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Dower and Curtesy - Defeasance of Decedent's Estate by Conditional Limitation

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DOWER AND CURTESY—DEFEASANCE OF DECEDENT'S ESTATE BY CONDITIONAL LIMITATION

The husband of Defendant died seized of a one-third undivided interest in a tract of land, defeasible by an executory devise over on his dying without issue. Decedent had no issue. Plaintiffs as interested parties brought suit for an adjudication of the rights of the parties in the realty and for partition. The widow's petition asserted that she was entitled to dower in the defeasible fee of which her husband died seized, and her contention was upheld. On appeal, *held,* affirmed. *Snidow et el. v. Snidow,* 192 Va. 60, 63 S. E. 2nd 620 (1951).

Does the determination of a fee simple defeasible estate by operation of an executory devise defeat the right of the surviving spouse to dower or curtesy? The recent Virginia case of *Snidow v. Snidow, supra,* involving dower, so held. All but one[1] of the Virginia cases directly in point are concerned with dower; but the principle applicable to dower is applicable to curtesy, ". . . which seems to be conceded on all sides."[2]

The present line of Virgina decisions is based upon the leading English case of *Buckworth v. Thirkell,*[3] decided in 1785. In that case Lord Mansfield held that the right of the husband to curtesy was not defeated. As was pointed out in a notable treatise,[4] "At the threshold of this inquiry it may be worth remembering that Lord Mansfield was a Scotch lawyer whose training had stressed the Civil Law, and that his reputation for greatness was earned in the fields of marine insurance and commercial law rather than in the field of property law. His pronouncements in the law of land frequently 'occasioned some noise in the profession' as Lord Alvanley[5] said this particular decision did."

Lord Mansfield dealt with the problem in almost the same manner as the Supreme Court of Appeals of Virginia has: He simply defined tenancy by the curtesy in a general way and applied the facts of the case, which he regarded as of the first impression, to the letter of his definition, concluding without further relevant

1. Taliaferro v. Burwell, 4 Call 321 (Va. 1803).
2. Jones et ux. v. Hughes, 27 Gratt. 560 (Va. 1876).
3. Buckworth v. Thirkell, 3 Bos. & Pul. 652, 127 Eng. Rep. (Reprint) note (a) p. 351 (K.B. 1785).
4. RESTATEMENT, PROPERTY, *Dower and Curtesy as Derivative Estates,* Vol. 1 Ap. 5 (1936).
5. Doe v. Hutton, 3 Bos. & Pul. 643, 127 Eng. Rep. (Reprint) 347 (1804).

rationale:[6] "During the life of the wife she continued seized 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." In one of the monographs in the Appendix of the RESTATEMENT it is pointed out that this reasoning is contrary to the reasoning applied to dower cases involving purchase money mortgages and vendors' liens.[7]

It is difficult to find any strong reason to support the proposition that dower should be allowed in realty which does not go to the deceased's heirs or to the devisees under his will, but to the ones designated by the grantor of the fee simple defeasible.

1. It has not been seriously argued in Virginia that it was the intention of the creator of the estate to permit dower; in no case has there been evidence to support such a view. Dower and curtesy are imposed by law on estates of inheritance and are not created by contract. Therefore, in the consideration of dower or curtesy the intention of the original grantor is not controlling; public policy should be the major concern.

2. There is no good reason founded on public policy for the result reached in the *Buckworth* case. In *Jones v. Hughes, supra,* at 565 it was said that since the widow should have dower if the decedent died with issue, " . . . there would seem to be no good reason why the husband's estate should not be prolonged, so as to give the right of dower in the one case as well as in the other, particularly as it is allowed to estates tail under similar circumstances . . ." It is suggested that a very good reason against the prolongation theory is found in the fact that estate of the decedent cannot be added to for the benefit of his widow without subtracting from the estate of the devisee over. The principle of dower and curtesy is based upon the marriage of the decedent and the surviving spouse: Dower is an extension of the duty of a husband to support his wife; curtesy has its origin in the common law unity of man and wife. There is no marriage bond between the devisee over and the decedent's wife; and there is no duty on the part of the devisee over, who might be a total stranger, to support the decedent's wife, any more than it is the duty of any other property owner to do so. It seems unjust to require one to assume an obligation of another's marriage.

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6. Buckworth v. Thirkell, *supra,* Reprint at 353.
7. RESTATEMENT PROPERTY, *supra,* at 6.

