the trust instrument was executed, the statute did not provide for forfeiture of the husband's marital rights in his wife's estate. Held: The trust agreement gave Wackwitz no present interest. It merely amounted to an offer that if she failed to survive him, he could take the trust fund upon consideration that he waive his marital rights in her estate. In order for there to be a binding contract between the husband and the estate, there must have been a valid consideration upon which the contract could rest. But Wackwitz had forfeited his marital rights by abandoning his wife and consequently had nothing to offer as consideration for his acceptance of the fund.

61 2 Tiffany, Real Property, sec. 576 (3d ed.); 5 Tiffany, Real Property, sec. 132 (3d ed.).

During coverture the wife is usually accorded the power to prevent her husband from alienating the homestead. 1 Powell, Real Property, ¶ 121. But this power ought never to be referred to as an "estate." It is a mere veto power. Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Castlebury v. Maynard, 95 N. C. 281 (1886).
INTERESTS ARISING FROM MARRIAGE

can be given to a statute which abolishes or diminishes the exemption without depriving the debtor of any constitutional right. As to the homesteader, the homestead is a mere privilege of exemption which the sovereign may recall.

"It seems absurd to say that a debtor can have a vested right to keep property against a debt contracted for its purchase, or, indeed a vested right in any exemption. As to him, the law grants the exemption as a boon, and because the state does not care to lend its aid to push an unfortunate to the wall. Its own public policy requires it, and that alone is the object. The exemption is not a right of the debtor."


One case holds contra to statement in text. Bridgman v. Wilcut, 4 G. Greene 563 (Iowa 1854).

63 Noble v. Hook, 24 Cal. 638 (1864); Sparger v. Cumpton, 54 Ga. 356 (1875); Harris v. Glenn, 56 Ga. 94 (1876); Mooney v. Moriarty, 36 Ill. App. 175 (1889); Bramble v. State, Use of Twilly, 41 Md. 435 (1874); (but holds that under statute providing "when the whole shall be sold and the defendant whose property is so sold, shall have one hundred dollars of the proceeds in money" the right of the debtor becomes vested upon full consummation of the sale and cannot be taken from him by subsequent statute); Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Leak v. Gay, 107 N. C. 468, 12 S. E. 312 (1890); Walkup v. Covington, 173 Tenn. 7, 114 S. W. 2d 45 (1938).

The homestead exemption is created by constitutional provision in some states. E. g., Tex. Const., Art. XVI, secs. 50, 51, and 52; N. C. Const., Art. X, sec. 2. This does not have the effect of giving to the homestead exemption an indivisible quality which it would not have had if created by statute. A constitutional exemption may not ordinarily be repealed by a statute, but only for the reason that constitutional provisions are paramount to, and not amendable by, statute. Nolan v. Reed, 38 Tex. 425 (1873); Bassett v. Messner, 30 Tex. 604 (1868); Bull v. Conroe, 13 Wis. 260 (1860). Constitutional exemptions may be terminated by the same power that created them—the people—expressing their sovereign will by amendment of the organic law. Harris v. Glenn, 56 Ga. 94 (1876).

The exemption called a "homestead" must be distinguished from the property in which the exemption exists, also called a "homestead." Of course, the property in which the exemption exists cannot be arbitrarily taken from the owner.

64 Sparger v. Cumpton, 54 Ga. 356, 360 (1875).
The homestead estate which vests in the widow and minor children on the death of the householder, under the provisions of the usual statute, is still essentially an exemption from sale by creditors but it also has the aspect of an estate for the life of the widow and minority of the children (so long as the conditions prescribed in the statute for the existence of a homestead are complied with). It has been said that this homestead estate in the widow and minor children cannot, under the constitution, be detrimentally affected by a change in the statutes.

