

NOTES

Inchoate Dower and Inchoate Curtesy—Corresponding Rights Today— Not Remainders

I

At common law and today the wife was immediately upon marriage entitled to an estate in her husband's lands if she survived him. This estate was for her life in all lands of which the husband was at any time seised of an estate of inheritance either legal or, by statute in 1799, equitable during coverture.¹ The wife's right before the death of her husband was known as inchoate dower.²

A husband at common law, on the other hand, upon his marriage became seised by right of his wife in all of his wife's lands and was by this right entitled to the rents, issues, and profits. Upon birth of issue alive he became seised of an estate known as curtesy initiate in all lands of his wife in which she had an estate of inheritance either legal or equitable.³ Curtesy initiate was an estate for their joint lives and ripened into curtesy consummate upon the death of his wife if he survived her.⁴

Both the estate of the husband in his wife's lands by right of the wife and his estate of curtesy initiate were subject to levy and execution.⁵ This remedy was given to his creditors because, since he had the enjoyment of the lands, it was no more than fair that the lands should be subject to the payment of his debts. In fact, this was necessary because upon marriage the husband became entitled to all his wife's personal property and all her choses in action which he reduced to possession. He was also liable for all of her debts and his property could be taken to satisfy any such judgments. It will be seen that, if this were not so, creditors of the wife could not satisfy their judgments since the wife had no separate estate except in equity. Moreover,

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1. *Young v. Young*, 45 N.J.Eq. 27, 16 A. 921 (Ch. 1889).
 2. *In re Alexander*, 53 N.J.Eq. 96, 30 A. 817 (Ch. 1894).
 3. *Cushing v. Blake*, 30 N.J.Eq. 689 (E. & A. 1869).
 4. *Nicholls v. O'Neill*, 10 N.J.Eq. 88 (Ch. 1854); *Hopper v. Gurtman*, 126 N.J.L. 263, 18 A. 2d 245 (E. & A. 1941).
 5. *Nicholls v. O'Neill*, *supra* note 4.

this worked no hardship on the wife since it was an estate in the husband which was vested in possession in him and she could not have had the enjoyment of the property until his death, at which time the rights of the purchaser of the husband's estate would terminate unless the judgment ran against her jointly with her husband.

However, after the passage of the Married Women's Act,⁶ the husband no longer took title to his wife's personal property of any kind. In addition, since the act provided that the wife should have complete control over her lands as though she were a *femme sole*, the right of the husband to possession of his wife's lands and both his estates by right of the wife and curtesy initiate were inconsistent with this provision and hence were destroyed by it.⁷ This left the husband's right of curtesy consummate untouched. He was no longer entitled to the possession of the lands of his wife and their enjoyment, these being preserved for the wife by the act; but he was still entitled to curtesy consummate in her lands if he survived her. This right, however, was conditioned upon the birth of issue alive since, the act being silent, the common law prerequisite of the birth of issue capable of taking the inheritance was necessary before the husband could have an estate of curtesy consummate.⁸

Hence, the problem arose as to the nature of the husband's interest after birth of issue alive during the lifetime of his wife. Before the birth of issue, the right to curtesy consummate was subject to two contingencies: first, that issue be born and, second, that he survive his wife; but after the fulfilment of the first contingency he had only to survive his wife to be entitled to curtesy consummate and his right under these circumstances corresponds to his wife's right of inchoate dower. She, too, would be entitled to an estate in his lands if she survived him though, like him, she had no present estate.

He could have no estate during the lifetime of his wife in view of the provisions of the Married Women's Act; so the term inchoate curtesy arose to describe his interest under these circumstances. This

6. R. S. 37:2—1 *et. seq.*; N. J. S. A. 37:2—1 *et. seq.*

7. *Porch v. Fries*, 18 N.J.Eq. 204 (Ch. 1867).

8. *Doremus v. Paterson*, 69 N.J.Eq. 188, 57 A. 548 (Ch. 1905), *aff'd* 69 N.J.Eq. 775, 61 A. 396 (E. & A. 1905).

term is believed to be accurate as compared to inchoate dower to which it would seem to correspond. This inchoate curtesy, like inchoate dower, could not be levied upon⁹ even though at common law an estate which arose in similar circumstances in the husband known as curtesy initiate was subject to levy. The reasons for subjecting whatever right the husband had in the lands of his wife to levy and execution no longer existed after the abolition of the estates of the husband by right of his wife and curtesy initiate; for, by statute, he could no longer take title to his wife's personal property and was deprived of his right to the possession and enjoyment of her lands. He was also exempted from his liability for her debts since her creditors could now have their remedy against her separate estate.

