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## Specific Performance—Forcing Release of Inchoate Dower Under Statutory Scheme

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whether "public policy" demands that the courts give such zealous regard to enforcing these contracts, even to the extent of overstepping the crystallized rules of contract law in order to reach the desired result.<sup>24</sup>

—FREDERICK H. BARNETT.

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### SPECIFIC PERFORMANCE — FORCING RELEASE OF INCHOATE DOWER UNDER STATUTORY SCHEME

A husband desiring to sell property sought to avail himself of a statute providing for the compulsory release of inchoate dower.<sup>1</sup> The West Virginia Supreme Court of Appeals granted the relief sought, holding the statute in question not unconstitutional as impairing existing dower rights. Inchoate dower, being only a possibility of an estate, is subject to the control of the legislature (by dictum) even to the extent of destroying it. The statute, being a proper exercise of this legislative power, is not unconstitutional. *Ruby v. Ruby*.<sup>2</sup> These principles are supported by the great weight of authority<sup>3</sup> and require no further consideration here.

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<sup>24</sup> Note (1928) 13 CORN. L. Q. 270.

<sup>1</sup> W. VA. REV. CODE (1931) c. 43, art. 1, § 6. See text above n. 27, *infra*.

<sup>2</sup> *Ruby v. Ruby*, 163 S. E. 717 (W. Va. 1932).

<sup>3</sup> That a wife's dower is inchoate until the husband dies: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681 (1892) (overruling earlier Illinois decisions to the contrary); *Pritchard v. Savannah St. & R.R. Co.*, 87 Ga. 294, 13 S. E. 493 (1891); *State v. Probate Ct.*, 137 Minn. 238, 163 N. W. 285, L. R. A. 1917F, 436 (1917); *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257 (1911); *Thornburg v. Thornburg*, 18 W. Va. 522 (1881).

That inchoate dower interests are completely subject to legislative control; *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124 (1875); *Thorburn v. Doscher*, 32 Fed. 810 (D. Ore. 1887); *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209 (C. C. A. 9th, 1893); *Ferry v. Ry. Co.*, 258 U. S. 314, 42 S. Ct. 358, 20 A. L. R. 1326 and note (1922); *Billings v. People*, 189 Ill. 472, 59 N. E. 798 (1901); *McNeer v. McNeer*, *supra*; *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 137 (1891); *Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678 (1918); *McAllister v. Dexter & P. R. Co.*, 106 Me. 371, 76 Atl. 891 (1910); *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382 (1907); *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322 (1866); *Chouteau v. Missouri P. Ry. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299 (1894); *Miner v. Morgan*, 83 Neb. 400, 119 N. W. 781 (1909); *Moore v. New York*, 4 Sandf. 456 (1851); *aff'd*, 8 N. Y. 110, 59 Am. Dec. — (1853); *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355 and note (1856); *Long v. Long*, 99 Ohio St. 330, 124 N. E. 161, 5 A. L. R. 1343 and note (1919); *Melizet's Appeal*, 17 Pa. 449, 55 Am. Dec. 573 (1851); *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330 (1889); *Hamilton v. Hirsch*, 2 Wash. 223, 5 Pac. 215 (1885); *Thornburg v. Thornburg*, *supra*; *Bennett v. Harsm*,

Three main types of relief have been formulated by the courts for the situation in which a vendee asks for specific performance of a contract for the sale of land in which the wife of the vendor has refused to join.<sup>4</sup> But the cases, in the words of a Missouri court,<sup>5</sup> are in "much confusion and irreconcilable contrariety".

The first allows specific performance only if the buyer is willing to pay the full purchase price with no compensation made for the unconveyed interest of the wife. The reason given for this rule is that it prevents any possibility of a husband coercing his wife to release her dower. It is equally true, however, that the rule neglects the rights of the purchaser and leaves him without adequate redress. Furthermore, since the amount of damages a husband would have to pay when sued at law under this rule is the difference between the contract price and the actual value of the land sold,<sup>6</sup> this rule may furnish an ill-disposed wife with an opportunity of subjecting her husband to damages at will. The desirability of a rule so capable of working an unfair result is seriously open to question.

