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DOWER IN JUDICIAL ACTIONS.

CLARENCE E. MARTIN

A support or maintenance of the wife, known to our law as dower, is not a new legal institution. Provision for the wife was practiced in the Roman law long before the birth of Christ. The Roman dos, or marriage portion, was provided by the wife's father or some of the wife's relations. If the wife continued a member of her father's clan or family, the husband being then under no obligation to maintain her, she needed no dos. But, if and when she left the parental roof, a dos was necessary. The theory of the Roman law, therefore, was that the dos was given as a provision for the expenses of the marriage—hence has grown the custom of dowry in all Latin countries. The radical difference—and it is radical—between dowry or dos and dower, is that, at the Roman Law, the former was brought into the family by the wife, and, at the common law, the latter comes from the husband's estate. The words, however, in the centuries of use, seem to have become more or less synonymous.

By the lex Julia, (B. C. 90), the father was compelled, if he had the means, to provide his daughter's dos, which passed into the control of the husband. It could not be disposed of, or encumbered, however, and the wife had the right to see that the dos was applied according to its legitimate purpose. Unless determined upon at its creation, upon dissolution of the marriage, the dos reverted to the donor or his heirs.

The Emperor Justinian, in the Institutes, refers to the donatione ante nuptias, which, he writes, by the constitutions of his father, Justin, might be increased after marriage. He says that by the lex Julia, the husband was prohibited from alienating Italian immovables, which formed part of the dowry, against the wish of the wife, but lest the weakness of the female sex should be abused to the detriment of their fortunes, he extends the law to all the Roman dominions. This great lawgiver also promulgated the rule that when the dos was returned by the husband, to the wife, at

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his death, in the form of a legacy, the legacy had to be paid without delay and no set-off of any character was admissible.

Dower, as we know it at the common law, however, did not exist at the Roman law. The civil law, in its original state, says Blackstone, had nothing that bore a resemblance to dower at the common law. Modern law writers tell us that dower is one of the most ancient institutions of the English common law. Lord Bacon remarks that in his time the law favored three things—life, liberty and dower.

The Anglo-Saxons were hardly removed from the pagan instincts of centuries, when the dooms of King Ethelbert were written at the end of the sixth, or the beginning of the seventh century, in the days of St. Augustine. In the seventy-fifth section, he proclaims:

"For the 'mund' of a widow of the best class, of an earl's degree, let the 'bot' be L shillings; of the second, XX shillings; of the third, XII shillings; and of the fourth, VI shillings."

The 'mund,' as described in the Longobardic law, was the sum paid to the family of the bride, for transferring the tutelage they possessed over her to the family of the husband. It is apparent, therefore, that the widow was provided for out of the estate of her husband by being paid a certain definite amount, even though the 'mund' had been paid to her family at the time of marriage.

Doubting that the institution was introduced by the Norman, because it bears not the slightest trace to any feudal reason for its invention, Blackstone says that it is possible that it might be with us the relic of a Danish custom; since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the vandals. "However, this bee," says he "the reason which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children."

In Doomsday dos is called maritagium, says Lord Coke, in his Commentaries on Littleton, but as we shall presently see maritagium was in reality curtesy as we now know it. The very word, says Coke, "doth impart a freedome." Among them, he recites, is that the tenant in dower shall not be "destroyed for the debt

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2. Vol. 5, 129.
3. Lib. 1, c. 5, § 36.
due to the King by the husband in his life time in the lands which she held in dower." Glanville, who wrote in the latter part of the twelfth century, distinguishes between the Roman dos and our dower, which latter, he says, corresponds with maritagium or marriagehood. But, marriagehood, as described by Glanville in the same book is equivalent to the Roman dos and in reality is our curtesy, for it was land given with the woman in marriage, which Glanville says reverted, unless the donee had "by her an Heir, Male or Female, heard to cry within the four walls," in which event the estate remained to the third generation and then reverted. Glanville devotes his entire sixth book to the law of dower and there describes the two kinds of dower then known—dower at the church door or ad ostium ecclesiae and by force of law. He gives forms of procedure and writs for its recovery or assignment. Forty days were given to the heir for assignment, during which time the widow enjoyed her quarantine. Now the widow, under our statute, enjoys her quarantine until dower is assigned.

