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## Dower in Equitable Estates

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This adherence to precedent in a matter of such vast public importance differs from the court's practices in constitutional matters where precedents have only been given such force as the expediency of the time demanded. That the same court which permitted the United States Steel Corporation,<sup>16</sup> a capitalistic organization, to control more than 50% of the trade and which permitted in the United States Shoe machinery case,<sup>17</sup> a capitalistic organization to control nearly all of the industry to be organized should find the refusal to work of the Journeymen in the Bedford case an unreasonable conspiracy in violation of the Sherman Law seems to import a disbelief in the soundness of labor organization rather than a strict adherence to any technical rules of law.

M. H.

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DOWER IN EQUITABLE ESTATES—The broad principle that a widow shall have a right to a life interest in one third of all the estates of inheritance of which her husband was seized during coverture was recognized in the Magna Carta.<sup>1</sup> However, at common law, dower attached only to legal estates of inheritance and was not recognized in equitable estates. This doctrine was definitely laid down in the case of *Radnor v. Vandebendy*.<sup>2</sup> Here the court was faced with the principle that equity follows the law, but refused to allow the wife dower in real property of which her husband had an equitable estate. This, even although two years prior, curtesy had been allowed to a husband in the trust estates of his wife.<sup>3</sup> This rule was subsequently severely criticized time and again,<sup>4</sup> but nevertheless was reluctantly

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<sup>16</sup> *United States v. United Steel Corporation*, 251 U. S. 417 (1920).

<sup>17</sup> *United States v. United Shoe Machinery Co.*, 247 U. S. 32 (1918).

<sup>1</sup> *McKechnie*, *Magna Carta* (2nd Ed. 1914) 215.

<sup>2</sup> 16 *Lords Jour.* 159 (1697) where the court said: "'Tis nothing but Precedent that consecrates Half the decrees in Equity. And no man shall say, that ever any Woman was endowed in equity of a trust estate. \* \* \* So that Equity doth not exceed the Rules of Law in advancing the Right of Dower. 'Tis true, unless Fraud be the case, Relief in Equity shall not be given against a legal title to dower."

Prior to the *Radnor* case the decisions were in conflict. *Colt v. Colt*, 1 Ch. Rep. 254 (1664) dismissing a bill in chancery for dower in a trust estate. *Contra*, *Fletcher v. Robinson* (1653), quoted from Register's book in *Banks v. Sutton*, 2 Wms. (Piere). 700, 710-712 (1732).

<sup>3</sup> *Snell v. Clay*, 2 Vern. 324 (1695). And thus the doctrine became settled that a husband shall have curtesy in a trust estate, but the widow shall not have dower.

<sup>4</sup> *Chaplin v. Chaplin*, 3 Wms. (Piere) 229 (1733); *Burgess v. Wheate*, 1 Wm. Bl. 123 (1759) per Lord C. J. Mansfield, ". . . it has been declared

followed until the Dower Acts of 1834<sup>5</sup> which remedied the situation and abrogated *Radnor v. Vandebendy*. So that at present a wife is endowed not only in the legal estates of inheritance, of which her husband was seized during coverture, but also, of the equitable estates of which her husband died seized. This rule is said to obtain in New York today.<sup>6</sup>

In the latest New York case<sup>7</sup> trenching upon the subject, the defendant, for the purpose of defeating his wife's right of dower in certain premises of which he was seized, procured her to join in a small mortgage on the premises. When the mortgage fell due, although able to, he refused to pay the same, had the mortgage foreclosed, to which action the wife was made a party, and at the foreclosure sale bought the premises in through his attorney. Subsequently, in pursuance to the defendant's wishes, the attorney conveyed the premises to the defendant's sister, without any consideration whatsoever. The action, brought by the wife to have the conveyance set aside as fraudulent as against her, and to establish her inchoate right of dower was upheld.

The first class of equitable estates in which the wife is entitled to dower is a trust estate wherein the husband is the *cestui que*. This rule applies to all trust estates, estates in fee including implied or resulting trusts.<sup>8</sup> Thus where A contracts to buy real estate from B, the latter is deemed to have the legal title in trust for A, who is

that a husband should be tenant per curtesy of a trust, the case of dower is the only exception, and not on law and reason, but because that wrong determination has misled in too many instances to be now altered and set right. *Radnor against Vandebendy* was determined on that principle only in the House of Lords."

