

THE DEFEASIBILITY OF DOWER

By GEORGE L. HASKINS †

Dower at common law was the estate to which a widow was entitled for her life, in one-third of the lands and tenements of which her husband had been seised beneficially at any time during the marriage, in fee simple and fee tail, to which issue of the marriage, if any, might by a possibility have succeeded.¹ During the subsistence of the marriage the wife had a protected expectancy known as "inchoate" dower which arose upon marriage and could not be defeated except for certain defined and limited causes and in certain definite ways. Upon the death of the husband her interest became "consummate" but was not regarded as an estate until actually set off and assigned. The essential features of common law dower have been preserved, with varying statutory modifications, in about one-half of the jurisdictions of the United States.² In some of these states the widow's fractional share of the realty has been increased from one-third to one-half; in others, her estate has been enlarged to a fee simple. Nearly all, however, recognize and protect an inchoate right of dower during the marriage and confine the widow's dower interest upon the husband's death to lands of which he was seised or possessed during coverture.³

Dower has usually been regarded as a derivative interest which depends upon the estate of the husband and cannot rise higher than its source. Hence, in most situations, the wife's inchoate dower and her estate after assignment are subject to the same defects and limitations existing in the husband's estate at the time the dower interest attached. There is no requirement that for a widow to be entitled to dower the husband's estate be indefeasible. Thus, if the husband acquires a defective title to realty, dower is defeasible to one having the interest which constitutes the defect.⁴ Similarly, dower may be de-

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

2. For a convenient summary of the extent to which common law dower has been retained in the United States, see 3 VERNIER, AMERICAN FAMILY LAWS 352-368 (1935).

3. In a few jurisdictions dower is confined to realty of which the husband died seised. ALASKA COMP. LAWS ANN. § 63-1-1 (1949); GA. CODE § 31-101 (1933); N.H. REV. LAWS c. 359, § 3 (1942).

4. *Kusch v. Kusch*, 143 Ill. 353, 32 N.E. 267 (1892). See 2 CRABB, REAL PROPERTY *165; 1 SCRIBNER, DOWER 290 (2d ed. 1883).

feated or impaired by the assertion of a creditor's lien⁵ or a judgment lien,⁶ acquired on the property before marriage, or by the assertion of an outstanding vendor's lien which attached to the land before or during marriage.⁷ Claims of creditors whose liens have attached during marriage are ordinarily postponed until the widow's claim to dower has been satisfied, unless she joined in the creation of such liens.⁸ Dower may also be subject to an equitable charge created in the deed to the husband,⁹ or to a preexisting right of dower in another woman.¹⁰

The *Restatement of Property* takes the position that the same conception of dower as a derivative estate is controlling in those situations where the husband's estate may terminate because it is less than a fee simple or because it is a fee simple defeasible.^{10a} Under that view the interest of his widow is terminated whenever the husband's estate would have ended under the terms of its limitation. Although in many situations that view is supported by the decided cases, there are certain situations in which the courts have not adhered to the conception of dower as a derivative interest. It becomes important, therefore, to consider in detail the effect upon dower of the expiration or divesting of the husband's estate.

EXPIRATION OF THE HUSBAND'S INTEREST

In England at early common law, if the tenant of a fee simple estate died without heirs, the land escheated to his overlord. In the course of time, the right of escheat became gradually restricted and inured nearly always to the benefit of the sovereign.¹¹ In those jurisdictions of the United States where tenure is still recognized, land will

5. *Brown v. Williams*, 31 Me. 403 (1850); *Hopper v. Hopper*, 172 Md. 152, 190 Atl. 841 (1937).

6. *Whitehead v. Cummins*, 2 Carter 58 (Ind. 1850); *Eiceman v. Finch*, 79 Ind. 511 (1881); *Sanford v. McLean*, 3 Paige 117 (N.Y. 1832); 1 SCRIBNER, DOWER 600-602 (2d ed. 1883). *Contra*: *Irvine v. Armstead*, 46 Ala. 363 (1871).

7. *Huginin v. Cochrane*, 51 Ill. 302 (1869); *Schaefer v. Purviance*, 160 Ind. 63, 66 N.E. 154 (1903); *Noyes v. Kramer*, 54 Iowa 22, 6 N.W. 123 (1880); *Spear v. Evans*, 51 Wis. 42, 8 N.W. 20 (1881).

8. A different rule prevails in Pennsylvania, where lands have been treated as chattels for the payment of debts, so that the rights of the widow are postponed until the settlement of creditors' claims. *Scott v. Crosdale*, 2 Dall. 127 (1791); *Mitchell v. Mitchell*, 8 Pa. 126 (1848). As to the effect of foreclosure of a lien superior to dower before and after the husband's death, see *Briegel v. Briegel*, 307 Pa. 93, 99, 160 Atl. 581, 583 (1931). The effect of present day legislation in Pennsylvania is discussed in BRÉGY, *INTESTATE, WILLS AND ESTATES ACT OF 1947* 607 (1949).

9. *Pendleton v. Meade*, 163 Va. 727, 177 S.E. 198 (1934).

10. *Stahl v. Stahl*, 114 Ill. 375, 2 N.E. 160 (1885); *Manning v. Laboree* 33 Me. 343 (1851).

10a. RESTATEMENT, PROPERTY §§ 54, 75, 84, 93 (1936).

