

1950

Interests in Land Subject to Dower--In Kentucky

James C. Blair
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Property Law and Real Estate Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Blair, James C. (1950) "Interests in Land Subject to Dower--In Kentucky," *Kentucky Law Journal*: Vol. 39: Iss. 1, Article 17.

Available at: <https://uknowledge.uky.edu/klj/vol39/iss1/17>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

INTERESTS IN LAND SUBJECT TO DOWER — IN KENTUCKY

At common law, a widow's dower interest was the right to a life estate, after the death of her husband, in one-third of the realty of which the husband was seised in fee simple or fee tail at any time during the marriage, except that there was no right to dower in land in which she had relinquished such right.¹

In Kentucky, dower is now governed generally by statute, the principal dower statutes, in regard to real property, being declaratory of the common law to a great degree. The wife's dower interest is still a life estate in one-third of the realty of which the husband was seised in fee simple during coverture, unless she has in some manner relinquished that right. Therefore, there are two basic requirements for dower: that the husband be seised during coverture, and that he have a fee simple estate.

The words "seized" and "seisin" are not susceptible of precise definition. Most authorities agree that at common law "seisin" usually meant the kind of possession one had when he had a freehold ownership.² However, in more recent times, the ownership connotation has been emphasized, and the word "seized" has frequently been used as if it were synonymous with "owned."³ In determining whether there is a dower interest, "seized" seems to have been interpreted by the courts to mean a present beneficial ownership. As can be seen as this note develops, the meaning given to this key word has actually been the determining factor as to which interests carried with them, a right to dower. In this connection, it should be recognized that actual possession by the husband is not necessary as long as he had the requisite seisin.⁴

If the fee simple ownership of the husband during coverture has not been modified in any of many possible ways, some of which are subsequently discussed,

¹ 2 TIFFANY, REAL PROPERTY, sec. 487 (3rd ed. 1939).

² KY. REV. STAT. sec. 392.020 (1948). "After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during coverture, unless the survivor's right to such dower or interest has been barred, forfeited or relinquished." A statute substantially to this effect was enacted at least as early as 1809. 1 STAT. LAW OF KY. p. 516 (Littell, 1809).

KY. REV. STAT. sec. 392.030 (1948). "If the husband, during the coverture, was seized in law of the fee simple of any real estate, then the wife, if she survives him, may have dower in that real estate, although the husband never had actual possession."

KY. REV. STAT. sec. 392.040 (1948). "(1) The wife shall not have dower in land sold but not conveyed by the husband before marriage, nor in land sold in good faith after marriage to satisfy an encumbrance created before marriage or created by deed in which she joined, or to satisfy a lien for the purchase money. If, however, there is a surplus of the land or proceeds of sale after satisfying the lien, she may have dower out of that surplus of the land or compensation out of the surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime. (2) If the husband held land by executory contract only, the wife shall not have dower in the land, unless he owned such an equitable right at the time of his death." A statute almost exactly like this one was enacted at least as early as 1852. REV. STAT. OF KY. c. 47, art. 4, secs. 6, 13, p. 393 (1852). The present statutes were enacted in 1894.

³ 1 TIFFANY, *op. cit. supra*, note 1, sec. 20. A freehold interest is one greater than a leasehold interest. 1 TIFFANY, *op. cit. supra*, note 1, sec. 25.

⁴ 2 TIFFANY, *op. cit. supra*, note 1, sec. 489.

⁵ KY. REV. STAT. sec. 392.030, *supra* note 2.

the wife has a dower right in the land. This almost meaningless generality is about the only generality that can be drawn in respect to those interests in land in which a wife has a right to dower, so, in the interest of accuracy, we are forced to a consideration of the widow's dower right in certain specific situations. The writer has not attempted to solve every problem that arises, or even to discuss them all, but rather, to survey the Kentucky dower law in this respect, and bring out the general rules governing it.

1. Life Estates

Clearly, there is no dower right where the husband had only a life estate.⁶ The statute expressly limits dower to fee simple estates.⁷ Dower is but a continuance of the estate of the husband, and there can be no dower unless it is an estate of inheritance.⁸

2. Future Interests

Where the husband had only a remainder interest and predeceased the owner of the life estate, the widow has no right to dower in such land.⁹ The courts, in this situation, look to the possessory connotation of "seisin" and since the husband never owned a freehold interest under which he had possession or a right to present possession, he was never "seized."¹⁰ This rule applies even though the owner of the life estate is a widow who has had the land assigned to her as dower.¹¹ However, if the land was subject to a dower right, but the dower was never assigned, the wife of the owner of the fee has a right to dower in that land.¹²

3. Defeasible Fees

A wife has a right to dower in a defeasible fee owned by the husband,¹³ unless the estate has been determined during the husband's life.¹⁴ But where the fee is to be determined if the husband dies without issue, and he does die without

⁶ Ford v. Yost, 300 Ky. 764, 190 S.W. 2d 21 (1945); Bodkin v. Wright, 266 Ky. 798, 100 S.W. 2d 824 (1937); Brady v. Brady, 158 Ky. 541, 165 S.W. 655 (1914); Thompson v. Vance, 58 Ky. (1 Metc.) 669 (1858). 2 TIFFANY, *op. cit. supra*, note 1, sec. 496.

