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DOWER IN MORTGAGED PROPERTY

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At common law, a widow was entitled to a life estate in one-third of all the lands of which her husband had been solely and beneficially seised at any time during coverture, in fee simple and fee tail, to which issue of the marriage might by a possibility have succeeded.[1] That interest was known as dower. Prior to the husband's death and during the subsistence of the marriage, the wife had a protected expectancy, known as inchoate dower, which attached at the time of marriage or the husband's subsequent acquisition of seisin. Once the wife's dower had attached to lands of the husband, it could not be defeated except for certain defined and limited causes and in certain definite ways. For example, the husband could not defeat her interest by conveying or mortgaging the property unless she consented thereto.[2]

Common law dower has been preserved with varying modifications in about one-half of the jurisdictions of the United States.[3] Despite modern statutory changes, nearly all of those jurisdictions recognize and protect the wife's inchoate right during marriage and permit her upon her husband's death to have dower set off in lands of which he was seised or possessed during coverture.[4] Consequently, as at common law, the husband is ordinarily not permitted to defeat his wife's dower by a conveyance or mortgage during coverture, unless she assents thereto by joining in the deed or by otherwise releasing her interest.[5] If the husband acquires property which is encumbered by a mortgage, or if the wife assents to a mortgage made after her inchoate interest has attached, different questions are presented. It seems useful, therefore, to present some of the important situations in which dower claims may arise with respect to mortgaged property and the extent to which such claims will be recognized.

At common law in England, a mortgage was treated as a conveyance creating an estate upon condition in the mortgagee. The latter's interest

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1. LITTLETON, TENURES § 36; CO. LITT. *30 b *et seq.*

2. 1 SCRIBNER, DOWER 603-605 (2d ed. 1883).

3. For a summary of statutory provisions, see 3 VERNIER, AMERICAN FAMILY LAWS 355 *et seq.* (1935).

4. In a few jurisdictions, dower is confined to lands of which the husband *died* seised. ALASKA COMP. LAWS § 4582 (1933); GA. CODE § 31-101 (1933); N. H. REV. LAWS c. 359, § 3 (1942). In such jurisdictions there is no inchoate right during marriage.

5. In several states, there is no protected interest in a wife who is a nonresident, and the husband may convey a clear title without her joinder. 3 VERNIER, AMERICAN FAMILY LAWS 426 *et seq.* (1935).

was defeasible upon the payment of the mortgage debt at the time specified. Hence, after the execution of a mortgage, the mortgagee was seised of the premises, and the mortgagor was not seised and had only an equitable estate.[6] Thus, if a man executed a mortgage upon his property before marriage, or if before or during marriage he acquired property already encumbered by a mortgage, his wife was denied dower unless the mortgage were redeemed during coverture, since otherwise he lacked the requisite seisin.[7] In equity she had no claim to dower in her husband's equitable estate because equity refused to recognize dower as an incident of such estates prior to 1833.[8] If the husband executed a mortgage after marriage and after his wife's inchoate right had attached to the property, her right to dower took precedence over the lien of the mortgage, unless she released her interest.[9] If she released that interest at the time the mortgage was executed, her dower was absolutely barred;[10] if the mortgage were redeemed and the hus-

6. LITTLETON, TENURES §§ 332, 334. See Butler's note to Co. LITT. *205a.

7. Dixon v. Saville, 1 Bro. C.C. 326 (1783). See D'Arcy v. Blake, 2 Sch. & Lef. 387 (1805). In the case of a mortgage for years, dower was allowed in the mortgagor's legal reversion. PARK, DOWER *160; 1 SCRIBNER, DOWER 476 (2d ed. 1883), and cases there cited.

8. This rule was the consequence in part of the common law conception of seisin, which was confined to legal interests, and in part of chancery's refusal to step in and permit dower in equitable estates. In those equitable interests which were executed into legal interests by the Statute of Uses, dower would of course be permitted by the common law courts; but those equitable interests which were unexecuted by the Statute remained outside the jurisdiction of the courts of common law. Although chancery generally attributed to equitable estates the same incidents and characteristics which attached to corresponding legal estates, an exception was made in the case of dower, where equity declined to follow the law. After some initial uncertainty (see Banks v. Sutton, 2 P. Wms. 710 [1732]) it became established that the widow of a *cestui que trust* was not entitled to dower in her husband's equitable estates. Chaplin v. Chaplin, 3 P. Wms. 229 (1733) (trust); Dixon v. Saville, 1 Bro. C.C. 326 (1783) (equity of redemption). Apparently the reason for this holding was that so large a proportion of estates in England was tied up in trusts, on the assumption that dower did not attach to equitable estates, serious confusion would have resulted from permitting dower in such estates. This explanation is effectively stated by Lord Redesdale in D'Arcy v. Blake, 2 Sch. & Lef. 387, 389 (1805). *Cf.* 2 BLACKSTONE, COMMENTARIES *337, to the effect that trust estates were not subject to dower "more from a cautious adherence to some hasty precedents than from any well-grounded principle." Maitland offers a different explanation, namely, that "dower had become an intolerable nuisance; when once dower had attached it could not be got rid of without a fine." MAITLAND, EQUITY 114 (1929). No doubt dower was an impediment to the free alienation of land; but although dower might be a nuisance to the husband's heir or transferee, it was far from being a nuisance to the widow who enjoyed it.