11. If a mesne lordship could be proved, the land would not escheat to the Crown. Escheat was abolished in England by the Administration of Estates Act, 1925, 15 GEO. 5, c. 23, §§ 45, 46.

generally escheat to the state upon the extinction of the owner's heirs.¹² In those states where tenure is not recognized, it will also pass to the state, generally on the analogy of *bona vacantia*.¹³ However, in apparently every case which has arisen, both in England and in the United States, where the husband has died without heirs, the widow has been allowed dower in the land.¹⁴

Dower was likewise unaffected by the expiration of a lesser estate than a fee simple to which it had attached. In thirteenth century England, if a gift were made to a man and the heirs of his body, the estate which he received was known as a fee simple conditional. In the generation prior to 1285, those gifts were interpreted by the judges to mean that, as soon as the donee had a child, the condition imposed by the donor was fulfilled for certain purposes. For purposes of alienation the donee thereupon had an estate which he might convey in fee simple absolute, regardless of whether or not the issue died thereafter.¹⁵ For purposes of dower, the estate was likewise treated upon birth of issue as a fee simple absolute, and the widow was allowed dower whether or not the issue subsequently died during the husband's lifetime.¹⁶ Even if the issue died after dower had been assigned, and the land reverted to the donor, her estate was not thereby divested.¹⁷ To have held that dower was defeated upon the running out of the husband's line would have deprived many widows of all subsistence in an age when such conditional gifts were common¹⁸ and the dying out of issue was by no means unusual.¹⁹ If no issue were born, however,

12. *In re Estate of John O'Connor*, 126 Neb. 182, 252 N.W. 826 (1934). Some states have conferred the benefits of escheat upon some agency or subdivision of the state. ILL. ANN. STAT. c. 3, § 162, c. 49, § 1 (1935); N.C. CODE § 5784 (1939); R. I. GEN. LAWS c. 582, § 1 (1938).

13. *Matthews v. Ward's Lessee*, 10 Gill & J. 443 (Md. 1839).

14. BRACTON, DE LEGIBUS fol. 297b; 1 ATKINSON, CONVEYANCING 258 (1839); 4 KENT, COMMENTARIES *49; PARK, DOWER *158; 1 SCRIBNER, DOWER 286-88 (2d ed. 1883) and authorities there cited. See *Pacific Bank v. Hannah*, 90 Fed 72 (9th Cir. 1898); *Burgess v. Wheat*, 1 Eden 177, 193, 28 Eng. Rep. 652, 658 (Ch. 1757-9); 1 WASHBURN, REAL PROPERTY 212 (6th ed. 1902).

At early common law, if the husband was attainted for treason or felony, his wife lost her dower. A statute in 1547, 1 Edw. VI, c. 12, § 16, secured her rights in cases of forfeiture, but the old rule was partially revived a few years later by 5 & 6 Edw. VI, c. 11, § 11. The English law on this point was never widely adopted in the United States. Cf. Massachusetts Body of Liberties, c. 10, in MASS. COL. LAWS 35 (Whitmore ed. 1889).

15. POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 17 (1885).

16. BRITTON 525 (Nichols ed. 1901).

17. "Although the gift was in the beginning conditional and the fee in suspense yet by birth of issue the feoffment becomes simple and absolute, and thus an action of dower accrues to the wife." *Ibid.*

18. Maitland states that, in the sixth and seventh decades of the thirteenth century, about one in every ten fines levied in the courts contained a limitation in fee simple conditional. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 16 (1885).

19. This statement is made on the basis of the frequency of escheat. If death without heirs generally was common, it is reasonable to infer that death without issue was even more common.

the words of the condition prevailed so as to deprive the widow of dower.²⁰

In 1285 the statute *De Donis*²¹ was enacted, providing in effect that the condition of birth of issue in conditional gifts be given literal effect. With the enactment of that statute, the fee simple conditional disappeared in England. It was revived, however, in this country in four jurisdictions which have held that *De Donis* was not received as part of the common law.²² The estate is still recognized in three jurisdictions in the United States.²³ No case in those jurisdictions has expressly decided whether, if a husband died unsurvived by the required issue, or without ever having had issue, his widow would be entitled to dower.²⁴ As above indicated, however, there is authority in early English law for permitting the widow to be assigned dower if the issue are no longer living at the husband's death, or for permitting her to retain her estate after assignment despite the subsequent death of issue.²⁵ The authors of *Restatement of Property*, unaware of the existence of the English authority, have taken the position in Section 75 that the wife's inchoate interest, as well as her dower estate, is defeated by the same event which would have ended the estate of the deceased spouse.²⁶ According to the Reporter, "the Institute found its position not bound by authority and has stated the rule required by the closest available analogies."²⁷

With respect to estates in fee tail, dower was permitted in England regardless of whether or not the husband died without having had issue or without issue living at his death;²⁸ and dower was not defeated by the extinction of the husband's line of descendants after his death.²⁹ It has been urged that the rule originated as a persistence of the principle applicable to estates in fee simple conditional before 1285.³⁰ No

20. BRITTON 525 (Nichols ed. 1901).

21. Statute of Westminster II, 1285, 13 EDW. I, c. 1.

22. Iowa, Nebraska, Oregon and South Carolina.

23. The creation of estates in fee simple conditional is no longer possible in Nebraska. Neb. Laws 1941, c. 153 § 10; NEB. REV. STAT. § 76-110 (1943).

24. There is dictum in *Withers v. Jenkins*, 14 S.C. 597, 615 (1881) to the effect that curtesy would be sustained in a surviving husband if his wife had died seised of an estate in fee simple conditional which had been ended by the extinction of the line of descendants.