COMMUNITY PROPERTY

Eight of our states have adopted from the Spanish-Mexican jurisprudence the community property system. Not being a part of the English common law, the community property system is premised largely on legislation. Although there is some variation in the laws of the different states,

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65 E.g., Mo. Rev. Stat. 1949, sec. 513.495: "1. If any such housekeeper or head of a family shall die and leave surviving him a widow or minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow or children, or if there be both, to such widow and children, and continue for their benefit until the youngest child attains the age of twenty-one years and until the remarriage or death of such widow; that is to say, the children of the deceased shall have the joint right of occupation with the widow until they shall arrive, respectively, at the age of twenty-one years, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her remarriage or death it shall pass to the heirs of the husband. 2. Such homestead shall not be subject to sale for the debts of the husband unless such debts be legally charged thereon during his lifetime, for which said debts the same may be sold free from the rights of such widow, children or heirs; provided, that if the heirs of the husband be persons other than his children, then such homestead may be sold for the payment of any debt or debts legally established against his estate, subject to the rights of the widow. Such sale in either case may be made at any time during the course of administration of the husband's estate, and to be conducted in like manner and the same proceedings had as is or may be provided by law for sales of other real estate for the payment of the debts of deceased persons."


67 Ariz., Cal., Idaho, La., N. M., Nev., Tex., and Wash.
basically the community property concept is that all property acquired by either the husband or wife during marriage, except that which is acquired by gift, bequest, devise, or descent by one or the other, shall be deemed the common property of the husband and wife.\textsuperscript{68}

Most of the constitutional cases concerning community property have arisen out of attempts of the legislature to enhance the power of the wife over the disposition of the community property. Two lines of apparently conflicting cases have arisen, whose divergence stems from opposing views of the nature of the interests of the spouses in the community property prior to the statute. One line of cases takes the view that the property is an acquit of the community and not the sole property of the one in whose name it was bought, although by the law existing at the time, the husband was given the exclusive management, control, and power of sale of such property. This power was given him, not because he was the exclusive owner, but because by law he was created the agent of the community. The power which he had was a simple power or agency to be exercised by him, not alone in his own interest, but also as a trustee for the interest of his wife. According to this line of cases, the husband is not deprived of property without due process when he loses the power to dispose of the community property without the consent of his wife,\textsuperscript{69} or when his absolute power of disposition is taken away and his wife is given the power of testamentary disposition over one half of the community property.

\textsuperscript{68} Tiffany, \textit{Real Property}, sec. 437 (3d ed.).

\textsuperscript{69} Arnett v. Reade, 220 U. S. 311 (1911). Held: It is plain that the wife has a greater interest than the mere possibility of an expectant heir. It is conceded that she has a remedy for an alienation made in fraud of her rights by her husband. As she is protected against fraud already, we can conceive no reason why the legislature can not make that protection more effectual by requiring her concurrence in her husband's deed; Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925); Mabie v. Whittaker, 10 Wash. 656, 39 Pac. 172 (1895).
in default of such testamentary disposition the share of the deceased wife to descend to her issue); 70 or when he is denied control over the personal earnings of the wife and the rents and interests from her separate real and personal property. 71

The opposing line of cases consists entirely of California decisions. In Spreckels v. Spreckels 72 it was held that an amendment to the Civil Code in 1891, forbidding the husband to give away community property without the consent of the wife in writing, 73 could not be construed retroactively, because prior to the amendment the code vested in the husband all of the elements of absolute ownership of the community property 74 to the exclusion of the wife, whose interest was a mere expectancy.

70 Warburton v. White, 176 U. S. 484 (1900). At the time the community property was acquired, the statute provided that upon the death of the husband or wife the whole of the community property subject to the community debts shall go to the survivor. Held: The husband had no vested right to succeed to the whole upon his wife's death.


72 116 Cal. 339, 48 Pac. 228 (1897). The court said: "The community property, as a rule, constitutes the earnings, gains, and savings of a man during his whole lifetime. If he can make presents to his friends, provide for indigent relatives, make advancements to his children, it must be from this property. To deprive him of this power is certainly to divest him of a property right. This argument need not, however, be pursued further, because counsel admit that, if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional." 116 Cal. 339, 348, 48 Pac. 228, 231. Accord, Clavo v. Clavo, 10 Cal. App. 447, 102 Pac. 556 (1909). In the Clavo case it was contended that the question was not necessarily involved in the Spreckels case, and what was there said was pure dictum. Held: "An examination of the reported case will show that the parties to the action treated the point decided as involved, and the opinion is devoted almost entirely to its consideration."


