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A bronzed, lank man! His suit of ancient black,
A famous high top hat and plain worn shawl,
Make him the quaint great figure that men love,
The prairie-lawyer, master of us all.

Vachel Lindsey, "Abraham Lincoln Walks at Midnight"

A SHORT ESSAY ON DOWER'S
ERODING FOUNDATION

by

Roger A. Petzke, Fisher, Troff & Fisher

Ever since the enactment of the Northwest Ordinance, Michigan law has provided dower for the support of wives who survive their husbands.¹ This provision entitles a widow to the use for life of one-third of all the lands of which her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof.² This article questions the continued viability of this estate. It suggests (1) that the conditions which originally justified dower no longer exist; (2) that the original purpose of providing financial security for surviving widows is served better by other provisions in the law; and (3) that the social harm in hampering free alienability of land so far outweighs any remnant of benefit, that dower, as presently defined, should be abolished in the State of Michigan.

Dower evolved into a positive institution of the law as a result of the unique combination of social, legal, and economic circumstances existing during the Middle Ages. At common law, marriage suspended the legal existence of a woman and imposed numerous disabilities upon her. While married, a woman could acquire no property of her own.³ Even her husband could not grant or devise anything to her.⁴ Likewise, if she survived her husband, she was not considered an heir to his land.⁵ Furthermore, if she had acquired real estate before marrying, her husband became entitled to the profits therefrom during the marriage; and if she had previously acquired personal property, it went to her husband absolutely.⁶ As a consequence of these disabilities, a woman who had not acquired realty prior to marrying could well have been left impoverished upon the death of her husband. A society with strong humanitarian instincts, however, would not tolerate such destitution. Sir Joseph Jeckyl epitomized the prevalent attitude when, in Banks v. Sutton,⁷ he remarked:

The relation of husband and wife, as it is the nearest, so it is the earliest, and therefore the wife is the proper object of the care and kindness of the husband; the husband is bound by the law of God and man, to provide for her during his life, and after his death, the moral obligation is not at an end, but he ought to take care of her provision during her own life.

The sustenance contemplated by this attitude could not be provided out of a man's personal estate. To begin with, the personal estates of even the wealthiest were inconsiderable.⁸ Life insurance, pensions, social security, joint bank accounts, and securities were simply not available.⁹ Even if a man did own a substantial amount of personal property he could give or bequeath a considerable portion of it away from his spouse.¹⁰ Furthermore, any personal property she would be entitled to if she survived her husband intestate was subject to the claims of creditors.¹¹ It is clear that in order to give effect to society's desire, the law had to compel husbands to provide for their widows out of their realty. As land was the principal source of wealth during the Middle Ages,¹² dower was the ideal vehicle for saving the widow from poverty.

Today, personal property is the predominant form of wealth. It is not uncommon for one to have interests in life insurance policies, pensions, securities, bank deposits, and social security benefits. If real estate is owned at all, it is commonly limited to the family residence. As a result, the modern day widow's dower interest usually attaches to but a small portion of her husband's estate and is insufficient to provide for her needs.¹³ Moreover, even if a substantial amount of realty is owned by a woman's husband, dower does not assure the security of her widowhood because there are several ways it can be defeated. As dower attaches only to estates of inheritance held in severalty, land held by a man for his life,¹⁴ for a term of years,¹⁵ in joint tenancy,¹⁶ or as a partner¹⁷ or trustee¹⁸ is not subject to dower in his wife. It seems clear that the limited protection dower affords a widow today does not justify the onerous burden it imposes upon the alienability of land.