Lord Mansfield pointed out in the mid-eighteenth century that the refusal of dower in equitable estates was not based on reason but had come about because the prior "wrong determination had misled in too many instances to be now altered and set right." Burgess v. Wheate, 1 W. Bl. 123, 160 (1759). Although the early reasoning did not apply with the same force to other forms of equitable interests, dower was nevertheless denied in every form of equitable estate (see CHALLIS, REAL PROPERTY 346 [3d ed. 1911]; MAITLAND, EQUITY 114 [1929]) until the rule was abrogated by statute in 1833. 3 & 4 WM. IV, c. 105 § 2 (1833). From the time of that statute, until the abolition of dower in 1925, (15 GEO. V, c. 23, § 45 [c] [1925]) a widow was permitted dower in the equitable estates of which her husband had *died* seised.

9. See note 2 *supra*.

10. PARK, DOWER *351; 1 SCRIBNER, DOWER 464 (2d ed. 1883). The right of the wife or widow to redeem is generally stated to be a consequence of the rule that she is entitled to dower in her husband's equity of redemption. *Cf.* Gibson v. Crehore, 5 Pick. 146 (Mass. 1827).

band regained seisin, her inchoate right again attached to the property;[11] if the mortgage were foreclosed, she had no interest in the surplus proceeds of the sale.[12]

Logically, the widow of the mortgagee, who had seisin of the land in question, would be entitled to dower, but it was established at an early date that she had no dower rights therein unless the estate of her husband had become absolute by breach of the condition of the mortgage.[13] Whether this was so because the mortgagee's seisin was not considered "beneficial",[14] or whether it was for the more practical reason that chancery would not compel a wife to release her inchoate dower in the event that she refused to join with her husband in the reconveyance to the mortgagor,[15] the early cases do not make clear. It may be suggested that since the mortgagee's interest was an estate subject to a condition subsequent, his wife's inchoate dower or her estate of dower after assignment would be defeasible upon the same terms as her husband's.[16] Whatever the reason, the rule which denied dower to the wife of the mortgagee was both sensible and practical. That rule is clearly accepted as law in this country[17] and has been incorporated into the statutes of several states.[18]

The view that the mortgagee is the legal owner of the mortgaged property still obtains in several jurisdictions in this country.[19] In such "title" jurisdictions the mortgagor is therefore considered the owner of an equitable interest, and accordingly he has no legal seisin. However, the rigor of the conceptual reasoning of the common law cases gave way at an early date to considerations of policy favorable to the mortgagor's widow. It was recognized that the mortgagee's claim under the conveyance was for purposes of enforcing his lien and therefore that the husband's "equitable" interest might sensibly be considered for many purposes a legal ownership. As stated in an early Massachusetts case, the mortgagor's interest is a legal estate "against all but the mortgagee and those holding under him."[20] It

11. Mathewson v. Smith, 1 R. I. 22 (1835).

12. Newhall v. Lynn Savings Bank, 101 Mass. 428 (1869); Kauffman v. Peacock, 115 Ill. 212, 3 N.E. 749 (1885).

13. PARK, DOWER *100. Because the dower of the mortgagee's wife attached upon breach of condition, it was at one time the practice of the English conveyancers to unite a third person with the mortgagee, so that a joint seisin might be created and thus prevent the mortgagee's wife from acquiring a right of dower. *Ibid.*

14. One of the requisites for dower was that the seisin be beneficial. 1 SCRIBNER, DOWER 278-279 (2d ed. 1883) and authorities there cited. Hence, a woman was not entitled to dower in an estate to which the husband had held a bare legal title, for example, property held by him in trust. Noel v. Jevon, 2 Freem. Ch. 43 (1678). Lord Hardwicke seems to have regarded a mortgage as similar to a trust, for this purpose. Cashborn v. Inglish, 7 Vin. Abr. 156 (1758).