74 Cal. Civil Code 1888, sec. 172: "The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate."

The interest of the wife was described as a "mere expectancy" in Stewart v. Stewart, 199 Cal. 318, 249 Pac. 197 (1926). See Simmons, "Interests of a Wife in California Community Property," 22 Calif. L. Rev. 404 (1934).
The code was again amended in 1917 by the addition of the following section:

“The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered . . .” 75

Prior to this amendment the code read:

“The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent there-to . . .” 76

The court also held that this amendment could not be applied where the community property had been acquired prior thereto. 77

The legislature of 1923 amended the California Civil Code to read as follows:

76 Cal. Civil Code, sec. 172 (Kerr 1908).
77 Roberts v. Wehmeyer, 191 Cal. 601, 218 Pac. 22 (1923). The land in question was purchased after the effective date of Stats. 1917 but with community funds acquired prior to the effective date. A house was later built on the land, also with community funds. In 1920 Mrs. Roberts commenced divorce proceedings against her husband. She was granted an interlocutory decree on Feb. 20, 1920, and was awarded the real estate. However, in January, 1920, Roberts conveyed the premises to defendant Wehmeyer and received as consideration a promissory note. Mrs. Roberts did not join in this conveyance. Held: Prior to the adoption of the amendment the husband had the unqualified power to sell the community property and the wife had a mere expectancy and not any title or interest she could convey; hence to apply the amendment where the property had been acquired previous to the amendment and thus require the husband to obtain the consent of his wife to transfer realty would deprive him of vested rights. It is true, said the court, that the legislature may prescribe regulations concerning the method of transferring property and change them at will, but such regulations may not contravene the constitutional guarantee that one may not be deprived of his property without due process.
"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 . . . ." 78

In McKay v. Lauriston et al., 79 where the wife predeceased the husband, the Supreme Court declined to give retroactive


Prior to amendment in 1923, Cal. Civil Code, sec. 1401 provided that upon death of the wife the entire community property belongs to the surviving husband. Sec. 1402 provided that upon death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband.

79 204 Cal. 557, 269 Pac. 519 (1928). The land in question was acquired by Mr. and Mrs. McKay in 1918. No change in the ownership of this property was made up to 1926 when Mrs. McKay died, leaving a will by the terms of which she sought to devise an interest in the said real property to her husband, the plaintiff, and to the defendants the other half. Held: When this land was acquired by the McKays, the law was that during the marriage the husband is the sole and exclusive owner of the community property and that the wife has no title thereto, nor interest or estate therein other than a mere expectancy as heir, if she should survive him. However, the interest of the wife during the life of her husband is somewhat greater than that of an ordinary heir, in that she is given access to appropriate legal remedies against fraudulent or inconsiderate acts of her husband in respect to the community property.

In subsequent cases the courts have followed McKay v. Lauriston in declining to give retroactive effect to the amendment of 1923. Sexton v. Daly, 95 Cal. App. 754, 273 Pac. 109 (1928); Williamson v. Kinney, 52 Cal. App. 2d 98, 125 P. 2d 920 (1942). In Reeve v. Phillips, 2 Cal. 2d 239, 70 P. 2d 607 (1937) it was held that community property acquired prior to the amendment of 1923 vested absolutely in the husband upon the death of the wife without the necessity of administration, although the death of the wife occurred subsequent to 1923.

While the husband's rights in the community property were held to be virtually that of a sole owner prior to the enlargement of the wife's rights by the statutes of 1917 and 1923, his rights were not immune from reasonable regulation for the enforcement of the duties owing to his wife and his family. It was contended in Goetting v. Goetting, 80 Cal. App. 363, 252 Pac. 656 (1927) that a statute granting the power to the court in actions for separate maintenance to make the same disposition of the community property as in actions for divorce, could not be applied when the property was acquired prior to the statute. Cal. Stats. 1917, p. 35. The court rejected the contention and remarked that it was not necessary to discuss what force this contention might have if the action were based wholly on facts arising before the adoption of the amendment of 1917 as it impliedly appeared from the finding that the course of conduct on which the court below based its decree continued after 1917.
effect to the amendment on the ground that the interests of the husband and wife become fixed and determined by the law in force at the time the community property is acquired by them. Their rights therein, thus acquired, cannot be diminished, enlarged, or in any way affected by subsequent legislation.