25. See text at note 16 *supra*.

26. 1 RESTATEMENT, PROPERTY § 75 (1936). See also *id.* at App. 12: "Butler states that dower and curtesy did survive such death [i.e. if the husband died unsurvived by the required issue, without ever having had issue], but there is no authority for or against the statement except the reputation of the stater."

27. *Ibid.*

28. Y.B. Mich. 5 Ed. II (1311), 63 SELDEN SOC. PUB. 18 (1944); Co. Litt. *241a, n.4 (Butler's ed. 1823).

29. *Ibid.*; Paine's Case, 8 Co. Rep. 34a (K.B. 1587); *Chaplin v. Chaplin*, 3 P. Wms. 229 (Ch. 1733).

30. *Buckworth v. Thirkell*, reported in note in *Doe v. Hutton*, 3 Bos. & P. 643, 652 *et seq.* 127 Eng. Rep. 347, 351 (C.P. 1804). See Co. Litt. *214a, n.4 (Butler's ed. 1823).

doubt in the beginning there was as much reason to apply the rule to estates tail as to estates in fee simple conditional, or for that matter to estates in fee simple absolute, when the husband died without heirs.³¹ The persistence of the rule may perhaps be explained on the grounds that so great a part of the land of England had become entailed by the fifteenth century that it was felt necessary to give the surviving spouse of the tenant-in-tail dower superior to the claims of surviving issue and to all remainders, executory interests and reversions.³² Where the problem has arisen for determination in American jurisdictions recognizing estates tail, the English view has been adopted without dissent.³³ Four states still recognize the fee tail,³⁴ and in one of these the question of defeasibility has been decided in accordance with the English view.³⁵ Because of the scarcity of American authority the American Law Institute has taken the position that there is no substantial body of American authority compelling the Institute to accept the English view.³⁶ In the interest of "symmetry", the *Restatement of Property* has rejected the "inexplicable anomaly" of the English rule, on the ground that in most situations dower is regarded as a derivative estate which is defeated by the same event which would have ended the estate of the deceased's husband.³⁷ Whether logic and symmetry are adequate reasons for objecting to an accepted rule of law seems open to question, especially in a work which purports to be a correct statement of the general law of the United States. It must be conceded, however, that fees tail no longer perform the function in family and land law which they did in the late mediaeval and early modern periods, and it may well accord with prevailing views today to say that the widow is entitled to dower in what the deceased spouse had, no more and no less.³⁸ Yet the decided cases do not support this view with respect to fees tail.

31. See note 14 *supra*.

32. 1 RESTATEMENT, PROPERTY, App. 13 (1936).

33. *Harkness v. Corning*, 24 Ohio St. 416, 429 (1873); *Sharp v. Pettit*, 1 Yeates 389 (Pa. 1794) (issue surviving); *Holden v. Wells*, 18 R.I. 802, 31 Atl. 265 (1895); 1 WASHBURN, REAL PROPERTY 224 (6th ed. 1902). See *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110 (1895); *Smith's Appeal*, 23 Pa. 9 (1854).

34. Delaware, Maine, Massachusetts, Rhode Island (as to deeds only). The fee tail was also a permissible type of land interest in Kansas and Wyoming until 1939. Kansas Laws 1939, c. 181; Wyoming Laws 1939, c. 92, 1949, c. 93, § 1. In Connecticut, Ohio and Rhode Island (as to wills only) fees tail are preserved as such for a single lifetime.

35. *Holden v. Wells*, 18 R.I. 802, 31 Atl. 265 (1895) (as to a deed).

36. 1 RESTATEMENT, PROPERTY §§ 84, 93 (1936).

37. *Id.* at App. 15. *Id.* at 13. "The cases seem to reach their conclusions by deduction from the accepted definitions of dower and curtesy respectively."

38. See *McMasters v. Negley*, 152 Pa. 303, 312, 25 Atl. 641, 643 (1893).

The legislatures of three jurisdictions preserve the fee tail as such for a single generation.³⁹ The same considerations apply to the resulting estate as have been already set forth in discussing the classic estate in fee tail. The decided cases have allowed dower when issue survive,⁴⁰ but the question of whether dower would be permitted when issue do not survive does not appear to have been litigated in these jurisdictions.⁴¹ The American Law Institute is opposed to permitting dower when no issue survive, again on the ground that dower should be viewed as a derivative interest.⁴²

In several jurisdictions a fee tail estate is converted by statute into a life estate in the first taker with a remainder over.⁴³ On the ground that a life estate is not one of inheritance, it has been held in at least one such jurisdiction that the widow of the life tenant would not be entitled to dower.⁴⁴ In the large number of states where the fee tail can no longer be created, the problem is not likely to arise.

DETERMINATION OF THE HUSBAND'S ESTATE BY SPECIAL LIMITATION OR RIGHT OF ENTRY

If the husband's estate in fee simple is subject to a special limitation,⁴⁵ the authorities seem agreed that his widow's dower is defeated upon the same terms as his own estate.⁴⁶ Thus, if land is given to *A* and his heirs, so long as lime is burned on the premises, the failure to burn lime will terminate *A*'s estate and, if dower has been assigned, "it will terminate that of his widow as well."⁴⁷ Before the happening of the event specified in the limitation, the widow whose dower has

39. R.I. GEN. LAWS c. 566, § 10 (1938) (as to wills only); CONN. GEN. STAT. § 7083 (1949); OHIO GEN. CODE ANN. § 10512-8 (1938). Wyoming was formerly in this group. WYO. COMP. STAT. ANN. § 66-137 (1945) (repealed Wyo. Laws 1949 c. 93 § 1).

