CHAPTER 6

Inchoate Dower[1]

1. IN ENGLAND

In the early days of the common law women were disadvantaged. "In the camp, at the council board, on the bench, in the jury box there is no place for them," say Pollock and Maitland.[2] The prevailing economy hinged on male tenure as a source of feudal dues and fighting men. The dominance of the husband ensured the dependence of the wife. As to realty, primogeniture made it unlikely that she would own any land in her own right. Even if she did, the husband's estate during coverture [3] entitled him to the rents and profits of all the wife's present freehold estates. The husband could sell his interest, and it could be taken by his creditors. She was not an heir, as far as the husband's realty was concerned. And even under the custom of London [4] she was entitled only to one third of what few chattels the husband owned.

[1] For an account of the origin and development of common law dower, see Haskins, "The Development of Common Law Dower," 62 HARV. L. REV. 42 (1948); also see Plucknett, A CONCISE HISTORY OF THE COMMON LAW 507–8 (1936); Rabinowitz, "The Origin of the Common Law Warranty of Real Property and of the Inchoate Rights of Dower," 30 CORNELL L. REV. 77 (1945); Sayre, "Husband and Wife as Statutory Heirs," 42 HARV. L. REV. 330 (1929). For an account of dowry, dower, and *morgive* (morning-gift) in early German law, see Huebner, A HISTORY OF GERMANIC PRIVATE LAW, 624–26 (1918), 4 Continental Legal History Series. A remnant of the Germanic "morning gift" is found in the ancient French requirement that the marriage be consummated before the wife obtains her dower. This apparently was abandoned by the sixteenth century, although one custom required that the wife should put her foot into the bed. Brissaud, A HISTORY OF FRENCH PRIVATE LAW 773, note 5 (1912), 3 Continental Legal History Series.

[2] Pollock and Maitland, HISTORY OF ENGLISH LAW 485 (2nd ed. 1905).

[3] This estate terminated on the birth of a child born alive capable of inheriting, in which event the husband acquired an estate by the curtesy initiate; 2 Bl. Comm.* 126. On the wife's death this would become consummate, a life tenancy.

[4] Discussed, *supra,* Chap. 5.

The husband, as such, was entitled to all her chattels upon marriage: he was the owner in law and in fact.[5] And he obtained her choses in action if he reduced them to possession.

But this very exclusion of the woman meant that the widow and, because of primogeniture, also the younger children would, on the husband's death, be destitute. And thus, paradoxically, dower flourished in the face of feudalism. The community concern for the economic protection and social standing[6] of the surviving family was strong enough to counterbalance other powerful factors, including: (a) the primary function of land in supplying troops for armies; (b) the interest of the heir; (c) the interest of the lord in wardship of land where the heir was an infant; and (d) the ancient principle that succession to land depended on blood relationship.

The dower protection, as it finally evolved, was a life interest in one third of the lands[7] of which the husband had been seised, in fee or in tail, at any time during the marriage.[8]

[5] The wife could keep her paraphernalia (personal clothing and adornments), but only if the husband had not previously alienated them. 3 Holdsworth, HISTORY OF ENGLISH LAW 527 (5th ed. 1942).

[6] Sometimes the "dowager" was allocated a "dower house," a modest home on the estate, where she would live the rest of her days. Haskins, *supra* note 1, at 47.

[7] If the husband had no land, it apparently was possible to bar dower in any after-acquired realty by endowing the wife in his chattels *ad ostium ecclesiae* (at the church door), 2 Bl. Comm.* 132; Digby, HISTORY OF THE LAW OF REAL PROPERTY 129 (5th ed. 1897). Dower in chattels was in disuse by the reign of Henry IV (1399–1423), a victim of the thirteenth century *risorgimento* in trade. 3 Holdsworth, *op. cit.*, at 190. A purely sentimental touch still lingers in the words of the marriage service: "With all my worldly goods I thee endow."

For an explanation of the legislative "bloomer" that inferentially established inchoate dower in personalty in Florida, see "Final Report of the Probate Committee," 7 FLA. S. B. A. JOUR. 7 (1933). The error was corrected by subsequent amendment.

[8] For the technical incidents of common law dower, see 2 POLLOCK and MAITLAND 420–26; 3 Holdsworth, *op. cit.*, 189–97; 1 American Law of Property §§5.1–5.49 (1952); Note, "Inchoate Dower Today," 96 U. PA. L. REV. 677 (1948). The wife's interest was until the husband's death a protected expectancy known as "inchoate dower"; and on his death it was known as "consummate" dower, although she did not get her estate in the land until it was formally assigned.

The strength of the widow's interest lay in its immunity to the husband's inter vivos transfers, even where the transferee had taken for value without notice. It could not be defeated by devise, and it could not be reached by the husband's creditors.

It was the feature of interference with inter vivos transfers that constituted the early strength of inchoate dower; and it was the same feature that led to its ultimate defeat. With the economic awakening of the thirteenth century dower came gradually into conflict with the burgeoning policy of freedom of property alienation. The history of the English land law became a tale of ceaseless attrition on direct and even indirect restraints on alienation. The persistent effect of this policy, in conjunction with the diminishing importance of land, was eventually to cause dower to fall into desuetude.[9] Until the advent of decedents' family maintenance legislation,[10] two decades ago, it could be said that "The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole a better disposition

[9] The utility of dower was seriously affected by the prevalence of conveyances to the use of the husband in the 15th and 16th centuries. Equity refused to declare dower in the use. After the Statute of Uses, 27 Hen. 8, c. 10 (1535), it was possible to avoid dower by both legal and equitable jointures. 2 Bl. Comm.* 136. For an account of these and other devices used to defeat dower see 3 Holdsworth, *op. cit.*, 195–97; 2 Tiffany, REAL PROPERTY, §527 (3d ed. 1939). The end came in 1834 (3,4 Wm. 4, c. 105) when Parliament declared the wife's dower to be defeasible by deed as well as by will, with dower surviving only in estates of which the husband died intestate. The latter protection was formally eliminated by Lord Birkenhead's legislation in 1925, 15 Geo. 5, c. 23, §48 (1925).