The retention of dower is all the more difficult to understand when one considers the tremendous expansion of women's property rights since the time dower became an institution of the law. No longer does a married woman suffer the disabilities of coverture.¹⁹ On the contrary, Michigan statutes of descent and distribution give her rights which were unknown at common law. In the event that a woman's husband dies testate, she can elect to take under the terms of the will, to take her homestead and dower rights, or to take her share as a statutory heir.²⁰ If her husband dies without a will she may elect either of the latter two alternatives.²¹ Not only does the Michigan statutory share provision change the common law rule that the widow could not be an heir of her husband but it also provides her with an interest in her husband's personal as well as real property²² and enlarges her interest from a life estate to one that is absolute.²³ As a statutory heir, however, a widow has no right to a share of her husband's personal property transferred by him before his death,²⁴ nor is her share immune from the claims of her husband's creditors.²⁵ If Michigan would revise its statutory share provision so as to incorporate the "augmented estate" concept of the Uniform Probate Code the widow's share would be invulnerable to defeat by inter vivos transfers of her husband.²⁶ Even without such a revision it appears that dower is no longer the most effective way to assure the wife's security out of her husband's estate. Indeed, an election of dower is probably advisable only in those cases where the husband owned a substantial amount of real estate and died insolvent or where the husband conveyed a substantial amount of real estate without his wife's consent.²⁷ In view of the fact that the right of separate property in the wife is now liberally accorded her,²⁸ attention should be given to the issue of whether the law should incorporate any sort of compulsory appropriation of a husband's property of his widow. As married women today have the right to collect social security payments and can hold survivorship interests in joint bank accounts and entireties properties, serious consideration should be given to proposals such as Michigan House Bill 4337 which eliminates both the statutory share and dower as we now know it in those cases where a decedent's intentions have been expressed by will.²⁹ In any event, it is time to realize that dower, owing its origin to the necessity of providing for women whose property rights were extinguished by marriage, is no longer supported by the same necessity.³⁰

The social structure of the Middle Ages was founded upon the institution of feudal tenure.³¹ This system of holding and transferring land was so simple that the introduction of dower did not significantly disrupt it. Land practices did not remain static however. Rather, as new social systems developed, land became less a form of status and more an object of commercial transactions. One consequence of this evolution is that today, dower significantly disrupts the ready transfer of realty.³²

While dower does not become consummate until a husband's death, a wife nevertheless has an inchoate interest during the marriage. The complication of land transactions is due to the fact that this inchoate interest is entitled to as much protection as is consummate dower itself.³³ Once attached, inchoate dower becomes an encumbrance that is immune from the acts of all except the endowed herself.³⁴ A wife may release her inchoate dower in land conveyed by her husband by joining in a deed or mortgage of the land.³⁵ Without such a manifestation of his wife's consent, there is absolutely nothing the husband can do to prejudice or defeat her dower.³⁶ He can not deprive her of that interest by conveying or contracting away land³⁷ nor by devising it by an antenuptial will.³⁸ She cannot be compelled to release her dower in such lands,³⁹ but on the contrary, the husband's grantee or devisee takes subject to the wife's inchoate dower.⁴⁰ Indeed, should the wife survive her husband, she is entitled to claim her dower even if during the life of her husband she acquiesced in others' occupying and making valuable improvements on the land.⁴¹ The possibility of such an assertable dower right clouds the chain of title of any real estate conveyed by a married man.⁴² Dower is perhaps the greatest obstacle which faces the title examiner in Michigan. Unless there is a valid relinquishment by the widow on the record, no title is free from the dower problem until the examiner determines that the prior holders were unmarried at the time they conveyed or that their wives have been dead for the period of the Marketable Record Title Act.⁴³ The title searcher is frequently confronted with a variety of difficult problems. For instance, in determining the validity of a wife's purported relinquishment, consideration must be given to whether the wife was mentally competent⁴⁴ and whether her signature is authentic and whether it was obtained without duress or misrepresentation.⁴⁵ The title examiner also needs to be aware of the possibility of common law marriages and needs to inquire into the validity of any divorces. If the search reveals the existence of an assertable dower right, an absent and often hostile former spouse needs to be located and her interest purchased.⁴⁶ These problems clearly illustrate that inchoate dower hinders the free alienability of land. They also make one realize that:

[I]t is a serious question whether the policy in favor of protecting the wife may not be outweighed by the disadvantages of the restrictions upon the husband's power of alienation and the litigation arising from such restrictions.⁴⁷

To retain in a society which is primarily industrial in character rules which had their origins in the needs of agrarian communities in the Middle Ages may not only be anomolous but reflects an unwillingness on the part of legislatures rationally to consider the basic purposes to be served.⁴⁸

It seems to me that the Michigan Legislature would do well to exonerate itself from this harsh indictment as soon as possible.

