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METHODS OF RELEASING DOWER

By LEO SCANLON

Dower, which may be defined as that portion of the lands or tenements which belonged to the husband, which the wife receives immediately on the decease of her husband for the maintenance of herself and for the care and education of her children, is a heritage from the common law of England. Of the origin of dower little is known, although it is mentioned in the Magna Carta, which was granted in the year 1215. In the vast majority of the states of the United States, Dower is regulated by statute, but in states where no statutes on this subject have been enacted Dower remains substantially the same as it was under the common law of England.

The Release of Dower is of great importance at the present time owing to the ever increasing transfers of real estate which at times involve such amounts of money as to be almost beyond the power of perception. The seller in order to pass a clear title free from all incumbrances, and the purchaser in order to protect himself from future law suits, are vitally interested in the release of dower. Dower may well be termed a pet of the courts, and in cases of doubt, courts will always decide in favor of dower.

It is interesting to note the various ways by which a release of dower may be effected. The anti-nuptial contract was not recognized at common law because it was held that (1) "No right can be barred before it accrues" (2) "That no right to title to an estate of freehold may be barred by a collateral satisfaction," but it is now recognized in some jurisdictions, providing the feme sole is of full age and competent to contract, the consideration of marriage being deemed sufficient.¹ The general rule in Equity is, "That any reasonable bona fide agreement made before marriage between parties competent to contract, whereby the wife agrees to accept a reasonable provision in lieu of dower is valid and enforceable."² The anti-nuptial contract is not what might be termed an effective release of dower, since the failure of the husband to fully perform the conditions of the contract,

¹ 37 GA. 296; 5 ;SW 36.

² 19 CJ (Dower) 149.

revives the right of dower in the wife.³

The post-nuptial contract entered into for the purpose of releasing dower, was ineffective under the common law by reason of the fact that, a feme covert could not make a valid contract.⁴

In states where the Married Women's Acts give the feme covert the right to enter into contracts, and dispose of their interests the same as a feme sole, the wife may completely bar her right to dower by means of a post-nuptial contract.⁵ "The power of a wife to release her inchoate right of dower by her voluntary act has always been reconized."⁶

Dower may be effectively released by means of jointure. A jointure may be defined as a competent livelihood of freehold for the wife, of lands and tenements to take effect in profit or possession presently after the death of the husband, for the life of the wife at least. If A and B, husband and wife, desired to effect a release of dower by means of jointure, a grant by A of a life estate to B after A's death would be sufficient providing A at the same time signified his intention that such provision shall be in lieu of dower. Prior to the enactment of the Statute of Uses such a release could not be effected before or during marriage. The effect of this statute was to fasten the legal title to the use, and thus place both the legal and equitable estates in the person in whose favor the use had been declared.

Under this statute if lands were conveyed for the benefit of a wife before marriage, she could then only claim dower in instances where she had been evicted from her jointure lands. The requisites of legal jointure, as prescribed by the Statute of Uses, are either expressly set out in the statutes of the states or they are declared by the courts to be the law of the land. These requisites are as follows: (1) "The jointure must take effect immediately upon the death of the husband." (2) "It must be for the wife's own life at least and not for the life of another, or for any term of years or other smaller estate." (3) "It must be made

³ 66 N.E. 256; 85 Ill 368; 10 OH St 501.

⁴ 19 CJ (Dower) 153.

⁵ 267 Ill. 111; 160 KY 282; 101 Mich 307.

⁶ 173 Fed. 121; 8 N.E. 477.

to herself and not to another in trust for her." (4) "It must be made in satisfaction of the whole dower and not for any portion of it, and this should so appear in the deed."⁷ It is absolutely essential, if a jointure is to be completely effected before marriage; if affected after marriage, the widow then has an election, she may either take under the jointure or take her dower as prescribed by the common law.⁸

An equitable jointure is an efficient means of releasing dower, and while this particular type of jointure does not demand all the requisites of a legal jointure, nevertheless to be completely effective it must be effected before marriage. Any reasonable provision which an adult person agrees to accept in lieu of dower will amount to an equitable jointure, although it may be wanting in the requisites of a legal jointure, equity will bar dower.⁹

One of the most common ways of effecting a release of dower in this country, is by means of having the wife join in the execution of the deed transferring the property with her husband. Statutes thoroughly govern this mode of release; therefore, the statutes must be complied with in every respect.

An interesting problem is raised in connection with this article, with regards to the possibility of a blanket release of dower. For example, A and B, husband and wife, desire to make a blanket settlement of their dower and curtesy so that it will be unnecessary in the future for either to sign the deeds of the other (join) in the conveyance of their respective lands during coverture. Can such a release be effected, so as to be completely satisfactory for the purpose intended?

An insane wife by her own act cannot release her dower.¹⁰ In the absence of statutes, the insane wife cannot be divested of her dower by any act of her guardian, or by order of any court. In some instances, however, statutes provide for the release of an insane wife's dower, by her guardian or by judicial proceedings under the courts control. The fact that a wife may join in the execution of a deed for the purpose of releasing her dower, with

⁷ 19 C.J. (Dower) 146.

⁸ 19 C. J. (Dower) 146.

⁹ 17 LRA N.S. 866.

¹⁰ Ex parte McElwain 29 Ill. 442.

her insane husband or his guardian, is ineffective to produce the result she intended.¹¹

The wife may effect a release of dower, where statute provides she may execute a power of attorney with like force and effect as if she were single, a release of dower executed by her husband, by virtue of a power of attorney authorizing that precise act is valid.¹²

The infant wife by reason of her incapacity to contract, cannot release her dower, unless the statutes expressly provide for such a release.

