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Property–Dower–Specific Performance is Allowed

Charles Clifford Gibson III

PROPERTY—DOWER—SPECIFIC PERFORMANCE IS ALLOWED. *Box v. Dudeck,* 265 Ark. 165, 578 S.W.2d 567 (1979).

John E. Box, Jr., executed a written contract to sell eighty-nine acres of land to R. F. Dudeck. Subsequently, Ruth M. Box, John's wife, refused to join in the agreement or execute a deed releasing her statutory dower rights. The buyer, Dudeck, then filed suit in Washington County Chancery Court for specific performance of the land sales contract.

The chancellor found that Box had agreed to sell his interest in the land and ordered specific performance of the land sales contract. Dudeck was ordered to pay the agreed price, less the value of the inchoate dower, which was found to be $20,826.00. The court also ordered a lien imposed on the property subject to these conditions: (a) if Box predeceased his wife, the lien would be void and Mrs. Box's dower interest would attach; (b) if Box should be alive seven years after the recordation of the deed, the abated amount would be payable to Box; (c) if Mrs. Box relinquished her inchoate dower right within seven years, the amount abated would be payable to her. The Arkansas Supreme Court affirmed the trial court judgment with the modification that if Ruth Box predeceased her husband within the seven year period, then the amount abated to Dudeck should be paid to John Box. *Box v. Dudeck,* 265 Ark. 165, 578 S.W.2d 567 (1979).

It is not unusual for husbands to undertake to convey and give good title to land owned by them, assuming the later responsibility of securing the consent of their wives.[1] If the wife refuses to relinquish her inchoate dower rights,[2] the husband becomes liable for

1. Horack, *Specific Performance and Dower Rights,* 11 IOWA L. REV. 97, 105 (1926).

2. At common law women were granted rights in their husband's property. These rights were called dower, and were the product of a society desiring to provide a form of social security to surviving widows. 2 R. POWELL, THE LAW OF REAL PROPERTY § 209[1] (rev. ed. 1977); 2 W. BLACKSTONE, COMMENTARIES *130. Dower in Arkansas is statutory and extends both to the personal and real proprty of the husband. *See* ARK. STAT. ANN. §§ 61-201 to -204, -206 (1971). With respect to land, a widow acquires one-third of her husband's property for life. *Id.* § 61-201. However, if the husband dies leaving no children, the widow obtains one-half in fee simple absolute. *Id.* § 61-206. The wife's entitlement to enjoy one of these statutory estates is contingent upon her surviving her husband. Mickle v. Mickle, 253 Ark. 663, 488 S.W.2d 45 (1972). She nonetheless has rights which attach to his property during his lifetime. These rights were designated as inchoate dower at common law. 2 R. POWELL, *supra.* Arkansas's statutory inchoate dower prescribes that no act by the husband

breach of contract because he cannot convey marketable title to the property.[3]

American courts have allowed the purchaser to elect the remedy of specific performance[4] in lieu of an action for damages.[5] Three general[6] approaches to applying the remedy have emerged. Under the first approach, courts of equity allow a deduction from the purchase price to the extent of the value of inchoate dower.[7] A second approach is to require the vendee to pay the full purchase price and risk the possibility of dower vesting.[8] A third way is for

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may deprive his wife of her dower rights in his property. ARK. STAT. ANN. § 61-208 (1971). Moreover, the wife's right of dower is not cut off even though the husband may sell the land. *Id.* § 61-207. The right may only be relinquished voluntarily and in a manner prescribed by law. *Id.* § 50-418.

3. A land sales contract implies, in and of itself, ownership and the power to give marketable title. Mays v. Blair, 120 Ark. 69, 179 S.W. 331 (1915). Title clouded by inchoate dower is not marketable title. Vaughan v. Butterfield, 85 Ark. 289, 107 S.W. 993 (1908).