⁷ KY. REV. STAT. sec. 392.020, *supra* note 2.

⁸ Ford v. Yost, 300 Ky. 764, 190 S.W. 2d 21 (1945); Bodkin v. Wright, 266 Ky. 798, 100 S.W. 2d 824 (1937).

⁹ Goodrum v. Guardian v. Kelsey, 244 Ky. 349, 50 S.W. 2d 932 (1932); Young v. Morehead, 94 Ky. 608, 23 S.W. 511 (1893); Arnold's Heirs v. Arnold's Admr., 47 Ky. (8 B. Mon.) 202 (1848). 2 TIFFANY, *op. cit. supra*, note 1, sec. 501.

¹⁰ Dixon v. Harris, 32 Ky. L. Rep. 275, 105 S.W. 451 (1907); Butler v. Cheat-ham, 71 Ky. (8 Bush) 594 (1871); Northcut v. Whipp, 51 Ky. (12 B. Mon.) 65 (1851).

¹¹ Carr v. Hart, 232 Ky. 37, 22 S.W. 2d 432 (1929); Carter v. McDanel, 94 Ky. 564, 23 S.W. 507 (1893); *cf.* Cate v. Ganter, 31 Ky. L. Rep. 892, 104 S.W. 296 (1897) (widow occupied the land as a homestead). 2 TIFFANY, *op. cit. supra*, note 1, sec. 502.

¹² Robinson v. Miller, 41 Ky. (2 B. Mon.) 284 (1842). This case may be sustained on either of two grounds, one of them being the one for which it is cited. 2 TIFFANY, *op. cit. supra*, note 1, sec. 502.

¹³ Daniel v. McManama, 64 Ky. (1 Bush) 544 (1866).

¹⁴ *See* Northcut v. Whipp, 51 Ky. (12 B. Mon.) 65, 72 (1851). 1 WALSH, REAL PROPERTY sec. 100 (1947).

issue, the wife still has a right to dower.¹⁵ This view is a continuation of the common law view which was earlier taken in regard to fee tails and later extended to include this situation.¹⁶

4. Land Jointly Owned

If the land was owned by the husband as a tenant in common, a widow is entitled to dower in the husband's interest.¹⁷ If the land was partitioned during the husband's lifetime, the widow has a right to dower only in the part received by the husband,¹⁸ but if the land was not partitioned during the life of husband, it has been held that she must take her dower as a tenant in common and is not entitled to be assigned dower in any certain part of the land.¹⁹

5. Partnership Land

There is a right to dower in the husband's share of partnership realty which is owned by the partnership at his death, *after* all the debts of the partnership have been paid.²⁰ An explanation given for this is that each partner holds an interest in the realty as a tenant in common, in trust for the partnership, and to the extent that it is needed to satisfy the obligations of the firm, each partner is a trustee and not a beneficial owner.²¹ It was earlier held that partnership realty would be treated as personalty for all purposes,²² but the later view is that once the partnership debts are paid, such realty will go to the widow and hers as realty,²³ at least unless the partners have agreed that it is to be treated as personalty for all purposes.²⁴ Of course, if title has once vested in the husband during

¹⁵ *Murphy v. Murphy*, 182 Ky. 731, 207 S.W. 491 (1919); *Landers v. Landers*, 151 Ky. 206, 151 S.W. 386 (1912); *Rice v. Rice*, 133 Ky. 406, 118 S.W. 270 (1909); *Fry v. Scott*, 10 Ky. L. Rep. 1013, 11 S.W. 426 (1889); *Northcutt v. Whipp*, *supra* note 14. This view, which is apparently the majority view, is severely condemned by 1 WALSH, *op. cit. supra*, note 14, sec. 100, and he credits its perpetuation to *stare decisis* (In this connection see *Rice v. Rice*, *supra* at 410, 118 S.W. at 271). 2 TIFFANY, *op. cit. supra*, note 1, sec. 510, apparently prefers the majority view.

¹⁶ *Northcutt v. Whipp*, 51 Ky. (12 B. Mon.) 65 (1851).

¹⁷ *Bloom v. Sawyer*, 121 Ky. 308, 28 Ky. L. Rep. 349, 89 S.W. 204 (1905); *Dehoney v. Bell*, 17 Ky. L. Rep. 76, 30 S.W. 400 (1895); see *Davis v. Logan*, 39 Ky. (9 Dana) 185, 186 (1839).

¹⁸ *Napper v. Mutual Life Ins. Co.*, 107 Ky. 134, 53 S.W. 28 (1899).

¹⁹ *Bloom v. Sawyer*, 121 Ky. 308, 28 Ky. L. Rep. 349, 89 S.W. 204 (1905). 2 TIFFANY, *op. cit. supra*, note 1, sec. 536.

²⁰ *Lowe v. Lowe*, 76 Ky. (13 Bush) 688 (1878); *Galbraith v. Gedge*, 55 Ky. (16 B. Mon.) 631 (1855). The Uniform Partnership Act, sec. 25 (e) abolishes the right to dower in specific partnership property.

²¹ 1 WALSH, *op. cit. supra*, note 14, sec. 99.

