A. A. Miller, for the widow.
E. C. Cattanach, for the infants.

MIDDLETON, J.:—By his will the deceased gives all his real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not re-marry. Save for the appointment of executors, this constitutes the whole will. The property consists largely of real estate.

It was admitted that the will gave the widow an estate in the lands during widowhood, and that save as to this estate the testator died intestate as to his realty. It was also admitted that the personalty would go to the widow absolutely.

The widow claims that the will does not put her to her election, and that she is entitled to an estate during widowhood in the testator's lands, and is also entitled in her own right to her dower interest in the same lands. She now seeks, under the Devolution of Estates Act, to elect to take a one-third interest in her husband's undisposed of real estate; i.e., in all his real estate subject to her estate during widowhood, in lieu of her dower.

I think I am concluded by authority, and that, as put by Boyd, C., in Marriott v. McKay, 22 O.R. 320, "a devise of all the lands to the widow durante viduitate puts her to elect. That devise gave her the freehold, and as tenant of the freehold she could not have dower assigned to her while she held that estate."

This is based upon the earlier decision in Westacott v. Cockerline, 13 Gr. 80, where Vankoughnet, C., upon the same reasoning, reaches the same conclusion.

The widow is, therefore, put to her election. If she elects against the will, she may then make the further election under the statute to take one-third of the land. If she elects to take her estate during widowhood, her dower right is gone, and she cannot then elect under the statute, because the right given to her by the statute is to take the third interest in the undisposed of lands "in lieu of" her dower.

Costs out of the estate.