Bracton discusses it; it is referred to in Fleta. Britton, which was written in the latter part of the twelfth century, adds to Glanville's two kinds of dower, a third, known as ex assenu patris, or by consent of the groom's father. Dower, at that time, was forfeited by a second marriage or adultery or elopement, even though the latter two happenings were not causes for divorce a vinculo. It was extinguished by treason or felony of the husband, because forfeiture took place and the wife was presumed to have advised or aided the husband to break the law. And, too, at that time dower had become subject to crown debts or taxes, Lord Coke to the contrary notwithstanding. Writing of the writ for reasonable dower, Britton says that "it is intended that this action shall be the most favored of any of the writs of possession not pleadable by assize, and therefore there ought to be greater dispatch therein."

In the Mirror of Justices, dower is referred to as an ordinance existing, apparently, whereof the memory of man runneth not to the contrary. In summing up what had previously been the law, it is stated that every one "might endow his wife ad ostium ecclesiae," without the consent of his heirs, and that widows marrying again without the consent of the guardians of their lands,

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4 7, c. 13.
6 Il. 249b.
7 Written by Horn about 1290.
"should lose their doweries." Bigamy and adultery are given as causes of forfeiture.

No reference is made to dower in Magna Charta. Yet in the Great Charter of 1217, it is provided that there shall be assigned to the widow as dower the third part of all the land, which "was his (not at the time of the marriage, but) in his life time, unless she was endowed of less at the church door." This latter was interpreted to mean unless she had accepted less at the church door. "Bracton's text and the decision of Bracton's time, however, suggest that this phrase in the charter was loosely used and without any intention of changing the law laid down by Glanville." The second Statute of Westminster contains a chapter on dower and its incidents. The Year Books of Edward I, it is said, contain many cases in reference to dower and its assignment.

It was not until Littleton wrote in the latter part of the fifteenth century that the law of dower and curtesy was becoming settled. Probably the greatest change from the law laid down by Glanville and the earlier law writers, was the limitation of dower to estates held during coverture and making dower at least a one-third interest for life in all such lands, whether the dower at the church door was less or not.

Whatever may be the changes in our law from century to century, it is apparent that dower owes its origin and existence to the introduction of Christianity into England, where, as elsewhere, the status of the woman was raised from that of a serf to that of a human being. In Ethelbert's law, we find the first trace after his conversion and baptism by Augustine, and from thence down the ages, the woman was entitled to some part of her husband's estate for her support and maintenance. It certainly took the place of the old pagan practice of buying the bride from her father or family. This was abhorrent to Christian ideals and brought forth the substitute or first form known as dower ad ostium ecclesiae which, as its name implies, made at the very door of the church by the bridegroom of full age, owner in fee simple, at the time of the marriage, and after "affiance made and troth plighted." The endowment might be of the whole or any part of the lands, the interest differing in different portions of the country. There is therefore an historical significance to the present day words of the marriage ceremony "with all my worldly goods, I thee endow." Dower could be given only openly and at the church door. Secret

2 Pollock and Maitland 421.
or death bed marriages carried no endowment of dower—the declaration must be made publicly.

And so with dower *ex aseunu patris*. When a young man had no lands of his own and desiring to copy the custom of more fortunate youths, with the consent of his father who must have been present, he would at the church door and at the time of the marriage, endow his bride with dower in the lands he hoped some day would be his. This dower attached, even though he did not survive to take as heir to the father. It was therefore a vested estate and not an inchoate right.

Blackstone mentions these two forms and the dower at the common law, as well as dower by custom, which was confined only to such places where the custom was different from either the common law or other forms. The two forms of dower created at the church door were abolished by third and fourth William IV, chap. 105. Littleton mentions a fifth form or dower *de la plus belle*, which Blackstone says was abolished with the military tenures of which it was a consequence, because it was feudal in its nature.

Dower at the common law, as we have observed, grew out of the desire of the law to provide for widows not endowed, or endowed of less than a third at the church door, or in lands of which the man was not seised at the time of marriage. Our forefathers brought the common law form with them to this country and we have this form, except where it has been changed by statute.

