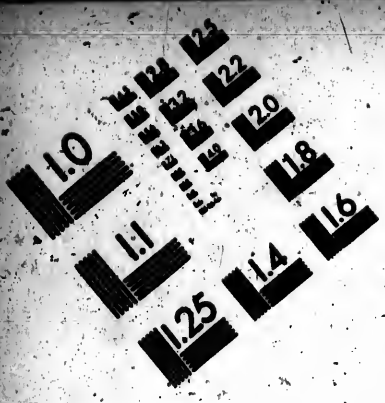

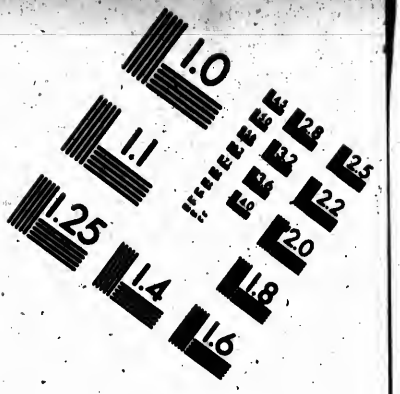

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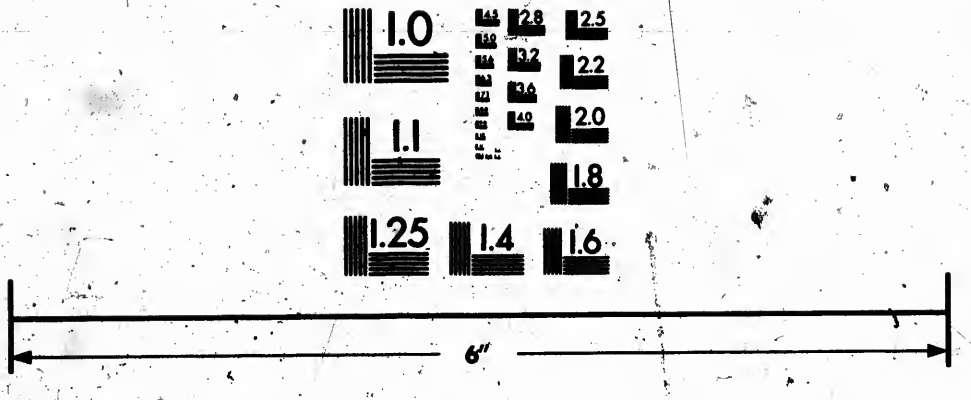

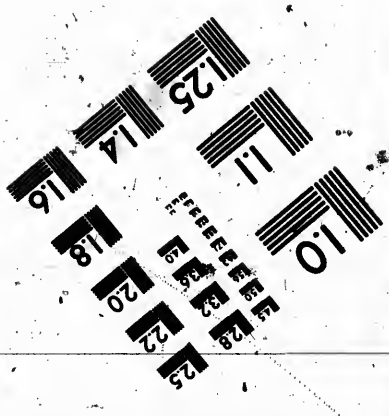

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Patton & Osler
10 Feb. 1863.

A HANDY-BOOK

OF

THE LAW OF DOWER;

WITH

STATUTES, FORMS, PLEADINGS, &c.

BY W. G. DRAPER, Kingston U.C., afterwards

BARRISTER-AT-LAW. Judge of the County Court of the Counties of Frontenac Lennox & Addington. Eldest son of W. H. Draper CB and Justice & Chief Justice of C.P. & Q.B. and of Error and Appeal and of the Court of Appeal

TORONTO:
PRINTED AND PUBLISHED BY W. C. CHEWETT & CO.,
KING STREET EAST.
1863.

TO THE

HONORABLE WILLIAM HENRY DRAPER, C. B.

CHIEF JUSTICE

OF

UPPER CANADA,

THIS WORK

IS AFFECTIONATELY INSCRIBED,

BY THE AUTHOR,

W. GEO. DRAPER.

PREFACE.

The great increase in late years of actions of dower, and the difficulty in obtaining books and correct information on the Law and Practice of Dower, experienced by country practitioners especially, induced the author to attempt this work.

Well aware of its many difficulties, it is hoped nevertheless that there will be some corresponding benefit to overbalance them, and at least that it may be said:

"He meant well who wrote this historie."

In England the action of dower has become nearly effete, since the husband can now destroy his wife's claim to dower, even without her consent; a mere declaration by the husband in a deed that dower is barred being sufficient, without the wife's concurrence, to bar her claim.

In Canada, however, every effort has been made by the Legislature not only to perpetuate such an estate, but also to facilitate the recovery of dower with greater speed and certainty than heretofore.

Whether it would be better to endeavor to do away with this estate or not is not intended to be argued here. All that is required is to discuss the law as it now stands, and the profession must judge the result as contained within.

It is regretted that there are several very important cases now in the course of adjudication which may affect some of the positions assumed; but every endeavor has been made to collect together in an accessible shape every decision of importance in England and Canada, for the guidance and assistance of practitioners here; and it is hoped the effort may be found useful to those who, like the compiler, have not large libraries for ready reference.

W. GEO. DRAPER.

KINGSTON, *July 28th*, 1863.

INDEX.

A.

PAGE

Absence for seven years is a presumption of death..... 81
Action of dower, how commenced..... 93
" Form of notice of 95
" must be brought within twenty years from death of husband..... 111
" cannot be brought if claimant joined in a deed 44, 111
" release by second husband alone is no bar to... 48
Adultery a bar of dower 5, 51
" Form of plea of..... 81
" Form of replication 82
Agreement, verbal, effect of, as to dower..... 42
Alien, widow of, entitled to dower..... 4
" may possess real estate in Canada..... 4
" must have possessed real estate on or before 23rd November, 1849..... 4, 51
" Law of New York as regards..... 51
" replication to plea of, need not state venue..... 70
" Form of plea of..... 77, 82
" Form of replication 82
Annual value, how estimated 65
Annuity in lieu of dower 107
" to be a lien..... 107
Appeal from order of confirmation..... 109
" not valid until bond for $100 given..... 109
" Court must decide within two terms after..... 110
" in case of reversal, the Court shall certify to the sheriff 110
" hearing of 110
" costs of, discretionary..... 110, 121

PAGE

Assignment by sheriff may be set aside, and a new one had 63
" should be by metes and bounds..... 63
" plea of, before action..... 84
" of improvements to be avoided..... 107
" Form of writ of..... 91
" Writ of, after judgment 105
" Writ of, granted where party acquiesces in claim..... 62, 195
" Widow cannot maintain ejectment until after 62
" costs of, follow suit..... 121

B.

Banns, no minister shall celebrate marriage without license or publication of..... 124
Bar of dower, Treason..... 5
" Adultery 5
" by married woman 43
" sale by execution is not a..... 46
" Statute of Limitations 46
" Settlement 49
" Jointure..... 48, 50
" short form of, by statute 123
Bigamy nullifies marriage 17
Bond as security for appeal..... 109

C.

Certificate of bar of dower 43
" in United States 44
" how verified 41, 104
" in Upper Canada 103
" Form of..... 102
" Fee for 104
" of marriage must be given if required..... 125
" fee for..... 125

PAGE

Charters, detinue of..... 52, 86
Church, marriage need not be celebrated in..... 125
Clandestine Marriages, Act to prevent..... 129
Clerk of the Peace to furnish books and lists to Ministers..... 127
Coal oil wells, dower may be assigned of..... 65
Commissioners may be appointed by sheriff..... 106
" must be sworn 106
" in case of death or resignation, others may be appointed..... 106
" shall lay off one-third of the land..... 106
" shall consider permanent improvements 65, 106
" may settle annuity in lieu of dower..... 107
" shall return evidence to sheriff..... 107
" shall return quantity and boundaries... 108
" may employ surveyors..... 108
" new, may be appointed in case of reversal 110
" fees to..... 110
Confirmation, order of, may be appealed from within 30 days 109
Consent to marriage, age for..... 7
Conveyancing, form of bar of dower in..... 123
County Court, Judge of, may grant writ of assignment in certain cases 105
Courtesy, tenant by, how to be satisfied, if estate sold under Partition Act..... 122
Costs, liability of infant to..... 75
" recoverable by *fi. fa.* 75
" equitable right to dower entitles widow to..... 75
" allowed after one month's demand in writing ... 97
" under sec. 1 of 24 Vic..... 110
" of appeal..... 110
" tariff of, to be arranged by Superior Courts..... 110
" what costs may be allowed..... 60

PAGE

Costs, security for, may be obtained..... 78, 69
" may be recovered where demand is alleged and judgment by default 72
" of assignment of dower follow the suit 121
Crim. con., evidence in an action for 19
Crown lands, widow entitled to dower in, if purchased by husband, though no patent issued..... 88

D.

Damages, measure of..... 54
" computation of 54
" how estimated..... 57, 111
" cannot be recovered for more than 6 yr's. 54, 128
" where none claimed, none can be recovered. 59
" suggestion may be entered after final judgment and enquiry go concerning 59
" demandant only entitled to, where husband died seised..... 60
" may be demanded of the heir, though under age 61
Death of husband consummates title in dower..... 30
" of husband must be tried by a jury..... 30
" how proved 30
" presumed after seven years absence..... 31
Death, party asserting fact of, must prove it 31
Declaration must be served within a year 94
" proceedings at trial when no personal service of 96
" Form of 98
Demand of dower must be served one month before action brought 97
" of dower, form of 99
Detinue of Charters..... 52, 86
Devise in lieu of dower 86
" plea of, and acceptance by widow in lieu of ... 83
Disqualification, difference between legal and canonical 11

PAGE

Divorce a bar of dower 5
Domicile of origin 13
Dos definition of 1
Dower, definition of 1
" cannot be recovered of lands already assigned for dower..... 88
" in equitable estates 89
" how barred or defeated..... 48
" action of how commenced..... 93
" certificate of bar of 48
" procedure in actions of 93
" abolished in certain cases..... 102
" how barred 102
" Venue in 93
" a widow's right to, may be conveyed in Equity 49
" vendor compellable in Equity to make an abatement if wife will not bar 49
" measure of damages in..... 54
" Tenant in, how satisfied if estate divided under Partition Act 122
Dowress, cannot maintain a possessory action until dower is assigned her 54

E

Election, If husband exchanges his lands, widow has her 84
" Time for making 86
" by widow to take what is devised to her in lieu of dower binds her..... 46
Equity, Court of, will aid the title of dower 42
Equitable estates, widow entitled to dower out of.. 89, 101
Evidence of marriage 15, 16
Evidence, in an action of crim. con. 19
" of death..... 80, 81
Exchange of lands, effect of 84
" plea of, and election by widow to take other lands 84

PAGE

Execution, sale of lands under, is no bar of dower ... 46

F

Fee for certificate of bar of dower ... 104
" for certificate of marriage ... 125
" to Registrar ... 125
" to Minister on celebrating marriage ... 126
Foreign Countries, marriages in ... 18
Forms of pleas, Tout temps prist ... 76, 80
" Replication thereto ... 76
" Rejoinder thereto ... 77
" Tender and refusal to accept ... 80
" ne unques accouple ... 80
" Replication thereto ... 81
" Adultery ... 81
" Alien, &c ... 77
" postea for demandant as to part and non seisin as to residue ... 77
" of Judgment thereon ... 78
" of postea where tenant pleads *ne unques seisie* and Jury find for demandant and assess damages ... 79
" writ of assignment of dower ... 91
" declaration ... 98
" issue and suggestion of service of demand one month before action brought ... 99
" of issue book and demand of dower ... 99

H

Hab. fac. seis, there cannot be an alias ... 68
Husband, death of, consummates title in dower ... 80
" death of, how proved ... 80
" alive, plea of ... 85
" replication thereto ... 85

I

Improvements, to avoid assigning dower of ... 58, 108

PAGE

Improvements, use of, to be excluded in estimating damages ... 111
Infants liable to costs ... 70, 75
" practice when they refuse to plead ... 68
Inspection of conveyances not granted under certain circumstances ... 70
Issue, form of ... 99
" book, form of ... 99

J

Joint tenant, wife of, dying first not entitled to dower ... 22
Jointure is a bar of dower ... 49
Judgment, form of ... 78
Jus accrescendi ... 22

K

Kilns of lime or brick, dower is assignable of ... 65

L

Landlord, tenant must notify ... 97
Lex domicilii ... 18
License, no minister to solemnize marriage without ... 124
" fund to belong to the legislature ... 128
Lien, annuity to be a ... 107
Limitations, form of plea of statute of ... 84
" of action of dower ... 111