<sup>5</sup> (1834) 3 and 4 William IV., ch. 105, § 3.

"When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall an estate of inheritance in possession, or equal to an estate of inheritance (other than an estate in joint tenancy) then his widow shall be entitled in equity to dower out of the same land."

<sup>6</sup> *Hawley v. James*, 5 Paige (N. Y.) 318 (1835); *Hicks v. Stebbins*, 3 Lans. (N. Y.) 89 (4th Dept. 1870); *Matter of McKay*, 5 Misc. (N. Y.) 123 (1893).

<sup>7</sup> *Byrnes v. Owens*, 243 N. Y. 211, 153 N. E. 51 (1926).

<sup>8</sup> *Nichols v. Parks* 78 App. Div. 95 (1st Dept. 1903). Inchoate right of dower does not attach to equitable estates, the court holding, "General rule is that if the husband, during his life time disposes of any equitable estate he may have in lands, the dower right of his wife therein will be defeated. It is only of such equitable estates as he may possess at the time of his death that she can claim dower." See also *Smallridge v.*

the beneficial owner. If A should die before taking legal title, and has not assigned the contract, his widow will be entitled to dower therein, subject to the equities of the vendor.<sup>9</sup> In such cases the executor or administrator will be compelled to complete the transaction even to the extent of using all the estate of the deceased,<sup>10</sup> the title then vesting in trust for the heirs, subject to the wife's dower.<sup>11</sup> It should be noted that if the deceased was not entitled to specific performance, because of some default on his part, the right of dower is lost.<sup>12</sup> Further, in New York, if the husband aliens such estate by assignment of the contract, in absence of fraud the wife will not be endowed.<sup>13</sup>

At common law where A contracted for real estate, paid the purchase price with his funds but had title taken in the name of another, the law presumed a trust in favor of A.<sup>14</sup> This rule has since been abrogated, and today where the husband has paid the purchase price the taking of title in a third person, in the absence of fraud, is presumed, by law to be a gift, not a trust.<sup>15</sup> A New York statute<sup>16</sup>

Hazlett, 112 Ky. 841, 66 S. W. 1043 (1902); *C. F. James v. Upton*, 96 Va. 296, 31 S. E. 255 (1898); *Nortnass v. Pioneer Townsite Co.* 82 Neb. 382, 117 N. W. 951 (1908).

<sup>9</sup> Walsh, *Law of Real Property* (1915) 164, *Malin v. Coult*, 4 Ind. 535, (1853); *Williams v. Kierny*, 6 N. Y. St. Rep. 560, 43 Hun. (N. Y.) 1 (4th Dept. 1887).

<sup>10</sup> *Supra*, note 9; 19 C. J. 479, § 71.

<sup>11</sup> C. P. A.

<sup>12</sup> *Supra*, note 9.

<sup>13</sup> *Supra*, note 8. Where the husband contracts to buy real estate, and then assigns the contract; this without more is not fraud on the wife, because while a husband may not deprive his wife of her dower by fraud, after the inchoate right has attached, he is under no obligation to take his money in which his wife has no interest and put it in land in his own name so that she may obtain a dower interest. *Nichols v. Parks*, *supra*, note 8.

<sup>14</sup> *O'Brien v. Gill*, 166 App. Div. 92, 151 N. Y. Supp. 682 (2nd 1915); *Monahan v. Holmes*, 58 Misc. 86, 110 N. Y. Supp. 300 (1908).

<sup>15</sup> *McKinley v. Hessen*, 135 App. Div. 832 (2nd Dept. 1909); A husband cannot defeat his wife's right of dower by taking a conveyance of land during coverture, to himself for life with remainder to his child, where the intent is to defraud her. *Cornelius v. Horst*, 11 Mo. App. 304, (1881). Where a judgment has been procured for the express purpose of defeating the wife's right of dower, the court refused to divest her of same. *Monroe v. Crouse*, 59 Hun (N. Y.) 248, 12 N. Y. Supp. 815 (1891).