15. FRY, SPECIFIC PERFORMANCE § 1000 (6th ed. 1921).

16. See Haskins, *The Defeasibility of Dower*, 98 U. OF PA. L. REV. 826 (1950).

17. Cooper v. Whitney, 3 Hill 95, 100 (N.Y. 1842); Reed v. Shepley, 6 Vt. 602 (1834).

18. *E.g.*, ARK. STAT. ANN. § 61-212 (1947); ILL. ANN. STAT. c. 3 § 178 (1935); MONT. REV. CODES ANN. § 5817 (1935).

19. See 1 JONES, MORTGAGES § 67 (8th ed. 1928).

20. Snow v. Stevens, 15 Mass. 278, 280 (1818).

has been widely held, therefore, that the mortgagor's wife is entitled to dower in property encumbered by a mortgage before marriage, subject only to that prior mortgage.[21] The same reasoning has been used to permit a wife to claim dower in her husband's equity of redemption when the mortgage has been executed during marriage with her joinder.[22] Her right in this latter situation has sometimes been put on the ground that by her joinder she has released her dower only in the interest conveyed to the mortgagee.[23] In other jurisdictions adhering to the English "title" view, the widespread acceptance of a rule that dower attaches to equitable interests[24] has enabled courts to give the widow dower in her husband's equity of redemption.[25]

In most jurisdictions in the United States, a mortgage is regarded merely as a lien for securing a debt, so that, upon the execution of a mortgage, the legal title remains with the mortgagor.[26] Where this doctrine prevails, the wife of the mortgagee is clearly not entitled to dower, since her husband never had seisin.[27] If the husband executes a mortgage on his property before marriage, or if, before or during marriage, he acquires property already encumbered with a mortgage, his wife's inchoate dower will attach to such property as against all but the mortgagee and those claiming under him.[28] If the husband executes a mortgage during coverture, his wife's right of dower is of course superior to the claims of the mortgagee,[29] unless she releases her inchoate right by joining in the mortgage.[30] Even

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21. Snow v. Stevens, 15 Mass. 278 (1818); Wait v. Savage, 15 Atl. 225 (Ct. Chan., N.J. 1888); Thorburn v. Wende, 257 N.Y. Supp. 186, 235 App. Div. 424 (1932). See 2 JONES, MORTGAGES § 823 (8th ed. 1928).

22. Bell v. Bell, 174 Ala. 446, 56 So. 926 (1911); Hewitt v. Cox, 55 Ark. 225, 15 S.W. 1026 (1891).

23. Bell v. Bell, *supra* note 22.

24. In the United States, the English rule was never widely accepted, and today there are only a few jurisdictions in which dower is not permitted in most forms of equitable estates of inheritance. The early American cases are considered in 1 SCRIBNER, DOWER 399-407 (2d ed. 1883). Frequently, dower in equitable estates has been limited to those which the husband owned at death, apparently because of a recognition that dower is a clog on marketability. In about one-half of the jurisdictions which retain dower substantially in its common law form there are statutes which deal with the matter in whole or in part (see 3 VERNIER, AMERICAN FAMILY LAWS 376-77, 380-93 [1935]); and in several more the English limitation has been declared inapplicable by judicial decision (see 1 SCRIBNER, DOWER [2d ed. 1883] 399 *et seq.*, 414 *et seq.*)

25. Rands v. Kendall, 15 Ohio Rep. 671 (1846); Bank of Commerce v. Owens, 31 Md. 320 (1869). *See* Kauffman v. Peacock, 115 Ill. 212, 216, 3 N.E. 749, 750 (1885); Davis v. Wetherell, 95 Mass. 60 (1866). See 3 VERNIER, AMERICAN FAMILY LAWS 380 *et seq.* (1935).

26. See 1 JONES, MORTGAGES § 67 (8th ed. 1928). In most of the states in this group the "lien" theory has been adopted by statute.

27. Snyder v. Richey, 150 Iowa 737, 130 N.W. 922 (1911).

28. Hewitt v. Cox, 55 Ark. 225, 15 S.W. 1026 (1891).

29. King v. Chandler, 213 Ala. 337, 105 So. 184 (1925); Pirkle v. Equitable Mortgage Co., 99 Ga. 524, 28 S.E. 34 (1896); Fulton v. Studebaker Bank, 84 Ind. App. 274, 151 N.E. 106 (1925); Hayes v. Whitehall, 13 N.J. Eq. 241 (1861); *In re* Freeman, 31 Ohio O. 232, 16 Ohio Supp. 6 (1945).