M

Marriage, *quoad* dower ... 7
" age of, consent to ... 7
" who authorized to solemnize ... 8, 9, 10, 14, 124
" what sufficient evidence of in dower ... 15, 16
" with deceased wife's sister ... 11
" disqualification to ... 11
" Record of, to be filed with Registrar ... 15
" between Quakers ... 15
" Bigamy nullifies ... 17

PAGE

Marriage in foreign countries. 18
" between a Jew and a Christian 19
" of minors illegal..... 21
" need not be solemnized in church or chapel 125
" penalty for neglecting to return list of..... 127
" Act, Imperial..... 129
Married woman, how to bar dower of 48, 102
" in Europe or the United States..... 48, 102, 103
" deed of, invalid unless directions in statute complied with 104
Maritagium 1
Merton, statute of, gives damages..... 54, 55
Meene profits, widow entitled to one-third of for six years 38
Mill, dower may be assigned of the profits of..... 64
Mines, dower is due of 33, 64
" widow may work open 33
Minister of any denomination may solemnize marriage 14, 124
" must keep record of marriages, and make a yearly return 15, 125
" shall not celebrate marriage without license or banns 124
" Fee to, on celebrating marriage 126
" in case of death or removal, duty of successor..... 126
" penalty on, for neglecting to return list of marriages 127
Minors, marriage of, illegal 21
Mortgagee, wife of, not entitled to dower 38
" in fee, in possession, may be sued for dower 70
Mortgagor, widow of, not barred 26

N

Ne unques accouple, plea of, how tried in England ... 19

PAGE

Ne unques accouple, form of plea of 80
" form of replication 81
Ne unques seisie, Evidence under plea of 28, 29
" form of plea of..... 85
Non tenure, form of plea of 88

O

Occupant, effect of recovery against 97
Order of confirmation may be reversed by Court 110

P

Particulars of premises cannot be obtained by demandant..... 69
Pleas, form of..... 80
" what may be pleaded together 69
Possession, primâ facie evidence of seisin 28
" vacant 96
Postea, form of 77
" form of, where tenant pleads "*ne unques seisie.*" 79
Practice in dower where tenant makes default 67
" where infant tenant refuses to plead..... 68

Q

Quakers, return of marriages of, by whom to be made 15, 126
Quarentine 2
Quarry, dower may be assigned of 64, 65

R

Record, form of 100
Registrar to file return of marriages 15
" fee to, for filing above 125
" duty of, on receiving record of marriages ... 126
Registry of marriages, book of, to whom to belong... 127
" Form of book of..... 125
Release by second husband is no bar..... 48

PAGE

Release by a woman married a second time without her husband joining in it, is void..... 46, 48
" by deed, plea of..... 84
Rents, widow entitled to one-third of..... 88
Replication to *tout temps prist* 76
Report, certified copy of, to be registered..... 121
Return to be made by commissioners to sheriff..... 108
" may be set aside or confirmed by sheriff..... 108
" may be appealed from within thirty days..... 109
" if not appealed from, to be conclusive..... 108
Right of entry, if husband entitled to, widow shall have dower..... 22, 101

S.

Security for costs may be obtained in dower..... 69
Seisin, husband must have had, during marriage..... 22
" must be in severalty..... 22
" in law sufficient..... 23
" transitory, effect of..... 23
" possession *primâ facie* evidence of..... 28
Service of declaration and notice..... 94
" proceedings at trial, when not personal..... 96
" tenant must notify his landlord of..... 97
Service, Form of issue and suggestion of..... 99
Sheriff, effect of sale of lands for taxes by..... 45
" to appoint commissioners..... 106
" commissioners to make return to..... 108
" may enlarge time for commissioners' report... 108
" may set aside report..... 108
" may confirm report..... 108
" to deliver possession when report confirmed... 109
" must certify proceedings under his official seal 109
" sale of lands by, is no bar to an action..... 46
" making partial assignment..... 63
" should return "by metes and bounds," if possible..... 64

PAGE

Sheriff, how to estimate the annual value 65
" duty of, if no appeal 121
Sister, marriage with deceased wife's 11
Statutes, 33 Geo. III. cap. 5..... 8
" 38 " cap. 4..... 9
" 59 " cap. 15..... 9
" 11 Geo. IV. cap. 36..... 9
" C. S. U. C. cap. 72..... 14
" 24 Vic. cap. 26..... 20
" C. S. U. C. cap. 84..... 101
" C. S. U. C. cap. 28..... 98
" 24 Vic. cap. 40 105
" 26 Geo. II. cap. 28..... 129
" C. S. U. C. cap. 86..... 122
" C. S. U. C. cap. 88..... 128
Statute of Limitations, plea of 84
Surveyors may be employed by commissioners. 108

T.

Taxes, sale of lands for, by sheriff, bars dower..... 45
Tenant in common, widow of, entitled to dower..... 23
" must notify his landlord of service..... 97
" by curtesy, in dower or for life, how satisfied, if estate sold under Partition Act..... 122
Tender, and refusal to accept form of plea of 80
Terre tenant, occupant not being..... 97
Tout temps prist, form of plea..... 76
" form of replication 76
" admits right of damages from commencement of suit 78
Transitory seisin, effect of..... 23
Treason, bar of dower..... 5, 48
" form of plea..... 86
" woman convicted of, loses her dower..... 49
" but if pardoned, regains her right..... 49
Trial, proceedings at, if tenant has not been personally served..... 96

PAGE

Trust, no dower of a 38

U.

Upper Canada Law Journal, extract from 112
Use, no dower of a 38

V.

Vacant possession 96
Vendor, compellable in equity to make abatement in purchase money if wife will not bar dower 49
Venue in dower 98

W.

Waste, to open a mine 34
Widow of alien entitled to dower 4
" electing to take an annuity entitled to priority 37
" entitled to dower in Crown lands 38
" electing to take what is devised in lieu of dower 46
" entitled to dower in certain cases 101
" has her election if husband exchanges lands... 34
Will, effect of devise in lieu of dower 36
Writ of assignment, form of 92
" of assignment granted upon judgment 105
" of assignment may be granted where the party acquiesces 105
" of dower *unde nihil habet* 54

TABLE OF CASES CITED.

A.

PAGE

Acey v. Simpson 38
Anderson v. Marriott 59
Attorney General v. Rowe 13

B.

Bain v. Mason 15
Barnford v. Barnford 56
Barrow v. Wadkin 51
Bending v. Bending 36
Benson v. Bellasis 50
Bishoprick v. Pearce 74
Blandy v. Widmore 50
Blower v. Morritt 38
Breakenridge v. King 83
Brook v. Brook 12
Burridge v. Bradyll 38

C.

Catherwood v. Caslon 19
Compton v. Bearcroft 13
Corsellis v. Corsellis 61
Count De Wall's case 4
Craig v. Templeton 3
Cumming v. Alguire 28

D.

Dack v. Currie 45
Davenport v. Davenport 4
Davila v. Davila 50
Davis v. McNab 59
Dayton v. Auldjo 64

PAGE

Dixon v. Saville 26

Doe Breakey v. Breakey 16
" Hagerman v. Strong 31
" Macdonald v. Cleveland 4
" Nutt v. Nutt 54
" Richardson v. Dickson 4
" Wheeler v. McWilliams 17
" v. Fleming 16
" v. Nepean 31

Dunn v. Snowden 31

Dyke v. Rendall 50

E.

Empey v. Loucks 60

Evans v. Morgan 16

F.

Fenton v. Livingstone 12

Ferguson v. Malone 70

G.

Garrard v. Tuck 20

George v. Thomas 16

German v. Groom 46

Gibson v. Gibson 36

Gomm v. Parrott 41

Goodman v. Goodman 19

Graham et ux. v. Law 6

Grant v. Great Western Railway Co. 11

H.

Hall v. Hill 35

Ham v. Ham 23

Harris v. Westerman 28
" v. Morden 72
" v. Harris 75
" v. Stratton 83

Haskell v. Fraser 22

Hawkshaw v. Hodgins 61

PAGE
Heath v. Dendy 38
Hetherington v. Graham 6
Hitchins v. Hitchins 56
Hoby v. Hoby 63
Hodgins v. McNeil 17
Hopewell v. De Pinna 31
Howard v. Wilson 47
Humphries v. Barnett 59

I.

Ilderton v. Ilderton 20

J.

Johnston et ux. v. McGill 28
Jones v. Jones 60

K.

Kernaghan v. McNally 42
Kerr v. Leishman 36
Kendrew v. Shewan 49

L.

Lautour v. Teesdale 13
Lawson v. Montgomery 48
Leach v. Shaw 3
Leader v. Barry 16
Lockman v. Nesse 28

M.

Mette v. Mette 13
Minaker v. Hawkins 28
" v. Ashe 28
Mundy v. Mundy 42
McDonald v. McIntosh 46
McGill v. Squire 48
McLean v. Laidlaw 48
" v. Horton 86
McLellan et ux. v. Meggatt 24

N.

	PAGE
Nash v. Preston	28
Nolan v. Cherry	69
" v. Reid	78
Norton v. Smith	25

O.

O'Hara v. Cheyne	35

P.

Phelan v. Phelan	69
Phipps v. Moore	16
Pickering v. Stamford	37
Potts v. Meyers	25

Q.

Quin v. McKibbin	74

R.

Reed v. Passer	
" v. Foster	
Regina v. Roblin	
" v. Chadwick	11
" v. Millis	19
Reninger's case	5
Rex v. [illegible]pton	14
" v. [illegible]	16
" v. [illegible]	17
" v. [illegible]ing	19
" v. Harbourne	31
" v. Inhabitants of North Weald Bassett	54
" v. Miller	34
Ritson v. Stordy	51
Roach v. Garvan	18
Robinet v. Lewis	60
Robinson v. Bland	18
" v. Blanchard	68
Rose v. Simmerman	49

S.

	PAGE
Smith v. Spencer	75
" v. Smith	41
Sneyd v. Sneyd	63
Sopwith v. Maughan	37
Spyer v. Hyatt	46
Stafford v. Trueman	71
Stahlsmidt v. Lett	37
Stoner v. Walton	16
Stoughton v. Leigh	34
Street v. Dolsen	69
" v. Rowe	59
Sutliff v. Forgey	5

T.

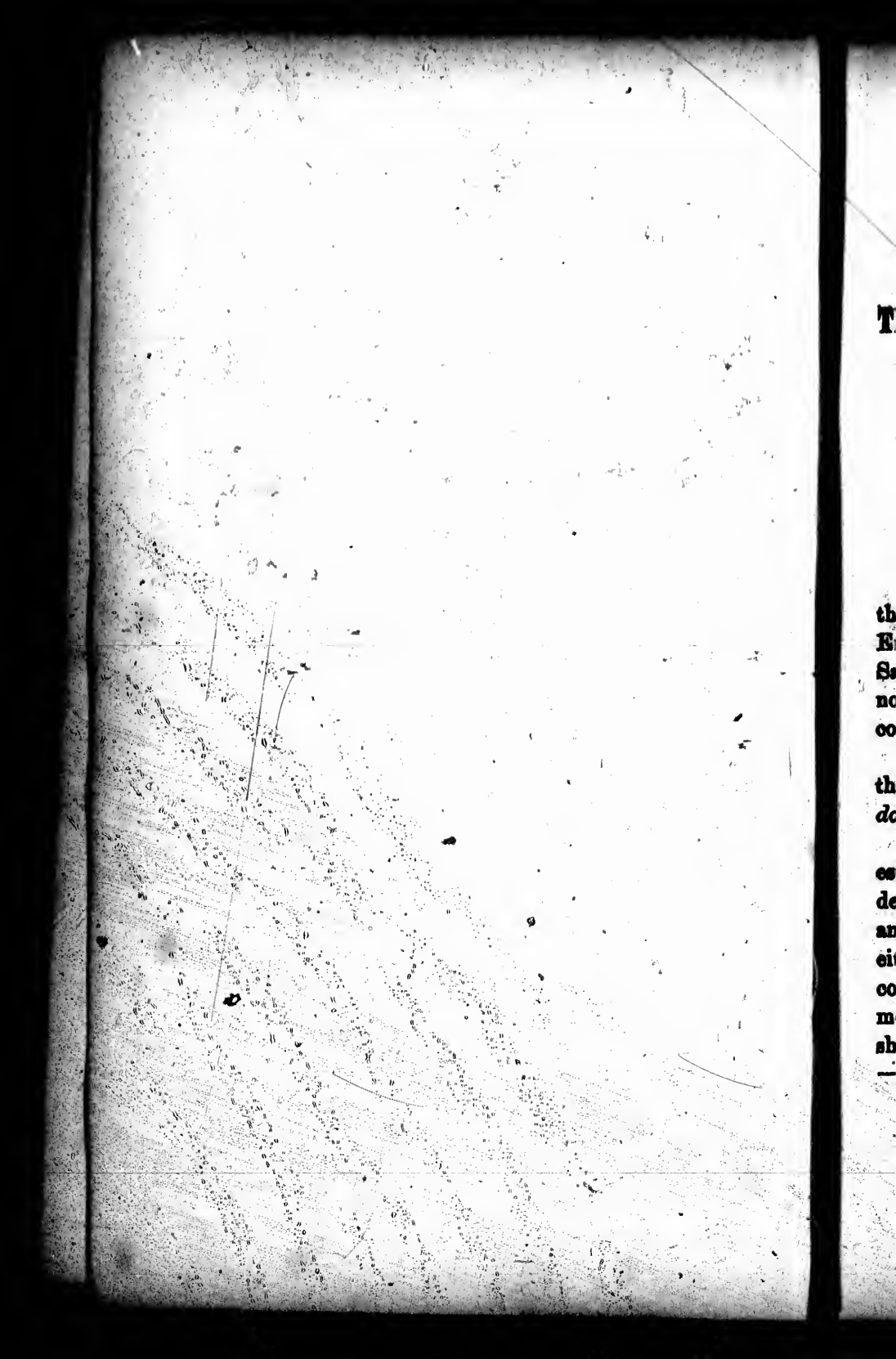
Taylor v. Linley	39
Thynn v. Thynn	64
Thorn v. Rolf	30
Thornhill v. Jones	45
Thompson v. Walls	50
" v. Morrow	58
Tindall, In re	31
Tomlinson v. Hill	45
Towley v. Smith	34

V.