<sup>16</sup> Real Prop. L. § 94; *Monahan v. Holmes*, *supra*, note 14, where the guardian bought certain premises with his ward's funds, taking title in her name, a trust was declared in favor of the child.

provides that no trust shall result in such a case unless title is taken by such third person either without the knowledge of the person paying or in violation of some trust.

The next class of cases are those where the title is taken by a trustee upon whom no active duties are imposed. By statute<sup>17</sup> a dry or naked trust imposing no active duties on the trustee is void, and neither legal nor equitable title thereto vests in the trustee. The title, both legal and equitable vest in the *cestui que*.<sup>18</sup> However, in order for this rule to apply the agreement, if any to reconvey by the naked trustee, must be in writing or the trust must have existed at the time of the grant.<sup>19</sup> In such cases there is no question as to the wife's dower inasmuch as the husband is seized of a legal estate of inheritance. In the case of *Phelps v. Phelps*,<sup>20</sup> the purchase price was paid by the husband, and title taken in the name of a third person. The agreement between the third person and husband made no mention of reconveyance, but merely stated the husband should receive the benefits of and have full control over the premises. The court there held that since the husband was seized of neither a legal nor equitable estate, the wife shall not be endowed therein. The husband merely had an action for breach of contract if the third party refused to go through. It is further submitted that even if there had been an equitable estate vested in the husband, the action would still have been untenable, inasmuch as the action was brought during the life-time of the husband, and since no fraud was averred or shown the husband could have alienated the estate at his pleasure.

A new aspect of this problem was presented to the court in *Melenky v. Melen*.<sup>21</sup> There the oral agreement to reconvey was between father and son and the courts have frequently held that such relationships takes the situation out of the statute of frauds. In the *Melenky* case the defendant's father conveyed the property to his son so that he might manage the property during his absence and promote business convenience. There was an oral promise to reconvey. The plaintiff subsequent to the conveyance, but relying on the statement that the father owned valuable real estate, married him. The son then refused to reconvey and the plaintiff brings this action to have her inchoate right of dower established and a reconveyance

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<sup>17</sup> Real Prop. L. §93.

<sup>18</sup> *Starbuck v. Starbuck* 62 App. Div. 437 (2nd Dept. 1901).

<sup>19</sup> *Bates v. L. M. Co.* 130 N. Y. 200, 29 N. E. 102 (1891); *Wend v. Walsh*, 164 N. Y. 154, 58 N. E. 2 (1900).

<sup>20</sup> 143 N. Y. 197, 38 N. E. 28 (1894), 25 L. R. A. 625.

<sup>21</sup> 233 N. Y. 19, 134 N. E. 822 (1922).

adjudged, the son having refused to reconvey at the father's request. The court per Cardozo J. held that since no fraud was proven against the plaintiff she could not compel reconveyance to the husband. Further the court met the proposition which would be presented by the constructive trust by saying the husband was not seized of an equitable estate.

Where fraud has permeated the transaction, such as in the Byrnes case, and it may be shown that the conveyance of the estate whether legal or equitable was for the express purpose of defeating the wife's right of dower, the conveyance will be set aside and the inchoate dower established.<sup>22</sup> It is not necessary in such cases that the wife wait until the death of the husband in order to bring the action, she may come in as soon as she discovers the fraud. Thus, in *Youngs v. Carter*,<sup>23</sup> the plaintiff's husband, before marriage, but in contemplation thereof, made a voluntary conveyance to one of his relatives. After marriage, upon discovery of said facts, plaintiff brought an action to have the conveyance set aside and her inchoate right of dower established. The court in rendering a judgment in the plaintiff's favor, laid down the rule that where a husband, prior to the marriage, in order to defeat his wife's dower, fraudulently conveys his real estate, the wife upon discovery of same may bring an equitable action to set aside the conveyance in order to protect her dower rights.<sup>24</sup> The case of *Douglas v. Douglas*,<sup>25</sup> illustrates the rule that where a wife is induced by her husband to join in a deed, thereby relinquishing her inchoate right of dower, upon his representation that the dower will attach to lands to be received in exchange, and he without her knowledge or consent has the title taken in his sister's name. Upon proof thereof, the wife may come in and have

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<sup>22</sup> *Supra* note 15, *infra*, notes 23, 24, 25, see also *Higgins v. Higgins*, 219 Ill. 146, 76 N. E. 86 (1905); *Bookout v. Bookout*, 150 Ind. 63, 49 N. E. 824 (1898); *Ward v. Ward*, 63 Ohio, 125, 57 N. E. 1095 (1900); *Nelson v. Brown*, 164 Ala. 397, 51 So. 360 (1910); *Wilson v. Wilson* 32 Utah 169, 89 Pac. 643 (1907).