The general rule is that dower and curtesy are derivative in nature. The exceptions to this rule—the fee tail, prior to 1776 in Virginia, and perhaps the fee conditional, prior to 1285—were based on the following reason: "In that country [England] from the fifteenth century on, so great a part of the land was entailed, and so large a part of the provision for the surviving spouse consisted of land rights passing as dower or curtesy that it was felt necessary to give to the surviving spouse of a tenant in tail a right to either dower or curtesy superior to all remainders, executory interests and reversions."[8] When the reason for the rule ceases the rule should cease; yet in this instance the rule as to fees tail has been kept alive and extended by an unusual use of analogies. Butler wrote of the *Buckworth case,* "It may therefore seem singular that the court, on this occasion, should prefer reasoning by way of analogy from the only admitted *exception* to the general rule (estates in fee tail) to reasoning by analogy from the general rule itself."[9]

3. The doctrine of *stare decisis* is used in support of the most recent Virginia cases. *Buckworth v. Thirkell* is cited. In 1876 *Jones v. Hughes, supra* and *Medley v. Medley,*[10] cases decided on the same day, followed the leading English case. In *Jones v. Hughes* the court said at 562, "And the same was held by this court a few years after [*Buckworth v. Thirkell*] in *Taliaferro v. Burwell.* No reference is made by the court in its decision, or by the council in argument, to the above decision of Lord Mansfield, which was probably not then known here." The *Taliaferro case, supra,* and the English case of *Moody v. King*[11] cite LITTLETON § 53, 2 Bac. Ab. 223 in their support of the prolongation theory. This section of LITTLETON defines dower and states the special rule applied to estates in fee tail; hence it is no more in point than any other authority that gives the general definition of dower that is accepted by all. One is tempted to ask, as does Wigmore in a comparable situation, "Is it not strange how slow some judges are to get out of the self-imposed bondage of precedents?"[12]

Minor gives the view of Virginia and the majority of Ameri-

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8. RESTATEMENT, PROPERTY, *supra,* at 13, 14.
9. BUTLER, COKE ON LITTLETON, note 241(a), as quoted in RESTATEMENT, PROPERTY, *supra,* at 7.
10. Medley v. Medley, 27 Gratt. 568 (Va. 1876).
11. Moody v. King, 2 Bing. 447, 130 Eng. Rep. (Reprint) 378 (C.P. 1825).
12. 5 WIGMORE, EVIDENCE § 1476 n. (3rd Ed. 1940).

can jurisdictions, citing the *Taliaferro, Jones, and Medley* cases.[13] In the United States at least eleven states[14] follow the view taken in the Buckworth case. Three states are opposed.[15] Although the majority view has been described as "undoubtedly correct,"[16] the authorities are greatly divided. The American Law Institute[17] and CORPUS JURIS SECUNDUM[18] support the minority view. Chancellor Kent wrote in support of the minority view, advocating its adoption,[19] "The subject is replete with perplexed refinements, and it is involved too deep in mystery and technical subtleties to be sufficiently intelligible for practical use. Here arises a proper case for the aid of the reformer. When any particular branch of the law has departed widely from clear and simple rules, or, by the use of artificial and redundant distinctions, has become uncertain and almost incomprehensible, there is no effectual relief but from the potent hand of the lawgiver."

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13. 2 MINOR'S INSTITUTES c. 8, p. 155 (4th Ed. 1891).
14. RESTATEMENT, PROPERTY, *supra*, at 7.
15. Edwards v. Bibb, 54 Ala. 475 (1875); Daniel v. Daniel, 102 Ga. 181, 28 S.E. 167 (1897); Smith v. Hankins, 27 Ohio St. 371 (1875).
16. 37 VA. LAW REV. 782 (1951).
17. RESTATEMENT, PROPERTY, § 54 (1936).
18. Smith v. Shepard, 370 Ill. 491, 19 N.E.2d 368 (1939); Hopper v. Hopper, 172 Md. 152, 190 A. 841 (1937); National Holding Co. v. Oram, 29 Ohio Ap. 138, 162 N.E. 704 (1928); Sheffield v. Cooke, 39 R.I. 217, 98 A. 161 (1916); McNeil v. McNeil, 61 Utah 141, 211 P 988 (1922); 28 C.J.S., Dower § 26 (1941).
19. 4 KENT, COMMENTARIES *33n. (1873).