4. If one promises to sell a thing and fails to perform his promise, an action for damages by the aggrieved party is the sole redress in a law court, but a court of equity may require the contract agreement to be specifically performed if an action at law for damages is not considered an adequate remedy. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 714, 717 (7th ed. 1857). Traditionally, a person making a contract for the sale of land can be required to specifically perform on the theory that land, unlike personalty, has a special value to the purchaser. *Id.* § 717. In an old case the Ohio court stated that "[t]he specific performance of a contract rests on the ground that the ordinary remedy for its breach will not afford adequate relief. In some cases, this is so apparent that a specific performance is decreed as a matter of course. Such is the case of a contract for the conveyance of real estate." Port Clinton R.R. v. Cleveland & T.R.R., 13 Ohio St. 544, 549 (1862).

5. 4A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1918 (repl. 1979).

6. Few jurisdictions follow any of these approaches precisely. The Missouri court characterized these specific performance cases by stating that "[t]here is no unanimity of decision on this question of diminution of purchase price. The cases are in much confusion and irreconcilable contrariety." Tebeau v. Ridge, 261 Mo. 547, 568, 170 S.W. 871, 876 (1914). *See* Horack, *supra* note 1.

7. *E.g.*, Brookings v. Cooper, 256 Mass. 121, 152 N.E. 243 (1926). This approach reflects a general rule of equity jurisprudence; the vendee should only pay for that performance which the vendor could give, it being unjust to allow the vendor to profit by his own default. 2 J. STORY, *supra* note 4, at § 779.

8. *E.g.*, Riesz's Appeal, 73 Pa. 485 (1873). The Pennslyvania court refused to reduce the purchase price to the extent the vendor did not perform the land sales contract. The court reasoned that "[t]he wife is not to be wrought upon by her love for her husband, and sympathy in his situation, to do that which her judgment disapproves as contrary to her interest; nor is he to be tempted to use undue means to procure her consent." *Id.* at 490. The Missouri court followed the above reasoning and stated that a court of equity should not indirectly or even remotely coerce a woman to relinquish her inchoate dower in the face of a statute which expressly provides that any relinquishment of her rights is to be done voluntarily. Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 706, 111 S.W. 480, 489 (1908). The court also stated that the amount to be deducted from the purchase price is not ascertainable because the value of the inchoate dower right cannot be calculated

the court to allow the value of inchoate dower to be deducted from the purchase price and to be held by the vendee until the dower rights expire or become barred.[9]

In *Hirschman v. Forehand*,[10] the Arkansas Supreme Court elected to follow the first approach. This requires the vendee to pay only for that performance the vendor can give. Later, in *Sebold v. Williamson*,[11] the court shifted its position and held that the amount abated should be regarded as an indemnity, thereby applying the third general approach. Under this approach the equitable remedy may be divided into three elements: the amount to be abated from the purchase price, the handling of the indemnity, and the interest, if any, which should be paid by the vendee on the amount abated.

If the vendor's wife refuses to relinquish her inchoate dower, the vendor cannot convey all of the property interest which he promised to sell. Thus, the amount to be abated from the purchase price is the value of the inchoate dower right since the vendee should not have to pay for a performance which the vendor cannot render.[12] In *Sebold* the Arkansas Supreme Court held that the amount to be abated is one-third of the total purchase price agreed to by the parties. The court settled on this figure because the actual value of inchoate dower could not be ascertained with reasonable precision.[13]

The indemnity element of the remedy allows the vendor to receive the amount retained by the vendee if dower never vests; but if dower vests, then the amount of the purchase price retained by the vendee compensates him for the loss of land to which the

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with reasonable precision. *Id.* at 711, 111 S.W. at 491. *See also* Kuratli v. Jackson, 60 Or. 203, 118 P. 192 (1911) (to grant specific performance is to make a new contract for the parties).

9. The apparent reason for this approach is that the vendee should retain the amount deducted from the purchase price only if the dower interest vests. *See* Holly Hill Lumber Co. v. McCoy, 203 S.C. 59, 26 S.E.2d 175 (1943). *See also* RESTATEMENT OF CONTRACTS § 365, Illustration 4 (1932).