30. Gove v. Cather, 23 Ill. 634 (1860); Glenn v. Bank of the United States, 8 Ohio Rep. 72 (1837); Whitehead v. Brownsville Bank, 166 Tenn. 249, 61 S.W.2d 975 (1933); Dundas v. Hitchcock, 12 How. 256 (U. S. 1851).

in the latter event, the wife is entitled to dower, but her claim is subject to the rights of the mortgagee and those claiming under him.[31] Although she cannot assert her dower against the mortgagee under these circumstances, she is permitted in equity to redeem the mortgage before foreclosure[32] (or after foreclosure when permitted by statute or court decree)[33] and thus to secure her right to dower in the entire property. By statute in many jurisdictions the widow is permitted to claim dower "as against every person except the mortgagee and those claiming under him."[34] Thus, today, she will generally be permitted to claim dower in property subject to a preexisting mortgage, or subject to a mortgage subsequently executed with her joinder, as against all except the mortgagee and those claiming under him.

In those jurisdictions which restrict dower to lands of which the husband was seised at death, or which have otherwise effectively abolished the wife's inchoate right, her interest is subject to all liens created by the husband, unless in fraud of dower. Elsewhere, when the husband pays off the mortgage debt or redeems the property, the dower of his wife reattaches to the entire property.[35] The result is the same when payment is made for or on behalf of the husband during his lifetime,[36] or if the debt is paid by his personal representative after his death.[37]

When a husband buys realty during coverture and gives back to the vendor a purchase money mortgage by way of security, the mortgage lien is superior to his wife's dower nearly everywhere, whether or not she joins in the giving of the mortgage.[38] The older cases justified this result by resorting to the rule that a transitory or instantaneous seisin is insufficient to support a claim to dower,[39] and that doctrine is sometimes expressed in judicial decisions today.[40] Modern cases reach the same result, holding, however, that the wife is entitled to dower subject to the mortgage lien. The purchaser, in other words, is not regarded under those modern cases as taking title to the property, which he thereafter encumbers, but as taking

31. As to requisites of an effectual release, see Perry v. Borton, 25 Ind. 274 (1865); McCabe v. Bellows, 7 Gray 148 (Mass. 1856); McMahon v. Russell, 17 Fla. 698 (1880).

32. Vaughan v. Dowdon, 126 Ind. 406, 26 N.E. 74 (1890); Collins v. Torry, 7 Johns. 278 (N.Y. 1810); Davis v. Wetherell, 13 Allen 60 (Mass. 1866).

33. See 3 JONES, MORTGAGES § 2177 (8th ed. 1928).

34. *E.g.*, ARK. STAT. ANN. § 61-210 (1947); ILL. ANN. STAT. c 3 § 178 (1935); MASS. GEN. LAWS c. 189 § 4 (1932); MONT. REV. CODES ANN. § 5814 (1935); WIS. STAT. § 233.04 (1943).

35. Richardson v. Skolfield, 45 Me. 386 (1858).

36. Snow v. Stevens, 15 Mass. 278 (1818); Richardson v. Skolfield, 45 Me. 386 (1858); Atkinson v. Stewart, 46 Mo. 510 (1870).

37. Hildreth v. Jones, 13 Mass. 525 (1816); Jones v. Bragg, 33 Mo. 337 (1863); Mathewson v. Smith, 1 R.I. 22 (1835); see Rossiter v. Cossit, 15 N.H. 38 (1844).

38. 1 JONES, MORTGAGES §§ 582, 584 (8th ed. 1928) and cases there cited. A contrary rule prevails in Georgia (by statute) and in Kentucky. GA. CODE § 31-109 (1933); cases are collected in Note, 52 L.R.A. (N.S.) 541 (1914).

39. Walters v. Walters, 73 Ind. 425 (1881); Hinds v. Ballou, 44 N.H. 619 (1863); Clark v. Munroe, 14 Mass. 351 (1817). See also 2 BLACKSTONE, COMMENTARIES 132.

40. Western Tie & Timber Co. v. Campbell, 113 Ark. 570, 573, 169 S.W. 253, 254 (1914); Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923); Glenn v. Clark, 53 Md. 580 (1880); Coffman v. Coffman, 79 Va. 504 (1885); Roush v. Miller, 39 W.Va. 638, 20 S.E. 663 (1894).