The creditor of the husband could not acquire the husband's right¹⁰ and make the wife treat with a stranger in dealing with her lands any more than a creditor of the wife could take her corresponding right in the lands of the husband.¹¹ Neither spouse could alienate his inchoate right for the same reasons.¹²

These rights are valuable rights¹³ which are protected by the law. It was held that a release of dower was good consideration to sustain a conveyance by a husband to a wife against his creditors¹⁴ and that a conveyance of all the husband's lands on the eve of marriage to defeat dower would be set aside as fraudulent.¹⁵ It is submitted that the right of inchoate curtesy is of equal value, and the same results would be reached if the question came before the courts. Moreover, both rights of inchoate dower and inchoate curtesy are protected when

9. *Bucci v. Popovich*, 93 N.J.Eq. 121, 115 A. 95 (Ch. 1921), *aff'd* 93 N.J.Eq. 511, 116 A. 923 (E. & A. 1922).

10. *Bucci v. Popovich*, *supra* note 9.

11. *Capital Circle, B. of U. v. Schmitt*, 84 N.J.Eq. 95, 92 A. 596 (Ch. 1914).

12. *Fuchs v. Christie*, 79 N.J.L. 14, 74 A. 129 (S. Ct. 1909); *Bucci v. Popovich*, *supra* note 9; *Hannan v. Wilson*, 100 N.J.Eq. 528, 135 A. 809 (E. & A. 1926).

13. *Trade Insurance Co. v. Barracliff*, 45 N.J.L. 543, 46 Am. Rep. 792 (E. & A. 1883); *Fike v. Fike*, 3 N.J.Misc. 485, 128 A. 849 (Ch. 1925).

14. *Wright v. Stannard*, Fed. Cas. 18094, 2 Brock 311.

15. *Smith v. Smith*, 6 N.J.Eq. 515 (Ch. 1847).

the land is converted into money by sale under judicial process.¹⁶

Today the rights of husband and wife correspond even more closely, for by statute the husband has curtesy consummate in the lands of his wife whether issue be born or not.¹⁷ So it would seem that the right to curtesy consummate, like dower, arises in favor of the husband by reason of the marriage alone, and his rights in his wife's lands would be the same immediately upon marriage as they were after the passage of the Married Women's Act when issue were born alive. The right to curtesy attaches, like dower, to all the lands of the wife of which she is actually seised¹⁸ or to her equitable estates, the seisin, in conformity to her beneficial interest, being sufficient to support the right.

Since both inchoate dower and inchoate curtesy arise under the same circumstances, both are subject to the same contingency of survivorship, attach to the same estates of the spouses, have the same restrictions upon alienation whether voluntary or involuntary, are given equal protection when the land is converted into money by judicial process, and though neither spouse takes a present estate in the lands of the other yet both rights are recognized by the law as valuable rights, it is submitted that today there is no reason for distinguishing between the legal consequences of inchoate dower and inchoate curtesy. In fact, the courts in the usual situations, after the passage of the Married Women's Act, have treated them alike or, more properly, have not treated them differently.

16. *Wheeler v. Kirtland*, 27 N.J.Eq. 534 (E. & A. 1875); *Ross v. Adams*, 28 N.J.L. 160 (S. Ct. 1859), *rev'd* on other grounds, 30 N.J.L. 505, 82 Am. Dec. 237; *Hays v. Whitall*, 13 N.J.Eq. 241 (Ch. 1861); *Hackensack Trust v. Tracy*, 86 N.J.Eq. 301, 99 A. 846 (Ch. 1916); *Leach v. Leach*, 69 N.J.Eq. 620, 61 A. 562 (Ch. 1905).

17. R. S. 3:37-2; N. J. S. A. 3:37-2.

18. Distinction is sometimes drawn between dower and curtesy in that seisin in law is not regarded as sufficient to support curtesy. However, the reason for this distinction has vanished since the Married Women's Act. Today the wife may recover the possession of her lands without the joinder of her husband; also the various statutes concerning dower and curtesy would seem to indicate that the legislature intends that they should be identical. Cf. *Statutes and Their Sources* by Landis in *Harvard Legal Essays*.

II

The courts sometimes refer to the rights of inchoate dower and inchoate curtesy as vested remainders.¹⁹ This terminology is, at the least, very confusing. They are not remainders. The definition of a remainder given by Chancellor Kent is as follows:

“The remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate and not in abridgement of it.”²⁰

This definition is generally accepted by the authorities.²¹ It will be seen from an examination of these words that dower and curtesy are not remainders. They are not “the remnant of an estate after a particular estate,” nor are they created by the same instrument which creates the particular estate. On the contrary, they are life estates created by operation of law. Moreover, in law they are treated differently for neither inchoate dower nor inchoate curtesy may be levied upon by execution independently of the fee;²² and, though under modern statutes both vested remainders and certain types of contingent remainders are transferable,²³ yet the courts do not permit the alienation of either inchoate dower or inchoate curtesy.²⁴ Both rights are personal to the party and hence inalienable; one spouse cannot make the other treat with a stranger. These rights may be destroyed in only two ways. One is the very common release of dower or curtesy and the other would seem to fall under the heading of joinder with the fee. By this is meant that the dower or curtesy may be destroyed if the right to one is in the same person as the fee, as where a wife with

19. *Doremus v. Paterson*, *supra* note 8; *Hackensack Trust v. Tracy*, *supra* note 16; *Hopper v. Gurtman*, *supra* note 4.

