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Recent Statutes

RECENT STATUTES

INCHOATE DOWER—RIGHT OF EXTINGUISHMENT.—In 1930, the New York Legislature abolished the dower right of wives to take one-third of the income of their deceased husbands' real property where the marriage was contracted after September 1, 1930, or where the husband became seized of the property after that date.[1] However, the statute left wholly unimpaired the so-called inchoate right of dower, for it did not affect the right of a wife, married before September 1, 1930, whose husband was living after that date, and had acquired realty before that time, to receive upon his death her one-third share.

By failing to include such inchoate dower in the statute, the legislature left in existence a right which, because it was an incumbrance on land, made it difficult for a husband to alienate his real property. It was, therefore, a logical step to remedy the situation by enacting a new statute[2] which provides that after February 14, 1938, an owner of land may apply to the Supreme Court to have extinguished any inchoate right of dower to which his land is subject.[3]

Inchoate dower is an ancient right which has always found a vigorous champion and assiduous protector in the courts and jurists of England and America. As long ago as 1626, Lord Bacon wrote that there were three things which the law favored: life, liberty, and dower.[4] In this country, Gardiner, J., speaking for the court in *Moore v. City of New York*[5] said "Dower is . . . a positive institution of the state, founded upon public policy." It may be added that courts and jurists have not been alone in their reluctance to interfere with the inchoate right of dower. An

1. N Y. REAL PROP. LAW (1929) § 190. This section abolished a wife's dower rights in the future, but at the same time the legislature passed N. Y. DEC. EST. LAW (1929) §§ 82-83. Under dower, the wife could get only a one-third life estate in her deceased spouse's real property; under this new section of the Decedents' Estate Law she may get as much as a one-half interest in both realty and personalty. The statutory attack upon dower was, consequently, effectively counter-balanced. The effect of the changes was not to lessen, but to enlarge, the property rights of the wife in her deceased husband's estate.

For a good discussion of inchoate dower see WALSH, LAW OF REAL PROPERTY (1915) 175, and on the history and probable origin of dower see DIGBY, HISTORY OF THE LAW OF REAL PROPERTY (5th ed. 1897) 127.

2. "An owner of land subject to an inchoate right of dower may maintain an action in the Supreme Court against the possessor of such right to have the right extinguished. In such action the court shall find the present cash value of the inchoate right of dower according to the law applicable to annuities and survivorships. It shall also determine whether the payment to the defendant of the sum found, in lieu of her right, would be unduly prejudicial to her. If the court determines that such payment would not be unduly prejudicial, the court, upon proof of payment of such sum to the defendant or upon payment into court for her credit, shall make an order declaring the inchoate right of dower extinguished.

"Nothing herein contained shall be construed to affect section one thousand and fifty-three, section one thousand and fifty-four, or sections one thousand three hundred and eighty-eight to one thousand four hundred and nine inclusive, of the Civil Practice Act, or section two hundred and forty-eight of the Surrogate's Court Act." N. Y. REAL. PROP. LAW (1937) § 190 a.

3. The above law was recommended by the Law Revision Commission and was accompanied by elaborate treatment of the reasons prompting the same. See N. Y. LEGIS. DOC. (1938) 65 (L).

4. BACON, LAW TRACTS. 331.

5. 8 N. Y. 110, 113 (1853).

aversion to tampering with it has been reflected in the acts of legislatures. For example, in only three instances has the New York Legislature allowed the inchoate right to be destroyed upon the suit of an individual,[6] without the consent of the wife, viz: (1) in a partition action when the property of co-tenants cannot be physically divided and it is necessary that it be sold, the court may extinguish the inchoate right of a co-tenant's wife,[7] and must direct that a portion of the proceeds received by her husband be set aside to await the consummation of the inchoate dower right; (2) when the wife is an infant or incompetent, the right may in certain instances[8] be extinguished and part of the proceeds may be set aside in the same manner as in a partition action;[9] (3) when the property of a deceased must be sold in order to facilitate the settlement of the estate, the inchoate right attached to such property may be extinguished and a portion of the proceeds set aside in the same fashion.[10]