10. 114 Ark. 436, 170 S.W. 98 (1914). *See also* Osborne v. Fairley, 138 Ark. 433, 211 S.W. 917 (1919); Reed v. Phillips, 191 Ark. 58, 83 S.W.2d 554 (1935). The Arkansas court first alluded to the problem in Vaughan v. Butterfield, 85 Ark. 289, 107 S.W. 993 (1908).

11. 203 Ark. 741, 158 S.W.2d 667 (1942). This rule was subsequently followed in Hawkins v. Lamb, 210 Ark. 1, 194 S.W.2d 5 (1946).

12. Vaughan v. Butterfield, 85 Ark. 289, 292, 107 S.W. 993, 993 (1908).

13. 203 Ark. 741, 745, 158 S.W.2d 667, 668 (1942). Apparently the court settled on this figure because ARK. STAT. ANN. § 61-201 (1971) (the general dower statute) grants one-third of the land to the wife for life.

dower interest attaches.[14] In *Sebold* the Arkansas Supreme Court affirmed a chancery court judgment which held that the amount abated and retained by the vendee would become payable to the vendor if he survived his wife or if the wife should release her dower.[15] The court also affirmed the chancery court decree that a lien should be retained in the deed by the vendor to protect his conditional right of payment.[16] In *Fletcher v. Felker*,[17] the United States District Court for the Western District of Arkansas followed this indemnity procedure, but also held that the expiration of the dower statute of limitations[18] would bar inchoate dower from vesting, and if dower became barred before vesting the amount abated should be payable to the vendor.[19]

The Arkansas Supreme Court has not passed upon the question of whether interest should be paid on the amount abated. In *Fletcher* the federal court, interpreting Arkansas law, held that the vendee should retain the amount abated without interest.[20]

In *Box v. Dudeck*,[21] the principal case, there were four arguments advanced by Mr. Box. First, the contract to sell was conditioned upon Ruth Box joining in the conveyance.[22] As to this contention, the Arkansas Supreme Court upheld the finding of the trial judge that John Box unconditionally agreed to sell his interest in the property, reasoning that the chancellor was in a position to observe the witnesses and should be overturned only if the finding was clearly against the preponderance of the evidence.[23] The second argument advanced was that the value of the inchoate dower for abatement purposes, as set by the chancellor, was in error.[24] The court upheld the value set by the chancellor, stating that although it may not have been precise, the burden was on the chal-

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14. *See* note 9 *supra*.
15. 203 Ark. 741, 743, 158 S.W.2d 667, 668 (1942).
16. *Id.*
17. 97 F. Supp. 755 (W.D. Ark. 1951).
18. ARK. STAT. ANN. § 61-226 (1971).
19. The federal court stated that "the only reasonable interpretation of the [statutory] language used is that her dower right is barred after the lapse of seven years, regardless of any effort on her part to assert it before that time." Fletcher v. Felker, 97 F. Supp. 755, 763 (W.D. Ark. 1951).
20. *Id.* at 764.
21. 265 Ark. 165, 578 S.W.2d 567 (1979).
22. *Id.* at 166, 578 S.W.2d at 568.
23. *Id.* at 168, 578 S.W.2d at 569.
24. *Id.* at 169, 578 S.W.2d at 570.

lenging party to show affirmatively that the value was erroneous.[25] The third argument presented was that the amount abated was a judgment and should bear interest as provided by law.[26] The court found that the reduction in the purchase price was not a judgment because the dower interest had not been destroyed by granting specific performance to the vendee and thus no interest should be charged.[27] The court stated that the amount abated could be payed to Mrs. Box whenever she relinquished her inchoate dower.[28] Finally, it was argued that the trial judge erred by not holding that if Ruth Box predeceased John Box within the seven year period the amount abated should be payable to him.[29] The court held this to be an oversight by the chancellor and accordingly modified the decree.[30]