The second allows specific performance with a deduction from the purchase price of the estimated value of the wife's interest.<sup>7</sup>

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51 Wis. 251, 8 N. W. 222 (1881). But after the death of either spouse the interest of the other becomes vested and not subject to legislative control, since statutes divesting previously vested rights are not upheld. *McAllister v. Dexter & P. R. Co.*, *supra*; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200 (1859); *Moore v. Kent*, 37 Iowa 20, 18 Am. Rep. 1 (1873); *Bottorff v. Lewis*, 121 Iowa 37, 95 N. W. 262 (1903) (dower of widow having vested on death of husband held incapable of being increased by subsequent legislation to the prejudice of heirs).

<sup>4</sup>*Hazelrig v. Hutson*, 18 Ind. 481 (1862); *Zebbley v. Sears*, 38 Ia. 507 (1874); *Hession v. Linastruth*, 36 Ia. 483, 65 N. W. 399 (1895); *Noecker v. Wallingford*, 133 Ia. 605, 111 N. W. 37 (1907); *Stein v. Francis*, 91 N. J. Eq. 205, 109 Atl. 737 (1919); *Scheffrin v. Wilensky*, 92 N. J. Eq. 109, 111 Atl. 660 (1920); *aff'd*, 92 N. J. Eq. 705, 114 Atl. 927 (1921) (realty dealers refused to perform contract to sell, the price having meanwhile risen, giving as reason that wife of one refused to release dower. Collusion with the wife appearing, plaintiff was given a decree for specific performance with indemnity for dower); *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453 (1857); *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395 (1881); *O'Malley v. Miller*, 148 Wis. 393, 134 N. W. 840 (1912) and cases cited in Notes (1924) 9 CORN. L. Q. 470 and (1921) 30 YALE L. J. 523.

<sup>5</sup>*Tebeau v. Ridge*, 261 Mo. 547, 568, 170 S. W. 871 (1914).

<sup>6</sup>*Plum v. Mitchell*, 26 S. W. 391, 392 (Ky. 1894).

<sup>7</sup>It is a general rule that where a vendor has contracted to convey a larger estate than he has, the vendee is entitled to specific performance of the contract with an abatement in the purchase price for that part of the interest which the vendor is unable to convey. Several courts hold dower an exception to this rule on the ground of likelihood of coercion of the wife and difficulty of computing the value of inchoate dower, but others hold neither reason is sufficient to take a case out of the general rule. Notes (1921) 30 YALE L. J. 523; (1921) 25 HARV. L. REV. 731.

Much can be said both for and against this rule. On the one side it indirectly coerces the wife and substitutes the terms of the court for the contract made by the parties, virtually enforcing an agreement which was never made.<sup>8</sup> Coercion usually results where an abatement is allowed, because the husband quite naturally brings pressure to bear on his wife to compel her to join in the conveyance. Furthermore, while an abatement based on mortality tables is approximately correct, it may work extreme injustice in an individual case since the dower may never vest. On the other side, the value of this right so calculated is in most cases fair and to refuse specific performance with this abatement against a vendor who has pretended he was able to convey the fee is to let him profit by his own misconduct. It has been given as an explanation of this rule that the vendor, having asserted title to all the land, is estopped to deny it later.<sup>9</sup> Apparently, however, the real justification is the great hardship resulting when the purchaser is left to his remedy at law and the comparatively slight hardship to the vendor in making him convey part of what he contracted to convey for a compensation on approximately the basis contracted for by the parties. This rationalization is especially applicable in those jurisdictions in which the vendee of land is not allowed damages for the loss of his bargain.<sup>10</sup>

Where the vendee is aware of the defective title, this rule has been held not to apply, not because such knowledge defeats the estoppel but because there is less hardship in denying relief to a purchaser with notice of the outstanding dower than to a purchaser without such knowledge.<sup>11</sup> And if the defect is known but the vendor assures the buyer of his ability to remove that defect, the purchaser is usually allowed this type of relief.<sup>12</sup> Some courts, however, refuse ever to allow specific performance with abatement unless the wife's refusal was procured by the husband or unless misrepresentation by the wife existed (she then not being an innocent party),<sup>13</sup> on the ground that the value of an inchoate dower is purely conjectural and not capable of ascertainment and

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<sup>8</sup> The Scotch law refuses thus to remake the contract. *Stewart v. Kennedy*, 15 App. Cas. 75, 102 (1890).