the title charged with the encumbrance.[41] Thus, his wife's dower is limited to the interest which he actually acquired. The same rule has been applied when, pursuant to an antecedent agreement, a mortgage is given to a third party who has supplied funds in payment for the property.[42] However, if the mortgage is to prevail over the dower of the mortgagor's wife, when she does not join in the execution of the mortgage, it must appear that the mortgage was given to secure the purchase price of the realty.[43] In many cases, especially in jurisdictions which follow the "title" theory of mortgages, an additional requirement is laid down, namely, that the mortgage be given back by the purchaser immediately upon receiving his deed to the property and as part of the same transaction.[44] When there has been a considerable delay in the giving back of the mortgage, the doctrine of instantaneous seisin cannot of course be used. Courts recognizing this requirement frequently find a reason for holding that a mortgage is superior to dower, as, for example, by extending the meaning of the "same transaction".[45] In jurisdictions which recognize an implied vendor's lien for the purchase price,[46] superior to dower, there would seem to be no valid reason why the subsequent execution of a mortgage for the purchase price in which the wife does not join should not be considered superior to dower on the ground that the subsequent mortgage was merely a reduction to writing of the rights of the parties. Thus, for a purchase money mortgage to be superior to dower, it is not always necessary that the mortgage be given back immediately to the grantor or other person advancing the purchase price. It is sufficient that the husband has either contracted with the seller, or a third party who supplied the purchase money, to execute and deliver a mortgage, or that under the local law the purchaser's interest in the property is subject to a vendor's lien to which the dower of the purchaser's wife is subject. The rule that dower is subordinated to a purchase money mortgage is expressly incorporated into the statutes of about two-thirds of the jurisdictions in this country which substantially retain common law dower,[47]

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41. Warren Mortgage Co. v. Winters, 94 Kan. 615, 146 Pac. 1012 (1915). See 2 POMEROY, EQUITY JURISPRUDENCE § 725 (5th ed. 1941).

42. Gammon v. Freeman, 31 Me. 243 (1850); Marin v. Knox, 117 Minn. 428, 136 N.W. 15 (1912); Jones v. Parker, 51 Wis. 218, 8 N.W. 124 (1881); see Protestant Episcopal Church v. E. E. Lowe Co., 131 Ga. 666, 63 S.E. 136 (1908).

43. See 1 JONES, MORTGAGES § 584 (8th ed. 1928) and cases there cited. The mortgage must in fact be given to secure the purchase money, and a mere recital that the mortgage was so given does not give priority to it. Continental Equitable Title & Trust Co. v. Conservation Bldg. & Loan Ass'n, 266 Pa. 298, 109 Atl. 776 (1920).

44. See 1 JONES, MORTGAGES § 583 (8th ed. 1928).

45. Boorum v. Tucker, 51 N.J. Eq. 135, 26 Atl. 456 (1893); Wheatley's Heirs v. Calhoun, 12 Leigh 264 (Va. 1841). *Cf.* Mayburry v. Brien, 15 Pet. 21 (U.S. 1841).

46. Brooks v. Woods, 40 Ala. 538 (1867); Thorn v. Ingram, 25 Ark. 52 (1867); Price v. Hobbs, 47 Md. 359 (1877). Further cases are collected in 1 SCRIBNER, DOWER 555, n.3 (2d ed. 1883).

47. See 3 VERNIER, AMERICAN FAMILY LAWS 380 *et seq.* (1935).

and several of them provide that the same priority shall be accorded the implied vendor's lien.[48]

If the wife has not joined in the execution of the mortgage, or if her interest is not otherwise subordinated thereto, she is of course entitled to her dower as against all transferees of the mortgagee. If she has joined in the mortgage, which the mortgagee thereafter assigns to a third party, she cannot recover her dower against such assignee in the normal case;[49] but in certain situations if the mortgagee assigns the mortgage to one who is under an obligation to pay the mortgage debt, the widow has been held to be entitled to her dower as against such assignee.[50]

If, after the execution of the mortgage in which his wife has joined, a mortgagor conveys the property to a third person by a deed in which his wife does not join, difficult questions may arise when the mortgage is paid off by the husband's grantee. In this situation, if the grantee did not expressly assume the mortgage, it is usually held that upon the husband's death his wife's dower is limited to the equity of redemption, despite the fact that the mortgage has been satisfied.[51] The grantee is deemed by his payment to have acquired the mortgagee's interest which was not subject to dower, and therefore the widow's dower will be limited to the mortgagor's equity of redemption in which she did not release her dower.[52] This result is clear if the grantee took an assignment of the mortgage when he paid the debt,[53] but some question has arisen as to whether, if he does not take an assignment, the dower of the grantor's wife reattaches to the property. Some jurisdictions have held that her dower does reattach free and clear of the mortgage.[54] Elsewhere, where the question has arisen, it has been held that the doctrine of equitable subrogation applies and that the purchaser will be regarded as holding the mortgage exactly as the mortgagee held it.[55] In this situation it is said that the grantee has acted for his own benefit, not because he had contracted to pay off the mortgage, and he is therefore subrogated to the position of the mortgagee to whom he pays the debt.[56] If, on the other hand, the grantee expressly assumes the debt at the time

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48. D.C. CODE § 18-202 (1940); KY. REV. STAT. § 392.040 (1948); MD. ANN. CODE GEN. LAWS art. 45 § 6 (1939); VA. CODE ANN. § 5119 (1942).