There are several inherent problems with granting specific performance in situations such as the one presented in *Box*. The method employed by Arkansas for ascertaining the value of inchoate dower for abatement[31] purposes is deficient in several respects. Under prior law the value of inchoate dower was set at one-third of the contract price.[32] The basic weakness of this method of valuation lies in the fact that it does not consider the possibility that dower may not vest. It is clear that the value of the inchoate dower of a wife who is fifty years old, with a husband who is thirty-five years old, is worth less than the inchoate dower of a wife who is thirty-five and married to a man who is fifty.[33] Moreover, the wife's dower, in realty, is only one-third for life[34] rather than one-third absolutely,[35] unless there are no children. In the latter event the

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 170, 578 S.W.2d at 570.
30. *Id.*
31. Abatement is a term of art, with different meanings depending upon the context in which it is being used. *See* BALLENTINE'S LAW DICTIONARY 2 (3d ed. 1969). For purposes of this note it shall mean the diminution of the purchase price of the land sales contract to the extent of the value of the inchoate dower right.
32. Sebold v. Williamson, 203 Ark. 741, 743, 158 S.W.2d 667, 668 (1942).
33. A Rhode Island court saw the error of setting the value of inchoate dower at one-third of the purchase price. The court held that the value should be determined with the aid of mortality and present value tables. Najarian v. Boyajian, 48 R.I. 213, 219, 136 A. 767, 770 (1927).
34. ARK. STAT. ANN. § 61-201 (1971).
35. The Indiana court recognized this fault of using one-third of the purchase price. Martin v. Merritt, 57 Ind. 34, 41 (1877).

dower would be one-half in fee simple absolute.[36]

The Arkansas Supreme Court in *Box*, without providing a reason, deferred to the chancellor's wisdom in calculating the value of the inchoate dower right.[37] It is open to question whether this policy is appropriate with respect to determining the value of the inchoate dower. In *Box* the chancellor arrived at the value by using an outdated and no longer accurate statutory table[38] designed for calculating the present value of vested life and remainder interests in property.[39] One error of this is obvious aside from the unreliability of the table. Inchoate dower is not a life estate, but is only a possibility of a life estate[40] or an estate in fee if there are no children.[41]

Some jurisdictions use an actuarial method of calculation which considers the effect of the contingent nature of dower on the value of the inchoate right.[42] Results obtained by this method re-

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36. ARK. STAT. ANN. § 61-206 (1971).

37. 265 Ark. 165, 169, 578 S.W.2d 567, 570 (1979).

38. ARK. STAT. ANN. § 50-705 (1971). This table is actuarily unsound, being out of date by thirty to forty years.

39. 265 Ark. 165, 169, 578 S.W.2d 567, 570 (1979). The following is an attempt to reconstruct the calculations made by the chancellor. Since the wife was 48 years old, the "proper" annuity figure was 11.5700 according to the table in ARK. STAT. ANN. § 50-705 (1971). The foregoing annuity figure times an income stream from one-third of the property (calculated by taking 6% of $30,000.00, which is one-third of the purchase price agreed to by Box and Dudeck) equals $20,826.00, which is the value of the inchoate dower right as found by the chancellor in *Box*.

40. The inchoate dower right of a wife is contingent upon the husband predeceasing her. Mickle v. Mickle, 253 Ark. 663, 488 S.W.2d 45 (1972).

41. ARK. STAT. ANN. § 61-206 (1971).

42. In Jackson v. Edwards, 7 Paige Ch. 386 (N.Y. 1839), the New York court expressed the following formula:

> [A]scertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then . . . deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between those two sums will be the present value of her contingent right of dower.

Id. at 408.

Tables based upon the above formula were published. E.F.P., *On The Present Value of Dower Rights—Vested and Contingent*, 4 Q.L.J. 1 (1859). Even though these tables are long out of date, new tables may be established by the use of the proper actuarial methods as set out therein.