40. *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110 (1895); *Broadstone v. Brown*, 24 Ohio St. 430 (1873) (curtesy).

41. In *Harkness v. Corning*, 24 Ohio 416, 429 (1873), which involved a claim of curtesy, the court said: "Among the incidents attaching at common law to an estate in fee tail, are the rights to curtesy and dower. With these rights the statute [of descent and distribution] above referred to does not interfere." At that time Ohio had a statutory provision which entitled a husband to curtesy whether or not issue had been born during coverture. 1 OHIO REV. STAT. c. 36, § 17 (1860). See *Miller v. Miller*, 83 N.E. 2d 254 (Ohio 1948).

42. 1 RESTATEMENT, PROPERTY § 93 (1936).

43. ARK. STAT. ANN. § 50-405 (1947); COLO. STAT. ANN. c. 40 § 7 (1935); FLA. STAT. § 689.14 (Cum. Supp. 1947); GA. CODE § 85-505 (1933); ILL. ANN. STAT. c. 30, § 5 (1935); KAN. GEN. STAT. ANN. § 58-502 (Cum. Supp. 1947); MO. REV. STAT. ANN. § 3498 (1939); N.M. STAT. § 75-112 (1941).

44. *Burris v. Page*, 12 Mo. 358 (1849); *Spencer v. O'Neill*, 100 Mo. 49, 12 S.W. 1054 (1889) (curtesy). See *Jones v. Makemson*, 293 Ill. 534, 127 N.E. 730 (1920).

45. The term "special limitation" is used in accordance with the usage approved by 1 RESTATEMENT, PROPERTY § 23 (1936).

46. *Moriarta v. McRea*, 45 Hun 564 (N.Y. 1887), *aff'd.* 120 N.Y. 659 (1890). See 1 RESTATEMENT, PROPERTY § 54 (1936); 1 SCRIBNER, DOWER 289-90, 297 (2d ed. 1883); 1 WASHBURN, REAL PROPERTY 268 (6th ed. 1902).

47. *Moriarta v. McRea*, *supra* note 46.

been assigned has the same rights of enjoyment as if her husband had had an estate in fee simple absolute;⁴⁸ but after the happening of the event her estate determines at once. If the husband's estate in fee is limited upon a right of entry for condition broken, mere breach of the condition will no more deprive his widow of dower *ipso facto* than the breach would terminate the husband's estate. The right must be exercised by the person entitled to assert it, and only thereafter will the dower interest be defeated.⁴⁹ The *Restatement of Property* agrees with the foregoing rules and explains them on the principle that dower is a provision for the widow out of the assets of the deceased spouse and that she is entitled to a share of what her husband had, no more and no less.⁵⁰

In those jurisdictions where inchoate dower is recognized as a protected expectancy in the wife during marriage, that interest subsists as if the husband's estate, which is subject to a special limitation or right of entry, were in fee simple absolute, until the happening of the event specified, and, in the case of the right of entry, the exercise of the right by the one entitled to assert it.⁵¹

The same considerations discussed with reference to a fee simple subject to a special limitation or to a right of entry likewise apply to a fee simple conditional and to a fee tail subject to those interests,⁵² except in one situation affecting the fee simple conditional. A reversionary interest which follows such an estate and which will take effect upon the extinction of the specified issue is technically a possibility of reverter.⁵³ Since, as pointed out above,⁵⁴ the widow's dower at common law was not defeated by the extinction of the specified issue, it follows that her interest was in that situation superior to the possibility of reverter in the grantor or his heirs.

TERMINATION OF HUSBAND'S ESTATE BY EXECUTORY LIMITATION

With respect to estate subject to an executory limitation, there is a marked diversity of authority as to the effect upon the right of

48. Presumably the widow might be liable for equitable waste. See 1 RESTATEMENT, PROPERTY § 193 (1936). Cf. *Gannon v. Peterson*, 193 Ill. 372, 62 N.E. 210 (1901); *Fifer v. Allen*, 228 Ill. 507, 81 N.E. 1105 (1907). In Illinois an estate in fee simple subject to an executory limitation is described as a "determinable fee." See KALES, FUTURE INTERESTS IN ILLINOIS § 301 (2d ed. 1920).

49. *Sullivan v. Sullivan*, 139 Iowa 679, 117 N.W. 1086 (1908); *Beardslee v. Beardslee*, 5 Barb. 324 (N.Y. 1849).

50. 1 RESTATEMENT, PROPERTY App. 3 (1936).

51. For a summary of jurisdictions recognizing inchoate dower, see 3 VERNIER, AMERICAN FAMILY LAWS 352-354 (1935).

52. *Anon.*, Carter 208, 210 (C.P. 1669); 1 SCRIBNER, DOWER 290, 293 (2d. ed. 1883).

53. 1 SIMES, THE LAW OF FUTURE INTERESTS § 177 (1936).

54. See text at notes 16 and 17 *supra*.

dower when the limitation over takes effect. If the husband's estate of inheritance is subject to an executory limitation which creates a power of appointment, the courts have generally had no difficulty in holding that the exercise of the power in his lifetime⁵⁵ or by will⁵⁶ defeats the dower of the widow as well as her inchoate right subsisting before his death. This result follows even when the power is possessed and exercised by the husband himself.⁵⁷ If the husband dies without having exercised the power, the dower interest becomes indefeasible.⁵⁸ It should be noted, however, that the *Restatement of Property* takes the position that a power appendant to an estate in fee simple cannot be created. Under that view, an attempt by the intended donee of the power to appoint the property will have no effect on a dower right which has attached to the property.⁵⁹

If the executory limitation creates an executory interest, it might be expected that the determination of the husband's estate of inheritance by the happening of the contingency expressed would terminate the estate of dower. That result is approved by the *Restatement of Property* on the ground that dower is a derivative estate and is subordinated to most other interests which cut short the husband's estate.⁶⁰ However, nearly all jurisdictions in which the question has arisen have taken a contrary position and there is, consequently, practically no case authority for the position taken by the *Restatement of Property*. The question accordingly merits detailed consideration.