²² *Cornwall v. Cornwall*, 69 Ky. (6 Bush) 369 (1869). This represents the English and minority view. 2 TIFFANY, *op. cit. supra*, note 1, sec. 504.

²³ See *Bennett v. Bennett*, 137 Ky. 17, 20, 121 S.W. 495, 496 (1910); *Davidson v. Richmond*, 24 Ky. L. Rep. 699, 69 S.W. 794 (1902).

²⁴ See *Givens v. Clark*, 13 Ky. Op. 676, 678, 7 Ky. L. Rep. 291 (abstract) (1885); *Lowe v. Lowe*, 76 Ky. (13 Bush) 688, 692 (1878). There is an extensive analysis of the Kentucky law on this point in 25 A.L.R. 397, where it is apparently concluded that the partners may, by agreement, impress the property with the character of personalty for all purposes. The cases cited in the previous footnote, however, have shown a tendency to discard this, and a recent case, *Strode v. Kramer*, 293 Ky. 354, 169 S.W. 2d 29 (1943) appears to follow these later cases.

the marriage, he cannot defeat dower by subsequently turning it into partnership property.²⁵

6. Land Subject to Equities and Liens

Since the wife's claim through the husband is subject to all the infirmities of the husband's title, if the husband buys land subject to an outstanding equity of which he has notice, the dower right has no priority over such equity.²⁶

Similarly, the wife does not have a right to dower in land sold to satisfy a lien for the purchase money, and as long as there is such a lien on the land, her dower right is subject to it.²⁷ She does, however, have dower in any surplus proceeds from the sale of the land to satisfy such a lien if such proceeds were not received or disposed of by the husband in his lifetime.²⁸ This is now based on statute, but is consistent with the requirement of beneficial ownership, since the husband never beneficially owned the land to the extent that he had not paid the vendor for it.²⁹ This supports the observation made earlier that beneficial ownership seems to be the key to the scope of the dower statute. If the vendor waives the lien as against the vendee, the dower right is no longer subject to it.³⁰ It is not necessary that the lien be enforced by court proceedings; any good faith sale to satisfy it is sufficient to cut off the dower right.³¹ The husband may sell more of the land upon which there is such a lien than is necessary to satisfy it, and if he does so in good faith because of the lien, the wife is still entitled to dower only in the surplus proceeds.³² If the wife fails to receive her dower out of the surplus proceeds, she has no claim against the land or the purchaser of the land, but may look only to the distributees of the surplus.³³

²⁵ See *Ratcliffe v. Mason*, 92 Ky. 190, 195, 17 S.W. 438, 439 (1891).

²⁶ *Adams v. Collier*, 8 Ky. Op. 323 (1875); see *Bartlett v. Gouge*, 44 Ky. (5 B. Mon.) 152, 153 (1844).

²⁷ KY. REV. STAT. sec. 392.040, *supra* note 2. *Chalk v. Chalk*, 291 Ky. 702, 165 S.W. 2d 534 (1942); *Matney v. Williams*, 28 Ky. L. Rep. 494, 89 S.W. 678 (1905); *Helm v. Board*, 114 Ky. 289, 70 S.W. 679 (1902); *Ratcliffe v. Mason*, 92 Ky. 190, 17 S.W. 438 (1891); *Johnson v. Cantrill*, 92 Ky. 59, 17 S.W. 206 (1891); *Poor v. Leavell*, 12 Ky. Op. 545, 5 Ky. L. Rep. 769 (abstract) (1884); *Lee v. James*, 81 Ky. 443, 5 Ky. L. Rep. 492 (1883); *Nazereth Literary and Benevolent Institution v. Lowe*, 40 Ky. (1 B. Mon.) 257 (1841). On this general subject see 52 L.R.A. (N.S.) 555.

²⁸ KY. REV. STAT. sec. 392.040, *supra* note 2. See *Chalk v. Chalk*, *supra* note 27 at 709, 165 S.W. 2d at 538; *Ratcliffe v. Mason*, *supra* note 27 at 197, 17 S.W. at 439; *Nazereth L. & B. I. v. Lowe*, *supra* note 27 at 259.

²⁹ "The wife's right of dower, is subordinate to the vendor's lien for the purchase money, because the lien is coeval with the husband's right to the land, and he acquires his title subject to the lien. As the title and the lien originate at the same time, the husband never has any right either equitable or legal unincumbered by the lien, and the wife's right of dower is therefore subject to the incumbrance." *McClure v. Harris*, 51 Ky. (12 B. Mon.) 261, 264 (1851); see *Lee v. James*, 81 Ky. 443, 445, 5 Ky. L. Rep. 492, 493 (1883).

³⁰ See *Carpenter's Ex. v. Kearns*, 12 Ky. Op. 9, 10, 4 Ky. L. Rep. 825 (abstract) (1883).

³¹ *Ratcliffe v. Mason*, 92 Ky. 190, 17 S.W. 438 (1891); *Johnson v. Cantrill*, 92 Ky. 59, 17 S.W. 206 (1891); *Lee v. James*, 81 Ky. 443, 5 Ky. L. Rep. 492 (1883).

³² *Ratcliffe v. Mason*, *supra* note 31, *Melone v. Armstrong*, 79 Ky. 248 (1881).