The Virginia court followed the above formula and denounced a similar formula which deducted the expectation of the life of the husband from the similar expectation of the wife. Under this formula the inchoate dower right could be worthless or even have a negative value if the husband was substantially younger than the wife. The court thought this possible result to be repugnant to the idea of dower being a valuable right. Strayer v. Long, 86

flect only the average probabilities of whether dower will vest.[43] The circumstances and particulars of a given case may vary, of course, in that the husband or the wife may have characteristics or habits which alter their life expectancies from the norm. This presents the question of whether the use of this method is altogether proper since inequities may occur in a particular situation.[44] Another weakness of the actuarial method, with all of its elaborate calculations and considerations, is that it does not take into consideration the effect of changing land prices on the value of inchoate dower.[45] However, it cannot be denied that the value of inchoate dower is more closely approximated by the actuarial method than by the former Arkansas rule[46] which rather arbitrarily set the value of inchoate dower at one-third of the purchase price. The actuarial method of valuation may also be superior to the *Box* rule since it at least establishes guidelines for the chancellor to follow in ascertaining the value of inchoate dower.

As noted above, several jurisdictions have adopted the actuarial approach as being sufficiently accurate for purposes of granting specific performance in cases such as *Box*. However, this might not be a proper course for Arkansas because the formula[47] does not take into consideration complicating factors peculiar to Arkansas. One of these factors is that the chances of dower vesting are decreased by the statute of limitations[48] and thus the value of inchoate dower correspondingly decreases because its value lies in the possibility of its eventual vesting. The value of inchoate dower is also directly affected by the Arkansas statute[49] which declares that the wife will receive one-half in fee if her husband dies without children.[50] The value of a possibility to receive one-half in fee is

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Va. 557, 10 S.E. 574 (1890). *See also* Share v. Trickle, 183 Wis. 1, 197 N.W. 329 (1924).

43. The calculations are based upon mortality tables. *See generally* E.F.P., *supra* note 42. Mortality tables reflect the average probabilities of continued life based upon the actual human experience of life and death. *See* Brown v. Bronson, 35 Mich. 415, 421 (1877).

44. *See* Sternberger v. McGovern, 56 N.Y. 12, 20 (1874). *Contra,* Brown v. Bronson, 5 Mich. 415, 421 (1877) (defending the use of mortality tables).

45. It seems to be elementary that if the value of the land increases, then the value of the inchoate dower attaching thereto would also increase.

46. *E.g.,* Hirschman v. Forehand, 114 Ark. 436, 170 S.W. 98 (1914).

47. *See* note 42 *supra.*

48. ARK. STAT. ANN. § 61-226 (1971).

49. *Id.* § 61-206.

50. Alabama, having a similar statute, sets the value of the inchoate dower according to which estate the wife presently appears able to take. Sadler v. Radcliff, 215 Ala. 499, 504, 111 So. 231, 235 (1927). However, this overlooks the possibility that the circumstances may

clearly worth more than a possibility to receive one-third for life. It thereby becomes evident that the true value of inchoate dower can only be approximated and is not precisely calculable.[51] It may be likened to the air we breathe. There is no doubt about its presence, but its very nature defies man's perception.

Since the present Arkansas rule requires some amount to be chosen to represent the value of inchoate dower,[52] it is important to note the serious ramifications that may arise from an erroneous valuation. If the value is set too high, the vendee obtains an unwarranted gain and the vendor an unjust loss.[53] In this instance the wife might initially suffer if she is dependent for support on the vendor-husband. The wife might be coerced in this situation to relinquish her statutory[54] right. Moreover, the legislature has decreed that any relinquishment of dower is to be by the wife's own voluntary act.[55] Potential injustice, however, is not limited to the vendor and his wife. If the value set is lower than the true value of inchoate dower, the vendee would suffer.