If the husband's estate of inheritance which is subject to the executory interest is terminated *during coverture* by the happening of a specified event, there are no cases holding that his estate is partially revived upon his death in order to give dower to his widow. If his estate has not been determined by the happening of the specified

55. *Ray v. Pung*, 5 B. & Ald. 561 (K.B. 1822); *Chinnubbee v. Nicks*, 3 Port. 362 (Ala. 1836); 3 PRESTON, ABSTRACTS OF TITLE *372; 1 SCRIBNER, DOWER 294-6, (2d ed. 1883). *But see Archer v. Urquhart*, 23 Ont. 214 (1893) (curtesy). In *Link v. Edmondson*, 19 Mo. 487 (1854), the court intimated that the rule of *Ray v. Pung*, *supra*, would not apply in Missouri on the ground that by statute equitable seisin of the tenant would be sufficient to endow his spouse.

56. *Thompson v. Vance*, 1 Met. 669 (Ky. 1858).

57. *Ray v. Pung*, 5 B. & Ald. 561 (K.B. 1822); SUGDEN, POWERS 479-81 (8th ed. 1861); 1 WASHBURN, REAL PROPERTY 221 (6th ed. 1902). In Pennsylvania, where a creditor has the power to subject a debtor's estate to the satisfaction of his claim regardless of the dower right of the wife, the husband's estates in fee simple are in effect subject to a power of appointment. Those who take under the exercise of this power have an interest which is superior to the widow's dower. *Mitchell v. Mitchell*, 8 Pa. 126 (1848); In *re Kligerman*, 253 Fed. 778 (E.D. Pa. 1918); 1 RESTATEMENT, PROPERTY App. 4-5 (1936).

58. *Peay v. Peay*, 2 Rich. Eq. 409 (S.C. 1844).

59. 3 RESTATEMENT, PROPERTY §§ 324, 332 (1940). *See Browning v. Bluegrass Hardware Co.*, 153 Va. 20, 149 S.E. 497 (1920). *But see Leggett v. Doremus*, 25 N.J. Eq. 122 (1874).

60. 1 RESTATEMENT, PROPERTY § 54, App. 5-11 (1936).

event during coverture or at his death, there would seem to be no reason why the widow should not be entitled to have her dower set off.⁶¹ Whether the estate which the widow has *after assignment* is thereafter defeated by the happening of the specified event in her lifetime is a different question which no case seems ever to have expressly decided.⁶² It is submitted that the happening of the specified event should in that situation cut short the widow's estate. The analogies presented by the case of an estate subject to a special limitation or to a right of entry for condition broken, discussed above, support that result, which has the clear approval of the American Law Institute.⁶³

If the husband's estate of inheritance is subject to an executory interest which takes effect *upon his death*, as upon the failure of issue him surviving, the problem of the widow's right to dower upon the happening of the specified event has not been resolved in accordance with the conception of dower as a derivative estate. In nearly all of the decided cases the widow has been permitted to claim dower, notwithstanding the fact that her husband's estate determined at his death.⁶⁴ In only two or three cases is there any authority that the widow is not entitled to dower,⁶⁵ and, despite an assertion to the contrary in the *Restatement of Property*,⁶⁶ it is probably safe to say that at most only one jurisdiction in the United States denies dower under these circumstances.⁶⁷

61. *Jackson v. Kip*, 8 N.J.L. 241 (1826); *Sheffield v. Cooke*, 39 R.I. 217, 98 Atl. 161 (1916).

62. In *Flavill v. Ventrice*, 2 Danv. Abr. 655 (1616) the judges were equally divided upon the question of whether under those circumstances the widow's dower was defeated. In *Sheffield v. Cooke*, *supra* note 61, there is dictum to the effect that the widow's dower would not be defeated, but the exact question was not litigated because the event had not yet happened.

63. 1 RESTATEMENT, PROPERTY App. 5 (1936).

64. Cases are collected in 1 RESTATEMENT, PROPERTY App. 7 n.18 (1936). To those cases the following should be added. *Carter v. Couch*, 157 Ala. 470, 47 So. 1006 (1908); *Beatty v. Calliss*, 294 Ill. 424, 128 N.E. 547 (1920); *Fry v. Scott*, 11 S.W. 426 (Ky. 1889); *Buschmeyer v. Klein*, 139 Ky. 124, 129 S.W. 551 (1910); *Cooper's Admr. v. Clark*, 192 Ky. 404, 233 S.W. 881 (1921), *corrected report*, 240 S.W. 361; *Allen v. Saunders*, 186 N.C. 349, 119 S.E. 486 (1923); *American Yarn & Processing Co. v. Dewstoe*, 192 N.C. 121, 133 S.E. 407 (1926); *Johnson v. Johnson*, 4 Tenn. Civ. App. 118 (1914).