Vannorman v. Beaupré	49

W.

Walker v. Powers	46
" v. Boulton	60
Walton v. Hall	50
Watson v. Watson	59
" v. King	31
Warbutton v. Warbutton	35
Wetherell v. Wetherell	51
White v. Laing	4
Williams v. Rider	69
Wilson v. Wilson	29
Woodward v. Dowse	51



A

TREATISE ON THE LAW OF DOWER;

WITH

STATUTES, FORMS, PLEADINGS, &c.

CHAPTER I.

DOWER.

Dos in the Roman law was the portion given with the woman at the time of her marriage. This in England was called *maritagium*. Among the Anglo-Saxons the dower consisted of goods, and there were no footsteps of dower in lands until the Norman conquest. (*a*) Dower.

The tenant in dower was so much favoured, that the maxim was "*Favorabilia in lege sunt, vita, fiscus, dos, libertas.*" (*b*)

Dower by the common law is defined to be an estate for life to which the wife is entitled, after the decease of her husband, in the third part of the lands and tenements of which her husband was seised, either in deed or in law, at any time during the coverture, to have and to hold to her in severalty by metes and bounds for the term of her life, whether she has had issue by her husband or not, and provided

(*a*) 2 Black. Com. 129.

(*b*) Reading on Uses, 87; Bac. Tr. 331; Park on Dower, 2.

Chap. I. Dower.

she be past the age of nine years at the time of her husband's death. (*a*)

A widow moreover is entitled to reside in her late husband's mansion for forty days after his death. This is called *quarantine*. It is provided by Magna Charta, "*Vidua maneat in capitali messuagio mariti sui, per quadraginta dies, infra quos, assignetur ei dos sua*" (*b*), and be sustained with victuals there. (Jenk. cent. 7, ca. 16; Park on Dower, p. 250, note *a*.) If ejected during her quarantine, the widow might have her writ *de quarentinâ habenda* (Gilb. Dow. 372; Fitz. N.B. 161); but if she marries within the forty days she loses her quarantine. (Co. Lit. 34 b. 32 b.) It has been made a question whether a woman staying in her husband's house during her quarantine may defend the possession thereof with force. (Dy. 161, *a*.)

By the statute of Merton, 20 Hen. III., it was ordained that persons convicted of deforcing widows of their dower should pay in damages the value of the dower from the death of the husband up to the time of giving judgment for recovery thereof. (*c*) This was the origin of damages in dower, now limited however to six years by our statute. (C. S. U.C. ch. 88, s. 18.)

Dower was intended for the sustenance of the widow and the nurture and education of the children,

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(*a*) Lit. ch. 5, s. 36, tit. Dower; Fitz. N.B. 334, L.

(*b*) Woodeson, vol. 2, p. 23; Reeves' English Law, vol. 1, p. 242; Bac. Abr. tit. Dower, p. 122.

(*c*) Reeves, vol. 1, p. 261.

and is paramount to the debts of the husband, even owing to the Crown. (*a*)

There were originally five kinds of dower, viz., dower by common law, dower by the custom, dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la pluis beale*. (*b*)

In Canada there is but one kind, viz., dower by common law. There exist here no such customs as borough English, or gavelkind; and dower *ad ostium ecclesiæ* and *ex assensu patris* were abolished by statute (4 Will. IV. ch. 1, s. 15; C. S. U. C. ch. 84, s. 8). Dower *de la pluis beale*, which arose out of the feudal tenures, expired naturally ages ago. (*c*)

Widows also (by virtue of 4 Will. IV. ch. 1, ss. 13, 14, 15; C. S. U. C. ch. 84, ss. 1, 2) are entitled to dower out of equitable estates (*d*), and where the husband had a right of entry; but in such case the dower must be sued for within the period during which such right of entry might be enforced.

There are three requisites to consummate the right to dower, viz., marriage, seisin, and death of the husband. (*e*) The differences between this estate and tenancy by the curtesy are, firstly, that in curtesy there must be issue born alive and during the life-time of the mother (*f*); secondly, in dower the

(*a*) Co. on Lit. 31 *a*; 1 Roper on Husb. and Wife, 411; Williams on Real Property, 4th ed. 190; Fitz. N.B. 335, Q.

(*b*) Lit. s. 51.

(*c*) Woodeson's Laws of England, vol. 2, p. 23.

(*d*) *Craig* v. *Templeton*, 8 Grant. Chy. R. 483; *Leach* v. *Shaw*, 8 Grant. Chy. R. 494.

(*e*) Co. on Lit. 31 *a*; Kent's Com. vol. 4 p. 36.

(*f*) Co. on Lit. 29 *b*; Bissett on Estates for Life, 40.

seisin may be either in deed or in law; thirdly, dower is an estate for life in the third part of the husband's estate, whereas curtesy is of the whole estate of the wife.

If the husband be an alien the wife shall not be endowed, was the law of England when Lord Coke wrote, and is so still (*a*); but in Canada, the statute 12 Vic. ch. 197, s. 12, enacts that "Every alien shall have the same capacity to take, hold, possess, enjoy, claim, recover, convey, devise, impart, transmit real estate in all parts of this province, as natural born naturalized subjects of her Majesty, in the same parts thereof respectively," and therefore the widow of an alien may be endowed in Canada (*b*); more especially as by the same statute it is enacted that any woman married to a natural born British subject, or person naturalized, shall be deemed to be herself naturalized and have all the rights and privileges of a natural born British subject. (*c*) The alien, however, to entitle his widow to dower, must have possessed real estate on or after the twenty-third day of November, 1849. In New York, while the

(*a*) Co. on Lit. 31 *a*. In England, a female alien becomes naturalized upon marriage to a natural born or naturalized subject (Imp. Act 7 & 8 Vic. ch. 66, s. 16); but this provision does not apply retrospectively to a case where a woman has died before the passing of the act. (Count De Wall's case, 12 Jurist, 145; 6 Moo. P.C. 216.) Nor is she by the common law entitled to dower. (Dart Ven. & Purch. 88 note *b*.)

(*b*) *Davenport* v. *Davenport*, 7 U.C. C.P. 401; *Doe Richardson* v. *Dickson*, 2 O.S. 292; *Doe Macdonald* v. *Cleveland*, 6 O.S. 117.

(*c*) *White* v. *Laing*, 2 U. C. C. P. 186.

general rule is admitted that the alien widow even of a natural born citizen is not entitled to dower, yet under the statute of 1802, the widows of aliens entitled by law to hold real estate, are held to be dowable. (*a*)

If the husband be attainted of treason, the wife shall not be endowed. (*b*)

A divorce *causâ consanguinitatis, affinitatis aut frigiditatis* which dissolves the *vinculum matrimonii* and makes the marriage void *ab initio*, bars the wife of dower (*c*); but if the divorce be not *a vinculo matrimonii* it will not bar the dower (*d*), and therefore a divorce for adultery, which is only a divorce *a mensâ et thoro* is no bar. (*e*) But by the statute West. 2, ch. 34, if a wife commits adultery and elopes she forfeits her dower, unless the husband is willingly reconciled to her and permits her to cohabit with him again, which, as Coke says, is comprehended shortly in two hexameters.

"Sponte virum mulier fugiens et adultera facta,
Dote suâ careat, nisi sponsi sponte retractâ." (*f*)

The wife of an owner of lands in fee, out of which she is dowable forfeits her right to dower by adultery, elopement, and remaining in a state of adultery,

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(*a*) *Sutliff* v. *Forgey*, 1 Cowen, 89; 8 ib. 718, s. c.; N.Y. Revised Stat. vol. i. 740, s. 2; Kent's Com. vol. 4, p. 36.

(*b*) Co. on Lit. 31 *a*; Stat. of West. 2, c. 34; Reeves' English Law, vol. 4, p. 477; Bac. Abr. tit. Dower.

(*c*) Co. on Lit. 33 *a*; Cruise's Digest 1, p. 165.

(*d*) Remington's case, Hob. 181.

(*e*) Co. on Lit. 32 *a*.

(*f*) Co. on Lit. 32 *b*. There is no Court in U. C. having power to grant a divorce of either kind.

Chap. I. Dower.

without reconciliation to her husband, the gist of the offence being the adultery (*a*); but a wife abandoned by her husband, and who subsequently was guilty of adultery, *held* not barred from dower. (*b*)

(*a*) *Woodward* v. *Dowse*, 8 Jur. N.S. 418; Woodeson's Laws of England, vol. 2, p. 24; *Hetherington* v. *Graham*, 6 Bing. 135; Fitz. N.B. 334, H.

(*b*) *Graham et ux.* v. *Law*, 6 U.C. C.P. 310.

CHAPTER II.

MARRIAGE.

Marriage must be between persons capable of contracting together and duly solemnized, and yet a marriage *quoad* dower will be valid, although contracted before the parties have arrived at the age of consent, and although the husband dies without having arrived at that age. (*a*) "Therefore if the wife be past the age of nine years at the time of the death of her husband, she shall be endowed, of what age soever her husband be, albeit he were but four years old;" and further, says Lord Coke, "albeit *consensus non concubitus facit matrimonium*, and that a woman cannot consent before twelve, nor a man before fourteen, yet this inchoate and imperfect marriage (from the which either of the parties at the age of consent may disagree), after the death of the husband, shall give dower to the wife, and therefore it is accounted in law *legitimum matrimonium quoad dotem*." (*b*) Marriage

The unsettled state of this country prior to the year 1792, the difficulties encountered in travelling, the sparseness of the population, and the almost total absence of ministers of any denomination, caused great difficulties and obstacles to parties desirous of

(*a*) Park on Dower, 17.

(*b*) Co. on Litt. 33 *a*; Bissett on Estates for Life, 69; Park on Dower, 18.

Chap. II. Marriage.

being legally united. Many marriages were solemnized by commanding officers, magistrates, surgeons, &c., which in law were illegal and invalid.

A great many marriages were solemnized as above; and inasmuch as grave difficulties were likely to arise subsequently with regard to property and civil rights, the Legislature, in 1798, passed a statute legalising all such marriages, and declaring them to be good and valid in law, to all intents and purposes.

By the statute 38 Geo. III. chap. 5, passed 9th July, 1798, it was recited that, "Whereas many marriages have been contracted in this province at a time when it was impossible to observe the forms prescribed by law for the solemnization thereof, by reason that there was no Protestant parson or minister, duly ordained, residing in any part of the said province, nor any consecrated Protestant church or chapel within the same; and whereas the parties having contracted such marriages, and their issue, may therefore be subjected to various disabilities; in order to quiet the minds of such persons, and to provide for the future solemnization of marriage within this province, *Be it, &c.*, That the marriage and marriages of all persons, not being under any canonical disqualification to contract matrimony, that have been publicly contracted before any magistrate or commanding officer of a post, or adjutant or surgeon of a regiment, acting as chaplain, or any other person in any public office or employment, before the passing of this act, shall be confirmed and considered to all intents and purposes as good and valid in law; and that the parties who have contracted

such marriage, and the issue thereof, may become severally entitled to all the rights and benefits, and subject to all the obligations arising from marriage and consanguinity, in as full and ample a manner as if the said marriages had respectively been solemnized according to law."