Naturally, many cases arose which did not fall within any of these three categories. Then, the fact that a wife could not be forced to sell her inchoate right of dower often worked a great hardship upon those who dealt with the husband. Mortgagees, for example, whose mortgages were executed after the marriage of the husband-mortgagor, could not by foreclosure and sale extinguish the wife's right;[11] trustees in bankruptcy or assignees for the benefit of creditors were forced to take the bankrupt husband's real property subject to his wife's interest;[12] grantees of the husband's property were in no better position;[13] and judgment creditors who sought to satisfy their debts by a sale of such real property were powerless to extinguish the wife's inchoate right.[14]

As was pointed out by the sponsors of the new statute,[15] it would seem that in these cases the judgment creditors constitute the group which suffers the greatest hardship. This fact is exemplified by comparing the position of a judgment creditor with that of a grantee or mortgagee. In the case of a grantee or mortgagee, both must acquire their claims against the husband *after* his marriage or his real property will not, as to them, be subject to his wife's inchoate dower. They, therefore, have an opportunity to learn of such incumbrance on the property before they contract. But a judgment creditor may have advanced credit to an unmarried debtor solely on the strength of the latter's ownership of real property. Yet, when the

6. Under its power of eminent domain the state may destroy inchoate dower. *In Re* Cropsey Ave., 268 N. Y. 183, 197 N. E. 189 (1935). (1935) 4 FORDHAM L. REV. 504.

7. N. Y. CIV. PRAC. ACT (1920) §§ 1051, 1053. Computation of the portion of the proceeds to be set aside for the wife is based on the law applicable to annuities and survivorships.

8. N. Y. CIV. PRAC. ACT (1920) §§ 1385, 1388. These instances are: (a) where the wife is mortgagee or trustee of property; (b) where she has entered into a valid contract for conveyance of the property; (c) where her personal property is insufficient to pay her debts; (d) where her interest will be substantially promoted by such disposition.

9. N. Y. CIV. PRAC. ACT (1920) § 1409 provides for the method by which the wife's share of the proceeds is to be handled.

10. N. Y. SURR. CT. ACT. (1920) § 248. It is to be noted that the new amendment expressly preserves these three rights of action. N. Y. REAL PROP. LAW (1937) § 190 a.

11. Sherod v. Ewell, 104 Iowa 253, 73 N. W. 493 (1897); Anderson v. McNeely, 120 App. Div. 676, 105 N. Y. Supp. 278 (3d Dep't 1907).

12. *In re* Acretelli, 173 Fed. 121 (S. D. N. Y. 1909) (wife must consent to extinguishment of inchoate right).

13. Mills v. Ritter, 197 Pa. 353, 47 Atl. 194 (1900).

14. Harrison v. Eldridge, 7 N. J. L. 392 (1801); House v. Jackson, 50 N. Y. 161 (1872). For a good discussion of this problem see (1925) 12 VA. L. REV. 166.

15. N. Y. LEGIS. DOC. (1938) 65 (L).

creditor later attempts to satisfy a judgment based upon the debt, which was contracted when the debtor was unmarried, he may find that because of the debtor's *intervening marriage* such real property, which is now subject to inchoate dower, will bring an amount less than that of the judgment debt. For instance, if at a sheriff's sale a judgment creditor bids in the debtor's property for the amount of the debt (as is usually the case), he must resell it in order to obtain liquid assets. However, the property, which is now subject to the inchoate dower of the debtor's wife, may, therefore, bring far less than the amount of the original debt.[16] Under the new statute, however, when real property is sold for the benefit of judgment creditors, mortgagees, trustees or any lienors, the burden of inchoate dower will not depress its price to such an extent. The reason is that anyone who purchases at such a sale, or for that matter any "owner",[17] may, under the present statute, bring an action in the Supreme Court to have the wife's inchoate right extinguished. True, payment must be made to the wife for such extinguishment; but such an amount can be computed in advance, and a purchaser is acquiring land more readily resaleable than when he buys land subject to inchoate dower. He is therefore willing to offer a higher price for such land.