<sup>9</sup> *Rudd v. Lascelles*, (1900) 1 Ch. 815, 818.

<sup>10</sup> *Bain v. Fothergill*, 31 L. T. 382, 7 H. L. 158 (1871).

<sup>11</sup> *Peeler v. Levy*, 26 N. J. Eq. 330 (1875). *Contra*: *Bradford v. Smith*, 123 Ia. 24, 98 N. W. 377 (1904); *Walker v. Kelley*, 91 Mich. 212, 51 N. W. 934 (1892).

<sup>12</sup> *Barker v. Cox*, 4 Chan. Div. 464 (1876); *Wilson v. Williams*, 3 Jur. (n. s.) 810 (1857).

<sup>13</sup> *Young v. Paul*, 10 N. J. Eq. 401 (1855).

because such relief necessitates so great a departure from the contract entered into as to be unduly harsh upon the vendor.<sup>14</sup> One court refused this type of relief because it felt compelled to leave the wife the option of taking one-third of the purchase price set aside for her or one-third of her husband's realty at his death, in accordance with a statutory provision.<sup>15</sup> The fact that there is a want of mutuality of remedy to such a contract has given pause to some courts,<sup>16</sup> but this objection is of dubious validity and has not proved insuperable.<sup>17</sup>

The third view allows specific performance with the estimated value of the dower retained by the vendee to be held as indemnity against the loss occasioned if the dower should later vest. There is a conflict of judicial opinion as to whether the purchaser should be required to pay interest on the sum retained. If the purchase price is retained without payment of interest the purchaser has received more than he is entitled to, a corresponding loss being thrown on the husband since he is deprived of both the land and part of the purchase price. The purchaser gets the use of all the land at only two-thirds of the price while the grantor and his wife lose all the land and receive only two-thirds of the price. Furthermore, it is especially likely to produce coercion of the wife, because unless she releases her rights her husband must lose and she indirectly suffers therefrom, usually being dependent upon him. The wife is thus induced to come to the aid of her husband and sign away her dower rights, unwilling as she may be to do so. In short, this rule permits the buyer to have the use of one-third of the land without cost to him frequently, and imposes a harsh penalty on the husband for being unable to make good title without reference to any misconduct by him and irrespective of whether his intentions were good or bad.<sup>18</sup>

If interest is paid on the retained purchase price, however, this rule loses much of its harshness, since interest on one-third of the price would usually approximate a fair equivalent for the use of this part of the land while the joint lives of the husband and wife continue. The vendor receives the interest during the joint lives of himself and his wife, and the principal on her de-

<sup>14</sup> *Humphrey v. Clement*, 44 Ill. 299 (1867); *Reilly v. Smith*, 25 N. J. Eq. 158 (1874).

<sup>15</sup> *Butler v. Butler*, 151 Ia. 583, 132 N. W. 63 (1911).

<sup>16</sup> *Graham v. Oliver*, 3 Beav. 124, 128 (1840).

<sup>17</sup> FRY, *SPECIFIC PERFORMANCE OF CONTRACTS*, (6th ed. 1921) §§ 465-475.

<sup>18</sup> The unfairness of this rule is well stated by Professor Horack, *Specific Performance and Dower Rights* (1926) 11 IOWA L. REV. 97, 122.

cease if he survive her; if she survives him the interest goes to the wife after the vendor's death and the principal to the vendee upon her death.<sup>20</sup> This was formerly the English practice,<sup>21</sup> but inchoate dower was abolished in England a hundred years ago.<sup>22</sup> But even then this rule is subject to criticism. If the value of the land increases after the contract is made, the wife is forced to sustain a loss by virtue of a contract which was in effect thrust upon her by her husband and the purchaser. If, on the other hand, the value of the land decreases after the contract is entered into it is not unduly harsh to hold the vendee to the valuation set in the agreement, since it was his voluntary act. At best, this rule is capable of operating in gross injustice to the rights of the wife.