A second inherent problem with the Arkansas approach involves the handling of the indemnity portion of the equitable remedy. In Arkansas the amount abated is payable to the vendor if the inchoate right does not vest, but if it does vest, the amount abated is retained by the vendee.[56] This might not be equitable in Arkansas. If there are children in being when the dower vests, then the vendee merely loses the use of a life estate and does not lose a part of the land absolutely.[57] The vendee might secure the entire title for less than the true value with a limited inconvenience imposed

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change. Minge v. Green, 176 Ala. 343, 356, 58 So. 381, 385 (1912) (dissenting opinion).

51. Several jurisdictions take this view. *E.g.*, Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S.W. 480 (1908).

52. Box v. Dudeck, 265 Ark. 165, 578 S.W.2d 567 (1979).

53. It would seem that the vendor should receive the full value of the part performance he renders. Moreover, the vendee should not be entitled to something he has not paid for.

54. ARK. STAT. ANN. § 61-201 (1971).

55. *Id.* § 50-418. This is very similar to the Iowa holdings to which the Arkansas court has referred many times. *See* Vaughan v. Butterfield, 85 Ark. 289, 107 S.W. 993 (1908); Hirschman v. Forehand, 114 Ark. 436, 170 S.W. 98 (1914); Sebold v. Williamson, 203 Ark. 741, 158 S.W.2d 667 (1942). The Iowa position is easily understood when notice is taken of the fact that IOWA CODE ANN. §§ 633.211, .238 (1964) grants a portion of the husband's lands in fee. In view of this, the absolute retention by the vendee of the amount abated if dower vests appears equitable because the vendee absolutely loses part of the land for which he has bargained.

56. Box v. Dudeck, 265 Ark. 165, 578 S.W.2d 567 (1979).

57. ARK. STAT. ANN. §§ 61-201, -206 (1971).

by the dower for as long as the widow lives. Other jurisdictions with dower statutes which grant life estates instead of estates in fee require the amount abated to be paid to the vendor's heirs at the expiration of the dower.[58]

It is also doubtful whether the apparent interpretation of the dower statute of limitations[59] by the Arkansas court in *Box* is wholly correct. Under *Box* the inchoate right is barred by the dower statute of limitations regardless of any action on the part of the wife to preserve it.[60] The concept of dower came about as a device to protect and provide for the wife.[61] If the husband can dispose of property to a willing buyer without the wife's agreement, subject only to a seven year statute of limitations, then the intention of society with regard to dower and the economic importance of it in providing for widows is substantially undermined. Although the Arkansas statute of limitations is useful in clearing land titles, it is difficult to believe that the General Assembly intended it to be used as a device which would partially vitiate its attempt to provide for widows. In this regard the legislature has decreed that no act of the husband shall infringe upon the wife's right to dower,[62] even though he may sell the land.[63] Indeed, another element of coercion on the widow's share arises.

Another obvious problem of the Arkansas approach is the disallowance of interest on the amount abated during the time that dower remains inchoate.[64] This rule allows the vendee to have the use of the amount abated plus the use of the land to which dower attaches as long as the right remains inchoate. The vendee thereby receives an unwarranted gain and a corresponding hardship is placed upon the vendor and his wife. An undesirable coercion on the wife to release her dower again becomes evident, disregarding the legislative requirement that relinquishment of dower is to be

58. *E.g.*, Sadler v. Radcliff, 215 Ala. 499, 504, 111 So. 231, 235 (1927).

59. ARK. STAT. ANN. § 61-226 (1971).

60. 265 Ark. 165, 170, 578 S.W.2d 567, 570 (1979). *See also* Fletcher v. Felker, 97 F. Supp. 755, 763 (W.D. Ark. 1951).

61. 2 R. POWELL, *supra* note 1.

62. ARK. STAT. ANN. § 61-208 (1971).

63. *Id.* § 61-207.