This case does not mean that the wife cannot be given the power of testamentary disposition over community property which has descended to her if it appears that the property was acquired by husband and wife prior to the amendment of 1923. Here the wife was not the survivor and the exercise by her of the testamentary power would have invaded the vested province of the husband (so the case holds). The California cases are in accord with the holdings elsewhere that the law in force at the death of the owner of the property determines who shall inherit it. The heirs of the husband have no vested right to inherit a share of the community property.80

The California courts have been alone among the courts in the community property states in maintaining that the wife does not have an actual ownership of half the community property during marriage but has only an expectant interest which she takes upon the husband's death.81 But even when it is agreed that this was the law of California prior to the amendments of 1891 and 1917, it is not altogether clear how

80 In re Phillips' Estate, 203 Cal. 106, 263 Pac. 1017 (1928). Prior to the amendment of 1923, upon the death of the husband, one-half of the community property went to the wife, and the other half was subject to his testamentary disposition. In the absence of such disposition, this half went to his descendants. After the amendment of 1923, if the husband failed to exercise his testamentary power, the one-half over which he had the power went to the surviving spouse. The decedent in this case died intestate in 1925, leaving as his sole heirs, his wife and a daughter. The decedent and his wife were married in 1893. The bulk of his estate consisted of community property acquired before 1923. Held: The wife is entitled to all.

this legislation was any more unconstitutional than the legis-
lation sustained in other jurisdictions restricting the husband's
power of disposition. The husband is injured whatever in-
terest the wife is considered to have in the property.

The California adherence to the doctrine that legislation
changing the rights of husband and wife in community prop-
erty cannot be made to operate as to property already ac-
quired has been strongly condemned as a blind following of
_Spreckels v. Spreckels_, wherein the doctrine seems to have
had no firmer foundation than an admission by counsel.\(^\text{82}\)
The attitude of the courts means that any reformation of
community property law cannot go completely into effect
until the existing generation has died. In the meanwhile there
is bound to be considerable confusion as to which statute
applies to any particular piece of property.\(^\text{83}\)

In 1927 the legislature of California declared that during
continuance of the marriage relation the respective interests
of the husband and wife in community property are present,
existing, and equal interests under the management and con-
trol of the husband.\(^\text{84}\) As to community property acquired
since this legislation, it is recognized that the wife has a
vested interest of which she cannot be involuntarily deprived
without violation of the Fourteenth Amendment.\(^\text{85}\)

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\(^{82}\) Johnston, Note, "Community and Separate Property: Constitutionality of
Legislation Decreasing Husband's Power of Control Over Property Already
Acquired," 27 Calif. L. Rev. 49, 56 (1938–39); Weseman, Note, "Community
Property: Constitutionality of Giving Retroactive Effect to Amendments of
document is also criticized, Armstrong, "Prospective Application of Changes
in Community Property Control—Rule of Property or Constitutional Necess-
ity?" 33 Calif. L. Rev. 476, 477 (1945).

\(^{83}\) The confusion which is possible under the California doctrine is well
illustrated by hypothetical examples, Armstrong, "Prospective Application
of Changes in Community Property Control—Rule of Property or Con-
stitutional Necessity?" 33 Calif. L. Rev. 476, 477 (1945) _supra_ note 82.


\(^{85}\) Cooke v. Cooke, 65 Cal. App. 2d 260, 260 P. 2d 514 (1944); Wissner
v. Wissner, 201 P. 2d 837 (Cal. 1949). Both of these cases involved insurance
ber of cases from various jurisdictions have held that com-

munity property rights existing at the time and place of mar-

riage and acquisition of the property cannot be taken away

by subsequent legislation. 86

policies, the premiums on which were paid out of the husband's salary, which is

community property.

In Cooke v. Cooke it was contended that the policy had been granted to the

husband in divorce proceedings held in Arkansas. An Arkansas statute provides:

"In every final judgment for divorce from the bonds of matrimony granted

to the husband, an order shall be made that each party be restored to all

property not disposed of at the commencement of the action, which either

party obtained from or through the other during the marriage and in con-


was held that the Fourteenth Amendment forbade the application of the

statute to the facts of the case, since the wife had a vested property interest in

the policy.