The development of dower in Virginia is interesting. The first mention of dower is in the orders of the assembly during the session of March, 1654, when the widow Burbage was given *one-half* of the plantation at Nansemond and one-third of all the other lands for life.9 In the regime of Sir Wm. Berkeley, in September, 1664, an act was passed by the General Assembly, in which it is recited that some doubts have arisen as to the manner of assigning dower, and enacting that thereafter land and houseing shall be divided, according to quantity and quality, equally into thirds, and the widow shall take her choice.10 In 1673, it was enacted that the widow should be endowed with a third of the real estate for life, giving the husband power to devise more to his wife, "but not lesse."11 The widow needed no vote in Virginia to assert herself. Dower was becoming troublesome. In 1705, the General Assembly enacted that if a widow sent a dower slave out of the colony, or if

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9 1 Hening Stat. 405.
10 2 Hening Stat. 212.
11 2 Hening Stat. 303.
her second husband did it for her, she should forfeit dower in the slaves and lands as well.\textsuperscript{12} And at the same session, it was enacted that the widow, not having a jointure settled on her in the lifetime of her husband, as by law "doth barr her of her dower," shall be "endowed of one full and equal third part" of her deceased husband's estate, "in manner as is directed and prescribed by the laws and constitutions of the Kingdom of England," and that she might occupy the mansion house and plantation thereto belonging, rent free, till dower was assigned.\textsuperscript{13} A similar provision was contained in the act of 1748, which, for another reason, was vetoed by the King and ordered repealed.\textsuperscript{14}

So colonial Virginia adopted finally the common law form of dower, although its legislative expression was a mere gesture. The common law form was always present. It is interesting to conjecture whether the other forms of dower found a resting place in our early jurisprudence. The language of the statutes does not preclude them. It is fair to presume therefore that the forms were in effect, if not practiced, prior to the Revolution and that there has been no direct repeal of them. But the statute which provides that the common law shall be in force, except where changed by statute, would seem to be an effectual bar to the advocacy of any or either of the other forms, and leaves us the common law form alone to consider in our discussion.

The inchoate right is neither a title, nor an estate in land, nor a lien upon the husband's land, nor a personal claim against the husband. It confers upon the wife no right of possession or control of the land to which it attaches.\textsuperscript{15} It is not protected by the Constitution until it becomes a consummate right or a vested estate, and consequently, even after marriage and before the death of the husband, the legislature may modify or destroy it at will without exceeding its constitutional limits.\textsuperscript{16} Marriage not being technically a contract, does not come within the protection of the constitutions, relative to laws affecting prior contracts. It is more than a possibility, however, it is a subsisting, separate and distinct interest or right, possessing many of the incidents of property. The right to dower is absolute during the life of the husband, if there be (1) lawful marriage, (2) actual or constructive seizure of real estate

\textsuperscript{12} 3 Hening Stat. 335.
\textsuperscript{13} 3 Hening Stat. 374.
\textsuperscript{14} 5 Hening Stat. 442, 568.
\textsuperscript{15} 19 C. J. 493.
\textsuperscript{16} Thornburg v. Thornburg, 18 W. Va. 522.
during coverture, and, it is consummated upon (3) death of husband. In West Virginia, the contingent dower right,

"is not property, and has no commercial value capable of ascertainment. It is a mere contingency wisely ordained for the protection of the wife in case she is left a widow, an event which may never happen, and until that contingency does arise the law does not regard the inchoate right as property having transferable quality or commercial value. The law makes provision for its release or extinguishment, but none whereby it may pass to another.""\(^{17}\)

An inchoate right of dower is an incumbrance.\(^{18}\) Unlike dower at the common law, under our statute the inchoate right exists in an equitable estate, or to a right of entry or action in any land, if an estate of inheritance.\(^{19}\)

It is barred by jointure\(^{20}\) when intended to be in lieu of dower. The word "intended" was inserted in 1849, instead of the words "expressly or by averment;" and the statute now covers personal, as well as real property, as part of the jointure, if so intended. Dower is also barred by leaving the husband and living in adultery or leaving without a cause entitled at least to divorce a mensa, and continuing thus at the time of his death.\(^{21}\) It is unnecessary to say, I take it, that divorce a vinculo bars dower, because the theory of the law is that such divorce dates back to the time of the marriage, and to all intents and purposes, save legitimacy of children, in effect holds that there never was a marriage existing between the parties. A man may not deprive his wife of dower by will. Within one year of probate, she may renounce the will and take her dower.\(^{22}\) It does not exist where the husband had a right to the reversion, which had not vested nor to which right of entry did not exist in his life time\(^{23}\) because seisin in law, which alone is necessary, is absent.