³³ *Helm v. Board*, 114 Ky. 289, 70 S.W. 679 (1902); *Ratcliffe v. Mason*, 92 Ky. 190, 17 S.W. 438 (1891); *Tisdale v. Risk*, 70 Ky. (7 Bush) 139 (1870).

It has also been held that mechanics and materialmen's liens on buildings erected on the premises are superior to the dower right.³⁴

A lien for taxes is superior to a widow's right to dower,³⁵ but if the land is sold to satisfy it, she still has a dower right in the remaining land or surplus proceeds.³⁶

The right to dower is not generally subject to other debts of the husband, and it cannot be sold in bankruptcy proceedings by the husband without the wife's consent.³⁷

7 Land Subject to a Mortgage

The wife of a mortgagor in whom title was never vested has no right to dower in the mortgaged property.³⁸ This is probably the universal view in both lien and title theory states.³⁹

Where the husband was the mortgagor of the land, the dower right is subject to the mortgage if the land was mortgaged before the marriage⁴⁰ or if the wife joined in the mortgage.⁴¹ However, in both of these cases, the wife has a right to dower in the surplus proceeds of a sale to satisfy the mortgage, if such proceeds were not received or disposed of by the husband in his lifetime.⁴² It has been said that the only difference between a wife's rights in land encumbered by a mortgage in which she joined and in land subject to a purchase money lien is that in the former case her rights are limited by her own waiver while in the latter, it is by operation of law.⁴³ A wife has a dower right in the equity of redemption in the sense that she has a right to dower in the surplus proceeds from a sale of the land⁴⁴ or from a sale by the husband of the equity of redemption,⁴⁵ and in the sense that, after a foreclosure sale, she may redeem the land, if the husband is dead, in the situation where the husband had a right to redeem it, which is, by statute, where the land was sold for less than two-thirds of its appraised value.⁴⁶

³⁴ *Nazereth L. & B. I. v. Lowe*, 40 Ky. (1 B. Mon.) 257 (1841). The present statute on such liens is Ky. REV. STAT. sec. 376.010 (1948). This statute is not clear as to whether such liens are superior to dower. However, the statute of 1831, under which the cited case was decided was even less susceptible of such an interpretation. 28 C. J. S. 105 says that the weight of authority is contrary to the view of this case.

³⁵ Ky. REV. STAT. sec. 134.420 (1948). *Chalk v. Chalk*, 291 Ky. 702, 165 S.W. 2d 534 (1942); *Maryland Casualty Co. v. Lewis*, 276 Ky. 263, 124 S.W. 2d (1939); *Harrison v. Griffith*, 67 Ky. (4 Bush) 146 (1868).

³⁶ *Mulligan v. Mulligan*, 161 Ky. 628, 171 S.W. 420 (1914); *Ketterer v. Nelson*, 146 Ky. 7, 141 S.W. 409 (1911) (curtesy); *Harrison v. Griffith*, *supra* note 35.

³⁷ *See Nelson v. Dunn*, 215 Ky. 292, 293, 284 S.W. 1084, 1085 (1926).

³⁸ *Ross v. McGrath's Admr.*, 27 Ky. L. Rep. 723, 86 S.W. 555 (1905).

³⁹ 1 WALSH, *op. cit. supra*, note 14, sec. 96.

⁴⁰ Ky. REV. STAT. sec. 392.040 (1), *supra* note 2.

⁴¹ *Ibid.* The word "deed" in the statute includes a mortgage. *Schweitzer v. Wagner*, 94 Ky. 458, 22 S.W. 883 (1893).

⁴² *Nelson v. Dunn*, 215 Ky. 292, 284 S.W. 1084 (1926); *McClain v. McClain*, 151 Ky. 356, 151 S.W. 926 (1912); *Ketterer v. Nelson*, 146 Ky. 7, 141 S.W. 409 (1911) (curtesy); *see Morgan v. Wickliffe*, 115 Ky. 226, 235, 72 S.W. 1122, 1123 (1903).

⁴³ *Morgan v. Wickliffe*, *supra* note 42 at 234, 72 S.W. at 1123.

⁴⁴ *Harrow v. Johnson*, 60 Ky. (3 Metc.) 578 (1861).

⁴⁵ *See Id.* at 581.

⁴⁶ *Hiller v. Nelson*, 118 S.W. 292 (Ky. 1909). Ky. REV. STAT. sec. 426.540 (1948).

If the widow redeems the land in this last situation, the heirs must contribute their pro rata share before they are entitled to participate in or enjoy the benefits of the redemption.⁴⁷ It has also been held that if there was mortgaged personalty as well as realty to secure an obligation, the wife has a right to have the proceeds from the sale of the personalty applied to the mortgage debt first.⁴⁸

When the land is sold to satisfy a mortgage to which the dower right is subject, just as in the case of a purchase money lien, if the wife fails to receive her dower out of the surplus proceeds, she has no claim against the land or the purchaser of the land.⁴⁹

Of course, if the wife does not join in a mortgage which was executed after the marriage, then she still has a dower right superior to the mortgage.⁵⁰

Where the widow is entitled to dower in surplus proceeds, such proceeds are treated as realty,⁵¹ so she gets a life estate in one-third.⁵² Assignment of dower in this situation is actually accomplished by allotting to her absolutely the money value of her interest, to be ascertained by estimating the probable duration of her life according to the life tables,⁵³ or by giving her the use for life of one-third of the money.⁵⁴ In *McClain v. McClain*,⁵⁵ it was held that it is within the discretion of the court as to which of these methods will be used, such discretion to be exercised in view of all the facts of the case so as to best protect the interests of all parties. In that case, the widow sought an absolute allotment of the money value of her interest. The general rule is that it may be done in either way in the discretion of the court, except that the widow cannot be forced to take an absolute sum without her consent.⁵⁶ Since the Kentucky case did not force her to take an absolute sum, it does not answer the question as to whether or not this may be done in Kentucky. However, while there are dicta in the opinion of the court susceptible of supporting either view, the general tenor of the opinion would seem to support a view that she may be so forced.