This marriage might be certified by any magistrate of the district, and recorded in the office of the Clerk of the Peace, in a register; and an attested copy of such register was sufficient evidence of such marriage.

Justices of the Peace were also authorized to marry people under this act; but as soon as there were five Parsons doing duty in any one district, then the authority of the Justices ceased; a penalty was imposed for performing the ceremony, and the marriage declared void.

The statute 38 Geo. III. ch. 4, authorised ministers of the Church of Scotland, or Lutherans, or Calvinists, to celebrate matrimony between any two persons, not legally disqualified to contract marriage, and one of whom shall have been a member of his congregation for six months previously. This act was passed in 1798. A certificate as above might be filed with the Clerk of the Peace, and would be sufficient evidence.

The statute 59 Geo. III. ch. 15, extended the provisions of the 38 Geo. III., and directed how parties might preserve the evidence of their marriage and birth of their children. This act passed in 1818.

The statute 11 Geo. IV. ch. 86, assented to 2nd March, 1831, declared, "That the marriage or mar-

Chap. II. Marriages.

riages of all persons, not being under any canonical disqualification to contract matrimony, that have been publicly contracted in this province before any justice of the peace, magistrate, or commanding officer of a post, or before any minister or clergyman, before the passing of this act, shall be and are hereby confirmed, and shall be considered good and valid in law; and the parties to such marriages, and the issue thereof, shall be entitled to *all the rights* and subject to all the obligations resulting from marriage and consanguinity," any law to the contrary notwithstanding; and section two points out the method of preserving the evidence of such marriages.

Section 3 authorized ministers of the Church of Scotland, Lutherans, Presbyterians, Congregationalists, Baptists, Independents, Methodists, Menonists, Tunkers or Moravians, to celebrate marriage between any two persons, not legally disqualified to contract matrimony; and section 6 points out the mode of preserving the evidence of such marriage in the Clerk of the Peace's office.

From the foregoing, it will appear that evidence of marriage in the shape of certificates was always to be sought for in the office of the Clerk of the Peace; but by the 20 Vic. chap. 66, passed 10th June, 1857, it was enacted that, after 1st January, 1858, returns of marriages are to be made to the Registrar of the county in which such marriage shall have taken place; and therefore, since that date, evidences of marriages must be sought for in the Registrar's office, and his certificate is sufficient evidence, as will be mentioned hereafter.

In the above mentioned acts, the phrases "canonical disqualification" and "legal disqualification" occur. Persons "canonically disqualified" are, it is apprehended, "legally disqualified;" but persons may be "legally" and yet not "canonically" disqualified. A canonical disqualification refers to marriages between parties of the kindred or affinity forbidden by the canons of the church. A legal disqualification refers to bigamy, infancy, force, fraud, idiocy, &c. There has never been, it is believed, any decision on these points in Canada, though doubtless they will some day form the subject of legal discussion, and may even arise in an action of dower. (*a*)

It is presumed the law would be held to be the same here as in England, and therefore that marriage with a deceased wife's sister would be held invalid. The statutes of Hen. VIII. and the Marriage Act (26 Geo. II.) (*b*), declaring such marriage invalid in England, were made the law of Upper Canada, along with all other laws regulating property and civil rights, on 15th October, 1792, and are, it is submitted, still in force.

Since writing the above, curious enough, a decision in a dower suit has been given by Vice Chancellor Esten, in the case of *Hodgins* v. *McNeil et al.* The effect of the judgment is that a marriage with a deceased wife's sister is unlawful and void, and may

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(*a*) *Grant* v. *G. W. R. Co.*, 7 U.C. C. P. 488. As to the applicability of the law of England in this country touching marriage, vide *Queen* v. *Robin*, 21 U.C. Q.B.R. 352.

(*b*) *Reg.* v. *Chadwick*, 11 Q.B. 288; 28 Hen. VIII. c. 16; 32 Hen. VIII. c. 38; 26 Geo. II. c. 33.

Chap. II. Marriage.

be annulled at any time by sentence of an ecclesiastical court, during the lifetime of the parties. But the death of either of the parties makes the marriage valid, that is, makes that lawful which was before unlawful, and legitimises the offspring. *Quære*, could a man married to his deceased wife's sister be convicted of bigamy if, living the sister, he married again; and supposing the husband dead, living the two wives, which of them would be entitled to dower?

The case of *Brook* v. *Brook* (a) decided, on appeal to the House of Lords, that marriage with a deceased wife's sister, even though celebrated in a foreign country where such marriages are held to be legal, are illegal in England, and consequently it is presumed they are illegal here. This case contains a very learned exposition of the law on this point, and of the rules which govern the law of marriage; and since we live so near to a foreign country, it may not be out of the way to give one of the rules determined therein relating to marriages in foreign countries. "Although the *lex loci contractus quoad solemnitates* determines the validity of the contract of marriage, the question whether the parties may enter into such contract must depend upon the *lex domicilii*."

The rule that a marriage which is good in the country where it is celebrated is good everywhere, is subject to the qualification that the marriage must not be one prohibited by the country to which the

(a) 7 Jur. N. S. 423; also see *Fenton* v. *Livingstone*, 5 Jur. N.S. 1183.

parties belong (*a*), and therefore a marriage in the United States between parties domiciled in Canada, who cannot contract marriage here, would be held void and illegal by our Courts. The presumption of law is against the intention to abandon the domicile of origin. Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*. (*Att. Gen.* v. *Rowe*, 31 Law J. Ex. 314; 6 L. T. N.S. 488.)

It is decided that British subjects, resident in a British settlement abroad, are governed with respect to marriage by the law which existed here before the Marriage Act (A. D. 1753), viz., the canon law. Therefore, where two British subjects, being Protestants, were married at Madras by a Portuguese Roman Catholic priest, according to the Catholic form, in the Portuguese language, in a private room, and the ceremony was followed by cohabitation, *Held* that this was a valid marriage, though without a license from the Governor, which it is the *custom* at *Madras* to obtain. (*Lautour* v. *Teesdale*, 2 Marsh. 243; s. c. 8 Taunt. 830.) Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest,

(*a*) Story on the Conflict of Laws, 84; Huberus de conflictu legum, lib. 1. tit. 3, s. 8; *Compton* v. *Bearcroft*, Bull. N. P. 114; 2 Kent's Com. 92; *Motte* v. *Motte*, 28 L. J.; Prob. 117; *Brook* v. *Brook*, 7 Jur. N.S. 422.

Chap. II. Marriage.

and interpreted into English by the officiating clerk; which service the parties understood to be the marriage service of the Church of England, and they received a certificate of the marriage, which was afterwards lost, is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years' cohabitation as man and wife, till the period of the husband's death; and such *British* subjects being attached at the time to the *British* army on service in such foreign country, and having military possession of the place, it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence) would be a good marriage by the law of *England*, as a marriage contract *per verba de præsenti* before the Marriage Act; marriages beyond the sea being excepted out of that act; and it would make no difference if solemnized by a Roman Catholic priest. (*Rex* v. *Brampton*, 10 East. 286.)

By the Con. Stat. U. C. ch. 72 (20 Vic. ch. 66), passed 10th June, 1857, "The ministers and clergymen of every church and religious denomination in Upper Canada, duly ordained or appointed according to the rights and ceremonies of the churches or denominations to which they respectively belong, and resident in Upper Canada, may by virtue of such ordination or appointment, and according to the rites and usages of such churches or denominations respectively, solemnize the ceremony of marriage between

any two persons, not under a legal disqualification to contract such marriage."

It is here to be noted, that by this statute any clergyman or minister of any denomination may solemnize the marriage ceremony between any two persons not being legally disqualified. Now whether this would be construed to mean between any two persons of the same denomination as the clergyman, or whether the marriage of two members of the Church of Rome by a Tunker minister would be valid, may be a question, but it looks very like it. By sec. 2, "Every such minister must have a license under the hand and seal of the Governor, or else banns must be proclaimed publicly three times in some church or chapel. By sec. 3, marriage may be solemnized any where and at any time. By sec. 5, the minister shall keep a record of marriages, and make a yearly return thereof to the Registrar (Sec. 7), who shall file and record the same; and in the absence or death of the witnesses to a marriage, the register, or a certified copy of it, shall be sufficient evidence of a marriage. (*a*) Sec. 11 renders valid "every marriage duly solemnized between members of the religious society of friends, commonly called Quakers (*b*), and the clerk or secretary must make the return.

In Upper Canada, on the plea of *ne unques accouple*, evidence of cohabitation and reputation of marriage will be sufficient in dower. It is not necessary to

(*a*) *Bain* v. *Mason*, 1 C. & P. 202.

(*b*) As to marriages of Quakers in L.C. vide 28 Vic. c. 11.

Chap. II. Marriage.

prove the marriage by persons who were present at the ceremony. (*a*) Proof of marriage by reputation and cohabitation for 20 or 30 years is sufficient in ejectment, and if the presumption therefrom is to be rebutted, it must be by positive testimony. (*b*) In dower, cohabitation and reputation *held* sufficient presumption of a marriage to render unnecessary strict proof of a marriage solemnized (*c*); but a presumption of marriage arising from reputation may be rebutted by proof that the woman formerly lived with another man, in such a manner as to raise the same presumption of marriage with him. The learned Judge held, in this case, that the presumptions were evidence as well for plaintiff as defendant, and the jury must decide. The plaintiff having put in a will, in which the testator spoke of H. as his wife, was not estopped from denying the marriage. (*d*) Marriages contracted in Ireland, between members of the Church of England and Presbyterians, celebrated by ministers not belonging to the Church of England, are legalized by the Imperial Stat. 5 & 6 Vic. chap. 26, and such marriages celebrated before that act was passed are legal marriages in this country. (*e*) A certificate of marriage by a

(*a*) *Stoner* v. *Walton*, Mich. Term, 5 Vic.; upheld in *Phipps* v. *Moore*, 5 U.C.R. 16.

(*b*) *Doe dem. Breakey* v. *Breakey*, 2 U.C.R. 349; *Evans* v. *Morgan*, 2 Cr. & J. 453; *Leader* v. *Barry*, 1 Esp. 353; Taylor on Evidence, 114, 371; *Doe* v. *Fleming*, 4 Bing. 266; *R.* v. *Stockland*, Burr. S.C. 503; 1 W. Black, 367.

(*c*) *Graham et ux.* v. *Law*, 6 U.C. C.P. 310.

(*d*) *George* v. *Thomas*, 10 U.C. Q.B. 604.

(*e*) Doe dem. *Breakey* v. *Breakey*, 2 U. C. R. 349.

magistrate, in the following form: "I do hereby certify that I have this day married A. and B. according to the Church of England," dated in 1801, with proof of cohabitation and reputation, but without proof of publication of banns, *Held* sufficient to establish the marriage against the evidence of cohabitation and reputation of marriage with another person alive at the time of the second marriage; defects of form in such cases being cured by 11 Geo. IV. ch. 36. (*a*) Where a marriage has in fact been proved, evidence of reputation and cohabitation is not sufficient to establish a prior marriage. (*b*) In all cases of *voidable* marriages, if the husband die before the marriage be avoided, the wife will be entitled to dower. (*c*) Marriage may be proved by parol testimony, even though a memorandum of it has been kept in a register which the law requires to be kept. (*d*)

In some cases the contract of marriage is, in its own nature, a mere nullity, as for instance in the case of bigamy. "If a man seised of land, tenement, rent, &c., in fee, take a wife, and during the same marriage, he marrieth another wife, and the husband die leaving both wives, the latter wife shall not have dower; because the marriage between them was void. And if a woman take a husband, and

(*a*) Doe dem. *Wheeler* v. *McWilliams*, 2 U. C. R. 77.

(*b*) Doe dem. *Wheeler* v. *McWilliams*, 3 U. C. R. 165.

(*c*) Parke on Dower, 21; *Hodgins* v. *McNeil*, *supra*.

(*d*) Taylor on Evidence, 297; *Evans* v. *Morgan*, 2 C. & J. 453; *R.* v. *Allison*, R. & R. 169; *Reed* v. *Passer*, Pea. R. 232; Roscoe's N. P. Ev. 2.

Chap. II. Marriage.

living the same husband, she marrieth another husband, who is seised of land in fee, and the second husband die, she shall not have dower of his land, *causa patet.*" (*a*) And see above as to marriage with a deceased wife's sister.