And while it is true, that property is not primarily or solely the object of marriage, and is but an incident which may or may not attach, yet our Virginia courts have gone far to hold that where the husband has a limited estate, if it be an estate of inheritance, that issue might by possibility inherit, and there is actual constructive seisin during coverture, the widow is entitled to dower.

\(^{17}\) Williams, J., in Carver v. Ward, 81 W. Va. 844, 85 S. E. 828.
\(^{19}\) W. Va. Code, c. 65, § 2; c. 71, § 17.
\(^{22}\) W. Va. Code, c. 78, § 11.
\(^{23}\) Blow v. Maynard, 2 Leigh 29.
As an illustration our court has held that where property is devised "to A and if he die without issue, to B", A's widow is dowerable.  

"Dower is the widow's last plank in her shipwreck." And while it is that last plank and she takes one-third of the rents from the moment of vesting, yet it must be in good faith, and she may not take title in her name to her husband's real estate in fraud of his creditors, for the husband then has no seisin, actual or constructive, and there can be no dower.  

We have observed that only two things are necessary to create the inchoate right, to-wit: lawful marriage and seizure during coverture. How can the wife divest herself or be be divested of the inchoate right? The assignment of dower, the ascertaintment of its value for a sum gross in lieu thereof under the statute, the conveyance or joinder in the deed for that purpose during the life of the husband and after the right has become a vested estate, the defeat by jointure or action of the wife, the effect of divorce or the existence of the will, are every day problems in the lawyer's office.  

Joining with her husband in the execution of a deed conveying land, the wife simply releases her inchoate right, and she is estopped from thereafter asserting that right. She does not convey anything. Where land is sold in the lifetime of the husband to satisfy a lien, created prior to marriage, or afterwards where she has joined, or for the purchase money, whether she has joined or not, or otherwise paramount to her claim, she has no inchoate right.  

This statute was part of the report of the revisors of the code in 1849, the recommendation of whom was substantially adopted by the legislature. The Virginia Court has held that where a married woman joined in a deed of trust to secure a debt she released her inchoate right of dower in the land and was barred of any interest therein. In two cases the Virginia court held that where there was a sale and surplus after payment of debt, the wife is barred of any lien upon or interest in the land, but must look to the surplus alone, and the purchaser takes the title to the real estate free and clear of any claim to inchoate dower. This would

26 Engle v. Engle, supra note 25.
27 Carver v. Ward, supra note 17.
seem to be a common sense rule. It is certainly a common sense interpretation of the statute. Joining in the execution of a deed or a deed of trust is one of the ways by which a wife releases her inchoate right.

But our court, on the identical statute, says that while the woman does not have a right to dower in the land, for she has released that, yet if there is a surplus, and the woman survives her husband, she is entitled to dower in the surplus and such dower in the surplus is a lien upon the very real estate which she has by her solemn deed released from her inchoate right of dower. Reading into the statute the word "lien," which does not occur, and attempting to overcome the clear import and meaning of that statute, Judge Haymond, speaking for an unanimous court, lays stress upon the case of Wilson v. Davisson, and says that the legislature, by adding a clause to the statute recommended by the revisers of the Code of 1849, made the dissenting opinion in that case the law of Virginia. It is admitted in the opinion that the purchaser takes the land free from dower, but subject to the inchoate right of the wife to dower in the surplus, if any, and that when such inchoate right becomes consummate, then such right to dower in the surplus, is a lien upon the land even though it be in the hands of an innocent purchaser. Should it be a sale under a deed of trust and the trustee makes no settlement, or should it be a judicial sale and the papers are lost, or should it be impossible to determine what the surplus is, if any, how can you pass upon the title with any degree of certainty? Mark you, under that decision the lien follows the land and the widow may look for her dower in the surplus, even though by her solemn deed, one of statutory methods of release, she has released the very lands of her inchoate right, then in the hands of a bona fide purchaser, or someone who claims under him. In other words, our court says that she has a lien for her dower in the surplus upon the land which she has released, and the husband or the creditors no doubt have taken that surplus and applied it to other uses.