<sup>23</sup> 10 Hun (N. Y.) 194 (1st Dept. 1877).

<sup>24</sup> *Supra*, note 22.

<sup>25</sup> 11 Hun (N. Y.) 406 (1st Dept. 1878). Where a husband in order to defeat his wife's right of dower, caused a mortgage to be foreclosed, making his wife a party, and by collusion with a person who held his contract to convey the premises for \$18,000 managed to have the lands sold to him for the amount of the mortgage; then settled with such person and received the difference between the mortgage and sale, it was the wife's right of dower was not barred by the sale. *Turner v. Kuehnle*, 70 N. J. Eq. 61, 62 Atl. 327 (1905). But where an innocent third party enters into the transaction as purchaser for value, the action will not be allowed. *Allen v. Allen*, 213 Mass. 29, 99 N. E. 462 (1912).

the conveyance to the sister set aside and have title declared in her husband so that her inchoate right of dower attaches.

The courts have repeatedly held that they will enforce a constructive trust for the grantor if there was a special confidential relationship between the parties.<sup>26</sup> Upon this hypothesis it has been argued that there is factually no distinction, or a distinction without a meaning, between an equitable estate and an equitable right.<sup>27</sup> It has been pointed out that in the Byrnes case the fraud was the pivotal point of the decision whereas in the Melenky case no fraud was found.<sup>28</sup> It is claimed that in the Melenky case the court has overlooked the fact that the father's representation to his wife imposed a duty to recover the property, but as the court holds "dower attaches, not to choses in action but to estates."

Thus, in considering the question of whether when a husband has been defrauded in parting with his land and thereby his wife's inchoate right of dower is extinguished, there is a duty imposed upon him to come in and have the conveyance set aside, thus reestablishing her inchoate right of dower, it is submitted that there is neither a duty in the husband nor a right in the wife to have the conveyance set aside, unless fraud as against the wife may be proved. The husband's acquiescence to the transaction as it stands, and refusal to bring the action is not such fraud as will entitle her to bring the action. It is conceded that this rule may work a grave injustice, especially where the defrauded husband died before he could avail himself of the fraud, but in such a case neither the wife, nor the heirs at law, nor personal representatives could avail themselves of the fraud, and therefore the action would be lost, but nevertheless the rule is absolute and the wrong to the husband is the misfortune of the wife.

A. M. LA P.

<sup>26</sup> *Bradley Co. v. Bradley*, 165 Cal. 237, 131 Pac. 750 (1913); *Mussey v. Shaw*, 274 Ill. 351, 113 N. E. 605 (1916); *Henderson v. Murray*, 108 Minn. 76, 121 N. W. 214 (1909); *Thierry v. Thierry*, 298 Mo. 25, 249 S. W. 946 (1923), *Harrington v. Shiller*, 231 N. Y. 278, 132 N. E. 89 (1921); *Sinclair v. Purdy*, 235 N. Y. 245, 139 N. E. 255 (1923); *Hanson v. Svarverend*, 18 N. D. 550, 120 N. W. 550 (1909); *Hatcher v. Hatcher*, 264 Pa., 105, 107 Atl. 660 (1919).

<sup>27</sup> "The equitable title, however, is one thing, and entirely different from the right in equity to bring an equitable action to set aside a transfer or to compel the performance of a duty on the part of the grantee in whom the legal title vests." *Gabler v. Gabler*, 118 Misc. 534, 193 N. Y. Supp. 500 (1922).

<sup>28</sup> The court says: "This is not a case where the grantor has attempted by a clandestine transfer of title to modify the incidents of marriage about to be contracted. The transfer was made to promote his (the husband's) business convenience when no marriage was in view. He is no subject to the reproach of plotting a fraud upon his wife." *Cardozo J.* 233 N. Y. 19, 23, 24 (1922).