In the cases of marriages in foreign countries, it appears to be adopted by the courts as a general principle, that, if solemnized according to the laws of the country where contracted, they shall be acknowledged here as legal marriages (*b*); and it was admitted by Lord Hardwicke in *Roach* v. *Garvan*, (*c*) that the sentence of a foreign court, *having proper jurisdiction*, is conclusive evidence of marriage from the laws of nations in such cases (*d*), as otherwise the rights of mankind would be very precarious and uncertain. The same doctrine has been laid down by Lord Mansfield in *Robinson* v. *Bland*, (*e*). But reasonable evidence of the celebration of the marriage, although without sentence would, it is apprehended, be sufficient in dower, where no circumstances appear to induce doubts whether the laws of the country were complied with. (*f*)

(*a*) Perk, sec. 304, 305; Park on Dower, 15; Taylor on Ev., 904; Cro. Eliz., 858.

(*b*) 2 Burr 1079; 2 Kent's Com. 92; see also In re Wright, 2 Jur. N. S. 465; *Brooks* v. *Brooks*, 7 Jur. N. S. 422.

(*c*) 1 Ves. Sen. 159; Park on Dower, 21; Taylor on Ev., 1139.

(*d*) Story on the Conflict of Laws, 84; 2 Kent's Com., 92; *Brooks* v. *Brooks*, 7 Jur. N. S. 422.

(*e*) 1 Bl. 259; Park on Dower, 21.

(*f*) Park on Dower, 22.

The plaintiff, in an action for crim. con., is bound to prove a marriage valid in all respects, and it is not sufficient evidence on his part to show that he and his alleged wife went through a religious ceremony with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife, in the belief that they had thereby contracted a valid marriage, if, in law, such marriage was not valid.

A marriage between English subjects, celebrated according to the rites of the Church of England, but not in the presence of a priest in holy orders, is valid at the common law. *Catherwood* v. *Caslon*, 13 M. & W. 261; *Regina* v. *Millis*, 10 Cea. & Fin. 534; 7 Jur. 911, 983; *Rex* v. *Mainwaring*, 1 Dear. & B., C. C. R. 132, 139.

Marriage is presumed between a Jew and a christian woman upon the weight of evidence in the absence of direct proof of a ceremonial marriage. (*a*)

Where in an action of dower the demandant relied upon evidence of cohabitation and reputation to prove the marriage said to have taken place in the United States, and failed, the court under the circumstances of this case refused a new trial. (*b*)

In England upon the plea of *ne unques accouple* a writ goes to the bishop for his certificate of the marriage (*c*), except the marriage be celebrated

(*a*) *Goodman* v. *Goodman*, 5 Jur. N. S. 902; 28 L. J. Chan. 745.

(*b*) 2 *Street* v. *Dolsen*, 14 U. C. Q. B. 537.

(*c*) Sellon's Prac., vol. 2, p. 207; Ros. on Real Actions, 220.

Chap. II. Marriage.

out of England, in which case it must be tried by a jury (*a*). The issue has always to be tried by a jury in this country.

The 24th Vic., chap. 46, enacts, "after reciting that doubts exist as to the validity of marriages contracted as thereinafter mentioned—1. The marriages of all persons, not being under any canonical disqualification to contract matrimony, which marriages had been publicly contracted in Upper Canada, before any minister or ministers, who was or were, prior to the passing of the act of Upper Canada, 11 Geo. IV., chap. 36, allowed to solemnize matrimony, before having obtained, and without such minister having obtained, a license from the Quarter Sessions under the said act, or a certificate from the Registrar of the said county, under the act of Canada, 10 & 11 Vic., ch. 18, are hereby declared to have been valid, and shall be considered as good and valid in law, and the parties to such marriages, and the issue thereof, shall be entitled to all the rights, and subject to all the obligations arising from such marriages, and the consanguinity resulting therefrom; any law or usage or custom to the contrary in anywise notwithstanding.

"2. In case either party to any such marriage has contracted a subsequent marriage before the passing of this act, this act shall not be construed to invalidate such subsequent marriage, but the validity thereof shall be determined as if this act had not been passed."

(*a*) *Ilderton* v. *Ilderton*, 2 H. B. 145.

It is illegal in this country, as it was in England before the 26 Geo. II., chap. 23, to marry by license where either of the parties is under twenty-one, without consent of parents or guardians; and the want of consent is a breach of the bond given on obtaining such license, conditioned that there is no lawful cause or impediment to hinder the marriage. *Semble*, that the eleventh clause of the statute is not in force in this country, and that such a marriage is not void. (*a*)

(*a*) *Regina* v. *Roblin*, 21 U. C. R. 252.

CHAPTER III.

SEISIN.

Seisin.

The next important consideration is the rule regarding seisin. "The husband of the woman claiming a dower must have had seisin of the lands and tenements whereof dower is claimed, during the coverture." (*a*)

By the C. S. U. C. ch. 84, s. 2, "when a husband hath been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced."

The husband must have had seisin of the land in severalty at some time during the marriage to entitle the wife to dower. Therefore in joint-tenancy the wife of the tenant dying first, is not entitled to dower; and if there be two joint-tenants in fee, and one makes a feoffment, the wife has no dower. (*b*) The maxim applicable is "*Jus accrescendi prefertur oneribus.*" And the reason seems to be that the

(*a*) Park on Dower, 24; Co. on Lit. 31*a*.

(*b*) Co. on Lit. 31 *b*; Williams on Real Property, 191; Stephen's Com., vol. 1, p. 816; *Haskell* v. *Fraser*, 12 C. P. 383.

land never was in the husband's seisin, except as subject to the paramount claim of the survivor, and therefore there was no seisin out of which dower could arise. (*a*) In Ohio it is held that the "*jus accrescendi*" does not exist to the exclusion of the right of dower in the widow of joint-tenant first dying (*b*), but the widow of a tenant in common is entitled to dower. (*c*) It is sufficient that the husband have a seisin in law, without being actually seised (*d*), and any period of time however short is sufficient to make such a seisin as dower will attach upon, but a transitory seisin for an instant when the same act that gives the estate to the husband, conveys it out of him, as in the case of a conusee of a fine, is not sufficient to give the wife dower. (*e*) Blackstone's reason for the wife's not being entitled to dower in this case, is that "the land was merely *in transitu* and never rested in the husband, the grant and render being one continued act;" but he adds, as regards the time, "if the land abide in him for the interval of but a single moment, it seems that the wife shall be endowed thereof." (*f*) *Broughton* v. *Randall*, is in point. (*g*) A father was tenant for life, remainder to his son in tail, Chap. III. Seisin.

(*a*) Stephen's Com., vol. 1, p. 316.

(*b*) Kent's Com., vol. 4, p. 360, note (*e*).

(*c*) *Ham* v. *Ham*, 12 U. C. Q. B. 497.

(*d*) Co. on Lit. 31*a*; C. S. U. C. ch. 84.

(*e*) Co. on Lit. 31 *b*; *Nash* v. *Preston*, Cro. Car. 190; *Sneyd* v. *Sneyd*, 1 Atk. 442.

(*f*) 2 Black. Com., 132; Park on Dower, 43.

(*g*) Noy. 64; Cro. Eliz. 503; Park on Dower, 42; *Sneyd* v. *Sneyd*, 1 Atk. 441.

Chap. III. Seisin.

remainder to the right heirs of the father. Both father and son were attainted of felony, and executed at the same time, both being hanged in one cart, the son not having any issue of his body; and it being proved by witnesses that the father moved his feet after the death of the son, it was found by verdict that the father was seised of an estate in fee of which his wife had right to be endowed, and the wife had judgment accordingly.

In the United States this doctrine of transitory seisin not giving right to dower, is exemplified in the case where the husband takes a conveyance in fee, and at the same time mortgages the land back again to the grantor, or some third person, to secure the whole or part of the purchase money. Dower cannot be claimed as against rights under that mortgage (*a*); but upon foreclosure of the mortgage and sale of the property, the widow would be entitled to dower out of the balance, after deducting the mortgage debt.

The rule with regard to such transitory seisins, as decided in the States, would appear to be that whenever the husband has a transitory seisin for the *purpose of alienation*, then the wife shall not be endowed; but if the seisin though momentary is *not* for the purpose of alienation, and is not rendered of such brief duration by the act or intention of the husband, then the wife shall be endowed; and the same rule is laid down in an English work. (*b*)

However in contradistinction to the above law, it

(*a*) Kent's Com., vol. iv., p. 89.
(*b*) Bissett on Estates for Life, 75 *et seq.*

has been held in our courts that where an estate was conveyed to a vendee, and immediately mortgaged back again to the seller to secure payment of the purchase money, that the widow of the mortgagor was entitled to dower. (*a*)

This decision has been confirmed on appeal by a majority of six judges to one, in *Norton* v. *Smith*, 7 U. C. L. J. 263. Chief Justice Robinson being the dissentient in both cases. Esten, V. C., says "The cases which have occurred in England are cases where property has been conveyed to one for the uses of another—the effect of which under the statute of uses is to convey the estate to the party for whose use it is conveyed to the person first named, who only acts as a conduit to convey it to the party intended, and in which first party there is only an instantaneous seisin, not entitling a widow to dower. But the case is different when the mortgage and deed are one transaction. In that case the person is by the deed fully and perfectly seised of the estate until by his own act (*not the act of another*) he parts with it by executing the mortgage.

And Sir W. Blackstone says (*b*) "The seisin of the husband for a transitory instant only, when the *same act* which gives him the estate conveys it also out of him again (as where by a fine, land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower, for the land was merely *in transitu*." It is

(*a*) *Potts* v. *Meyers*, 14 U. C. Q. B. 499.

(*b*) 2 Com. 131; Cruise's Digest, vol. i., p. 167.

Chap. III. Section. observable that the words are "*same act*," and this appears to be the correct reading according to Mr. Park in his treatise on dower, pp. 48 *et seq.*; but again at p. 187 in speaking of dower of equities of redemption he says "The rule that a woman is not dowable of an equitable estate being once established, it follows, as a necessary consequence, that if the husband makes a mortgage *in fee* before marriage, the wife will not be dowable of the equity of redemption. If indeed the money was paid on the day named in the condition, the estate would revest in the husband, and the wife become dowable; but no subsequent payment of the mortgage money by the husband will render her dowable, if he dies before a reconveyance of the legal estate." (*a*) It is submitted in *Potts* v. *Meyers*, and *Smith* v. *Norton*, that the deed and mortgage were both executed during coverture, though the question is not directly alluded to. The practice in Canada is to cause the wife to bar her dower in the mortgage. In England the husband can now bar his wife's dower by a declaration in the conveyance without her joining.

It is clearly laid down in Bacon's abridgment that "The wife shall hold her dower discharged of judgments, recognizances, statutes, mortgages, or any other incumbrances made by the husband after marriage, because after his death her title, which is now consummate, has relation to the marriage and seisin of her husband, which were before the incumbrances. And in the margin it says, "The widow of a mort-

(*a*) *Dixon* v. *Saville*, 1 Bro. C. C. 326; 2 Pow. Mort. 720; Park on Dower, 187; Craine's Digest, vol. 1., p. 172.

gagor not barred of her dower if she did not join in the mortgage. (*a*) Chap. III. Section.

A. conveyed land to B. in 1833, and on the same day took back a mortgage for the whole purchase money. B. paid nothing for either principal or interest, and in 1840 reconveyed absolutely to A., the land being then vacant. B.'s wife did not join in either mortgage or reconveyance, and eighteen years after B.'s death, brought an action against C. who had purchased from A. soon after the reconveyance, and had erected valuable buildings. *Held*, that the seisin of the husband B. was complete, and that the widow was entitled to dower.—(*Potts* v. *Meyers*, 14 U. C. Q. B. 499 affirmed.) *Smith* v. *Norton*, 7 U. C. L. J. 268; in Appeal, 20 U. C. Q. B. 218. In a declaration in dower there was no averment that the husband died seised and no damages claimed. Plea, "*ne unques seisie que dower.*" It appeared that a patent for the land issued to one K., and a witness was called, who proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced and no evidence of its contents given. It was proved, however, that B., the person from whom defendants purchased, derived title through P., who had held a bond for a deed from the patentee, and that P. before he sold to B., took a quit claim from M. of *all his interest* in the land, executed by M. only, in which it was stated that the land "was devised by will to the said M. by K., the original grantee of the Crown." *Held*, that no estoppel arose upon this deed, and there was no

(*a*) Bac. Abr. tit. Dower G., p. 144.