⁴⁷ *Hiller v. Nelson*, *supra* note 46.

⁴⁸ *Harrow v. Johnson*, 60 Ky. (3 Metc.) 578 (1861). No Kentucky case was found giving the widow a general right to redeem the property if there has been no foreclosure. The general rule is that she has such a right. 1 WALSH, *op. cit. supra*, note 14, sec. 96; 2 TIFFANY, *op. cit. supra*, note 1, sec. 500. If the mortgage debt is paid by the personal representative of the husband, generally the widow is entitled to dower in the land. There is a split of authority as to whether or not the widow is entitled to have the personalty in the husband's estate applied to the debt so as to free the land from the mortgage. 2 TIFFANY, *op. cit. supra*, note 1, sec. 500. For a more complete discussion of the subject of this footnote, see 19 C. J. 485.

⁴⁹ See *Nelson v. Dunn*, 215 Ky. 292, 294, 284 S.W. 1084, 1085 (1926); *Morgan v. Wicliffe*, 15 Ky. 226, 235, 72 S.W. 1122, 1123 (1903).

⁵⁰ *City Bank & T. Co. v. Planter's Bank & T. Co.*, 176 Ky. 500, 195 S.W. 1124 (1917); *McClure v. Harnis*, 51 Ky. (12 B. Mon.) 261 (1851).

⁵¹ *McClain v. McClain*, 151 Ky. 356, 151 S.W. 926 (1912).

⁵² *McClain v. McClain*, *supra*, note 51, *Ketterer v. Nelson*, 146 Ky. 7, 141 S.W. 409 (1911) (curtesy).

⁵³ *Harrison v. Griffin*, 67 Ky. (40 Bush) 146 (1868); see *Brewer v. Vanarsdale & Hers*, 36 Ky. (6 Dana) 204, 206 (1838).

⁵⁴ *McClain v. McClain*, 151 Ky. 356, 151 S.W. 926 (1912); *Harrison v. Griffith*, *supra* note 53.

⁵⁵ 152 Ky. 206, 153 S.W. 234 (1913). This is an extension on rehearing of *McClain v. McClain*, *supra* note 54.

⁵⁶ 1 WALSH, *op. cit. supra*, note 14, sec. 108.

8. *Instantaneous Seisin*

Closely related to the mortgage situation is the problem of the effect of instantaneous seisin; that is, where the husband has title for only an instant, and then conveys the property to another both conveyances constituting a part of one transaction. In Kentucky, if the seisin is beneficial, then dower attaches although it is instantaneous.⁵⁷ It has been held that if the mortgagee, to whom a mortgage was executed immediately after conveyance to the husband, did not have a vendor's lien on the property, then there was beneficial seisin in the husband even though the mortgagee furnished the purchase money.⁵⁸

9. *Land Conveyed In Fraud Of Dower*

A wife is entitled to dower in land conveyed by the husband before marriage but after an agreement to marry when such conveyance was in fraud of dower,⁵⁹ provided that she did not learn of the conveyance before the marriage.⁶⁰ She is also entitled to dower in land bought by the husband during marriage but conveyed to another by his direction in fraud of dower.⁶¹ These situations are exceptions to the seisin during coverture requirement.

Whether or not there was such fraud depends upon the circumstances, such as the amount of the husband's real estate which was conveyed, the amount of consideration he received, and whether or not it was reasonable as a suitable provision made by the husband for the purpose of furnishing pecuniary aid to the grantee in view of their relationship and in view of the size of the estates of both the husband and the grantee.⁶² If a sizable portion of the husband's estate is conveyed, it is prima facie in fraud of dower.⁶³ The husband may, however, in good faith, make such provision for his children by a former marriage as is reasonable, and no more in amount than a father in his pecuniary condition might naturally be expected to give his children by way of advancement.⁶⁴ If the husband

⁵⁷ McClure v. Harris, 51 Ky. (12 B. Mon.) 261 (1851); Tevis v. Steele, 20 Ky. (4 T. B. Mon.) 339 (1827). 1 WALSH, *op. cit. supra*, note 14, sec. 96.

⁵⁸ McClure v. Harris, *supra* note 57. But see McIlvane v. McIlvane, 10 Ky. Op. 181, 182 (1879); Gully v. Ray, 57 Ky. (18 B. Mon.) 107, 114 (1857). These two later cases clearly state a contrary rule by way of dictum, and the rule they state would seem to be more in accord with the statute (KY. REV. STAT. sec. 392.040 (1), *supra*, note 2), which says, "a lien for the purchase money" (italics, writer's). The weight of authority is probably in accord with the dicta of these two cases. 2 TIFFANY, *op. cit. supra*, note 1, sec. 490; 52 L.R.A. (N.S.) 543.

