

Chan. Cham.]

RE McMORRIS.—McMASTER V. HECTOR.

[Chan. Cham.]

that a service on Saturday would have been insufficient.

I think under the circumstances of the case the summons should be discharged without costs.

From this judgment the plaintiff appealed by summons to a judge, which came on for hearing before Mr. Justice Galt, when

C. S. Patterson shewed cause.

Osler, contra.

GALT, J.—I felt some doubt upon the point decided by Mr. Dalton, but after consideration, I think the view he takes is the correct one. The question of the *bona fides* of the defendant's attorney does not properly come before me on this summons. I am not, therefore, called upon to make any remark on the circumstances which are detailed by the plaintiff to set aside the proceedings of the defendant on the ground of trickery.

Summons discharged.

IN CHANCERY—MASTER'S OFFICE.

RE McMORRIS.

Dower.

A widow who has barred her dower in a mortgage, given by the husband for his own debt, is entitled to have the mortgage paid off by the husband's assets. If she claim dower merely out of the equity of redemption, she has priority over creditors, but if out of the *corpus* of the property, she is postponed to them. On a sale of the lands, as soon as the debts of the husband are paid, she takes precedence over the heir and volunteers, claiming under the husband, and becomes absolutely entitled to her rights as doweress in the balance of the proceeds. *Sheppard v. Sheppard*, 14 Grant, 174, noticed.

[May, 1872, *Mr. Boyd*.]

In this case land mortgaged by the testator was ordered to be sold, and by consent of the widow her rights as doweress were to be ascertained in the master's office. She also claimed dower in lands for the purchase of which her husband had been in treaty with the Crown.

Mr. Holmested for the widow.

Mr. McWilliams for the legatees.

MR. BOYD.—The widow's position in equity seems to be this: having barred her dower in a mortgage in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband is, in one aspect, in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the land. If she claims dower merely out of the equity of redemption, that would be given her of course in priority to creditors, but if, as here, she claims dower out of the whole *corpus* of the mortgaged land, then she cannot do this to the prejudice of creditors. According to the decisions of this court, general creditors would have the right to marshal the mortgage debt upon the land mortgaged to the prejudice of the widow's dower. But after payment of creditors her rights as doweress accrue absolutely to a life estate in one-third of the lands mortgaged or of the proceeds of the sale thereof. When the mortgage is paid out of the testator's assets, as in this case, by a sale of the lands, it is equivalent to a payment by the testator himself, so far as

the doweress is concerned. Had the mortgage been redeemed by the heir out of his own moneys, questions of contribution by the widow would have arisen, which do not arise in the present case. The wife simply bars her dower with a view to secure the debt due by her husband; when that debt is paid by the husband's estate, she is remitted, as against the heir and volunteers claiming under the husband, to her full rights as doweress in the whole estate mortgaged. *Sheppard v. Sheppard*, 14 Grant, p. 174, and the passage from Park cited with approval therein are authorities for these positions. I do not regard this case as over-ruled save in so far as it decides that creditors are to be postponed till dower is paid out of the mortgaged estate, see *White v. Bastedo*, 15 Gr. 546, and *Thorpe v. Richards*, *ibid*, 403. I do not see upon what principle her claims to dower should be postponed to the legatees in the will named, and indeed by the decree, on further directions, they are only to be paid after the satisfaction of all other claims. As to arrears she can only have these upon contributing one-third of the interest on the mortgage debt since the death to the time of the sale.

Craig v. Templeton, 8 Gr. 483, goes to the limit of the law, and that case cannot be extended to meet the present, where the right to a patent was cancelled in the testator's life, and by a mere act of grace was it given to his child afterwards.

McMASTER V. HECTOR.

Computation of subsequent interest.

Former practice in respect to computation of subsequent interest now altered, except in certain cases. Subsequent interest should be computed upon the aggregate of principal, interest and costs, which the puisne incumbrancer has paid for redemption money. Upon the principal money, subsequent interest should be regulated by the rate fixed in the mortgage security—upon the interest and costs, only statutory interest should be computed.

[June, 1872, *Mr. Boyd*.]

This was a foreclosure suit in which a second mortgagee had redeemed the plaintiff. A question arose as to what subsequent interest should be allowed the party who redeemed.

MR. BOYD.—By the old practice of the court, a master's report computing interest on the principal money secured by mortgage, ascertaining what was due and fixing a time for payment, was equivalent to a judgment at law in converting such interest into principal money. If the sum so found due was not paid, subsequent interest would be computed on the whole, interest and principal, *Bacon v. Clerk*, 1 P. Wms. 478; *Creuze v. Hunter*, 2 Ves. Jr. 159; *Perkyns v. Baynton*, 1 B. C. C. 574. The same rule applied where part of the sum found due by the report consisted of costs, *Bickham v. Cross*, 2 Ves. Sr. 471; *Bruere v. Wharton*, 7 Sim. 483. The old rule, however, is now otherwise, and only the principal carries interest, except where a favour is asked by the mortgagor in the way of extending the time for payment, *Whallon v. Craddock*, 1 Keen, 267; *Holford v. Yates*, 1 K. & J. 677; *Whitfield v. Roberts*, 7 Jur. N. S. 1268, and where a later mortgagee or incumbrancer