Chap. III. Seisin. proof of seisin in M. *Minaker* v. *Hawkins*, *Minaker* v. *Ashe*, 20 U.C.Q.B.R. 20. W. C. died seised in fee of land, having devised the same to his wife for life, and after death to his son, the demandant's husband, in fee. The testator's widow, the devisee for life, died before the demandant's husband, and during her life his interest was sold under a *fi. fa.* lands, and conveyed to one J., who having recovered possession, sold to the tenant, who mortgaged back again to J., but continued in possession. It was not shewn whether all the mortgage money had been paid or not; but the time for payment of several of the instalments had not arrived. *Held*, that the demandant could not succeed, for the tenant was not tenant of the freehold, but the mortgagee; nor was the husband ever so seised as to entitle his widow to dower, for his reversionary interest was sold during his lifetime. *Cumming* v. *Alguire*, 12 U. C. Q. B. 330.

Under the plea of *ne unques seisie*, possession by the husband is *primâ facie* evidence of seisin, *Lackman* v. *Nesse*, Easter Term, 7 W. IV.; but in a subsequent case it was held that the demandant could not be allowed to recover on mere evidence of possession by her husband without proving his title. *Johnson et ux.* v. *McGill*, 6 U. C. R. 194.

In a cause of *Harris* v. *Westerman*, tried at Croydon assizes, before Mr. Justice Buller, it was contended that demandant ought to have shewn such an estate in her husband as she was dowable of to support the issue—(Plea, *ne unques seisie* and issue thereon.) *Held*, *possession* and *receipt of rents*

were *primâ facie* evidence of a fee simple estate, and if the party in possession had only a *particular estate*, it was incumbent upon, and in the power of defendant to shew it. Wentworth's System of Pleading, Vol. X, p. 161.

A. conveys, without consideration, to N. W. a lot of land, who takes it and remains in possession some years and leaves. A. subsequently conveys to T. W. for value the same land. Upon a plea of *ne unques seisie que dower* in an action for dower by the widow of N. W. against T. W. *Held*, that the first deed being without consideration, was fraudulent as against the second, and that the claim for dower rested upon the seisin under it, was not sustainable. (*a*)

(*a*) *Wilson* v. *Wilson*, 8 U. C. C. P. 525.

CHAPTER IV.

DEATH OF THE HUSBAND.

Death of the Husband.

Upon the death of the husband the title of the wife becomes consummate, and her right to recover commences.

Mr. Park lays it down that this question of the death of the husband is not triable by jury in a writ of dower, but by the Court *per testes* (*a*): and it has been said that, after the Court have given judgment upon the proofs, the matter shall never be brought in question again upon better proofs, for this is in effect to attaint the Court, and impeach their credit. (*b*) By the C. S. U. C., ch. 31, s. 2, "All issues of fact now or hereafter joined in any action, real, personal or mixed, brought in any of her Majesty's courts of justice within Upper Canada, and the assessment or inquiry of damages in any such action, the trial or assessment of which is not otherwise provided for, shall be tried and determined or assessed and inquired of by the unanimous verdict of twelve jurors, duly sworn, &c. The death of the husband being a question of fact, must be left to a jury in Canada, the same as any other issue of fact.

As to the mode of proof, any direct evidence, such as attending his death bed or his funeral, &c., will

(*a*) Park on Dower, 247; *Thorn* v. *Rolf*, Dy. 185; Moor, 14.
(*b*) Hard, 127.

answer. Death will be presumed also in case of a continued unexplained absence from home for seven years, and the non-receipt of intelligence concerning the party (*a*); but the jury may presume the fact of death in a shorter period than seven years if other circumstances concur: as if a party when last heard of was aged, or infirm, or ill (*b*), or had since been exposed to extraordinary peril as a storm and probable shipwreck. (*c*) The fact of the party being alive or dead at any particular period within, or at the end of the seven years, must be proved by the party asserting that fact. (*d*)

Where a party who takes under a will has not been heard of for seven years, the testator having died after three years had elapsed, and advertisements, issued on the death of the testator, failing to produce any information, such legatee must be presumed to have survived the testator, and cannot be presumed to have died at any particular period during the seven years. (*e*) The law may presume death after seven years' absence, but not the time of the death. (*f*)

In the case of *Doe Hagerman* v. *Strong et al.* (*g*) it was proved that A. was last seen in this province

(*a*) Tay. on Ev. 127, *Hopewell* v. *De Pinna*, 2 Camp. 113.
(*b*) *Rex* v. *Harbourne*, 2 A. & E. 544; Tay. on Ev. 129.
(*c*) *Watson* v. *King*, 1 Stark. 121; Roscoe on Ev 38.
(*d*) *Doe* v. *Nepean*, 5 B. & Ad. 86; In Error, 2 M. & W. 894.
(*e*) *Dunn* v. *Snowden*, 11 W. R. 160; *In re Tindall*, 30 Beav. 151.
(*f*) *Nepean* v. *Doe dem. Knight*, 2 M. & W. 894.
(*g*) 4 U. C. R. 510.

Chap. IV. Death of the Husband.

in December, 1827, and was never afterwards heard of. A *fi. fa.* against A.'s lands was placed in the Sheriff's hands on 13th July, 1833, tested 29th June, 1833. The heir of A. brought ejectment against the purchaser under the Sheriff's sale, and endeavoured to recover upon the ground that, after so many years (about 15) had elapsed over and above the seven years, the law presumed A. to have been living since he was last heard of. The presumption that he did not die till the expiration of the seventh year, though there was no circumstance in evidence to shew that he died earlier, was at an end, and that it was incumbent on the purchaser at Sheriff's sale to shew that he did not in fact die till after the seventh year, and that the jury should be directed to find whether he did or did not die within the term of seven years. But, *held*, the proper direction to give the jury was, that at the end of seven years the fact of death was to be presumed and *not* sooner, unless there was some evidence affecting the probability of life continuing as long, and also that it was incumbent on the heir of A., and not upon the purchaser under the *fi. fa.*, to shew when A. died.

CHAPTER V.

OF WHAT ESTATE A WOMAN IS DOWABLE.

Of what Estate a Woman is Dowable.

Dower attaches to all real hereditaments, whether corporeal or incorporeal, unless there is some special reason to the contrary, as of a manor, an advowson, rents, rent charge, rent seck, commons certain, in gross or appendant, piscary, a fair, a market, a quarry, a dove house, a mill. (*a*) Perkins puts the following case: "If a rent is granted unto a man in fee, and the grantee accepts of the grant and takes a wife, and at the day of the payment the tenant of the lands tenders the rent unto the husband, and he will not receive the same, but openly refuses the same and dies before any receipt of the rent by him, or by any other in his name, or for him, &c., and before any thing paid to him in the name of seisin of the rent, &c., yet the wife shall have dower of the rent." (*b*)

Dower also is due of iron or other mines which have been wrought during coverture, but not of mines unopened at the death of the husband; and if the land assigned for dower contains an open mine, the tenant may work it for her own benefit, but it

(*a*) Kent's Com. vol. 4, p. 40; Perk. 342, 345, 347; Co. on Lit. 32 *a*; Park on Dower, 112 *et seq.*

(*b*) Perkins, s. 378.

Chap. V. Of what Estate a Woman is Dowable.

would be waste in her to open and work a mine (*a*), and so of a coal oil well or a spring of water. (*Rex* v. *Miller*, Cowp. 619.)

The Court of Common Pleas decided "That the widow was dowable of all her husband's mines of lead and coal, as well those which were in his own landed estates, as the mines and strata of lead or lead ore and coal in the lands of other persons, which had in fact been opened and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no dependence on the subsequent continuance or discontinuance of working them, either by the husband in his lifetime or by those claiming under him since his death." (*b*)

When the husband exchanges his lands for others, the widow may elect out of which lands she will be endowed; but she cannot have dower in both, although the husband was seised of both during the coverture (*c*), and note that the exchange must be proved in proper technical form and by deed. (*d*) A power to lease and manage his real estate, given by a testator to his trustees, does not by itself raise

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(*a*) Fitzherbert, N.B. 332 *c*. If a house be accidentally burned down, it is not waste. Roscoe on Real Actions, 121, 109.

(*b*) *Stoughton* v. *Leigh*, 1 Taunt. 402; Kent's Com. vol. 4, p. 41. It is presumed that dower would attach to a coal oil well.

(*c*) Bac. Abr. tit. Dower, p. 187; Fitz. N.B. 149; Park. on Dower, 261 *b*; Co. on. Lit. 31 *b*; *White* v. *Laing*, 2 U.C. C.P. 186; *McClellan et ux.* v. *Meggatt*, 7 U.C.R. 554.

(*d*) *Towsley* v. *Smith*, 12 U.C.Q.B. 555; *Stafford* v. *Trussman*, 7 U.C.C.P. 41.

an implication of the testator's intention to exclude his wife from dower, so as to compel her to elect. In determining the obligation of the widow to elect, the Court will regard the intention of the testator apparent on the whole of the will. The amount of the provision made by the will is a material circumstance in indicating the testator's intention. (*Warbutton* v. *Warbutton*, 18 Jur. 415.) This case was decided by Sir J. Stuart, V. C., but the authority of it is shaken by a decision in Appeal in *Parker* v. *Sowerby*, 18 Jur. 523, where it was held by Lord Cranworth, Sir J. L. Knight Bruce, L. J., and Sir G. J. Turner, L. J., that all that is necessary to raise a case of election is that there should appear on the face of the will an intention which would be frustrated by the claim of dower; and *Hall* v. *Hill*, 1 Dru. & W. 94, decided that such an intention was shown by the testator giving trustees a leasing power over his real estate. See also *O'Hara* v. *Cheyne*, 6 Jo. & Lat. 665; *Gibson* v. *Gibson*, 1 Dru. 42. See also an article in 18 Jur. part 2, p. 197, on the above case of *Warbutton* v. *Warbutton*, 10th June, 1854.

A testator directed all the rents and income of his estate to be divided between his widow and children, one share to each of the children and two to the widow, her heirs and assigns for ever, and proceeded as follows: "I hereby direct that each child, on attaining his or her majority, receive his or her share (after expenses of proper repairs are deducted), for his or her sole use." *Held* that this gave the widow an absolute interest in all his estate, and that a subsequent devise over of her share, in the event of her

Chap. V. Of what Estate a Woman is Dowable.

dying intestate, was repugnant and void, and that the children were entitled to the income only on attaining twenty-one. The will also directed "That no real estate be sold without the unanimous consent and direction of all my executors," and also gave them power to buy and sell, give and take titles in fee simple, in as full a manner as if he were living, and appointed his widow executrix, and F. and H. executors thereof. F. and H. renounced probate, and the widow alone proved the will. *Held* that the widow, under the devise mentioned, was put to elect whether she would take under the will or claim her dower. (*Kerr* v. *Leishman*, 8 Grant, Chy. R. 435.)

A testator gave all his household furniture and effects in his house to his wife; a pecuniary legacy, debts, &c., to be paid out of the general personalty; all his real estates to be sold by auction; and then one half of the whole personalty and of the proceeds of the realty to his wife, and one-fourth to a nephew and one-fourth to a niece. *Held* that the widow was not bound to elect between her dower and the benefit given her by the will. A direction to sell realty contained in a will is not in itself alone inconsistent with the intention that the widow should have her dower, as a power to demise would be. (*a*) But where a will expressly declares that what is given to the widow is intended to be in lieu of dower, and where the widow accepts it, she is as much bound by her election in a court of law as in equity. (*b*) As to the time of election, where a testator made a

(*a*) *Bending* v. *Bending*, 3 Kay & J. 57; 3 Jur. N.S. 535.
(*b*) *Walton* v. *Hill*, 3 U.C. Q.B. 562.

provision for his widow expressly in lieu or satisfaction of any estate or interest to which she might be entitled as his widow, out of his real and personal estate, and she enjoyed the provision in ignorance of her right to dower — *Held* that sixteen years after the testator's death she was entitled to elect. (*Sopwith* v. *Maughan*, 30 Beav. 235.)

Chap. V. Of what Estate a Woman is Dowable.

W. C. bequeathed to his wife, "upon condition of her making no claim upon the residue," an annuity for life; but if she made any claim upon the residue of his property, he bequeathed unto her no part of his property; the annuity was not to be paid; and he directed that property reverting to his estate, whether leasehold or copyhold, should as soon as the amount was obtained be immediately invested, and the interest to be received for the children of T. W. *Held* that the widow of the testator was entitled to dower and also to the annuity. (*a*)

A widow cannot so far elect to take under a devise as to enter into possession of the whole property out of which she claims dower, and yet sue for her dower, when that was part of the property expressly devised to her in lieu of dower. (*b*) A widow dowable out of her husband's lands, having elected to take an annuity given by the will in lieu of dower, the testator's estate being insufficient to pay the legacies in full. *Held*, she was entitled to priority over the other legatees. (*c*) If there be any valu-

(*a*) *Wetherell* v. *Wetherell*, 8 Jur. N.S. 814; *Pickering* v. *Stamford*, 3 Ves. 331.