64. In BOX v. Dudeck, 265 Ark. 165, 169, 578 S.W.2d 567, 570 (1979) the Arkansas court did not face the interest question as part of the equity remedy. It was contended by the appellant that the amount abated was a judgment which is required by law to bear interest. The court simply stated that it was not a judgment. However, a federal court, interpreting Arkansas law, decreed that the vendee was to hold the amount abated without interest. Fletcher v. Felker, 97 F. Supp. 755, 764 (1951).

voluntary.[65] Some other jurisdictions recognize this gross inequity and require interest to be paid.[66]

Further, the court in *Box* stated that the wife may receive the amount abated if she should subsequently release her dower rights to the vendee.[67] This is altogether inconsistent with the idea of inchoate dower due to the fact that dower is only a contingent right.[68] To allow the abated amount to be paid to the wife upon relinquishment of inchoate dower is to give her something that the dower statute[69] does not. Moreover, she is not without rights in the amount abated, if it were returned to her husband upon the relinquishment of her right.[70]

The *Box* decision indicates the willingness of the Arkansas court to continue its practice of apportioning the rights of the parties in cases fraught with impossible difficulties and uncertainties. It is elementary that the function of equity is to do what is equitable and not to add to injustice. Some jurisdictions recognize the inability of a court to reach a truly equitable result in cases such as *Box* and only allow the remedy of specific performance if the vendee is willing to pay the full purchase price and risk the possibility of dower vesting.[71] Under this line of thought a recalcitrant spouse could prevent her husband from selling his interest in land because prospective buyers usually would not accept land subject to inchoate dower. This result would be repugnant to the policy of Arkansas law which allows the husband to sell his interest in property even though his wife refuses to join.[72]

In any event, the Arkansas Supreme Court should not be delegated the task of dealing with the insolvable problems which arise when the wife refuses to join the husband's conveyances. A court should not have to be associated with the improprieties which may

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65. ARK. STAT. ANN. § 50-418 (1971).

66. *E.g.*, Sadler v. Radcliff, 215 Ala. 499, 504, 111 So. 231, 235 (1927). *Contra*, Peddicord v. Peddicord, 242 Iowa 555, 47 N.W.2d 264 (1951) (enunciating the Iowa rule).

67. 265 Ark. at 169, 578 S.W.2d at 567.

68. LeCroy v. Cook, 211 Ark. 966, 204 S.W.2d 173 (1947).

69. ARK. STAT. ANN. § 61-201 (1971).

70. *See id.* § 61-202.

71. *See generally* cases cited note 8 *supra*.

72. This conclusion is supported by a reading of the Arkansas statutes. The General Assembly felt so strongly about the preservation of the homestead right that it decreed that any contract which purported to convey away homestead is invalid. ARK. STAT. ANN. § 50-415 (1971). However, the inchoate dower right statutes do not invalidate a contract which affects land to which dower might attach. They only declare that such a contract will not deny the wife her dower estate unless she assents thereto. *Id.* §§ 61-207, -208 (1971).

occur in cases such as *Box*. Some relief may be in sight since, under the rationale of a recent United States Supreme Court decision,[73] there is a distinct possibility that the inchoate right may be in violation of the United States Constitution. Be that as it may, inchoate dower was created by the General Assembly, and it is within its power to take it away.[74] If the legislature decides that the policy pertaining to inchoate dower should be preserved, then it has an inherent responsibility to formulate guidelines for solving the difficult problems which arise in cases such as *Box*.[75]

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73. While the wife has an inchoate dower right, the husband does not have an inchoate curtesy right. *See* ARK. STAT. ANN. § 61-229 (1971). A similar type of unequal treatment based upon gender was held to be in violation of the fourteenth amendment. *See* Orr v. Orr, 440 U.S. 268, 281 (1979) where the Supreme Court stated that "[n]eedy males could be helped along with needy females with little if any additional burden on the State."

74. Dower is not a constitutionally protected right. Randall v. Kreiger, 90 U.S. (23 Wall.) 137 (1874); State v. Boney, 156 Ark. 169, 245 S.W. 315 (1922).

75. A salutory step was taken by the West Virginia legislature in providing the procedure and guidelines for situations where the husband wishes to convey his interest in land and the wife does not wish to release her dower interest. WEST VIRG. CODE ANN. § 43-2-4 (Cum. Supp. 1979).