65. *Myers v. Moore*, 12 Dec. O. 805 (Ohio 1884). See *Weller v. Weller*, 28 Barb. 588 (N.Y. 1858); *Smith v. Hankins*, 27 Ohio 371 (1875). In *Hatfield v. Sneden*, 54 N.Y. 280 (1873) the New York court announced itself in favor of the *Buckworth v. Thirkell* rule. In *Smith v. Hankins*, *supra*, the widow claimed her husband's realty as statutory heir on the ground that the habendum clause in the deed by which the property was conveyed to the husband was repugnant to the granting clause. So far as appears from the report, counsel for the plaintiff did not claim dower. It was held that when the condition took effect there was nothing left to the plaintiff "by way of inheritance or dower."

66. 1 RESTATEMENT, PROPERTY App. 7, 8 (1936).

67. *Myers v. Moore*, 12 Dec. O. 805 (Ohio 1884). This was a *nisi prius* decision. The case is not cited by the *Restatement of Property*.

Several considerations provide the basis of the accepted view, of which the strongest is English precedent. In the case of *Buckworth v. Thirkell*,⁶⁸ decided in 1785, Lord Mansfield permitted a husband to claim curtesy in the estate of his wife which was determined by her dying under twenty-one without issue living at her death—a decision which is said to have “occasioned some noise in the profession at the time it was decided.”⁶⁹ No previously decided case seems to have been squarely in point.⁷⁰ Forty years later, Lord Mansfield’s holding with respect to curtesy was extended to dower by the decision in *Moody v. King*,⁷¹ on the ground that the earlier case had settled the law and that it would “be productive of much confusion to unsettle it again.”⁷² The court further stated that the purpose of dower is to secure an independent maintenance to a widow for whom the husband may have made an inadequate provision and accordingly refused to deny the widow’s right to an independent maintenance because of “a mere quibble on words.”⁷³

It has been suggested in the *Restatement of Property*, by way of explanation of the decision of *Buckworth v. Thirkell*, that “it may be worth remembering that Lord Mansfield was a Scotch lawyer whose training had stressed the Civil Law.”⁷⁴ If this statement means that Lord Mansfield was inadequately trained in English law, it may be pointed out that he was educated principally in England and that his early legal career was spent largely in that country. After attending Westminster School and Christ Church, Oxford, Lord Mansfield was admitted to Lincoln’s Inn in 1727 and called to the English Bar in 1730.⁷⁵ Indeed, a recent biographer speaks of his “sound knowledge

68. Reported in note in *Doe v. Hutton*, 3 Bos. & P. 643, 652 *et seq.*, 127 Eng. Rep. 347 (C.P. 1804); 1 COLLECTANEA JURIDICA 332 (Hargrave’s ed. 1791).

69. Lord Alvanley, in *Doe v. Hutton*, *supra* note 68, at 653. This was not the only decision of Lord Mansfield’s in the field of conveyancing which scandalized the English Bar. See *Perrin v. Blake*, 1 W. Bl. 672 (K.B. 1769); *Taylor v. Horde*, 1 Burr. 60 (K.B. 1757). Compare Arden’s remarks in *Baynham v. Guy’s Hospital*, 3 Ves. 295, 298 (Ch. 1796); FEARNE, CONTINGENT REMAINDERS *127 *et seq.*; GRAY, RULE AGAINST PERPETUITIES §197, n.3 (4th ed. 1942).

70. In an earlier case, *Sumner v. Partridge*, 2 Atk. 47 (Ch. 1740), there was a devise “to A and her heirs, and if she die before her husband, he to have 20 pounds a year for life, remainder to go to her children.” A died before her husband, and it was held that the husband was not entitled to curtesy. This case is perhaps distinguishable from *Buckworth v. Thirkell* on the ground that A’s children took as purchasers under the devise, and hence A was not seised of an estate to which issue of the marriage might have succeeded. Cf. *Barker v. Barker*, 2 Sim. 249 (Ch. 1828).

71. 2 Bing. 447 (C.P. 1825).

72. *Ibid.* at 451-452. Other reasons were advanced by the court, including the analogy of a fee simple given to a man upon condition that he have children, in which case his widow even would be entitled to dower even if he have no children.

73. *Ibid.*

74. 1 RESTATEMENT, PROPERTY App. 5 (1936).

75. FIFOOT, LORD MANSFIELD 27 *et seq.* (1936).

of English law.”⁷⁶ If, on the other hand, the statement is intended to convey the impression that Lord Mansfield’s decision in the case was influenced by the civil law of Scotland, the reply can be made with emphatic assurance that there is not the slightest echo of Scottish influence in the decision.⁷⁷ From his opinion in *Buckworth v. Thirkell*, the decision in the case seems to have stemmed from a literal acceptance of the definition of dower and curtesy as arising when the sooner dying spouse was seised of an estate of inheritance to which issue of the marriage might by a possibility inherit.⁷⁸ Judging by the arguments of counsel and the brief report of the case, it appears that the court formed its opinion of the case on the ground of the analogy which they supposed it to bear to an estate tail,⁷⁹ in which, as already stated, dower and curtesy are permitted to continue after the failure of issue.⁸⁰ That analogy was clearly presented by counsel in *Moody v. King*.⁸¹ In view of the fact that in both *Buckworth v. Thirkell* and *Moody v. King* the limitation over was to take effect upon the death of the spouse without leaving issue (i.e. definite failure of issue) the analogy to a fee tail was not so close as it would have been if the executory interest had been limited to take effect upon an indefinite failure of issue. Nevertheless, if the widow of one whose issue can only be tenants-in-tail is entitled to dower, it is not wholly illogical that a widow whose children, if any, would take as tenants-in-fee by inheritance should not likewise be entitled to dower.⁸²

Whatever the basis for the decision, *Buckworth v. Thirkell*, as extended by *Moody v. King*, has become accepted law in England,⁸³

76. *Id.* at 32. See 3 CAMPBELL, LIVES OF CHIEF JUSTICES 225 (1881).

