

THE CHARITABLE SPIRIT OF THE LAW.

sionis, since it was not of absolute necessity that she should claim her dower, but it is of absolute necessity that the law should cast the freehold on the heir: *Gilb. Ten.*, 26, 27. So that, by the endowment, the possession is avoided that the law cast on the heir: *Ib.* This "absolute necessity" depends altogether upon reasons of feudal policy. It is explained in *Cruise's Digest*, that the widow holds of the heir by fealty; the assignment of dower by the heir being a species of sub-infeudation not prohibited by the statute *Quia Emptores*, because the heir does not depart with the fee: 1 *Cruise*, 165, pl. 26. An estate in dower is a continuation of the husband's estate, but it is a tenancy of the heir: *Ib.* 169, pl. 8; 163, pl. 15. This distinction between the present estate in curtesy on the death of the wife, and the possible estate in dower on the death of the husband does not appear to have been present to the minds of the Legislature, when the statute was enacted which now appears in the *Rev. Stat. c. 105, sec. 40*, where it is said that the estate of the husband as tenant by the curtesy, or of a widow as tenant in dower shall not be affected. . . . but all such estates shall remain, pass, and descend, &c.

Under the copyhold system of tenure, the widow's right are preserved, as we submit they might well be by direct enactment under the socage tenure of this country. In *Vaughan v. Atkins*, 5 Burr, 2787, Lord Mansfield says, "the law casts the free-bench upon the widow, just as it casts the descent upon the heir." This sentence suggests the text of a short statute, which would secure incontestably the rights of the widow by providing that an estate in dower for one-third of the land should vest in the widow, at and upon the death of the husband. The effect of this would be that the widow would become at once a

tenant in common with the heirs; and this is the law as declared by statute in Vermont and Connecticut. Some progress has been made in this direction by the Partition Act, which recognizes the right of the widow, irrespective of the assignment of dower (*Rev. Stat., c. 101, s. 49*), and which also provides that "doweresses and parties entitled to dower" may be compelled to make or suffer partition: *Ib.* see 4. This last Act in effect carries out the suggestion of Lord Loughborough in *Mundy v. Mundy*, 2 Ves. Jr., 124, when he asked: "Can not a doweress come here, as a coparcener can come for a partition?"

When we think of the very slight formality required to vest a present estate in dower in the widow: that it may be done by word of mouth, without any setting apart of a specific parcel of land by metes and bounds (*Leach v. Shaw*, 8 Gr. 497, and *Reeve v. Power*, 2 Bos. & Pul, N. R., 33 Dom. Proc.), we can see no reason why it should not be the law that the estate should vest, as of course, on the death of the husband.

In a succeeding paper, some considerations will be suggested, which may perhaps go to invalidate the doctrine laid down in *McDonald v. McIntosh*.

(To be continued.)

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(Continued.)

A former article on this subject in the November number of this Journal aimed at showing how strong the presumption of English law in favour of innocence is, and how absolute is the proof that is required in order to convict a person of a criminal or illegal act. So much is this the case that Paley, in his *Moral and Political Philosophy* (Bk. vi. chap. ix.), complains of the state of the law in this respect as doing much harm. to the