FOOTNOTES

1. NORTHWEST ORDINANCE art. I, §2 (1787) entitled a widow to dower the same as at common law. May v. Rumney, 1 Mich. 1 (1847). All subsequent Michigan dower statutes have likewise accorded her that right. Mich. Rev. Stat. 1846, ch. 66, §1; Mich. Comp. Laws 1857, §2772; Mich. Comp. Laws 1871, §4269; How. §5733; Mich. Comp. Laws 1897, §8918; Mich. Comp. Laws 1915, §11654; Mich. Comp. Laws 1929, §13072; Mich. Comp. Laws Ann. §558.1 (1967).

2. Mich. Comp. Laws Ann. §558.1 (1967).

3. Banks v. Sutton, 2 P. Williams 700 (1732).

4. The Origin and Kinds of Dower, 19 AM. JURIST 292, 298, (1838).

5. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §29, (2d ed. 1953).

6. HOLDSWORTH, HISTORY OF ENGLISH LAW 525-26 (3d ed. 1923).

7. 2 P. Williams 700 (1732).

8. 1 C. SCRIBNER, LAW OF DOWER 21 (2d ed. 1883).

9. It's Time To Abolish Dower & Curtesy In Virginia, 3 U. RICH. L. REV. 299 (1969).

10. Haskins, The Development of Common Law Dower, 62 HARV. L. REV. 42, 47, (1948).

11. Id.

12. 1 AMERICAN LAW OF PROPERTY §5.3 (A.J. Casner ed. 1952).

13. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §30 (2d ed. 1953).

14. Spears v. James, 319 Mich. 341, 29 N.W. 2d 829 (1948).

15. Redman v. Shaw, 300 Mich. 314, 1 N.W. 2d 555 (1942).

16. Schmidt v. Jennings, 359 Mich. 376, 102 N.W. 2d 589 (1960).

17. Mich. Comp. Laws Ann. §449.25 (2) (e) (1967).

18. Pungs v. Hilgendorf, 289 Mich. 46, 286 N.W. 152 (1939).

19. MICH. CONST. art. 10, §1 declares: "The disabilities of coverture as to property are abolished..."

20. Mich. Comp. Laws Ann. §702.69 (1968).

21. Mich. Comp. Laws Ann. §702.70 (1968).

22. Mich. Comp. Laws Ann. §702.93 (1968).

23. Mich. Comp. Laws Ann. §§702.80, 702.93 (1968).

24. Cranson v. Cranson, 66 Am D. 534, 4 Mich. 230 (1856).

25. This is as it should be though. The unqualified priority of dower over creditors of the widow's husband is unfair to those who have transferred other assets to the deceased husband on credit. 2 R. POWELL, REAL PROPERTY §213 [1] (1975).

26. UNIFORM PROBATE CODE §2-202 augments a decedent's estate by adding to it, under certain circumstances:

The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer...

As a consequence, the widow's share includes either part of the consideration received by her husband for the sale of his property or part of the value of such property if it was transferred for less than adequate consideration.

27. 1 AMERICAN LAW OF PROPERTY §5.42 (A.J. Casner ed. 1952).

28. 1 C. SCRIBNER, LAW OF DOWER 22 (2d ed. 1883).

29. MICH. H. B. 4337 §119 provides:

The surviving spouse, whether widow or widower, has dower, which, insofar as it confers rights on the surviving spouse which are effective upon the death of the other spouse, consists of the rights described by sections 131, and 141 to 145.

The sections mentioned provide for family allowances, exemptions, homestead allowances, and allowances for spouses unintentionally omitted in the decedent's will.

30. Holland, The Nature of an Inchoate Right of Dower; How It May Be Protected For The Wife's Benefit, and How It May Be Relinquished By Her Act, 4 COUNSELLOR 199, 208 (1895).

31. See C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 2-25 (1962).

32. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §30 (2d ed. 1953).