49. Popkin v. Bumstead, 8 Mass. 491 (1812); Farwell v. Cotting, 8 Allen 211 (Mass. 1864). See McMahon v. Russell, 17 Fla. 698 (1880).

50. McCabe v. Swap, 14 Allen 188 (Mass. 1867); Bartlett v. Musliner, 28 Hun 235 (N.Y. 1882). *Accord*: Everson v. McMullen, 113 N.Y. 293, 21 N.E. 52 (1889).

51. Lee v. James, 81 Ky. 443 (1883); Strong v. Converse, 8 Allen 557 (Mass. 1864); Lake v. Nolan, 81 Mich. 112, 45 N.W. 376 (1890); Thompson v. Boyd, 21 N.J.L. 58 (1847); Everson v. McMullen, 113 N.Y. 293, 21 N.E. 52 (1889); Bryar's Appeal, 111 Pa. 81, 2 Atl. 344 (1885).

52. Strong v. Converse, 8 Allen 557 (Mass. 1864).

53. *Ibid.*; Bryar's Appeal, 111 Pa. 81, 2 Atl. 344 (1885).

54. Atkinson v. Angert, 46 Mo. 515 (1870).

55. Strong v. Converse, 8 Allen 557 (Mass. 1864); Wedge v. Moore, 6 Cush. 8 (Mass. 1850); Simonton v. Gray, 34 Me. 50 (1852); Chiswell v. Morris, 14 N.J. Eq. 101 (1861); Everson v. McMullen, 131 N.Y. 293, 21 N.E. 52 (1889); Kenyon v. Segar, 14 R.I. 490 (1844).

56. Strong v. Converse, 8 Allen 557 (Mass. 1864).

of the conveyance, it is usually held that he becomes the primary debtor and the mortgagor is liable as surety.[57] Therefore, when he subsequently pays off the debt, he is paying it pursuant to an obligation to the husband to do so, and consequently the wife's dower will be restored.[58] The purchaser of mortgaged land is well advised to obtain a full and valid release from the wife, best accomplished, perhaps, by advancing to the vendor sufficient money to pay off the existing mortgage, taking a deed to the then unencumbered premises from both husband and wife, and refinancing, if necessary, on his own.

A married woman appears generally to have the right to redeem her husband's land from a mortgage during his lifetime, whether or not the encumbrance is paramount to her dower.[59] However, the right to redeem does not mean that the mortgagee can be compelled to accept payment on part of the mortgage debt and to surrender a proportionate interest in the estate.[60] Foreclosure proceedings against her husband to which she was not made a party have been held to leave this right unimpaired.[61] Where the wife is joined in the foreclosure proceedings, her dower and her right to redeem are, in the absence of irregularities, extinguished,[62] unless there is a statutory period within which she or her husband may redeem and one of them does redeem in that period.[63]

If her husband dies before foreclosure of a mortgage superior to dower, the widow may redeem because she is entitled to have her dower set off.[64] At common law the heirs, as successors-in-interest, might also redeem;[65] and therefore a problem of contribution arises when both the widow and the heirs attempt to assert their claims to the land. If the heirs pay off the debt, it has been held that the widow seeking dower in the mortgaged

57. Wedge v. Moore, 6 Cush. 8 (Mass. 1850); Bartlett v. Musliner, 28 Hun 235 (N.Y. 1882).

58. Bolton v. Ballard, 13 Mass. 227 (1816).

59. Bigoness v. Hibbard, 267 Ill. 301, 108 N.E. 294 (1915); Vaughan v. Dowden, 126 Ind. 406, 26 N.E. 74 (1890); Lamb v. Montague, 112 Mass. 352 (1873); Moore v. Smith, 95 Mich. 71, 54 N.E. 701 (1893); Smith v. Hall, 67 N.H. 200, 30 Atl. 409 (1892). Cases are collected in Notes, 12 A.L.R. 1347, 1353 (1921) and 65 A.L.R. 963, 964 (1930).

