any one or live in the house." She said she did not want the land, as she could not work it; that she would rather have something else.

She was requested not to go away till the matter was settled, and on behalf of all the heirs an offer was made to leave it to two persons to stake out the land, but she repeated that she could not work it, and would rather have something else. She was told whatever third the law would give her was ready for her.

Soon after the notice was served of the claim, in July she came again to the land and was again told that the third was ready for her, and she was requested to name a person on her behalf to measure it out. But no portion for her was even in fact marked out.

The learned judge, by consent of parties, directed the jury to find for the demandant, with one shilling damages, on all the issues, subject to the opinion of the court upon the evidence whether, drawing such inferences from the evidence as they might think right, the demandant or the tenant in the action should succeed upon the issues joined, the court to let the verdict stand for demandant, with or without damages, or to order a nonsuit, according to their opinion.

J. D. Armour, for demandant, cited Bishoprick and Wife v. Pearce, 12 U. C. Q. B. 306; Quin v. McKibbin, Ib. 323.

O'Hare showed cause.

ROBINSON, C. J.—I cannot distinguish these cases from that of Bishoprick and Wife v. Pearce, referred to in the argument (12 U. C. Q. B. 306). We are bound, I think, to give effect to our statute 13 & 14 Vic., ch. 58, sec. 5, according to the evident intention of the legislature in making the provision, which was that the tenant should not be subject to costs in cases of dower, unless the demandant were driven to sue for it. If she bring her action when she need not—that is, when her right is not disputed, and when the tenant has been willing to give her all she is entitled to without an action—then the statute protects the tenant against paying costs unnecessarily incurred. Here the tenant has pleaded no false plea, made no unjust defence, and shewn no disposition, before or since the action, to dispute the claim to dower. The only thing to be done therefore was to set out the land for the demandant to occupy.

This the tenant could not do alone, because he was not to be the sole judge in the matter. He offered to join in appointing persons to mete out the dower, but the demandant, according to the evidence, declined to take part in the measurement by appointing some one to act for her; she would take no interest in the matter, not caring about the land, as she said, but wanting money instead.

I do not see how the jury could have found upon their oaths that the tenant in this case had *refused* to render her dower, and that was the only issue raised upon the record.

The verdict, I think, should be in favour of the tenant on the issue, which will not interfere with the demandant taking judgment for her dower.

BURNS, J.—This case differs from the cases of Bishoprick v. Pearce and Quin v. McKibbin in the facts. The record, so far as the tenant pleading the plea of *tout temps prist*, and the demandant replying a demand of dower and refusal by the tenant, presents the case the same, but the evidence shews that in the present case the husband died seized of the premises, and the tenant was in possession by operation of law. The record does not show or suggest that the husband did die seised, and therefore it cannot be ascertained by the record whether it is a case in which the demandant would be entitled to costs as well as damages, irrespective of our statute. The pleadings seem to me sufficient to raise both questons —namely, whether the demandant is entitled to damages and costs, or costs only, if it be a case where she is not entitled to damages. In either case the demandant upon this record was at once entitled to her judgment for sisin of her dower, and there was no occasion to have taken down the case to *nisi prius* in order to have obtained the writ of *habere facias seisinam*. It was only necessary to go downtotrial for the purposeof determining the issues, with a view to see whether the demandant was entitled to recover damages as well as costs. The tenant in this case coming into the possession at the death of the husband, was not a wrong-doer as against the demandant until she demanded her dower and he had refused to give it to her. Therefore the plea of *tout temps prist* in this case was a proper plea on the part of the tenant, but I do not think the effect of the plea is to admit the right to damages. If the demandant's count had stated that the husband had died seised, the effect of the plea then might possibly be to admit the right to damages, but that point is not in question on this record. I think the application of what my brother Draper said in Bishoprick v. Pearce has been misapplied in this case. When he quoted from Bac. Abr. "Dower" D. 2, that notwithstanding the heir had pleaded *tout temps prist* the demandant would be entitled to recover damages from the teste of the original writ to the execution of the writ of inquiry, he must be understood to have meant upon a record properly framed for the purpose. In Hargrave's Notes to Coke on Littleton, 32 *b*, it is said, speaking of how the inquiry shall be of the dying seised and damages, "If judgment be by confession or default, a writ shall issue to deliver seisin and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted it may be supplied by writ of inquiry." The damages are—1. The value *de tempore mortis*; 2. *Damna occasione detentionis dotis*, though if they are mixed up together by the verdict yet it will be good. Now if the tenant's plea of *tout temps prist* be true, one can see no reason, though the demandant may be entitled to recover the value of the third part from the suing out the writ, why he should be subject to the second class of damages. Then with regard to the first, I find, upon looking into the cases in Viner's Abridgment, in all cases where the tenant pleads *tout temps prist*, and the demandant replies to it, there should be a suggestion that the husband died seised, and then the jury would be sworn upon the issue not only to try it, but to inquire of the dying seised and the damages. Upon the record so framed the jury might find the plea for the tenant, and yet asses the value or profits from the suing out of the writ to the time of the inquiry, for it is said that upon the plea of *tout temps prist* being put in, and the demandant taking issue upon it, the damages shall await the event of that issue and the demandant cannot in this case take judgment and pray a writ of inquiry—Roscoe on Real Actions, I. 310. The suing out of the writ is of itself a demand of dower, and if the tenant pleads *tout temps prist*, and the demandant confesses the plea, she is at once entitled to her writ of *habere facias seisinam* without damages; but if she contests the truth of the plea, her right to damages is suspended till the trial of the issue; and as the plea of *tout temps prist* admits the right to dower, she may be entitled to damages from the suing out of the writ, as a demand of her dower, though she fail upon the issue she has tendered upon the tenant's plea. My brother Draper seems to have thought that the heir would be subject to costs where damages were assessed, even though he succeeded on the plea of *tout temps prist*, under the operation of the statute of Gloucester. I am not prepared to assent to that proposition. It was not necessary to determine that point in the case of Bishoprick v. Pearce, nor is it necessary to do so in this case, as the record is not framed suggesting a case that would entitle the demandant to have damages assessed, even from the suing out of the writ. I see in a note to page 321 of the first volume of Roscoe on Real Actions, that it is made a *quære* whether, when the tenant saves himself from damages on a plea of *tout temps prist* he is liable to costs. In this case the demandant has omitted from the record the matter which entitles her to an inquiry respecting damages, and consequently costs, and has gone to trial simply upon the truth of the tenant's plea. If she contends that it is worth her purpose to apply for a writ of inquiry as to the value since the writ was sued out, she can apply for a writ of inquiry, and then the question of costs would properly arise, if any sum were found that she would be entitled to recover.

In Park on Dower, 307, it is said, "The statute of Merton, in giving damages, has left the method of ascertaining them to the court; and the usual practice is, unless the damages are either admitted by the party, or ascertained by the jury who try the action, to grant a writ of inquiry; and if judgment is given for the demandant by default, confession, or any other way than by verdict there must of necessity be a jury impannelled to asses the damages." For the reasons which I shall presently give, I think we can give no judgment in the demandant's favour on the plea, but the contrary, that upon the plea judgment should be given for the tenant; and therefore, if the demand shall contend that she is entitled to the costs of suing out and serving the writ, she must pro-