⁵⁹ Anderson v. Anderson, 194 Ky. 763, 240 S.W. 1061 (1922); Goff v. Goff's Exr., 175 Ky. 75, 193 S.W. 1009 (1917); Leach v. Duvall, 71 Ky. (8 Bush) 201 (1871); Petty v. Petty, 43 Ky. (4 B. Mon.) 215 (1848). 2 TIFFANY, *op. cit. supra*, note 1, sec. 506.

⁶⁰ Smith v. Erwin, 26 Ky. L. Rep. 760, 82 S.W. 411 (1904); Murray v. Murray, 90 Ky. 1, 13 S.W. 244 (1890); Cheshire v. Payne, 55 Ky. (16 B. Mon.) 618 (1855).

⁶¹ Rowe v. Ratliff, 268 Ky. 217, 104 S.W. 2d 437 (1937); Redmond's Admx. v. Redmond, 112 Ky. 760, 66 S.W. 745 (1902).

⁶² Anderson v. Anderson, 194 Ky. 763, 240 S.W. 1061 (1922).

⁶³ Leach v. Duvall, 71 Ky. (8 Bush) 201 (1871); see Fennessey v. Fennessey, 84 Ky. 519, 522, 2 S.W. 158, 160 (1886).

⁶⁴ Goff v. Goff's Exr., 175 Ky. 75, 193 S.W. 1009 (1917); Fennessey v. Fennessey, *supra* note 63. In Anderson v. Anderson, 194 Ky. 763, 767, 240 S.W. 1061, 1063 (1922), the court expressly reserved the question as to whether this exception also applies to a conveyance made by a son to his dependent mother and sister.

had promised his former wife that he would execute the conveyance, this is also a circumstance tending to show his good faith.⁶⁵

10. Land Held in Trust

The wife of a trustee has no right to dower in land held in trust by the husband,⁶⁶ since he has no beneficial ownership. Again, beneficial ownership is the determining factor; but here the term refers to the fact that the trustee has only a bare legal title. It is apparent that the absence of beneficial ownership in this situation is something different than the absence of beneficial ownership in the purchase money lien situation.

Where the land is held in trust for the husband, the wife is entitled to dower, since he has the beneficial ownership.⁶⁷

11. Land Under Contract Of Sale

(A) Husband As Vendor

Where the husband, before marriage, has contracted to convey the land, the wife has no dower interest in such land although it is not conveyed until after the marriage.⁶⁸ This is true even though the vendee had only an option which he later exercised.⁶⁹ This was earlier based upon the idea that the husband never owned the beneficial interest during the marriage, and it was generally said that he held the land in trust for the vendee's benefit;⁷⁰ but this situation is now specifically provided for by statute.⁷¹ Again, here is a situation where the court, before the statute, applied the beneficial ownership test. But what is beneficial ownership under a contract to sell land? It has been said that if the vendee gives up his right to specific performance or takes damages in lieu of it, then the wife does have a dower right, since the beneficial interest is then said to reinvest in the husband as of the date of the contract.⁷² Where the husband made a bona fide gift before the marriage and the donee took possession and improved the land, the wife has no right to dower if a conveyance is made after the marriage.⁷³ Where the husband was not bound to convey because the contract was oral or he was an infant when it was made, there is no dower right if he does later convey,⁷⁴ but if he does not later convey during his lifetime, the wife is entitled to dower.⁷⁵

⁶⁵ Goff v. Goff's Exr., *supra* note 64; Fennessey v. Fennessey, 84 Ky. 519, 2 S.W. 158 (1886).

⁶⁶ See Tevis v. Steele, 20 Ky. (4 T. B. Mon.) 339, 341 (1827).

⁶⁷ Pursifull's Adm'x. v. Pursifull, 299 Ky. 245, 184 S.W. 2d 967 (1944); Chalk v. Chalk, 291 Ky. 702, 165 S.W. 534 (1942). An see Ky. REV. STAT. 392.020, *supra* note 2, which says "or anyone for the use of"

⁶⁸ Fontaine v. Dunlap, 82 Ky. 321 (1884); Dean's Heirs v. Mitchell's Heirs, 27 Ky. (4 J. J. Marsh) 451 (1830); Stevens v. Smith, 27 Ky. (4 J. J. Marsh) 64 (1830).

⁶⁹ Mineral Development Co. v. Hall, 115 S.W. 230 (Ky. 1909).

⁷⁰ Fontaine v. Dunlap, 82 Ky. 321 (1884); Dean's Heirs v. Mitchell's Heirs, 27 Ky. (4 J. J. Marsh) 451 (1830); Stevens v. Smith, 27 Ky. (4 J. J. Marsh) 64 (1830).

⁷¹ Ky. REV. STAT. sec. 392.040, *supra* note 2.

⁷² Dean's Heirs v. Mitchell's Heirs, 27 Ky. (4 J. J. Marsh) 451 (1830).

⁷³ Ganes v. Ganes Exr. and Heirs, 48 Ky. (9 B. Mon.) 295 (1848).