60. Gibson v. Crehore, 5 Pick. 146, 151 (Mass. 1827); Bell v. Mayor of New York, 10 Paige 49, 71 (N.Y. 1843).

61. Denton v. Nanny, 8 Barb. 618 (N.Y. 1850); Oades v. Standard Savings & Loan Ass'n, 257 Mich. 469, 241 N.W. 262 (1932). *Contra*: Bowden v. Hadley, 138 Iowa 711, 116 N.W. 689 (1908); Filley v. Dickinson, 110 Neb. 356, 193 N.W. 914 (1923) (in both cases the governing statutes excluded dower in lands "sold under execution or judicial *sale* during the life of the legal owner". (Italics supplied). If the foreclosure was fraudulently procured, the dower right is not defeated. Byrnes v. Owen, 243 N.Y. 211, 153 N.E. 51 (1926).

62. Shope v. Schaffner, 140 Ill. 470, 30 N.E. 872 (1892); Schweitzer v. Wagner, 94 Ky. 458, 22 S.W. 882 (1893).

63. See WILTSIE, REAL PROPERTY MORTGAGE FORECLOSURE §§ 1203-1205 (5th ed. 1939).

64. McGough v. Sweetser, 97 Ala. 361, 12 So. 162 (1892); Simonton v. Gray, 34 Me. 50 (1852); Hays v. Cretin, 102 Md. 695, 62 Atl. 1028 (1906); Merselis v. Van Riper, 55 N.J. Eq. 618, 38 Atl. 196 (1897).

65. Hunter v. Dennis, 112 Ill. 568 (1884); Zaegel v. Kuster, 51 Wis. 31, 7 N.W. 781 (1881). See 2 JONES, MORTGAGES § 1361 (8th ed. 1928).

property in a common law state will be required to contribute a proportionate share towards the redemption.[66] In one case she was required to contribute one-third of the interest from the time of her husband's death until the due day, and then to contribute a sum yearly equal to an annuity on an amount equal in value to one-third of the land.[67] In those jurisdictions where the heirs can demand that the widow contribute, it is generally held that she is not entitled to call upon her husband's estate—exclusive of her own share—to make up the contribution.[68] England[69] and a few states in this country[70] take a contrary position and allow the widow to have the personality of the decedent applied to the mortgage debt. The effect of the minority view is to permit the widow to obtain dower in the entire property and thus to negative the effect of her release.[71]

If land is sold, either before or after the husband's death, to satisfy a mortgage lien which is superior to dower, the dower rights of the wife or widow are ordinarily extinguished,[72] unless there is a statutory period within which the mortgage may be redeemed and redemption takes place within that period.[73] If foreclosure takes place after the husband's death and there remains a surplus after the payment of the mortgage debt, the interest of the widow is usually held to be transferred to such surplus, on the analogy of cases of equitable conversion.[74] This principle is incorporated into the statutes of several jurisdictions.[75] There is some authority to the effect that, if foreclosure takes place during the husband's lifetime, the wife's inchoate right in the husband's equity of redemption will likewise be protected by transferring her interest to a fund of the surplus established for

66. Cox v. Garst, 105 Ill. 342 (1883).

67. House v. House, 10 Paige 158 (N.Y. 1843). By statute in Massachusetts the widow can decline to contribute and take dower according to the value of the estate after deducting the money paid for redemption. MASS. GEN. LAWS c. 189 § 4 (1932).

68. Hewitt v. Cox, 55 Ark. 225, 15 S.W. 1026 (1891); Trowbridge v. Sypher, 55 Iowa 352, 7 N.W. 567 (1880).

69. PARK, DOWER *351. In England the widow was also entitled to have the lands which remained to the heir charged with the mortgage debt in exoneration of the land asssigned to her in dower. *Ibid.*, *351-52.

70. Harrow v. Johnson, 3 Met. 578 (Ky. 1861); Mathewson v. Smith, 1 R.I. 22 (1835); Bank v. Dudley, 76 W.Va. 332, 86 S.E. 307 (1915) (widow entitled to share pro rata with general creditors). See Mantz v. Buchanan, 1 Md. Ch. 202 (1848). In Rossiter v. Cossit, 15 N.H. 38 (1844) the administrator was held personally liable where he redeemed the mortgage and enlarged the widow's dower at the expense of creditors. See Kling v. Ballentine, 40 Ohio St. 391 (1883).

71. For example, in the case of Harrow v. Johnson *supra* note 70, the heirs' share was distinctly lessened by the application of this view.

72. See 3 JONES, MORTGAGES § 2177 (8th ed. 1928).

73. See WILTSIE, REAL PROPERTY MORTGAGE FORECLOSURE §§ 1203-1205 (5th ed. 1939). Holding that a widow is entitled to redeem her dower interest when her husband died during the redemption period, Van Vronker v. Eastman, 7 Metc. 157 (Mass. 1843); Hiller v. Nelson, 181 S.W. 292 (Ct. App., Ky. 1909).