The statute provides that the amount of the payment to be made to the wife for the termination of her inchoate right is to be computed by the court according to the law of annuities and survivorship.[18] Such present value of an inchoate right is still determined[19] according to a rule laid down by Chancellor Walworth as long ago as 1839.[20] As soon as such an amount is paid to the wife or into a court for her, the court will declare the inchoate right extinguished, and the land may thereafter be sold free from any possibility of an incumbrance.[21]

If should be noted that this new statute provides for an immediate cash payment to the wife and that title to this sum vests in her at once.[22] In former

16. Usually the sale of real property which is subject to an inchoate right of dower will bring far less that its true value minus the value of the inchoate right. Buyers are reluctant to purchase property in which any interest, however contingent, might subsequently ripen into a present estate.

17. See note 2, *supra*. An accompanying note attached to the Recommendation of the Law Revision Commission to the Legislature reads: "The preservation of inchoate dower rights attaching prior to September 1, 1930, has continued to hinder the disposition of property, to the detriment of owners of property, their purchasers and execution creditors. The object of this amendment is to provide a method whereby the owner of land may extinguish an inchoate dower interest by paying to the possessor thereof its present cash value, provided the court finds that such payment, in lieu of dower, would not be unduly prejudicial to such possessor."

It might be argued that the term "owner" used in the statute is limited to a husband who desires to extinguish the inchoate dower right of his wife because the present amendment forms a new sub-section of Section 190 of the Real Property Law, wherein the relation of husband and wife alone is mentioned. This argument seems to be untenable, however, in view of the fact that the announced purpose of the statute was to relieve a situation which was detrimental to "owners of property, their purchasers and execution creditors". N. Y. L. J. Feb. 19, 1938, p. 1, col. 4.

18. See note 2, *supra*.

19. See note 2, *supra*.

20. Its value is the difference between the present value of an annuity, equal to a one-third interest in the proceeds of the property payable during the expectancy of the wife and the present value of such an annuity payable during the joint lives of both husband and wife. Jackson v. Edwards, 7 Paige 386, 408 (N. Y. 1839); (1925) 12 VA. L. REV. 166, 169.

21. See note 2, *supra*.

22. See note 2, *supra*.

instances when the law allowed extinguishment of the inchoate right of dower, it was provided merely that the fund might be set aside for her, she to have no interest therein or benefit therefrom until she had survived her husband.[23] By the new statute those statutes which authorize the former mode of payment are not to be affected in any way.[24]

It is of interest that the statutes which allowed extinguishment of inchoate dower in cases of partition, incompetency of wife, or settlement of decedents' estates, provided that the mode of payment to the wife was left to the discretion of the court.[25] Throughout the entire transaction the court *must* exercise complete control over the method of settlement of the wife's right of dower and could order her share "to be invested, secured or paid over in such manner as it deems calculated to protect the rights and interests of the parties."[26] Under the new statute, however, the court has no such discretion, but is *compelled* to order the inchoate dower right extinguished upon proof of payment to the wife or upon payment into court for her credit.[27] The language of the statute places the option as to the mode of payment upon the owner of the land and not upon the court. It may be that the legislature has gone too far in thus removing the court's control over the method of payment to the wife. Is it not possible that in the event of a direct payment to her (which under the new statute the court could not prevent), the husband might cajole her into giving him partial or absolute control over the fund? Or that lacking business sagacity, as many women do, her funds be frittered away on unsound ventures? In such case the entire proceeds of the land might be dissipated. With both the land and the proceeds therefrom alienated by him, there would be a complete circumvention of the whole purpose of dower—namely, economic security for the wife. It is possible that the legislature in its zeal to perfect the alienability of land has unthinkingly opened the way for the working of hardship upon the wife.