[10] Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6 Chap. 45, as amended by the Intestates' Estates Act, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 64. This legislation, which is discussed, *infra,* Chap. 21, affects testamentary transfers only.

to the property of the dead, and more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law." [11]

2. In the United States

In this country, however, inchoate dower still permits the widow to exact a "stereotyped and inflexible" distribution. To be sure, in the last century many states abolished the wife's inchoate interest, and restricted dower to the real estate owned at death. And there has been other legislative tinkering. Thus we may find in various states that the fraction has been upped to one half, that the interest has been changed to a fee instead of the common-law life estate, that the interest may not extend to lands sold on judicial sale, and that the non-resident spouse may be excluded. But the plain fact is that in one form or another inchoate dower is still retained in a substantial majority of the non-community property states.[12]

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

[11] Cockburn, C. J., in Banks v. Goodfellow, (1870) L.R. 5 Q.B. 549, a case dealing with testamentary capacity.

[12] Simes, Model Probate Code §31 (1946); 2 Powell, Real Property ¶217 (1950); 3 Vernier, American Family Law §189 (1935); 1 P-H Wills, Est. & Trust Serv. ¶2731; *cf.* 1 Glenn, Fraudulent Conveyances and Preferences 241 (1940).

in the chain of title.[13] This possibility may exist for an indefinite time after the death of the husband concerned.[14] If a wife refuses to release her dower, it may mean court proceedings to compensate the purchaser or possibly loss of the sale. The existence of intricate legal questions as to the existence of dower,[15] combined with factual and legal doubts as to the validity of a particular "marriage" [16] in the chain of title, may require costly title searches or title insurance. It is perhaps fair to state that inchoate dower adversely affects the price of real estate, and to that extent defeats its own protective purpose.

And there are other doubts as to whether or not the protection is effective. Presumably its chief merit is to prevent the husband from selling the land against his wife's will. But if the husband takes legal advice, he may in some states defeat dower by sleight-of-hand conveyancing, or by taking title in a corporate name. And the wife is in an unenviable situation if her improvident husband needs her consent in order to convey a marketable title. If, for example, he wants to sell the farm, the combined pull of sentiment and necessity is against her holding out either for (a) no sale or (b) sale with a portion of the purchase price set aside immediately for her maintenance after his death.

Finally, inchoate dower is unsatisfactory when tested under the maintenance and contribution formula.[17] There is no criterion of need. In consequence, the infringement on the reliance interest of the donee – and also of the bona fide

[13] 2 Tiffany, REAL PROPERTY 377 (3d ed. 1939).

[14] In many states dower must be elected within a prescribed period after publication of notice to creditors. Nevertheless, there may be instances when no publication has been made or administration initiated.

[15] See, *e.g.*, Melenky v. Melen, 189 N.Y. Supp. 798, 198 App. Div. 66 (4th Dep't 1921); 21 COL. L. REV. 821 (1921); 35 HARV. L. REV. 206 (1921); 8 VA. L. REV. 51 (1921); *cf.* Note, "Why Not Abolish Dower in Ontario?" 17 FORTNIGHTLY L. J. 242, 245 (1948).

[16] Thus, common law marriages where permitted, marriages occurring after one of the parties has secured a questionable divorce, conflict between a common law marriage and a ceremonial marriage, and the like.

[17] Discussed, *supra*, Chap. 4.

purchaser – may in the individual case be quite unwarranted. Under the formula too much protection for the widow is as objectionable as none at all.[18]

Why does inchoate dower still persist, in spite of these drawbacks? Professor Rheinstein [19] views it as a manifestation of the tendency of American legislatures to prefer debtors to creditors, to subordinate urban interests to rural interests. He points out that the dower exemption affects claims against a decedent's estate and also judicial sales in the husband's lifetime.[20] Thus the family is protected as to land other than the homestead; and the amount received by the wife at the judicial sale (as the equivalent of the present value of her dower expectation) can be used by the family to make a fresh start. This theory receives additional strength when we consider that realty usually comprises a large portion of the total holdings of the average rural family. Moreover, there is probably less family disharmony in rural areas, and consequently fewer attempted evasions of the dower interest. On the other hand, there are a number of jurisdictions whose laws are inconsistent with Professor Rheinstein's thesis. For example, inchoate dower apparently is abolished [21] in Georgia, Mississippi, South Dakota, Tennessee, Vermont, and Wyoming; no protection appears to be given against judicial sales in Indiana, Iowa, Kansas, Minnesota, and Nebraska. Probably the survival of inchoate dower may be attributed to a combination of reasons. Not the least of these reasons is the inertia of state legislatures, especially when it comes to toppling an ancient institution that purports to protect the home and family.

[18] Inchoate dower can co-exist with decedents' family maintenance legislation, but the combination is not ideal. See *infra*, p. 301.

[19] Rheinstein, CASES ON DECEDENTS' ESTATES 68 (2d ed. 1955).

[20] On the problem of present computation and payment of the widow's inchoate dower on sale by lien creditor, see Re Lesperance, (1927) 4 D.L.R. 391, 61 O.L.R. 94. This case occasioned a mild controversy between "Amicus Curiae" and "Amicus Amici" in 5 CAN. B. REV. 773 (1927) and 6 *id.* 176 (1928).

[21] By the same token, inchoate dower is still retained in Ontario, the "creditor" province of Canada.