Again our court speaks, and, upon the same statute, holds that it is error to sell the real estate in which there is a surplus, except subject to the widow's dower. But how can it be determined prior to the sale, that there will be a surplus? Like the former holding, the effect is to sell the contingent right so far as the lien debt is

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33 2 Robinson 334.
concerned, and the balance subject to the lien for computed dower, which the wife has expressly released. Error once released runs wild indeed! Luckily the statute says that the court may make "such order as may seem to it proper to secure her right," that is her dower in the surplus. Our court has also held that the wife, prior to her husband's death, may not file a petition to protect her inchoate right, and in another case, that the purchaser may not do so. If, after sale with a surplus, neither wife nor purchaser may move to protect their respective rights, is it not apparent that the husband takes the surplus in which the wife has dower, and the purchaser an interest?

The legislature intended certainly to settle the law. Our court has attempted to legislate and make the law what it thinks it should be. Assuredly the law in Berkeley County, is most unsettled, upon an identical statute, the interpretation of which has never caused the slightest tremor in Frederick County, and the application of which might and does affect adjoining landowners!

Under the statute, dower is barred for any conduct for which a decree for divorce a mensa would lie, providing the parties are living separate and apart at the death of the husband, and the offense is not forgiven. Property acquired after a decree a mensa, by force of the statute is separate property and there is no dower therein. But dower or curtesy remain to that time. A wife may bar herself by her own agreement by taking lands in lieu of dower, in a divorce action, even though that settlement is afterwards set aside. Dower is released by ante-nuptial agreement, only to the extent clearly manifested in the instrument by its plain words or necessary implication therefrom. A joinder in a deed to maintain and support husband and herself is a sufficient consideration for post nuptial settlement to release dower. Bankruptcy of the husband does not bar dower, nor is the wife estopped, even though she appeared in the bankrupt action and orally agreed to release her dower in consideration of a sum gross, if after the sale no money was paid. But the court put the reason for its conclusion upon the ground that there was no issue made as

to dower, no appearance for that purpose, and no rule by which any inchoate right could be measured.\(^43\)

Out of this maze of decisions, we come now, face to face, with other decisions, which in this circuit at least again unsettles the law. It has been our belief that when land was partitioned that the wife’s inchoate right followed the land assigned to her husband. That proposition seems still to be safe. The seizure in fact is to the land and when the interest of the tenant in common is allotted, the right to curtesy or dower attaches to the allotted portion. If the court can settle “all questions of law affecting the legal title, that may arise in any proceedings,”\(^44\) and can direct the sale if not susceptible of partition or divisible in kind, it must naturally follow that the interest offered includes the inchoate right of dower as though the interests were allotted and not sold. But our court says that this isn’t the law. It has held that the inchoate right of husband or wife is not sold in a partition suit, and that the inchoate right of the wife remains in the property after sale, and, when consummate, action can be brought.\(^45\)

We know that one of the material differences between dower and curtesy is that dower attaches to all land held by the husband during coverture, curtesy to land of the wife of which she dies seized.\(^46\) The reason is that the wife may not convey without her husband’s joinder. Living separate, the wife may convey. In Calvert v. Murphy, supra, the court held that a deed made by the wife for her real estate in which the husband did not join, is void, but it does create color of title, and adverse possession under it for ten years ripens into title and she is disseised. And, therefore, the husband, even if he be non compos mentis at the time the deed is made, is barred of his curtesy, though he brought the suit within the requisite statutory period after removal of disability, because the statute having run against the wife in her lifetime, she had no estate at her death.

In Helmick v. Kraft, supra, it was held that the husband of a female coparcener is not a necessary party, unless he has some interest other than the contingent right of curtesy. “Ordinarily,” says Judge Poffenbarger, “a wife cannot convey her real estate without the consent of her husband; but the statute imposing or retaining this restraint has no application to judicial sales, and

\(^{43}\) Carver v. Ward, supra note 17.