It is unlikely that the new section will be successfully attacked on constitutional grounds. However, the case of *Lawrence v. Miller*[28] decided in 1849, intimated by way of dictum that a statute which forced a wife to sell her inchoate right of dower, which had already attached to land, would be unconstitutional. The theory of this dictum was that inchoate dower was a right acquired by the marriage contract, and that such a statute would violate Article I, Section 10 of the Federal Constitution which forbids the impairment of the obligation of contracts by any state. However, it has since been decided by the United States Supreme Court that marriage is a contract which is not within the prohibition of that section of the Constitution.[29] Belief in the impregnability of this statute to constitutional attack is strengthened by a comparison with foreign statutes which have not been declared unconstitutional.[30] The Legislature of Minnesota enacted a statute abolishing all inchoate

23. *In re* Cropsey Ave, 268 N. Y. 183, 197 N. E. 189 (1935) (eminent domain); N. Y. Civ. Prac. Act (1920) § 1053 (action for partition); N. Y. Civ. Prac. Act (1920) § 1409 (wife is infant or incompetent); N. Y. Surr. Ct. Act (1920) § 248 (sale of decedent's estate).

24. See note 2, *supra*.

25. See notes 5, 6, 7, and 8, *supra*.

26. N. Y. Civ. Prac. Act (1920) § 1053.

27. See note 2, *supra*.

28. Lawrence v. Miller, 2 N. Y. 244, 249 (1849). But see Moore v. City of New York, 8 N. Y. 110 (1853) which in effect overrules the argument advanced by Lawrence v. Miller, *supra*, in holding that legislation may provide that inchoate dower in land taken by eminent domain be extinguished.

29. Maynard v. Hill, 125 U. S. 190 (1887).

30. The Report of the Commission to Investigate Defects in the Law of Estates, N. Y. Legis. Doc. (1928) 70, pp. 69-71, discusses the constitutionality of such a statute.

dower,[31] past and future, without compensation; and other states have statutes similar to New York providing for extinguishment with compensation.[32]

As New York Real Property Law Section 190 prevents any right of dower from arising from future marriages, the problem of inchoate dower is limited to the cases of persons who now possess such rights. Nevertheless the new statute fills a present, though diminishing, need in providing a means for expediting the alienation of property which, for a time, will be subject to inchoate dower.

WORKMEN'S COMPENSATION—RIGHTS OF ACTION OF EMPLOYEES AGAINST THIRD PERSONS AND SUBROGATION THERETO.—The right of an injured workman to receive compensation from his employer for injuries sustained in the course of his employment, even though the employer has not been at fault is well settled in Compensation Law. However, his legal status when injured by a third person has been subject to many modifications in New York. A recent amendment to the Workmen's Compensation Law[1] has made important changes in regard to the employees' rights against third party tort-feasors. To understand these additions, it is helpful to consider briefly the last several amendments to Section 29, which deals with employees' rights against third party wrongdoers.

Prior to 1935 an employee who was injured in the course of his employment through the negligence of a third party was compelled to *elect* between taking compensation and suing the wrongdoer.[2] He could not do both. Generally, in the hour of want and sickness, he elected compensation rather than the chance of recovery from the third person. So while the Workmen's Compensation Laws of the various states have never completely destroyed the workman's common law right of action against a third party wrongdoer,[3] nevertheless, as a practical matter, the workman in New York was reluctant to exercise his right from the force of economic circumstances. It was the rare case in which the workman could afford to wait for the court to give him judgment and forego compensation. If the employee chose to take compensation his common law right of action against the third party was assigned by operation of law to the insurance company which had paid the compensation to the injured employee.[4] The insurance company might then sue the third party and possibly collect a sum many times in excess of that which the carrier had paid to the injured workman in compensation benefits. As the insurance company kept the entire proceeds of such recovery from the third party tort-feasor,[5] it would often be unduly enriched and the workman would be deprived of his just benefits. Some small part of the injustice to the workman was eliminated in 1935[6] when Section 29 was amended to provide that where the insurance company, as assignee of the employees' common law right of action against the third party, recovered a sum in excess of the compensation paid, and other expenses, such excess was divided

31. MINN. STAT. (Mason, 1937) § 8622-1.

32. N. J. COMP. STAT. (1911) § 25 W. VA. CODE ANN. (Michie, 1932) § 4100.

1. N. Y. WORKMEN'S COMP. LAW § 29, as amended by N. Y. Laws 1937, c. 684.

2. Section 29 of the Workmen's Compensation Law has been amended many times without changing the necessity of the workman's election to take compensation or to sue the third party tort-feasor. N. Y. Laws 1922, c. 615; N. Y. Laws 1924, c. 499; N. Y. Laws 1934, c. 695; N. Y. Laws 1935, c. 328.