Although there is a possibility of coercion where specific performance is granted with a retention of one-third of the purchase money upon which interest is to be paid, it is much less than where a present abatement of the price is made, or where the purchaser is allowed the use of a third of the land without paying therefor — which would continue during the joint lives of husband and wife unless she chose to relinquish her rights.

It may be suggested that this rule is unfair to the purchaser in that it requires him to pay interest on one-third of the retained purchase price when he is not certain that he will ever get more than two-thirds free of encumbrances. This is balanced by the fact that he is given the use of the land, and the legal interest rate on one-third of the purchase price is approximated by the reasonable value of the use of one-third of the land, subject to the qualification that such a balance would be upset in case the value of the land should appreciably vary from the price set in the contract.

Retention of part of the price as an indemnity contingent upon the vesting of the inchoate right and the final determination of the precise rights of the parties would ordinarily protect the future interests of all concerned. Even where common law dower exists and the wife is likely to get a third interest for life in the land, the possibilities of hardship are much reduced, for if the

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<sup>20</sup> See note (1924) 9 CORN. L. Q. 470, at 471. The effect of giving this much of the principal sum to the vendee roughly approximates equality insofar as it approaches in amount the interest he has paid on the sum. There would be exact equality only where the interest payments precisely equalled the third of the purchase price.

<sup>21</sup> *Wilson v. Williams*, *supra* n. 12.

<sup>22</sup> 3 and 4 Wm. IV, c. 105 (1833).

wife predeceases her husband exact justice according to their bargain may be done as between vendor and purchaser. If, however, the wife survives her husband the sum retained, while interest on it may not represent the actual value of her life interest, at least will not cause the price to be reduced. The court can, at the time the husband dies leaving a widow, again estimate the value of her interest and do it with much more accuracy that it could have at the agreed date for performance.

It thus appears that some courts refuse specific performance with compensation when a spouse refuses to join in the conveyance,<sup>22</sup> and others allow specific performance against the vendor with some sort of compensation for unreleased dower rights.<sup>23</sup> Other methods of protecting the vendee have been devised. Some courts require the vendor to provide a bond to indemnify the vendee from possible loss by the vesting of the dower,<sup>24</sup> and others allow the vendee to show damage resulting to him from the outstanding dower as a cloud on his title, the amount of such damages to be deducted from the purchase price and stand as a lien on the land for the vendor should he survive his wife.<sup>25</sup> One court even ordered the inchoate dower of the wife figured as consummate as of the time of the decree and the value thereof deducted.<sup>26</sup>

The West Virginia Revised Code provides for the calculation and payment of the estimated value of the inchoate dower to the reluctant spouse (*be it the husband or the wife*) at suit of either party to the contract.<sup>27</sup> This remedy clearly falls under none of the rules already considered; it transcends all of them. Its object is quite salutary. Too frequently a shrewish spouse has been able to prevent the sale of the other's property because the prospective buyer would not take it subject to dower and the

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<sup>22</sup> *Rust v. Conrad*, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720 (1882); *Chicago, K. & S. R. Co. v. Lane*, 150 Mich. 162, 113 N. W. 22 (1907); *Kuratli v. Jackson*, 60 Ore. 203, 118 Pac. 192, 38 L. R. A. 1195 (1911) (specific performance with compensation refused, purchaser having known at time of contracting that vendor was married).

<sup>23</sup> *Noecker v. Wallingford*, *supra* n. 4; *Walker v. Kelly*, *supra* n. 11; *Aiple-Hemmelman Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652 (1908); *Saldutti v. Flynn*, 72 N. J. Eq. 157, 65 Atl. 247 (1906); *Payne v. Melton*, 69 S. C. 373, 48 S. E. 277 (1904); *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665 (1906) (vendor held entitled to interest on retained part of purchase money).

<sup>24</sup> *Stein v. Francis*, *supra* n. 4.

<sup>25</sup> *Granoff v. Korpus*, 182 N. Y. Supp. 136 (1919).

<sup>26</sup> *Stein v. Francis*, *supra* n. 4.