77. I make this statement on the authority of the Rt. Hon. Lord Cooper, Lord President of the Court of Session of Scotland, with whom I have corresponded about the case. Despite the later accusation of Lord Redesdale in *Shannon v. Broadstreet*, 1 Sch. & Lef. 52, 66 (Ir. Ch. 1803), that “Lord Mansfield had on his mind prejudices derived from his familiarity with Scotch law,” it is only rarely that any reliance on Scots law can be detected in Lord Mansfield’s decisions. For such a case see *Le Chevalier v. Lynch*, 3 Burr. 1905 (K.B. 1766). Cf. FIFOOT, LORD MANSFIELD 88, 188 n.3 (1936).

78. “During the life of the wife she continued seised of a fee simple to which her issue might by possibility inherit. I am of opinion, that the Defendant is entitled to be tenant by the curtesy.” *Buckworth v. Thirkell*, in *Doe v. Hutton*, 3 Bos. & P. 643, 652, 127 Eng. Rep. 347, 351 (C.P. 1804). Issue of the marriage had been born alive. Cf. *Moody v. King*, 2 Bing. 447, 452, 130 Eng. Rep. 378, 380 (C.P. 1825).

79. See Co. Litt. *241a n. (Butler’s ed. 1823). Compare the sentence in another report of the case in 1 HARGRAVE, COLLECTANEA JURIDICA 332, 336 (1791): “Now it is contended, that this is a conditional limitation: it is no such thing; there is no condition in it; it is a contingent limitation. If it is a limitation, it does not defeat the right of the husband to be tenant by the curtesy: the husband may be tenant by the curtesy, though the estate is spent.”

80. See notes 28, 29, 33 *supra*.

81. By Wilde, Serjt., *Moody v. King*, 2 Bing. 447, 450, 130 Eng. Rep. 378, 379 (C.P. 1825).

82. *Moody v. King*, *supra* n.81.

83. *Ibid.*

Canada,⁸⁴ and in apparently all but one jurisdiction in the United States.⁸⁵ The rule of those cases has even been cited by text writers⁸⁶ and by an occasional decision⁸⁷ as authority for permitting the dower interest after assignment to continue when the executory interest takes effect after the death of the husband. It must be emphasized, therefore, that there is virtually no case authority for the position taken by the *Restatement of Property*, namely, that dower is defeated when the husband's estate is determined by the taking effect of an executory limitation.

The soundness of the rule of *Buckworth v. Thirkell* and *Moody v. King* has been questioned by a number of text writers,⁸⁸ and its acceptance in this country has been roundly criticized by the *Restatement of Property*.⁸⁹ In favor of the rule it has occasionally been argued that the widow should be entitled to dower despite the termination of the husband's estate because of a supposed intent on the part of the original grantor or deviser to include in his conveyance the prolonged estate required for the widow's dower.⁹⁰ Aside from the inherent difficulties in presuming such an intent, it is difficult to see why that intent should be operative in the case of a fee simple subject to an executory limitation and inoperative in the case of a fee simple subject to a special limitation or to a power of appointment. Other writers have sought to limit the application of the rule by distinguishing those cases where the divesting interest is an executory devise and those where it is a shifting use,⁹¹ and it is at least worth noting that all the

84. *Cowan v. Allen*, 26 Can. Sup. Ct. 292 (1896).

85. See cases cited note 64 *supra*. Only in Ohio has the doctrine of *Buckworth v. Thirkell* apparently been rejected. *Myers v. Moore*, 12 Dec. O. 805 (Ohio 1884). See *Smith v. Hankins*, 27 Ohio 371 (1875). The *Restatement of Property* is incorrect in stating that Alabama and Georgia have rejected *Buckworth v. Thirkell*. 1 RESTATEMENT, PROPERTY App. 7, 8 (1936). The case of *Edwards v. Bibb*, 54 Ala. 475 (1875), cited therein, App. 7, n.19, was repudiated ten years later in another case involving the construction of a different clause of the same will, *Bibb v. Bibb*, 79 Ala. 437 (1885). In a subsequent case, *Carter v. Couch*, 157 Ala. 470, 47 So. 1006 (1908) (curtesy) the doctrine of *Buckworth v. Thirkell* was followed. The case of *Daniel v. Daniel*, 102 Ga. 181, 28 S.E. 167 (1897), cited by the *Restatement* in the same note, involved a widow's claim as statutory heir and not dower. In *Smith v. Hankins*, 27 Ohio St. 371 (1875), also cited in the same note, counsel for the plaintiff did not claim dower, at least so far as appears from the report.

86. 1 SCRIBNER, DOWER 305 (2d ed. 1883): "The case, therefore, is to be considered as expressly deciding that the determination of an estate by operation of an executory devise, does not defeat the right of the widow to dower, nor of the husband to be tenant by the curtesy."

87. See *Sheffield v. Cooke*, 39 R.I. 217 (1916).

88. Co. LIT. *241a, n.(Butler's ed. 1823); ROPER, HUSBAND AND WIFE *502-508 (Jacob's ed. 1841); 4 KENT, COMMENTARIES *33n.; PARK, DOWER *177 *et seq.* (1819).

89. 1 RESTATEMENT, PROPERTY, App. 7 *et seq.* (1936).