⁷⁴ Oldham v. Sale, 40 Ky. (1 B. Mon.) 76 (1840).

⁷⁵ Eubank v. Eubank, 13 Ky. Op. 673, 7 Ky. L. Rep. 291 (abstract) (1885).

(B) *Husband As Vendee*

If the husband held the land under an executory contract of purchase only, the wife has a right to dower in it only if he held such equitable right at his death.⁷⁶ Therefore, if the husband sold or assigned his equitable right before getting legal title, the wife has no dower rights in the land,⁷⁷ even though he does later get legal title.⁷⁸ It has been said, however, that a transfer of his equitable right by operation of law or by reason of the bankruptcy of the husband is not such a disposition as will deprive the wife of dower.⁷⁹ If the land is sold to satisfy a purchase money lien before the husband's death, there is still a right to dower in the surplus proceeds, although the husband only had an equitable title.⁸⁰ An earlier case held that a wife had a right of dower when the husband held the equitable title at his death only if he had fully paid for the land,⁸¹ but it is now probably sufficient if the heirs are entitled to get specific performance either by having the husband's estate pay whatever remains due, or by paying it themselves.⁸²

12. *Mines and Minerals*

A widow has a dower right in mines opened by the husband upon his land before his death,⁸³ and probably she can work these to exhaustion.⁸⁴ She also has

⁷⁶ *Robinson v. Miller*, 40 Ky. (1 B. Mon.) 88 (1840); *Graham s Heirs v. Graham*, 22 Ky. (6 T. B. Mon.) 561 (1828); *Bailey and Wife v. Duncan s Reprs.*, 20 Ky. (4 T. B. Mon.) 256 (1827). This case was based on a statute making a wife dowerable in estates held for the use of or in trust for the husband. The court felt that it was not only intended to embrace express trusts but also trusts resulting from executory contracts. This is now provided for in KY. REV. STAT. sec. 392.040 (2), *supra* note 2.

⁷⁷ *Smallridge v. Hazlett*, 112 Ky 841, 66 S.W 1043 (1902) *semble*; *Green v. Ray*, 1 Ky. Op. 96 (1867); *Gully v. Ray*, 57 Ky. (18 B. Mon.) 107 (1857); *Heed v. Ford*, 55 Ky. (16 B. Mon.) 114 (1855); *Lawson v. Morton*, 36 Ky. (6 Dana) 471 (1838); *Hamilton v. Hughes*, 29 Ky. (6 J. J. Marsh) 581 (1831). In this case, the court refused to apply the trust statute mentioned in note 76 *supra*, largely because of public policy, because title bonds were, by law, assignable, and if a wife's conveyance of her dower rights would be necessary, then the statute making such bonds assignable would be defeated. In *Heed v. Ford*, *supra*, it was added that since title bonds were not required to be recorded and were freely transferable, the evils resulting from letting dower attach would outweigh the advantages. The rule has now been adopted by statute (KY. REV. STAT. sec. 392.040 (2), *supra* note 2), and represents the view of the weight of authority. 2 TIFFANY, *op. cit. supra*, note 1, sec. 498. This would seem to be a situation where the court failed to apply the beneficial ownership test. *Contra: Winn v. Elliott*, 3 Ky. (1 Hardin) 490 (1808).

⁷⁸ *Gully v. Ray*, *supra* note 77; *Heed v. Ford*, *supra* note 77.

⁷⁹ *See Lane v. Judy*, 12 Ky. Op. 379, 381, 5 Ky. L. Rep. 513 (abstract) (1883).

⁸⁰ *Tisdale v. Risk*, 70 Ky. (7 Bush) 139 (1870).

⁸¹ *Pugh v. Bell*, 18 Ky. (2 T. B. Mon.) 125 (1825).

⁸² *See Brewer v. Vanarsdale s Heirs*, 36 Ky. (6 Dana) 204, 205 (1838); *cf. Harrison v. Griffith*, 67 Ky. (4 Bush) 146 (1868). There is a clear split of authority on this. 2 TIFFANY, *op. cit. supra*, note 1, sec. 498.

⁸³ *Whittaker v. Lindley*, 8 Ky. L. Rep. 690 (abstract), 3 S.W 9 (1887). On this general subject see 2 TIFFANY, *op. cit. supra*, note 1, sec. 492.

⁸⁴ *See Damels v. Charles*, 172 Ky. 238, 241, 189 S.W 192, 194 (1916). *But see Ky. River Consolidated Coal Co. v. Frazier*, 161 Ky. 374, 378, 170 S.W 986 (1914); *Whittaker v. Lindley*, 8 Ky. L. Rep. 690 (abstract), 3 S.W 9, 10 (1887).

a dower interest in royalties from mines opened after the husband's death by persons with whom he had entered into enforceable contracts for that purpose while living.⁵⁷ These mines are treated as realty.⁵⁸ There is a right to dower in unopened mines,⁵⁷ and if the husband owns mineral rights, the wife has a dower interest in such rights.⁵⁸ The dower right in royalties paid is an absolute right to one-third of such royalties, not just a life estate in one-third, provided the husband made a mineral lease and not an outright conveyance.⁵⁹ This is based on the theory that they are profits or rents arising from the use to which the husband devoted the land.⁶⁰ However, it has been held that if a mineral lease is made by the wife and the remainderman, she is only entitled to the use of one-third of the royalties for life,⁶¹ just as she would be if they had sold real estate so held.⁶² If dower has been assigned in the land by metes and bounds, the wife is entitled to dower in royalties from mines located on all the property, not just the property assigned to her, if the mines were opened or the mineral rights were leased before the husband's death;⁶³ this also being true before there has been an assignment by metes and bounds.⁶⁴ In this particular field, especially, the Kentucky law is by no means certain, although in recent years, it has seemed to be approaching a degree of certainty. The writer has not discussed many of the problems which arise, and in many of those which have been mentioned, there has been a lack of consistency and definiteness in the Kentucky cases.