33. Bonfoey v. Bonfoey, 100 Mich. 82, 58 N.W. 620 (1894).

34. Inchoate Dower and the Marketable Title, 4 WASHBURN L. J. (1965).

35. Mich. Comp. Laws Ann. §558.13 (1967).

36. Oades v. Standard Savings & Loan Ass'n., 257 Mich. 469, 241 N.W. 262 (1932).

37. Wagner v. Wagner, 237 Mich. 271, 211 N.W. 738 (1927); Delaney v. Manshum, 146 Mich. 525, 109 N.W. 1051 (1906).

38. Burrall v. Hurd, 61 Mich. 608, 28 N.W. 731 (1886).

39. Richmond v. Robinson, 12 Mich. 193 (1864).

40. Wallace v. Harris, 32 Mich. 401 (1875).

41. Rockwell v. Rockwell, 81 Mich. 493, 46 N.W. 8 (1890).

42. The Protection of the Surviving Spouse: A Search for Georgia Reform, 9 GA. L. REV. 946, 949 (1975).

43. Mich. Comp. Laws Ann. §565.101 (1967).

44. Though a wife's dower interest may be barred by its sale in accordance with the procedure established by Mich. Comp. Laws Ann. §600.2931 (1968), there is no authority enabling a husband to mortgage the inchoate dower right of his insane wife. Petition of Cody, 243 Mich. 553, 220 N.W. 788 (1928).

45. If a wife's release of her inchoate dower is obtained by fraud she may have the release set aside. Smith v. Holdoway Construction Co., 344 Mo. 862, 129 S.W. 2d 894 (1939).

46. Property and the Family: Spousal Protection, 4 RUTGERS CAMDEN L.J. 195, 205 (1973).

47. 1 AMERICAN LAW OF PROPERTY §5.1 (A.J. Casner ed. 1952).

48. 1 AMERICAN LAW OF PROPERTY §5.5 (A.J. Casner ed. 1952).

THE LEGISLATIVE SCENE

Committee on Legislation
Joseph H. Hollender, Chairman

The Legislature reconvened on September 19, following a ten-week summer recess, interrupted by a one-day special session on August 30. Between September 19 and September 29, the most current date for which figures are available, 314 new bills were introduced in the House and Senate.

The following section indicates the action which has taken place on bills previously reported to the Real Property Law Section.

Action on Previously Reported Bills

- H. B. 4050: Completed third reading with amendments on September 21; Passed on September 22; referred to the Committee on Conservation.
- H. B. 4251: Amendments offered on September 28.
- H. B. 4252: Referred to Committee on Economic Development on September 19.
- H. B. 4505: Completed third reading with amendments on September 19; Passed on September 21; referred to the Committee on Finance.
- H. B. 5073: Public hearings held on September 7 and 15.
- S. B. 610: Amendments offered September 29.

Newly Introduced Legislation

- H. B. 5305: Amends Farmland and Open Space Preservation Act, 1974 PA 116, by reducing to 180 days the period in which an owner under a development rights agreement or easement must notify the governmental unit holding such rights of the termination of the agreement; also permits purchaser who wishes to continue under the agreement to do so under a new contract. (Introduced September 19, 1977, by Reps. Hoffman, et al, and referred to the Committee on Agriculture.)
- H. B. 5330: Amends 1963 PA 213 by permitting governmental units to approve surety companies which are to issue bonds on public works projects. (Introduced September 22, 1977, by Reps. O'Neill, et al, and referred to the Committee on Towns and Counties.)
- H. B. 5343: Amends Section 901 of the Revised Judicature Act of 1961, by authorizing non-lawyers to represent corporations in actions where the amount in controversy is less than \$2,500.00. (Introduced September 22, 1977, by Reps. Sietsema, et al, and referred to the Committee on Judiciary.)