Wissner v. Wissner was an action by the wife of a deceased insured to

recover half of the proceeds of a National Service Life Insurance Policy.
The husband apparently had become estranged from the plaintiff and without

her knowledge and without her consent he made his parents, the defendants,

beneficiaries. The defendants relied on 38 U. S. C. sec. 802 (g) (1946 ed.)

which provides that the insured shall have the privilege of changing the

beneficiary without consent of the beneficiary (but only within the class

including parents and wife). The state court thought that the Fifth Amend-

ment prohibited Congress from giving to this statute the effect claimed by

the defendants, that the wife had a vested right in one-half of the proceeds,

which Congress could not take from her. The Supreme Court of the United


Court declared that the judgment below had frustrated the deliberate purpose

of Congress from giving to this statute the effect claimed by

the defendants, that the wife had a vested right in one-half of the proceeds.

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of Congress from giving to this statute the effect claimed by
Five common-law states, Oregon, Nebraska, Michigan, Oklahoma, and Pennsylvania, experimented briefly with the community property system in the 1930's and 1940's and then repealed their statutes.\(^{87}\) Constitutional questions may well arise in respect to the community property acquired while the statutes were in effect. The devices by which the legislatures sought to return to status quo were: (1) It is presumed that property acquired during the existence of the community property law, and all property acquired after repeal but in exchange for (or with the proceeds, increase, or income from) property acquired prior to repeal, is not community property; \(^{88}\) (2) Any claim that property is community property must be filed within a designated period to be available as a claim or defense by either husband or wife in any action, proceeding, or controversy; \(^{89}\) (3) Third persons relying on the record or apparent separate title of one spouse are protected against undisclosed community property.

There are also a number of Texas cases which hold invalid a statute enlarging the wife's separate property, not, however, on the ground of due process or impairment of the obligation of contract, but on the ground that the statute conflicted with a constitutional provision prescribing what shall be the wife's separate property. Tex. Const., Art. 16, sec. 15. Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925); Gohlm, Lester & Co. v. Whittle (Tex. Civ. App.) 254 S. W. 595, rev'd 114 Tex. 584, 273 S. W. 808 (1925); Frame v. Frame (Tex. Civ. App.) 14 S. W. 2d 865, rev'd 120 Tex. 61, 36 S. W. 2d 152 (1931).

\(^{87}\) The reason for the adoption of the community property system was to allow taxpayers to take advantage of the federal income tax provisions whereby husband and wife in community property states were privileged to declare only half of their respective incomes, the other half being declared by the nonearning spouse as community income. After Congress, by the addition of the "split income" provision to the Internal Revenue Code in 1948 (Int. Rev. Code, sec. 12 (d)) extended to married persons everywhere the income tax advantages which had been enjoyed in the community property states, there was no longer any need for the community property acts adopted by the five states. They immediately repealed their legislation. See Chapter 3, p. 32 et seq.

\(^{88}\) Neb. Laws 1949, c. 129, sec. 2.

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rights; 90 (4) Where a spouse dies later than two years after the repeal takes effect, all property which would have been separate property of the decedent if the community property law had never been enacted shall pass by will or intestacy as separate property; 91 (5) Spouses are privileged to join in a written agreement changing their community holding to a tenancy in common, tenancy by entireties, or to separate property. 92

Device (5) above presents no constitutional difficulties. (4) is based upon the general view that legislation may constitutionally alter or restrict testation and the laws of inheritance. 93 (3) may be sustained under the general principles relating to retroactive recording statutes, that is, that they are constitutional so long as a reasonable opportunity to record is accorded the person affected. 94 (2) is more doubtful. It has usually been held that one in possession of property and not made a party to a proceeding involving the title may not constitutionally be obliged to take affirmative steps to assert his interest on penalty of losing it if he does not act. 95 The exceptions have involved some degree of emergency where the public interest in certainty of titles greatly outweighed the individual prejudice. Perhaps the community property situation is one in which the courts would recognize a public interest sufficient to warrant the private inconvenience. (1) is probably constitutional. No one can be said to have a constitutional right that a court should not use a presumption against him. However, if the erection of a presumption greatly hampers the claimant in establishing his interest there may conceivably be a taking of property with-

90 Ore. Laws 1949, c. 349, sec. 5.
91 Ore. Laws 1949, c. 349, sec. 4.
92 Ore. Laws 1949, c. 349, sec. 3.
93 Supra Chapter 3, p. 90 et seq.
94 Supra Chapter 3, p. 73.
95 Supra Chapter 3, p. 48 et seq.
out due process. Statutory presumptions have been declared unconstitutional when unreasonable, but this presumption hardly appears to be that.