

freehold appear and admit he right to dower, she may, nevertheless, go on and recover damages for the detention.

The Dower Act, R. S. O. c. 55, has been construed too rigidly, and without giving due effect to the very proper enactment, sect. 45, that in cases not otherwise provided for by the Act, the pleadings and proceedings shall be regulated by the law as it was relative to suits and actions of dower before August 10, 1850. There is nothing in the general enactment of the Dower Act, and certainly not with the aid of the 45th section to prevent the plaintiff from recovering her damages if she has claimed them, and is entitled to recover them.

Held also, R. S. O. c. 55, has not taken away or diminished the right of the dowress to damages against all persons and in all cases where they were recoverable here before August 10, 1850; and such damages are general damages as well for what are called *mesne* profits as for detention; and such general damages are covered by and included in the words "damages for detention of dower" in R. S. O. c. 55, or such general damages are not taken away by that Act, but are saved by sect. 45, and may be recovered by the law as it was before August 10, 1850, as "a case not otherwise provided for" by the Revised Statutes.

Held further, although no one but an heir or devisee can plead *tout temps prest* in an action of dower, because the feoffee of the heir or anyone claiming in the *per* had not the freehold immediately on the death of the husband, and so could not at all times from her death have been ready to render the dower, yet damages for detention of dower against a tenant in the *per* are not in every case to be computed from the death of the husband. For since, under O. J. A. s. 19, subs. 10, equity is to prevail; and since, under R. S. O. c. 55, s. 3, the tenant of the freehold has it in his power to offer to make an assignment of dower, a tenant may, at all events now, be permitted to plead he has at all times since he became tenant of the freehold, been ready and willing to render the plaintiff her dower, and if the plaintiff desire to avoid that plea she should reply a demand and refusal; which reply, if duly proved,

Seemle, damages would only be computed against the tenant from the date of the demand.

J. Bethune, Q.C., for the plaintiff.

Z. Lash, Q.C., and *King*, for the defendants.

Boyd, C.]

[June 20.

DUNLAP V. DUNLAP.

Conveyancing—Habendum—Mistake.

When the evidence showed that A. and his son, B., desired to effect a settlement of a landed property, embodying an agreement substantially as follows:—That B. should remain with A. on the place, and, if he did so, the land should be his on A.'s death; that A. should be the proprietor and have authority over the place while he lived; that B. should work the land and provide suitable maintenance thereon for A., and besides pay him \$45 a year for life, and also pay certain legacies six years after A.'s death. But the parties employed a quack conveyancer to draw the deed of settlement, who failed to provide for many of the essential provisions of the agreement, and as to the land, made A., in consideration of natural love and affection, grant the land to B., his heirs and assigns, *habendum*, "to have and hold the same after the decease of A. unto and to the only proper use and behoof of the said A. his heirs and assigns for ever;" and now brought this action for waste against A.

Held, the deed was not void, as passing only a freehold to commence *in futuro*, for the *habendum* is not essential to a deed, and the granting part of the deed was sufficient of itself to pass the immediate freehold to B. The consideration of blood-relationship expressed in the deed was sufficient to carry the use to B., and the deed, viewed as a covenant to stand seized, would vest the entire estate in B.; but *quare*, whether, according to the reasoning in *Goodlittle v. Carter*, 5 B. & Cr. 709, the express limitation of the use in the *habendum* after A.'s death would not rebut the implication of an immediate vesting of the use at the date of the deed in B., and the use of so much of the estate as was not expressly limited, (*i. e.*, here for the life of A.), result to and vest in A.

Held, further, however this might be, the deed did not express the true agreement of the parties and could not be allowed to stand; but B., having acted on the faith of the arrangement for some years, and being willing to carry out the original bargain, and execute proper instruments, the deed should not be set aside, but should be amended, and, if necessary, settled by the Master.