(*b*) *Walton* v. *Hill*, 8 U.C.Q.B. 562.

(*c*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.

Chap. V. Of what Estate a Woman is Dowable.

able consideration for a testamentary gift, such as the relinquishment of dower by a widow, such legacy will be entitled to preference of payment over the other general legacies, which are mere bounties (*a*); but such a legacy has no priority where the testator leaves no real estate out of which the widow is dowable. (*b*)

A widow is entitled to dower in lands purchased from the Crown by her deceased husband, and whereof he died possessed, although no patent issued therefor and the purchase money had not been all paid. She is also entitled to one-third of the rents and profits for six years before the commencement of the suit. (*c*)

The wife of a mortgagee is not entitled to dower. (*d*)

A widow was never allowed dower of a use; nor is she now entitled to dower out of a trust estate; and when an estate is conveyed to a man by way of mortgage, it is not subject to dower. (*e*)

A widow is not dowable of lands assigned to another in dower. The maxim is *dos de dote peti non debet*, but this maxim does not apply unless

(*a*) *Burridge* v. *Bradyll*, 1 P.Wm. 127; *Blower* v. *Morrit*, 2 Ves. sen. 420.

(*b*) *Acey* v. *Simpson*, 5 Beav. 35; Williams on Ex. 1169; *Heath* v. *Dendy*, 1 Russ. Chan. Ca. 543; vide also Will. on Ex. 1239 *et seq.*

(*c*) *Craig* v. *Templeton*, 8 Grant, Chan. R. 483; 4 Will. 4, ch. i. s. 44; Sug. on Vend. 133.

(*d*) *Ham* v. *Ham*. 12 U. C. Q. B. 497: but see Sug. on Vend. 837. "The wife of a trustee in fee or a mortgagee in fee of a forfeited mortgage is at law entitled to dower."

(*e*) Cruises Digest, vol. 1, p. 174.

dower be actually assigned. (*a*) If no dower be assigned, it does not take place.

Where a testator by will made a provision for his wife, who was married to him before 1884, but did not declare that the provision was to be in bar of dower. *Held* that the wife was not dowable out of freeholds which the testator had devised to trustees, with a discretionary power of sale, and power to let from year to year in the mean time. (*b*)

By the C. S. U. C. ch. 84 (4 Will. IV. ch. 1), a widow is entitled to dower out of equitable estates: "When a husband dies beneficially entitled to an interest in any land which does not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land."

Under this statute, therefore, says Sir Edward Sugden (*c*), "dower attaches on an estate contracted for, unless it be otherwise provided by the husband, the purchaser. And dower attaches not only on equitable estates, but on estates partly legal and partly equitable, if the interest is equal to an estate of inheritance in possession. The common uses to bar dower, therefore, viz., a power of appointment,

(*a*) Cruise, vol. 1, p. 174.

(*b*) *Taylor* v. *Linley*, 5 Jur. N. S. 701.

(*c*) 2 Sug. on Vend. 224, 10th edit.; Bissett on Estates for Life, 112.

Chap. V. Of what Estate a Woman is Dowable.

with, in default of appointment, a limitation to a trustee for the owner's life, interposed between limitations to him for life, and, in fee, would not prevent a woman from being entitled to dower under the act, so far as the estate remains undisposed of by the husband, either by appointment or conveyance. The only question is, had he substantially an estate of inheritance in possession? But the *common form* declares, that the object of such limitation is to bar the wife of dower, and that declaration would effect that object, although the husband should die seised of the fee."

E. H. devised to trustees her freehold premises situate at B., in trust, to receive the rents, and after providing for repairs, &c., and applying part of them towards the maintenance, &c., of F. S., to let the residue accumulate until F. S. should attain twenty-one years, and then to pay such accumulations to him; but if he should die under such age, without issue living at his decease, &c., then such accumulations should be applied for the benefit of the person to whom (*and in the like manner and form as*) the premises were limited; and when F. S. should have attained twenty-one, then the trustees were to stand possessed of the premises in trust for him in fee; but if he should not leave any issue living at his decease, &c., then the premises were to be held in trust for A. S. in fee; and if she should not leave any issue, &c., then over. F. S. attained twenty-one, married E. S., and died intestate and without issue. *Held* that upon the death of F. S. without issue, A. S. took an equitable estate in fee, deter-

minable in the event of her dying without issue. *Held also* that E. S., the widow of F. S., was entitled to dower notwithstanding that the executory devise over took effect. (*a*)

A person equitably entitled to lands (in which case a person who had not paid up his purchase money or obtained a conveyance) created a mortgage thereon, containing a power of sale in default of payment. The power of sale was not exercised until after the death of the mortgagor; afterwards the widow of the mortgagor filed a bill against the purchaser for dower in the mortgaged premises. A demurrer thereto for want of equity was allowed; dower attaching only to such equitable estates as the husband dies seised of; the sale when made having relation to the time of creating the power, and thereby overreaching the title to dower which had in the mean time attached. (*b*)

In equity, bills are filed by dowresses to obtain their dower, but, to avoid objection to the jurisdiction, it is prudent also to pray a discovery of deeds or the like. (*c*) That was so in the case of *Moor* v. *Black*, Cas. Temp. Talbot, 126, and Lord Chancellor Talbot compelled the discovery and the assignment of dower. In the case of *Curtis* v. *Curtis*, 2 Bro. Ch. Ca. 620, where the title to the dower was denied, Lord Chancellor Bathurst ordered the bill to be retained, with liberty to the plaintiff to try her right

(*a*) *Smith* v. *Spencer et al.*, 2 Jur. N.S. 778.

(*b*) *Smith* v. *Smith*, 3 U. C. Chan. R. 451.

(*c*) As to discovery of deeds in possession of tenant, vide *Gomm.* v. *Perrott*, 8 Jur. N.S. 1150; 26 L. J. C. P. 279.

Chap. V. Of what Estate a Woman is Dowable.

at law, and the widow having established her right at law, Lord Alvanley decreed her the relief prayed. In the case of *Mundy* v. *Mundy*, 2 Vesey, jr., 129, Lord Loughboro lays down that if a legal title, such as dower, is controverted, it must be made out at law; but a court of equity will act in aid of the title.

A widow filed her bill for dower against alienees of her husband. In order to make out her title to dower, she was obliged to give in evidence a deed by which the estate had been conveyed to the person from whom her husband claimed. This deed contained a recital that the legal estate was outstanding in trustees. She also gave in evidence certain orders of the Court of Chancery, to shew that such recital was mistaken. *Held* that she was entitled to a reference to ascertain the lands of which she was dowable. (*a*)

A widow having again married, she and her husband verbally agreed with the devisees, that she and her husband should enjoy a certain portion of the estate during her life in respect of her interest therein. *Held* that this was binding on all parties interested, as being an agreement not within the Statute of Frauds; and the Court restrained the purchaser of portions of the estate from disturbing the doweress and her husband during her lifetime. (*b*)

(*a*) *Kernaghan* v. *McNally*, 11 Ir. Chan. R. 52, A. C.

(*b*) *Leach* v. *Shaw*, 8 Grant Chy R. 494.

CHAPTER VI.

HOW DOWER MAY BE BARRED OR DEFEATED.

Chap. VI. How Dower may be barred or defeated.

By the C. S. U. C., chap. 84, ss. 4, 5, 6, 7, 8, 9 and 10, dower may be barred by a married woman, firstly (sec. 4) by joining in a deed or conveyance of lands in Upper Canada with her husband in which deed a release of dower is contained. By sec. 5 a married woman may also bar her dower in any lands or hereditaments by executing either alone or jointly with other persons a deed or conveyance to which her husband is not a party, containing a release of such dower. Sec. 6 requires a married woman barring her dower by deed or conveyance to which her husband is not a party, to be examined touching her consent to be barred by one of the judges of the superior courts in Upper Canada, or the judge of the county court or chairman or presiding magistrate of the quarter sessions, or two justices of the peace for the county in which she resides or happens to be. Sec. 7 gives the form of the certificate. Sec. 8 directs that a married woman being within the United Kingdom of Great Britain and Ireland, or any of her Majesty's colonies, or the United States, and there barring her dower by any deed or conveyance to which her husband is not a party, shall be examined, as mentioned before, by the mayor or chief magistrate of a city or town, if in the United Kingdom, or if in a colony or one of the

Chap. VI. How Dower may be barred or defeated.

United States, by a judge of the supreme court of the colony or state, and if she gives such consent, and the same appears to the person so examining to be free and voluntary and not the effect of any coercion, then such person shall certify as above. Sec. 9 requires the certificate of a mayor or chief magistrate to be verified by the common seal of the city over which they preside, or under the seal of their office. And the certificate of a judge must be verified by the seal of the governor of the colony of which such person is judge. Sec. 10 enacts that no deed of a married woman shall be effectual to bar her dower (if the husband be not a party) unless the directions mentioned above are complied with.

By 24 Vic., ch. 40, s. 19, no action of dower can be brought in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time may not have been had, or though any informality may have occurred in respect thereof. This was passed 18th May, 1861. Therefore since that date acknowledgments of bar of dower, as formerly required, appear to be virtually abolished.

Where a nominee of lands of the Crown, before letters patent issued, sold and conveyed the lands, being then unmarried, and afterwards, being married, obtained a patent and made a new conveyance to the same party. *Held*, that his widow could not claim dower in the land as she was estopped by the deed made before the patent issued. (*a*)

(*a*) *McLean* v. *Laidlaw*, 2 U. C. R. 222.

A sale and conveyance by the sheriff of lands sold for taxes, during the life time of the husband, under the wild lands assessment act, destroys the right of the widow of the owner to dower (*b*); but dower is

(*b*) *Tomlinson* v. *Hill*, 5 Grant's Chy. R. 221; C. S. U. C., ch. 55, s. 150. The report of this case does not state the grounds of the decision. The section of the assessment act is the 150th, which enacts that a sheriff's deed shall have the effect of vesting the land in the purchaser, or his heirs or assigns, or other legal representatives, in fee simple or otherwise, free and clear of all charges and incumbrances thereon, except, &c. The sale of land for taxes only, vests in the purchaser a contingent estate which cannot be perfected until the expiration of a year from the date of the sale. And it is submitted that if the claim for dower was inchoate at the time of the conveyance by the sheriff, it is no bar of dower. In *Thornhill* v. *Jones*, 12 U. C. Q. B. 231, and *Deck* v. *Currie*, 12 U. C. Q. B. 334, it has been determined that a claim for dower being only inchoate at the time of the execution of the deeds, constitutes no breach of a covenant for seisin. Lord Coke lays it down that "Tenant in dower shall not be distrained for the debt due to the king by the husband in his lifetime in the lands which she held in dower and other privileges she hath, of all which Ockham yields the reason *Dotis ejus parcatur quia præmium pudoris est.* Co. on Lit. 31*a*; Williams on Real Property, 4th Ed., p. 190; Cruise's Digest, vol. i., p. 177. Now if a debt due to the Crown cannot extinguish a claim to dower, *a fortiori*, a debt due to a municipality in the shape of taxes cannot extinguish it. In the United States the widow's right to dower is recognised under such circumstances. Mr. Blackwell speaking in reference to this very point says "Independent of this statute, upon common law principles, she is not barred of her dower in such a case. By the common law and English statutes in aid of it, dower could only be barred by a divorce *a vinculo*, by eloping with an adulterer, by the attainder of her husband for treason, by detaining the title deeds from the heir, by jointure in satisfaction, by levying a fine or suffering a common recovery. "This doctrine has been recognized in this country, the court holding that her own voluntary assent or misconduct was necessary to bar her right of dower, and that no *laches* of the husband could have any such effect. A contrary rule would be

Chap. VI. How Dower may be barred or defeated.

not barred by the sale in execution of the husband's lands. (*a*). Dower will be barred if not sued for within twenty years after the death of the husband. (*b*)

Where a widow elects to take what is devised to her expressly in lieu of dower, she is as much bound by her election in a court of law as in equity (*c*); and if the husband have exchanged lands, and the widow elects to be endowed of the one, she is barred of her dower in the other. She cannot have dower in both.