20. 4 Kent 197; A shorter but substantially the same definition, Co. Lit. 143A.

21. Will. Real Prop. 282; Chall. Real Prop. 69.

22. *Supra* note 9.

23. R. S. 46:3-7; N. J. S. A. 46:3-7.

24. *Mullen v. Mullen*, 98 N.J.Eq. 90, 129 A. 749 (Ch. 1924), *aff'd* 98 N.J.Eq. 728, 130 A. 628 (E. & A. 1924).

a right to inchoate dower acquires the equity of redemption.²⁵ The joinder may be accomplished also by a joint judgment and execution against the husband and wife.²⁶ This execution and sale takes both the fee and the right to curtesy or dower and they merge in the fee or, rather, are destroyed by their union. Execution is impossible against the inchoate right alone, which is indestructible in this manner; but, if it can be brought together with the fee, it is destroyed whether this joinder be accomplished through an execution on a joint judgment, by the ownership of both rights coming to the same person, or by the right being released to the owner of the fee.²⁷

Considerable confusion appears in the cases referring to the question whether inchoate dower and inchoate curtesy are remainders. The discussions have been mostly in connection with whether a husband is a proper or necessary party to suits involving his wife's lands.²⁸ It is submitted that in all cases he would be at least a proper party because of equity's principle that all those interested in the object of the suit shall be parties. Vice-Chancellor Stevens in dicta in the case of *Doremus v. Paterson*²⁹ referred to the rights of the husband before issue born as a contingent remainder and so held he was not even a proper party;

25. *Wade v. Miller*, 32 N.J.L. 296 (S. Ct. 1867).

26. *Hopper v. Gurtman*, *supra* note 4.

27. An interesting question presents itself as to whether a release is not merely another method of accomplishing the joinder with the fee of the rights of inchoate dower and inchoate curtesy. No cases were found in which a release was valid except to one who held at least the technical fee of the mortgagee. However, such a view would raise the difficulty of explaining the validity of a release of inchoate dower or inchoate curtesy in a state that followed the lien theory of mortgages, where the legal title was held by the mortgagor and the mortgagee gets only a lien. Perhaps this lien of the mortgagee would be sufficient to sustain the release and cause its merger as to him or, perhaps, the release could be viewed as being suspended until proceedings were taken against the land and then the inchoate right destroyed by the union with the fee.

28. *Castner v. Sliker*, 43 N.J.Eq. 8, 10 A. 493 (Ch. 1888); *Doremus v. Paterson*, *supra* note 8; *Hackensack Trust v. Tracy*, *supra* note 16; *Bristol v. Skerry*, 64 N.J.Eq. 624, 54 A. 135 (Ch. 1903).

29. *Doremus v. Paterson*, 69 N.J.Eq. 188, 57 A. 548 (Ch. 1905), *aff'd* 69 N.J.Eq. 775, 61 A. 396 (E. & A. 1905).

he also spoke of the husband's rights after issue born as a vested remainder. This dicta was followed on a similar question of joinder by Vice-Chancellor Walker in the case of *Hackensack Trust Co. v. Tracy*.³⁰ Again, however, these statements were unnecessary to the decision. In the subsequent case of *Bucci v. Popovich*,³¹ Vice-Chancellor Fielder decided that the trustee in bankruptcy of the husband acquired no interest in his wife's lands. This decision was made with the concurrence of the then Chancellor Walker. The case of *Hopper v. Gurtman*³² again refers to inchoate curtesy as a vested remainder, though once again it was not necessary to the decision. It will be seen that it is important that this terminology be abandoned. If such an inchoate right were a vested remainder, then any judgment against the husband would be a lien against his wife's lands and, as a result, many titles in this state would be jeopardized because it has never been considered necessary to search against the husband when the title came through the wife. The case of *Bucci v. Popovich*³³ indicates and, it is submitted, correctly so, that such a search is entirely unnecessary. To hold either the inchoate right of dower or inchoate curtesy a vested remainder would thus seem to be unnecessary and highly undesirable.

30. *Hackensack Trust v. Tracy*, *supra* note 16.

31. *Bucci v. Popovich*, *supra* note 9.

32. *Hopper v. Gurtman*, *supra* note 4.

33. *Bucci v. Popovich*, *supra* note 9.