- H. B. 5397: Amends Section 27 of the General Property Tax Act, 1893 PA 206, by directing that the following additional items included in the last conveyance of the property should not be considered in assessing property:
- (1) broker's fees
 - (2) real estate transfer taxes
 - (3) title insurance premiums
 - (4) attorney's fees
 - (5) amounts deductible as fixing-up expenses under Section 1034 of the Internal Revenue Code.
- (Introduced September 22, 1977, by Reps. Brotherton, et al, and referred to the Committee on Taxation.)
- H. B. 5435: Amends Section 2 of 1974 PA 198 by permitting industrial development property in plant rehabilitation districts to be owned or leased under certain circumstances. (Introduced September 29, 1977, by Reps. Gingrass, et al, and referred to the Committee on Economic Development.)
- H. B. 5414: Amends 1967 PA 288 by providing for a presumption of acceptance of land dedicated to public use. (Introduced September 29, 1977, by Rep. Anderson, and referred to the Committee on Towns and Counties.)
- H. B. 5417: Amends Section 27 of the General Property Tax Act, 1893 PA 206, by extending the exclusion from assessed value items of normal maintenance and repair. (Introduced September 29, 1977, by Rep. Mathieu, et al, and referred to the Committee on Taxation.)
- H. B. 5418: Amends 1919 PA 306 by providing for cessation of real estate solicitation upon owner's request. (Introduced September 29, 1977, by Rep. Padden, and referred to the Committee on Civil Rights.)
- H. B. 5422: The bill would prohibit the construction or renovation of parking facilities which use heating or air conditioning. (Introduced September 29, 1977, by Reps. Bennane, et al, and referred to the Committee on Urban Affairs.)
- S. B. 922: Amends Section 15 of 1972 PA 348 by providing that actions under the act may be commenced either in the County where the defendant resides or does business or in the County where the rental unit is located. (Introduced September 21, 1977, by Sen. Hertel, and referred to the Committee on State Affairs.)
- S. B. 978: Amends Section 5720 of the Revised Judicature Act of 1961 by prohibiting eviction of a tenant if the termination of tenancy is grounded on the tenant's membership in a tenant union or association. (Introduced September 28, 1977, by Sen. Corbin, and referred to the Committee on Judiciary.)
- S. B. 979: Amends the title of 1966 PA 125 and adds a Section 4 which requires the "mortgagor" (sic) to pay interest on escrow deposits if the mortgagor is required to make periodic escrow payments. (Introduced September 28, 1977, by Sen. Corbin, and referred to the Committee on Corporations and Economic Development.)

S. B. 1020: Amends Sections 1 and 3 of 1971 PA 227 by removing broker's listing agreements from home solicitation sales and permitting rescission rights to be explained in separate instrument. (Introduced September 29, 1977, by Sen. Faxon and referred to the Committee on Agriculture and Consumer Affairs.)

Federal Legislation

None to report.

Federal Rule Making

None to report.

Attorney General Opinions

None to report.

State Agency Rules

Proposed new income tax rules announced August 17, 1977. Public hearing scheduled for September 29, 1977, in Lansing.

JHH/cec

CASE BRIEFS

Committee on Significant Legal Decisions
Maurice A. Merritt, Chairman

Stancroff v Brown, et ux, MCA Docket No. 28974 (July 7, 1977).

Plaintiff sought specific performance of a ten year lease, dated October 18, 1965, which contained the following option:

"Lessee shall have the option to renew this lease for a further term of Ten (10) years, from October 18, 1975, to September 30, 1985, or any other period of time to be agreed upon by lessee and lessor, for such terms and rentals agreeable to both parties ninety (90) days prior to initial lease expiration. . . . "

Lessee gave the requisite notice and negotiations ensued, but parties could not agree on the terms of the new lease. Plaintiff requested trial court to determine the reasonable rent. Testimony indicated that it was the term of years and not the amount of the rental that caused the breakdown of discussions.

Trial court found the renewal clause to be void for uncertainty and denied plaintiff's request.

Appellate court reversed and remanded to determine a reasonable rent. It held that the term of years was fixed and was not an issue for negotiation, that defendants did not negotiate in good faith.

SECTION NEWS

Our thanks to author Roger A. Petzke for his article on dower rights.