13. Other Situations

It was at one time held that shares of railroad stock were realty and a widow had a dower interest in them,⁶⁵ but it is unlikely that these decisions are still of any weight, and such stock is probably now regarded as personality.⁶⁶

⁵⁷ *Cook v. Cook's Admr.*, 261 Ky. 501, 88 S.W. 2d 27 (1935); see *Cram v. West*, 191 Ky. 1, 5, 229 S.W. 51, 53 (1921); *Damels v. Charles*, 172 Ky. 238, 242, 189 S.W. 192, 194 (1916).

⁵⁸ See *Cram v. West*, *supra* note 85, at 5, 229 S.W. at 53.

⁵⁹ *Trumble v. Ky. River Coal Corp.*, 235 Ky. 301, 31 S.W. 2d 367 (1930). This case expressly rejected dicta in several previous Kentucky cases which said that there was no dower in unopened mines. Since mineral rights are regarded as real estate, the court could see no reason why the wife should not have a dower right in them. It admits that dower in unopened mines may be of no beneficial value to the widow, since she could not open them without committing waste, but says that it would be beneficial where the widow and the remainderman join to lease or sell such rights.

⁶⁰ *Ibid.*

⁶¹ *Cook v. Cook's Admr.*, 261 Ky. 501, 88 S.W. 2d 27 (1935); *Williamson v. Williamson*, 223 Ky. 589, 4 S.W. 2d 392 (1928).

⁶² See *Collins v. Lemaster's Admr.*, 232 Ky. 188, 22 S.W. 2d 567 (1929).

⁶³ *Lemaster v. Hudson*, 214 Ky. 467, 283 S.W. 439 (1926).

⁶⁴ See *Collins v. Lemaster's Admr.*, 232 Ky. 188, 190, 22 S.W. 2d 567 (1929); *Lemaster v. Hudson*, *supra* note 91, at 469, 283 S.W. at 440.

⁶⁵ *Cook v. Cook's Admr.*, 261 Ky. 501, 88 S.W. 2d 27 (1935).

⁶⁶ *Williamson v. Williamson*, 223 Ky. 589, 4 S.W. 2d 392 (1928); *Cram v. West*, 191 Ky. 1, 229 S.W. 51 (1921).

⁶⁷ *Copeland v. Copeland*, 70 Ky. (7 Bush) 349 (1870); *Price v. Price* *Heirs*, 36 Ky. (6 Dana) 107 (1838).

⁶⁸ See *Chappell v. Chapell*, 124 Ky. 691, 697, 99 S.W. 959, 960, 30 Ky. L. Rep. 935, 936 (1907); *Spalding v. Paine's Admr.*, 81 Ky. 416, 421, 5 Ky. L. Rep. 391, 394 (1883). 1 Ky. Acrs 1871, c. 1866, p. 87, (passed March 22, 1871). 17 Am. Jur. 675; 19 C. J. 468.

If the husband was seised of land during coverture but lost it by adverse possession, the widow still has a dower right in such lands.⁸⁷

Where the husband has exchanged land with another, the wife cannot have dower in both tracts, but must elect.⁸⁸ However, a relinquishment of dower in one during the life of the husband is not a relinquishment of dower in the other, nor an election to take dower in the one relinquished.⁸⁹ This must mean that a relinquishment of dower in one is actually an election to take dower in the other tract.

JAMES C. BLAIR

⁸⁷ *Williams v. Williams*, 89 Ky. 381, 11 Ky. L. Rep. 608, 12 S.W. 760 (1889). In this case, the adverse possession did not begin until after the marriage. If the land was in the adverse possession of another the whole time during the marriage, generally, the wife has no dower right because the husband was not seised during the marriage. 2 TIFFANY, *op. cit. supra*, note 1, sec. 489.

⁸⁸ *Stevenson v. Brasher*, 90 Ky. 23, 11 Ky. L. Rep. 799, 13 S.W. 242 (1890); *Mahoney v. Young*, 33 Ky. (3 Dana) 588 (1835); see *Stevens v. Smith*, 27 Ky. (4 J. J. Marsh) 64 (1830). This rule is a common law exception to the rule that a wife has dower in all lands of which the husband was seised during coverture. The rule only applies "when the transaction is an exchange in the strict common law meaning of the word, involving a mutual grant of equal interests in the respective parcels of land." 2 TIFFANY, *op. cit. supra*, note 1, sec. 494 at p. 352.

⁸⁹ *Stevenson v. Brasher*, *supra* note 98; *Mahoney v. Young*, *supra* note 98.