In the absence of statutes to the contrary a wife may not be divested of her inchoate right of dower by any voluntary act of her husband, or by any decree or judgment rendered in favor of her creditors.

The above rule, however, does not apply in cases where the statutes provide that a wife has dower only in those lands of which her husband died seized and possessed,¹³ or in cases where the statute provides only for dower in lands not sold under execution or other judicial sales.¹⁴ A sale under a judgment or decree to satisfy a lien for debts which have been incurred prior to the marriage or were in existence at the time the land was purchased, will defeat the wife's right of dower,¹⁵ unless there be a surplus as a result of such sales. Where lands are sold in order to pay the purchase price, the widow can claim no right of dower,¹⁶ in the absence of statutes to the contrary. With regard to mortgages the general rule is that mortgages issued by the husband do not effect the wife's right of dower.

In some states an absolute divorce constitutes a bar to dower. The effect of divorce on dower varies in the different states by reason of statutes which govern such proceedings.¹⁷

The wife does not lose her right to dower by reason of the fact that lands formerly belonging to her husband have been ac-

¹¹ *Rannels v Isgrigg* 99 Mo. 19.

¹² 16 LRA 209.

¹³ 7 Bush (Ky) 139; 14 N.C. 3; 85 Tenn. 520.

¹⁴ 30 Iowa 65.

¹⁵ 25 Ala. 152.

¹⁶ 2 Rob (Va) 384.

¹⁷ *Shouler*, Domestic Relations Page 1674.

quired by other parties by reason of adverse possession during the life time of her husband, because dower does not vest until the death of her husband. The wife, therefore, cannot bring an action of ejectment against the adverse possessors until after her husband's death. The widow is allowed a reasonable time after the death of the husband to bring such action.¹⁸

If the husband's lands be claimed under the right of eminent domain during his lifetime, the right of dower in such lands is extinguished.¹⁹

Owing to the fact that real estate has now become a common article of commercial traffic, and transfers oftentimes must be speedily effected, various states in order to facilitate such transactions have enacted statutes providing less cumbersome methods for caring for the wife's right of dower.

In some instances dower has been completely abolished by statute,²⁰ and in other instances substitutional measures have been provided. It is rather interesting to note that England, from whom we inherited our dower laws, has by statute practically abolished the widow's right of dower. The widow under the English statutes can only claim dower out of such lands as the husband has not disposed of during his life or by the terms of his will. The husband, therefore, if he so desires, may completely extinguish all dower incumbrances, by his own independent act.²¹

New York early enacted a statute providing that the widow may only take dower from such lands as her husband possessed at the time of his death.²² Other states have followed New York by providing similar provisions.²³ Other states have provided that the wife shall only take dower from the lands of which her husband died seized in instances where the wife is a non-resident.²⁴ While there are some occasions when such provisions may work a hardship on the widow, as a general rule she is as adequately cared for under these provisions as she is under the

¹⁸ Tiffany Real Property-Dower.

¹⁹ Tiffany Real Property, P. 777.

²⁰ 22 Colo. App. 543; 96A 405 (NJ); 31 Utah 360.

²¹ Shouler, Domestic Relations, Page 1643.

²² N.Y. Stats. 1860, March 20.

²³ 2 Alaska 397; 11; 2 Ky. 341.

²⁴ 79 Kan. 82; 145 Mich. 219; 91 Neb. 317. 159 Wis 539.

statutes which adhere more strictly to the old provisions as enumerated in the common law.

In Indiana the right of dower has been abolished by statute. In its place has been substituted an interest in fee of the husband's realty and personalty at his decease.

In some of the western states where the property of the husband and wife is held as community property, the right of dower as well as the husband's right of curtesy has been completely abolished. Under these statutes all property acquired before marriage remains the separate property of the person owning the same before coverture, and such property may be sold or mortgaged by that party without the consent of the other party. Generally all property acquired subsequent to the marriage becomes community property. The husband has control of the community property, but the wife must join in any deed or instrument granting or encumbering the property for more than one year, excepting as otherwise specified by statute. In case of death of either the husband or wife, the surviving party usually receives one half of the property outright, the other half being distributed according to the will.

The State Legislature has the absolute right to prescribe the manner in which dower may be barred. The right of dower is not a privilege or immunity of citizenship under either state or federal constitutions.²⁵ The power of each state to regulate dower within its boundaries is not denied by the 14th Amendment to the Federal Constitution. The states have the exclusive right to regulate the title and the disposition of all real property within the limits of the state having the power to give or withhold dower.²⁶

The right to dower and the manner in which it may be released are regulated by statutes which differ in the various states. These statutes may well be termed mandatory since they must be followed to the letter, for the courts in construing provisions regarding dower, do so with the purpose in view of preserving dower, and in attempting to effect a release of dower, the slight-

²⁵ 15 How 591; 2:50 U.S. 525; 254 U.S. 231.

²⁶ 268 Fed. 117; 54 Fed. 209.

est deviation from the statute may cause the provision to be ineffectual for the purpose for which it was intended. In many instances the disastrous results which may follow an ineffectual release of dower, can hardly be anticipated, and for this reason the party attempting to effect a valid release of dower must absolutely assure himself that the release conforms with the statutory requirements in every respect.