Robert H. Janover, Vice-Chairman of the Committee on Commercial Transactions and Syndications, is in the process of assembling materials - relating to the work of the committee - for the December issue.

The articles for the October issue were originally to be submitted by Mr. William T. Myers, Chairman of the Leases, Cooperatives and Condominiums Committee. Mr. Myers recently advised me that these articles will be submitted for publication in the December issue.

* * *

The following report is from Section Chairman Maurice S. Binkow:

Under Ralph Jossman's most effective leadership, the Section registered significant gains during its fiscal year recently completed and is ready to build upon these gains during the coming year.

First, the Michigan Real Property Review has been appearing upon a bi-monthly basis in expanded form. Each Committee has been responsible to contribute substantive articles of current interest to the Review and each issue of the Review also contains reports on current legislation and current judicial decisions. The Review has become a most creditable publication under the original editorship of Professor Frank Sengstock before his untimely death last year and we expect it to become of growing importance under the very competent editorship of Professor George Siedel of the University of Michigan.

Second, the Section has been co-sponsoring seminars with ICLE during the past year and has been responsible for providing the speakers and planning the substantive programs. The Section also sponsored its second annual summer conference in July, 1977 consisting of workshops in various aspects of real estate practice and law and at various levels of expertise. There was something for everyone. Both the conference and the individual seminars have been well attended and received. The Council extends its appreciation to Dick Rabbideau for a job well done and we are pleased to report that Dick will continue his chairmanship of the seminar activities during the new fiscal year. In addition to regular seminar programs and summer conference, the Section will be sponsoring specialized workshops in several areas of less general appeal than those co-sponsored with ICLE, but which will give the participants a chance to probe more deeply into the subject matter. If all goes as planned, these round table sessions will be held at various locations around the state.

Third, the substantive Committees have been functioning to a greater degree than in earlier years. Some of their results are evident to all of you. For example, the Legislative Committee (under Joe Hollender's chairmanship) and the Committee on Current Judicial Decisions (under Maurice Merritt's chairmanship) report bi-monthly in the Real Property Review. Important work is also being accomplished by several of the substantive Committees. For example, the Mechanic's Lien Committee, under Bob Bolton, is closely monitoring the proposed legislation substantially amending the mechanic's lien laws and has been working with the

Legislative Committee and the sponsors of this legislation. While a majority of the Committees have been performing useful work, all of the substantive Committees will henceforth present an agenda of work to be accomplished during the year so that they will be performing their intended roles and affording an opportunity to Committee members who desire to both benefit and be benefited by and through Committee work.

The Section has also set up certain special Committees to study certain specialized subjects, the latest being Paul Ward's Committee to study whether standardized real estate forms should be prepared by the Bar. You are acquainted with the Section's active and autonomous Land Title Standards Committee which is presently preparing a supplement to the Land Title Standards for distribution within the next few months.

Finally, our educational role will be greatly expanded if the Supreme Court adopts the self-designation (specialization) rules proposed by the Representative Assembly.

Our Section is less than four years old, but it consists of almost 1,400 members, a vigorous leadership through the Council and the Committees, and an expanding educational role through our seminars and workshops and our Real Property Review. We will continue to build upon our very good start and are prepared to accept an expanded educational role if self-designation is adopted. A debt of gratitude is owed to our past Chairmen, Norm Gilmore, Pat Keating and Ralph Jossman, and your present Chairman intends to build upon their good work. Any member having criticisms, comments or constructive suggestions or who may wish to work upon any of the Committees should contact me at the address or telephone number listed below.

Maurice S. Binkow
Section Chairman
2290 First National Building
Detroit, Michigan 48226
Telephone (313) 962-6700

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Dick Rabbideau, Chairman of the Committee on Seminars, Workshops and Meetings, reports:

The Committee on Seminars, Workshops and Meetings will announce the fall and winter program in the December issue of the Review.

Well received programs on Landlord/Tenants Rights and Remedies and Mortgages and Land Contracts concluded an active year of participation with ICLE.

The excellent presentation by Jerome Halperin of Coopers & Lybrand at the Annual Meeting has provided an excellent precedent for future annual meeting presentations.