

Chan. Cham.]

ROWE V. WERT.

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the second mortgagee was not entitled to notice that this point would be considered in settling the report. *Held*, Also, that under the above circumstances the widow is entitled to dower, as against the second mortgagee in this country, though this is not so in England.

[October 17.—MR. TAYLOR.]

This was an application for leave to appeal from a report of the Master at Belleville after the time limited, under the following circumstances :

A first mortgagee filed a bill for sale of the mortgaged premises, after the death of the mortgagor. The mortgagor afterwards mortgaged the equity of redemption, and subsequently died. His wife joined in the first mortgage, for the purpose of barring her dower, but not in the second. A warrant having been taken out, after the sale, for the purpose of taking subsequent accounts, the Master in making his report thereon, found the widow entitled to dower as against the second mortgagee. From this finding the second mortgagee asked for leave to appeal. The motion was not made until more than six months after the date of the report.

*Thorne* in support of the application. The Master had no power to entertain the claim. It should have been raised on the first account. There was no account of rents and profits. *Dawson v. Bank of Whitehaven*, 37 L. T. N. S. 64, is expressly in point. No one can be prejudiced by the delay.

*Hoyle* contra. The delay is unreasonable and has not been explained. There is no ground for applying. The case cited is not in point. There is no equitable dower in England, while the law is otherwise here.

The matter was argued before the MASTER, sitting as REFEREE *pro tem*.

I refuse the application. The delay is great, and is not accounted for. In some cases leave has been given even after great delay, but in all such cases, some excuse for the delay has been given. Here, two days after the report was filed, the solicitor knew of the report and its contents, and stated in a letter to the defendant's solicitor his intention of applying, yet he took no steps to do so, for at all events six months.

I do not think the Master was wrong in reporting as he has done. It is not beyond his jurisdiction. He has only reported to the Court a special circumstance which under G. O. 220, he had the right to do. He has not taken any account of the amount due the widow, he has simply reported as a fact that her claim to dower comes in between the claim of the plain-

tiff and that of the subsequent incumbrancer. The amount to which the widow may be entitled has yet to be ascertained and then any question as to her past receipt of rents can be gone into.

At the time the Master made his report, the widow was, under the authorities, clearly entitled to dower. That she is not now entitled to dower can be argued only on the authority of *Dawson v. Bank of Whitehaven*, 37 L. T. N. S. 64. I have read that case carefully, and I do not think it is an authority in this country. The reasoning by which the Court of Appeal came to the conclusion that the widow was not entitled to dower was, that the wife having with the husband joined in a mortgage of the legal estate with a power of redemption she assented to her husband's estate being converted from a legal into an equitable estate; having done so, as the Master of the Rolls says, "she knew or must be taken to have known that one of the incidents to the legal estate, the inchoate right to dower, did not attach to an equitable estate. She extinguished her dower at law, and that extinguishment at law operated as an extinguishment in equity, because the dower did not exist in equity at all." Again he says, "the legal right to dower was extinguished, and the right to dower not being an incident to an equitable estate cannot exist for any purpose that can be recognized in this Court." L. J. Cotton took exactly the same ground, though he admitted that when dealing with property which a court of equity recognizes and assists a party in securing, as a mere equity, the general proposition is true that where a wife mortgages her property, she is considered as parting with that solely for the purpose of the mortgage and not further or otherwise. This was the view taken by V.C. Mowat in *Forrest v. Laycock*, 18 Gr. 611, and has ever since been in this country considered as the correct one. In another respect *Dawson v. Bank of Whitehaven* may be distinguished. The mortgage deed contained a power or trust to sell. That power was exercised in the life-time of the husband and the estate was converted into personalty, the wife assenting thereto by being a party to the deed.

The objection that the existence of a claim for dower should have been made known at the time of the original reference before the Master has no force. Had the defendants in possession of the report then made redeemed, no question as to the dower would have arisen. The widow would, as against the heirs, have been let in to her dower out of the land, freed from all incumbrances. It was only when the land had been sold and it became necessary for