<sup>27</sup> W. VA. REV. CODE (1931) c. 43, art. 1, § 6.

perverse spouse was unwilling to accept a reasonable sum in lieu thereof. This situation is made possible because an outstanding dower renders the title of land so defective as to release a purchaser from the obligation of completing the sale,<sup>23</sup> and also constitutes a breach of the covenant against incumbrances.<sup>24</sup> It obviously should not be the policy of the law to permit either a husband or wife to prevent the other from disposing of his or her interest in land.

But, admitting the desirability of this statute, it is nevertheless subject to criticism:

“The granting of an abatement of a sum in gross to be deducted from the original agreed price at the time set for performance has, it seems to the writer, but little to be said in its favor, for no matter how anxious a court may be to do justice as between the parties, it is dealing with interests of so uncertain a nature that any fair or accurate estimate is absolutely impossible, with the result that while the court may protect and preserve the interest of the wife, it thrusts a hardship upon either the husband or the purchaser, in that it makes them settle for a definite sum and purports to estimate with definiteness interests which from their very nature are incapable of accurate estimation. The result is that equity has forced the parties into a gamble as to the value of their rights.”<sup>25</sup>

It seems not too inequitable to allow the remedy of specific performance against a spouse who undertakes to sell and assumes the responsibility of securing the other's consent, unless the vendor has expressly conditioned the entire sale upon such other spouse consenting to release his or her claim. The difficulty with this situation is that courts go illogically far in construing a contract as having been so conditioned to relieve the vendor from the hardships of specific performance.<sup>26</sup>

Furthermore, as pointed out by the court in the principal case, this statute really benefits rather than burdens the recalci-

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<sup>23</sup> *Porter v. Noyes*, 2 Greenl. 22, 11 Am. Dec. 30 (Me. 1822). But if the purchaser is willing to take such title as the husband is able to convey, the court will enforce the contract against the husband. *Greenwood v. Ligon*, 10 Semdes & M. 615, 48 Am. Dec. 775 (Miss., 1848); *Jursheedt v. Union Dime Sav. Inst.*, 118 N. Y. 358, 23 N. E. 473, 7 L. R. A. 229 (1890).

<sup>24</sup> *Thrasher v. Pinckard's Heirs*, 23 Ala. 616 (1853). It does not, however, constitute a breach of the covenant of seisin, or good right to convey, because it is at most a contingent incumbrance (since the husband may survive the wife) and does not affect his legal title to the land. *Whisler v. Hicks* 5 Blackf. 100, 33 Am. Dec. 454 (Ind., 1839).

<sup>25</sup> *Horack, op. cit. supra* n. 18, at 127.

trant spouse. Whereas formerly there was no statutory provision for the payment to the wife of the value of her dower, or to the husband of what was then a right of curtesy, under the new rule he or she is given the estimated present value<sup>21</sup> of such inchoate interest while the other spouse is still alive and it is uncertain but that the reluctant party may be the first to die, in which event under any of the three major judicial rules dower or curtesy would be worthless.

—KINGSLEY R. SMITH.

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<sup>21</sup> *Ibid.* at 105 where the writer cited *Venator v. Swenson*, 100 Ia. 295, 69 N. W. 522 (1896) in which the court said, after deciding on uncertain evidence that the contract involved was conditioned on the wife's signing:

"It seems to us that this case is like hundreds of others, where men meet and fix the terms of a sale of land, and fix a time for performance, tacitly, if not otherwise, understanding that the wives will concur, and with no expectation of the transaction being completed without such concurrence."

See *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695 (1890); *Spadoni v. Frigo*, 307 Ill. 32, 138 N. W. 226 (1923); *Healy v. Hohn*, 157 Ia. 375, 138 N. W. 551 (1912).

<sup>22</sup> W. VA. REV. CODE (1931) c. 42, art. 2, § 4, prescribes in detail the method of determining the value of inchoate dower. See *Blevins v. Smith*, 154 Mo. 583, 16 S. W. 213, 13 L. R. A. 441 (1891) (holding inchoate dower a contingency founded on a contingency, so not susceptible of computation by any definite rule); but see also *MacKenna v. Fidelity Trust Co.*, 184 N. Y. 411, 77 N. E. 721 (1906) (holding that purchaser at foreclosure sale by title subsequent to that of wife could perfect his title by paying her estimated value of her dower).