90. *Hatfield v. Sneden*, 54 N.Y. 280 (1873) (curtesy). See also, *Vance*, *The Restatement of the Law of Property*, 86 U. OF PA. L. REV. 173, 186 (1937).

91. 1 ATKINSON, CONVEYANCING 258 (2d ed. 1841). Cf. *Evans v. Evans*, 9 Pa. 190 (1848); *Milledge v. Lamar*, 4 Desaus Eq. 617 (S. C. 1816), for dicta that the rule of *Buckworth v. Thirkell* applies to shifting uses.

cases in this country in which *Buckworth v. Thirkell* has been followed are cases in which the divesting interest is an executory devise.⁹² At least one case refused to follow *Buckworth v. Thirkell* when the estate was not one which the issue could take by descent but only by purchase.⁹³ Such rationalizations are important more because they indicate dissatisfaction with the rule than because of the inherent subtleties of their distinctions. However, it is interesting and important that nearly all the decided cases in which the rule of *Buckworth v. Thirkell* has been followed involve an executory limitation which takes effect upon the death of the husband without issue him surviving.⁹⁴ To permit dower when the estate of the deceased spouse determines upon the running out of the line of descent accords with the rule permitting dower to be assigned when the husband's estate has come to an end upon the extinction of heirs generally, and the reasons for permitting it in the one case are perhaps the same as in the other.⁹⁵ The acceptance of the rule of *Buckworth v. Thirkell* perhaps reflects a social policy favoring the widow as opposed to the taker under the executory interest, who has rarely, if ever, paid value for the uncertain interest which he received.⁹⁶ Scribner has suggested that the rule of *Buckworth v. Thirkell* is desirable when the husband's estate is defeasible upon an event which is related to the death of the husband, and undesirable when the estate is defeasible upon an event which has no relation to the death of the husband without leaving issue, or which may happen during coverture, or at a period subsequent to his death.⁹⁷ That author was impressed by the analogy to estates tail and to conditional fees at common law, which he considers the *Buckworth v. Thirkell* situation to resemble, and where dower was permitted despite the failure of issue at the husband's death.

Even if it were possible to justify the rule of *Buckworth v. Thirkell* because of the long-accepted tradition in England that a widow is entitled to dower despite the termination of her husband's estate tail by the failure of issue, the continuance of that rule in this country is no longer so justifiable as it may have been in Lord Mansfield's time. Certainly there is little reason to extend the rule so as to permit dower when the executory limitation takes effect at the husband's death for a reason other than his death without leaving

92. See cases cited note 64 *supra*.

93. *Barker v. Barker*, 2 Sim. 249, 57 Eng. Rep. 782 (Ch. 1828). These cases involved curtesy. See also 2 JARMAN, WILLS 1426-7 (1930).

94. See cases cited note 64 *supra*.

95. See text at note 14 *supra*.

96. Cf. *Moody v. King*, 2 Bing. 447, 453 130 Eng. Rep. 378, 380 (C.P. 1825). See Vance, *The Restatement of the Law of Property*, 86 U. OF PA. L. REV. 173, 186 (1937).

97. 1 SCRIBNER, DOWER 319 (2d ed. 1883).

issue, and one court has so held.⁹⁸ The American Law Institute has criticized the rule of *Buckworth v. Thirkell* on the ground that it is "inconsistent with the general law of dower and curtesy."⁹⁹ Consistency is hardly an end in itself and is certainly not decisive if sound policy requires a solution which does not fit an established pattern. Indeed, consistency may perhaps have been served by the court's decision that the facts of *Buckworth v. Thirkell* resembled the analogous situation of a fee tail. However, despite the solicitude of American courts for the widow, even at the expense of third persons, it seems difficult to justify the exception today, apart from stare decisis. The rationalizations articulated by the court in *Moody v. King* are no longer so persuasive as they may have been in the nineteenth century.¹⁰⁰ Moreover, the case is in principle the same as that in which a husband, having an estate in fee simple together with a power of appointment, appoints by will in favor of a third person, in which case his widow is denied dower.¹⁰¹ The fact that dower is subject to the same infirmities as the husband's estate in nearly every other situation is certainly relevant to a consideration of whether or not this conception should be recognized in those jurisdictions where the question has not been specifically adjudicated. To date, no statutes have dealt with the problem. Since common law dower is still widely recognized in this country, the situation would seem to be one in which the policies involved should be carefully considered by the legislatures.

98. *Myers v. Moore*, 12 Dec. O. 805 (Ohio 1884).

99. 1 RESTATEMENT, PROPERTY App. 11 (1936).

100. *Moody v. King*, 2 Bing. 447, 451, 130 Eng. Rep. 378, 379 (C.P. 1825): "A woman by marriage not only surrenders to her husband the personal property of which she is then possessed, and profits of her real property, but also her capacity of acquiring property during her coverture; and she has therefore an equitable claim to a provision out of her husband's property on his death."

101. *Thompson v. Vance*, 1 Met. 669 (Ky. 1858); SUGDEN, POWERS 479-481 (8th ed. 1861). The case put by KALES, FUTURE INTERESTS IN ILLINOIS § 484 (2d ed. 1920), is not in point since in that case *A* appointed by deed during his life. It seems quite clear on all authority that *A*'s widow would be denied dower.

Curiously enough, the *Restatement of Property* takes the position in § 325 that dower is unaffected by the attempted exercise of a power appendant on the ground that such a power cannot be created. The inconsistency is apparently the result of the fact that Professor Powell was the Reporter for § 54 and is the author of the Appendix, whereas Professor Leach was the Reporter for § 325.