\(^{44}\) W. Va. Code, c. 79, § 1.


\(^{46}\) W. Va. Code, c. 65, § 15.
the two statutes dealing with different subjects must be allowed operation and effect accordant with their respective terms.\textsuperscript{47} Therefore, it is apparent that the husband of the coparcenor is barred of curtesy, because the court, by directing a sale in a judicial proceeding, can divest the married woman without consent of her husband, and he need not even be a party to the suit and has no right to come in and ask to be made one, and the wife not being seized at the time of her death, with such estate, the husband has no curtesy. It being separate property, the wife then takes the proceeds, or the balance of the proceeds, of the sale of her portion of the property free from any interferance of her husband. Thus has legislature and court conspired to rob the common law of one of its fundamentals—the right to and supervision over the property of the wife.

Certainly, then, the rule will hold good as to the widow’s dower. But no; our court has determined\textsuperscript{48} that, under the law as it now is, a widow’s inchoate right of dower not becoming consummate until death of the husband, when it attached to real estate held at any time during the coverature, is not sold with the land by the court in a partition suit, and a decree cannot authorize a sale of the land free from the contingent right of dower. In other words, such contingent right must remain unsold and \textit{in esse} or \textit{in nubibus}, as you desire, to plague the purchaser, his grantee or his heirs in the days to come. The court softens the force of its decision by announcing that when reference is made to a commissioner to ascertain the value, it may be done, and when ascertained, the partitioners may agree to it and to a sale free from dower, and the controversy may be amicably settled in that way. “Methods of calculating the value of such contingent interests, though not prescribed by statute, have been compiled by scientists and resorted to by the courts in many cases for practical purposes,” says Judge Miller. How does this coincide with Judge Williams’ expression in \textit{Carver v. Ward}, \textit{supra}, when he says: “There is no means prescribed by law whereby the value of the wife’s contingent dower may be ascertained?”

In the Ragland Coal Co. Case, Judge Miller says that the partition statute “makes no provisions for partition of such contingent dower in law, nor does it make any provision for the sale thereof and apportionment of the proceeds to such contingent interest.”

I call your particular attention to the language of Judge Miller,

\textsuperscript{47} Helmick \textit{v. Kraft}, \textit{supra} note 45.  
\textsuperscript{48} Ragland Coal Co. \textit{v. Spencer}, \textit{supra} note 45.
when he says that the statute makes no provision "for partition of contingent dower in land." While dictum here, does this mean that the court would decide in a proper case that allotment would not carry the wife's dower to that share? The language is susceptible of such interpretation.

We have the Virginia statute of partition. The general assembly of Virginia in 1886 added to section three of the statute the sentence: "A sale of land so made by order of the court shall operate to bar the contingent right of dower of the wife in the share of her husband in the land so sold, whether she be a party to the suit or not." This places the wife upon a parity with the husband. Her dower is barred just as his curtesy. Judge Miller, in his opinion, cites this statute, and then comments: "Under that statute land sold in a partition suit would no doubt bar the wife's contingent dower. But our statute does not so provide. The defendant in this case has not by any instrument binding her consented to release or relinquish her contingent dower in the land decreed to be sold. Apparently she stands on her legal rights. She cannot be compelled to part with these legal rights in this suit, and she can do so only by the method prescribed by statute, that is by her voluntary deed." This decision is right, for under our statute reasonably construed a wife may only bar her contingent right by deed, as Judge Miller suggests, or in some way that would amount to a deed.

Would an answer in a suit releasing dower estop future claim? May a widow be estopped from asserting her consummate right by her conduct when she had only an inchoate right? Or, to put it another way, suppose a wife is a party to a suit, joins with her husband in his answer, allows the property to be sold, may she, upon the death of her husband, ask for dower in the land sold? Or, may she in such suit, refuse to answer, remain silent, and be barred by the judgment? Recent cases only are considered.

Having in mind the equitable statute and the statute giving one under disability the right to sue after removal of such disability, we may approach the inquiry with some degree of certainty that a woman may not by her affirmative conduct, if not by her silence, lead one into an unfair or inequitable position.