3. Newark Paving Co. v. Klotz, 85 N. J. L. 432, 91 Atl. 91 (1914); see Miller v. N. Y. Ry., 171 App. Div. 316, 318, 159 N. Y. Supp. 200, 201 (2d Dep't 1916).

4. Travelers Ins. Co. v. Brass Goods Mfg. Co., 239 N. Y. 273, 146 N. E. 377 (1925).

5. *Ibid.*

6. N. Y. Laws 1935, c. 328.

so as to give the insurance company one third of such excess and the injured employee two thirds. This progressive step brought the New York law in 1935 almost in line with the 1913 Massachusetts[7] concept of the workmen's rights in a similar case.

If the workman elected to take compensation, thereby transferring his right of action against the third party to the insurance company, the employee could not prevent a compromise or settlement by the insurer notwithstanding the fact that he had a two thirds interest in the proceeds of any recovery. In view of this fact, a possibility existed that the employee would be deprived of substantial rights. Since the insurance company was still the assignee of the workman's right of action, and as such, its primary purpose was recovering what it had paid out in compensation, it often compromised the suit brought against the tort-feasor, for any amount which would make it whole, rather than to proceed with the suit for the benefit of the injured workman. There was also the possibility that the assignee-insurer had insured the employer under the Workmen's Compensation Law and also had insured the third party wrongdoer against loss resulting from ordinary public liability. In such a situation it could hardly be expected that the insurance company would sue itself for the benefit of the injured workman. Instead, the insurer could drop all legal action to the exclusion of the employee's rights and deprive him of any chance of receiving two thirds of whatever proceeds may have been realized from an action against the third party tort-feasor.

These injustices to the employee have been substantially, though not totally, cured by the recent changes in Section 29 of the Workmen's Compensation Law.[8] An injured workman is no longer forced to make an election, to sue in case of a third party action. The workman who is entitled to compensation receives it immediately. Then, within six months after receiving a compensation award but not later than one year from the time his right of action accrues, the workman, in his individual capacity, has the right to sue the third party responsible for his injuries, employing an attorney of his own selection. The insurance company which has in the interim been paying him compensation benefits is given a lien against the proceeds of that common law action to the extent of all compensation that the workman has received. In other words, the acceptance by the workman of compensation in the period of his greatest need, that is, immediately after his injury, does not bar his right to pursue his remedy against the third party wrongdoer. The workman will receive the full proceeds of his recovery less the insurance company's lien for compensation paid. His rights no longer will be prejudiced by the possibility of the insurance carrier's compromising a suit for its own benefit. Theoretically, at least, the third party action will be prosecuted in the best interests of the workman as there will be no need for the workman to forego his action because of his immediate need for financial assistance.

In case the workman fails to bring suit within the time limited for such action, the insurer who has paid compensation to the injured employee is protected by the assignment to it by law, of the workman's common law right of action, with the provision that the workman is to receive two thirds of any recovery in excess of the compensation paid. In such a case the rights of the workman and the insurance carrier remain unchanged by the recent amendment to Section 29.

7. MASS. ANN. LAWS (1936) c. 152, § 15, which provides that the workman was to receive 4/5 of any excess over the amount paid out in compensation. Hall v. Henry Thayer & Co., 225 Mass. 151, 113 N. E. 644 (1916). New Jersey originally permitted a double recovery by the injured workman against both the third party and the insurer. Newark Paving Co. v. Klotz, 85 N. J. L. 432, 91 Atl. 91 (1914). Since 1913, however, the insurance carrier is subrogated to the workman for the amount paid out in compensation. N. J. Acts 1913, c. 174, § 8.