74. See 3 JONES, MORTGAGES § 2177 (8th ed. 1928) and cases there cited. Further cases are collected in Notes, 12 A.L.R. 1347, at 1358 *et seq.* (1921), 65 A.L.R. 963, at 965 *et seq.* (1930).

75. ARK. STAT. ANN. §§ 61-212, 61-213 (1947); HAWAII REV. LAWS § 12104 (1945); KY. REV. STAT. § 392.040 (1948); MONT. REV. CODES ANN. § 5816 (1935); VA. CODE ANN. § 5119 (1942); W. VA. CODE ANN. §§ 4098, 4099 (1943); WIS. STAT. § 233.06 (1947).

her benefit and to remain intact during the joint lives of herself and her husband.[76] Such provision is expressly authorized under the statutes of Kentucky, Virginia and West Virginia.[77] More generally it is held that if the foreclosure takes place in the husband's lifetime, the surplus is personal property which belongs to the husband free of his wife's inchoate dower.[78] In jurisdictions where the wife or widow is permitted to claim dower in the surplus, her share is ordinarily estimated on the basis of the surplus alone.[79] In others, by statute[80] or decision,[81] she is entitled to so much of the surplus as represents her dower in the entire property. The reasoning of these decisions is that, since her release was given to the mortgagee and since his claim has been satisfied out of the proceeds, dower takes precedence over the claims of all other persons.[82] A few states have extended her right even further and have not confined her to the surplus proceeds. In such jurisdictions it has been held that she is entitled to dower in the full value of the entire property on the ground that, having mortgaged her separate property for her husband's debt, she has the right of a surety against him and may require that, to the extent that her dower has been reduced by the husband's failure to pay off the mortgage debt, it shall be made up from his other property.[83] This reasoning is not wholly convincing. Although the wife's inchoate right is regarded for many purposes as a protected interest, she is not regarded as having such a separate estate as she can convey, mortgage or otherwise encumber. Moreover, the effect of the surety doctrine, it is submitted, is virtually to negative her release as to all except the mortgagee—a result which is inconsistent, from the standpoint of heirs and creditors, with the effect of a release in an absolute conveyance during coverture. The surety doctrine has accordingly been rejected in most states.[84] Where that doctrine is recognized, it can be explained rationally only in terms of a policy favoring dower above most other interests.

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76. Greiner v. Klein, 28 Mich. 12 (1873); Wood v. Price, 79 N.J. Eq. 14, 81 Atl. 664 (1911); Denton v. Nanny, 8 Barb. 618 (N.Y. 1850); Home Building Corp. v. Rosin, 121 Misc. 264, 200 N.Y. Supp. 814 (1923); De Wolf v. Murphy, 11 R.I. 630 (1877).

77. KY. REV. STAT. § 392.040 (1948); VA. CODE ANN. § 5119 (1942); W. VA. CODE ANN. § 4099 (1943).

78. Kauffmann v. Peacock, 115 Ill. 212, 3 N.E. 749 (1885); Dean v. Phillips, 17 Ind. 406 (1861); Newhall v. Lynn Savings Bank, 101 Mass. 428 (1869).

79. Hewitt v. Cox, 55 Ark. 225, 15 S.W. 1026 (1891); Holden v. Dunn, 144 Ill. 413, 33 N.E. 413 (1893); Bank of Commerce v. Owens, 31 Md. 320 (1869).

80. MICH. STAT. ANN. § 26.225 (Henderson 1938); W. VA. CODE ANN. § 4098 (1943).

81. Shobe v. Brinson, 148 Ind. 285, 47 N.E. 625 (1897); Virginia-Carolina Co. v. Walston, 187 N.C. 817, 123 S.E. 196 (1924); Bank v. Dudley, 76 W. Va. 332, 86 S.E. 307 (1915).

82. Green v. Estabrook, 168 Ind. 123, 79 N.E. 373 (1907); Mowry v. Mowry, 24 R.I. 565, 54 Atl. 383 (1902); *In re* Reynolds' Estate, 90 Utah 415, 62 P.2d 270 (1936).

83. Kling v. Ballentine, 40 Ohio St. 391 (1883); Gwathmey v. Pearce, 74 N.C. 398 (1876). Cases are collected in Notes, 12 A.L.R. 1347 (1921) and 65 A.L.R. 963 (1930). See Note, 19 N.C.L. REV. 82 (1940) for discussion of some of the complex problems arising under the "surety" theory in insolvent estates.

84. See Note 11 COL. L. REV. 66, 67 (1911).