Reluctantly I have come to the conclusion that she is not estopped. There is not a case in this state where the widow was barred of her dower, or right to sue for its value under the statute,\textsuperscript{49} or

\textsuperscript{49} W. Va. Code, c. 65.
she was adjudged to have released it, unless she had done so in writing amounting in effect to a deed or release. We must leave out of this discussion any reference to dower consummate or vested. The widow is then free; she may be estopped as others are. Take the case of Fleming v. Pople. There the widow entered into an agreement with her husband in which she took lands in lieu of her contingent right in a divorce suit, which agreement was set aside in another suit by creditors of her husband. She had sold the property. The court held she had sold whatever interest she had and could not set up dower in other lands. She was estopped "by her solemn deed," says Judge Williams, "from asserting claim."

If she join with her husband in a trust deed, set aside as a preference, she is not estopped from claiming dower in surplus over amount named in trust deed, even though it may be for benefit of all the creditors. Sec. 2, chap. 74, Code, does not enlarge the scope of such trust deed, beyond its expressed purpose, to the detriment of the wife's right to dower. Carver v. Ward, supra, follows the same line of reasoning, that is: in a court action where the right to dower is not in issue, whatever is agreed to be done for the release of this right must be done before she is estopped. It is so in Virginia. Where the wife joined with the commissioner after the sale in the deed for the land sold, in a creditors' suit, none of the liens established in which, were superior to dower right, and the husband did not join, the court said there was no estoppel for the purchaser was not misled.

As a general rule acts of the wife during couverture to operate as a bar of dower by way of estoppel must in effect amount to one of the modes pointed out by the common law or recognized by the statute as constituting a bar. There are exceptions to this rule, but we do not find them in the Virginias.

The Ragland Coal Co. Case, under consideration, seems to settle the question. There the husband and wife were joint tenants and originally owned the land. The husband conveys his undivided interest without the wife joining. The purchaser sues in partition. The plaintiff claimed that the defendant, the owner of the undivided half, was the owner of the contingent right to dower in the plaintiff's half. The plaintiff sought to have this contingent right set up in the decree as one of the interests in the land. Although

50 76 W. Va. 176, 88 S. E. 1058.
52 Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 967.
53 19 C. J. 500.
the wife was a party defendant, the court held she was there only as a coparcenor or tenant in common, and that the purchaser took subject to the right of the wife, if the contingent right became consummate, to assertion of that right. It is true this isn’t a case where the wife remained silent, but the court holds that she does not have to speak, or act, for neither would affect her right when consummate. And in this case, would the Virginia amendment of 1886 avail, as the husband’s undivided interest was conveyed, without her joinder prior to suit?

What then is the remedy? We observed that from the earliest times, dower has been favored in the law, a particular writ was made for its assignment, its assignment was made with dispatch, its continuance as a legal principle has rested as a moral obligation binding the consciences of lawgivers and interpreters. The wife should stand on no higher ground than the husband, but she should be protected. Unless there is an agreement, or express release, the contingent right should be held intact for both, and that right transferred to the fund in case of sale. The purchaser should not be made to suffer nor to see to an application of the purchase money. We have an expression in this community that a court title is the best kind of title to get. Would that it were so. The purchaser at a judicial sale, under the present statutes, ought to know the meaning of caveat emptor.

In attachment suits, creditors’ suits, and to enforce judgments or mechanic’s liens, partition suits, in fact in all cases when the judicial sale is ordered, the spectre of the contingent right of dower, haunts the judgment of the court and the dreams of the lawyers. Few know when they are safe. It should not be so. The wife deserves protection. She required it in the time of the Emperor Justinian, she needs it no less now. But it should not be at the expense of the purchaser. The purchaser at a judicial sale should know that he has a clear and unimpeachable title, like Caesar’s wife—above suspicion, free from any encumbrance of any character. As it is now litigation or loss frequently awaits him and development and improvement many times are halted. The law should be settled. The legislature should act and do so effectively. Dower should be retained from the proceeds of sale and paid when and if consummate, unless the wife waives it during coverture, and that waiver should be effectual. Good business demands such action. Common honesty and good morals peremptorily urge it.