8. See note 1, *supra*.

The statute as amended makes no change in the provision for deficiency compensation in cases where recovery in a third party action is less than the sum which would be paid to the workman in a compensation award. The rule is still that the workman may recover the difference between his compensation award and his verdict from the insurance company. However, if the workman compromises the action against the tort-feasor without the consent of the insurance carrier, he loses his right to recover the deficiency between the amount of the verdict and the amount which would have been paid to him under a compensation award.[9]

While the workman's rights are better protected now than before the present change in the law, the insurance carrier is not protected in any way against the possibility that the workman, who has brought his action within the time limited, might after the insurer has paid a definite sum in compensation to the workman, compromise his action without the consent of the insurance company for less than the sum paid in compensation. It is, of course, true that if the workman had no *bona fide* cause of action, the insurance company would have had none under the former statute. While there is little reason why a workman would compromise a good cause of action for less than its value, it has been done. When it is done, the insurance company, although damaged by the tort-feasor's negligence to the extent of the compensation paid and, therefore, having a substantial right, receives little protection from this law.[10]

It may also be pointed out that under the present law the insurance company may be damaged by its inability to join as a party plaintiff with the workman, where the workman, through a choice of an incompetent attorney or otherwise, fails to prosecute his cause of action to his full advantage.

In view of the many changes made in Section 29 in recent years, it would appear that the present amendment is merely one step forward towards a more just definition of the workman's and the insurance company's rights in third party actions. Yet these rights could be better defined and better protected by a further change in the law. It is submitted that the law should be further amended to provide that the workman and the insurance company have separate causes of action[11] against the third party tort-feasor, with provision for their joinder as parties plaintiff to prevent the tort-feasor's being subject to double recovery. Such separate cause of action of one would not be affected by any compromise or settlement of his claim by the other.[12]

9. Roth v. Harlem Funeral Car Co., 268 N. Y. 661, 198 N. E. 545 (1935)

10. An attorney who has a lien on the recovery of a cause of action may recover from the defendant if a compromise is effected and the plaintiff secured from the defendant a sum insufficient to pay the attorney's fee. N. Y. Laws, 1879, c. 542, § 66.

Analogously it would seem that the insurer should recover from the tort-feasor when the workman's compromise is less than the compensation paid. But the question is not settled either in cases or this new statute.

11. CONN. GEN. STAT. (1930) § 5231 provides for separate causes of action in case of a suit against a third party tort-feasor. In New York under Section 29 of the Workmen's Compensation Law the insurance carrier has a separate and distinct cause of action in a death action against the tort-feasor for payments made to the Treasurer of the State of New York under Section 15, subdivisions 8 and 9 of the Workmen's Compensation Law. This is true in spite of the fact the wrongdoer has already paid a sum greater than compensation would have been for the death of the employee and has obtained a general release. Phoenix Ind. Co. v. Staten Island Rapid Transit Ry. 251 N. Y. 127, 167 N. E. 194 (1929); Staten Island Rapid Transit Ry. v. Phoenix Ind. Co., 281 U. S. 98 (1930).

12. PA. STAT. (Purdon, 1936) tit. 77, § 671 provides that the insurance carrier be subrogated to the rights of the injured employee only to the extent of the compensation paid. Under this statute it has been held if the workman has recovered on or compromised his cause of action against the tort-feasor, who was notified that compensation had been

The workman should receive compensation during the period of his greatest need and be allowed to proceed with his third party action in any way he sees fit, the insurance company having no interest other than a separate cause of action for damages it has sustained in form of compensation paid because of the tort-feasor's negligence.

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paid, the insurance carrier may still sue the tort-feasor unless he had lost his right by laches and the recovery by the employee is no bar to such action. Smith v. Yellow Cab Co., 288 Pa. 85, 135 Atl. 858 (1927). CONN. GEN. STAT. (1930) § 5231 provides: "No compromise with such third person by either employer or employee shall be binding upon or affect the rights of the other, unless assented to by him."