In an action for dower by T. H. and S. H., his wife, in lands of the former husband of S. H., the

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manifestly unjust." Blackwell on Tax Titles, p. 646 to 650 and note. Vide F. N. B. 150 and Cruise's Digest, vol. 1., p. 177; Gil. on Dower, 411; Park on Dower, 852 *et seq.*, where this question is discussed, and Chief Baron Gilbert assigns the correct distinction, which is that if the debt to the king be subsequent to the marriage, then the wife's dower being a contract for infeudation, at the very time of the marriage, and which binds the lands, the assignment of dower overreaches the charges by debt of the king; for if the husband could not alien during the coverture so as to defeat the wife's infeudation, he could not make any other charges which would impeach it, and therefore the wife then may have a general prohibition, since the king's debt does not affect the lands; but if the king's debt was before the marriage then the contract for infeudation was subject to the burden of the king's debt. In *Tomlinson* v. *Hill*, it does not appear whether the taxes accrued due before or after the marriage, but the sale undoubtedly took place during the lifetime of the husband, and consequently at a time when the wife's title was inchoate. In England a widow's freebench is not subject to deceased husband's debt. *Spyer* v. *Hyatt*, 1 Jur. N. S. 315.

(*a*) *Walker* v. *Powers*, Mich. Term, 4 Vic.

(*b*) *McDonald* v. *McIntosh*, 8 U.C. Q.B. 338; *German* v. *Groom*, 6 U.C.R. 414; 24 Vic. chap. 40, s. 18.

(*c*) *Walton* v. *Hill*, 8 U.C. Q.B. 562.

defendant pleaded a release by S. H. after action brought, and an examination and certificate by two justices of the peace according to the provisions of 3 Will. IV., ch. 9, (C. S. U. C., ch. 84, s. 7,) *Held*, on demurrer, plea bad; for that statute is not applicable to this case, but the examination and certificate should have been such as are required by the 37 Geo. III., ch. 7, or 50 Geo. III., ch. 10. And *quære* whether a release, without the husband's concurrence, could in any case be effectual to bar the action. (*a*) This *quære* was resolved in a case between the same parties, decided the next year, to the effect that a woman, under a second coverture, cannot, without her husband's concurrence, release her right to dower in lands of her first husband; and *quære* whether she could release this right by a conveyance in accordance with the statutes for enabling married women to alienate their real estate.

An action was brought in the names of husband and wife for dower claimed by the wife in the lands of her first husband. After action brought the wife executed a release to the defendant of her right, and went before a judge of a county court, and obtained a certificate of her examination and consent according to the provisions of 50 Geo. III., ch. 10. *Held*, that such release was no bar to the action, being without the consent or concurrence of the husband, and not being a conveyance for any purpose contemplated by the different statutes for barring dower. (*b*)

(*a*) *Howard* v. *Wilson*, 9 U. C. Q. B. 450.
(*b*) *Howard* v. *Wilson*, 10 U. C. Q. B. 186.

Chap. VI. How Dower may be barred or defeated.

In another case the tenant pleaded amongst other things a release by demandant to one W., through whom the tenant claimed. At the trial it appeared that demandant's husband had conveyed the land in question with other land to W. as Trustee, to transfer it to M., the husband's brother. After the husband's death, the brother allotted this land to demandant, and she, being married a second time to one McGill, sold it to the defendant, who paid her the purchase money and received a conveyance from W., executed at demandant's request. A release was produced, executed by demandant, describing herself as Bridget McGill, late widow of M., her first husband, to W., of all her dower "to the within mentioned land," dated the same day as the first husband's deed to him; but it was not shewn that this release had been annexed to or endorsed on any other deed. *Held*, (affirming the case of *Howard* v. *Wilcox*,) that on these pleadings demandant must succeed, notwithstanding the apparent injustice of the case; for the release was void because the second husband did not join in it. (*a*)

A release by second husband alone is no bar to the action. (*b*) Attainder of treason is a bar of dower, (Bac. Abr. tit. Dower); and though the husband had been pardoned, yet the wife should not have dower; but of land purchased by the husband after the pardon, the wife shall be endowed. Park 391; Bac. Abr. tit. Dower, p. 121; 5 & 6 Edw. 6,

(*a*) *McGill* v. *Squire*, 13 U. C. Q. B. 550.

(*b*) *Lawson* v. *Montgomery*, 10 U. C. Q. B. 258.

c. 11, s. 13. (a) If a woman be attainted of treason or felony, she will thereby lose her dower, but if pardoned, she may then demand it, though her husband should have aliened his land in the meantime: for when this impediment is removed, her capacity to be endowed is restored. Cruise's Digest, vol. i., p. 185.

A widow's title to dower before assignment, although not transferable at common law, may be the subject of sale and conveyance in equity. (b) And where a party agrees to convey property, he is bound to do so free of dower; or if the wife will not bar her dower, then to convey subject thereto with an abatement in the purchase money. (c)

By a settlement made on the marriage of an adult female, it was declared that in consideration of the intended marriage, and "for providing a competent jointure and provision of maintenance" for the wife and issue of the marriage, the father of the husband had paid him £3,000; and that the husband had given a bond for the payment of £2,000 six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture the husband bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill by the wife

(a) Co. on Lit. 41*a*, 392*b*.

(b) *Rose* v. *Simmerman*, 3 Grant's Chy. R. 598.

(c) *Kendrew* v. *Shewan*, 4 Grant's Chy. R. 578; *Vannorman* v. *Beaupré*, 5 Grant's Chy. R. 599.

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Chap. VI. How dower may be barred or defeated.

for dower out of the lands so sold, *Held*, that her right was barred by the settlement, and that she had no lien on or right to resort to the lands for the satisfaction of the amount due on the bond. *Dyke* v. *Rendall*, 2 DeG. Mac. & G. 209; 16 Jur. 939; 21 L. J. Chanc. 905. If an adult lady contracts to accept any given thing in satisfaction of her dower, she must take that thing with all its faults and all its defects. Per Lord St. Leonard's Chan.

A marriage settlement made provision for the wife out of real and personal estate, and declared that such provision was in lieu of dower or thirds. *Held*, that the widow was not only barred of her dower, but took no interest in her intestate husband's estate under the statute of distributions. (*a*)

A. by marriage articles is bound to pay his wife, if she survives him, £1,500 in full of dower, thirds, custom of London, or otherwise out of his real and personal estate; A. dies intestate; this bars the wife of her share by the statute of distributions. (*b*)

Where a will expressly declares that what is given to the widow is intended to be in lieu of dower, and where the widow accepts it, she is bound by her election whether at law or equity (*c*); but where a will devised an annuity to a wife "upon condition of her making no claim upon the residue;" *Held*,

(*a*) *Thompson* v. *Watts*, 2 Johns & H. 291; 8 Jur. N. S. 760; 6 L. T. N. S. 817.

(*b*) *Davila* v. *Davila*, 2 Vern. 724; *Benson* v. *Bellasis*, 1 Vern. 15; *Mandy* v. *Widmore*, 2 Vern. 709.

(*c*) *Walton* v. *Hill*, 8 U. C. Q. B. 562.

Chap. VI. How Dower may be barred or defeated.

she was entitled to the annuity and also to dower. (*a*)

Adultery is a bar of dower; and even where a woman departs from her husband's house in consequence of his cruelty, yet under 13 Ed. I., ch. 34, by adultery, without reconciliation, she forfeits her dower. (*b*)

Alienage is a good bar of dower where the claim arose before the 23rd November, A.D. 1849, 12 Vic., ch. 197, but since that period aliens have been entitled to hold property with equal rights to British subjects (except as to voting), a privilege not accorded in Great Britain, where an alien can only hold lands for the benefit of the king. (*c*)

In the State of New York no alien can purchase real estate until he has declared his intention to become a citizen of the United States. The following is the law:

Sec. 24.—Revised Statute of New York, Part 2, Ch. 7, Art. II.—Any alien who has come, or may hereafter come, into the United States, may make a deposition or affidavit in writing, before any officer authorized to take the proof of deeds to be recorded, that he is a resident of, and intends always to reside

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(*a*) *Wetherell* v. *Wetherell*, 8 Jur. N. S. 814; *Pickering* v. *Stamford*, 3 Ves. 331.

(*b*) *Woodward* v. *Dowse*, 10 C. B. N. S. 722; 8 Jur. N. S. 413.

(*c*) A devise of real estate to trustees in trust for an alien is not void, and the court will enforce the execution of the trusts for the benefit of the Crown. *Barrow* v. *Wadkin*, 3 Jur. N. S. 679; also *Fitzon* v. *Stordy*, 2 Jur. N. S. 419.

Chap. VI. How Dower may be barred or defeated.

in the United States, and to become a citizen thereof, as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization, which shall be certified by such officer, and be filed and recorded by the secretary of state in a book to be kept by him for that purpose. And such certificate, or a certified copy thereof, shall be evidence of the facts therein contained.

Sec. 25.—Any alien who shall file and make such deposition, shall thereupon be authorized and enabled to take and hold lands and real estate, of any kind whatsoever, to him, his heirs and assigns forever, and may during six years thereafter, sell, assign, mortgage, devise and dispose of the same in any manner as he might or could do if he were a native citizen of this state or of the United States, except that no such alien shall have power to lease or demise any real estate which he may take or hold by virtue of this provision, until he becomes naturalized.

Sec. 26.—Such alien shall not be capable of taking or holding any lands or real estate, which may have descended or been devised or conveyed to him previously to his having become such resident, and made such deposition or affirmation as aforesaid. Lalor on Real Estate, p. 32.

Detinue of charters by the widow is a bar of dower in an action against the heir, but not against a stranger, but such detainer is no bar for more lands

than the charters contain, and if the widow be *enciente*, she may detain them for the infant. (*a*)

Chap. VI. How Dower may be barred or defeated.

Bigamy is a good bar to dower also, and so is a divorce *a vinculo matrimonii*.

(*a*) Park on Dower, 295, 296; and see post Forms of Pleas.

CHAPTER VII.

THE MEASURE OF DAMAGES IN DOWER. (a)

The Measure of Damages in Dower.

Where the husband of a woman is seised of an estate of inheritance and dies, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture to hold for the time of her natural life. (b)

"A dowress," says Mr. Park (c), "having no right of entry till her dower is assigned, cannot, if an assignment is refused, maintain a possessory action." In England the legal remedy to enforce an assignment of dower, is by a writ of dower *unde nihil habet*, or by a writ of right of dower, upon which if she obtains judgment, dower is assigned and ejectment may then be brought. (d) But if either of these remedies is resorted to, the writ of dower *unde nihil habet* is much to be preferred, because by the statute of *Merton* (e) the dowress

(a) Sedgwick on the measure of Damages, p. 129 *et seq.*

(b) Black. Com. Book II., ch. 8, s. 4, 129.

(c) Park on Dower, 283.

(d) Doe *Nutt* v. *Nutt*, 2 C. & P. 430. A widow before assignment of dower has not such an interest in the land of which she is dowable, as to be irremovable from the parish in which the land lies. *Rex.* v. *Inhabitants of North Weald*, Bassett 2 B. & C. 724. But a widow's title to dower before assignment, although not transferable at common law, may be the subject of sale and conveyance in equity. *Rose* v. *Simmerman*, 3 Grant's Chy. R. 598.

(e) *Quod viduæ quæ post mortem virorum suorum expelluntur de dotibus suis, et dotes suas vel quarentenam suam*

recovers damages for the non-assignment of her dower. This act gives damages to widows who *could not have their dower without plea.* Lord Coke says, (Inst. 32 b.,) "It is necessary for the wife after the decease of her husband, as soon as she can to demand her dower, before good testimony: for otherwise she may by her own default, lose the value after the decease of her husband, and her damages for detaining of her dower; for if she bring a writ of dower against the heir, and the heir cometh into court upon the summons on the first day and plead that he has been always ready, and yet is to render dower, &c., if the wife hath not requested her dower, she shall lose the mesne value and her damages; but if she have requested her dower she may plead it, and issue may be thereupon taken. And the case of *Dobson* v. *Dobson*, Ca. Temp. Hard. 19, and 2 Barnard K. B. 180, accords with that "The damages in these cases are according to the value, not of the land but of the rent." Hall M. S. S. Co. Let. 32 note 5; and if the lands are leased for years before marriage, the wife will recover dower, not according to the value of the land, but according to the rents, and it follows that if the rent reserved was nominal, no damages, or

habere non possunt sine placito, quod quicunque deforciaverit eis dotes suas vel quarentenam suam de tenementis de quibus viri sui obierint seisiti et ipsæ viduæ postea per placitum recuperaverint si ipsi deforci de injusto deforciamento convicti fuerint reddant eisdem viduis damna sua scilicet valorem totius dotis eis contingentis de tempore mortis virorum suorum usque ad diem quo ipsæ viduæ per judicium curiæ seisinam suam in de recuperaverint.

Chap. VII. The Measure of Damages in Dower.

none but nominal damages, can be recovered. In the case of *Hitchens* v. *Hitchens*, (*a*) one S. H., in 1679, devised that if his stock and credits abroad should not be sufficient for payment of his debts and legacies, that his executions should pay the same out of the rents and profits of his real estate; and where debts and legacies were paid, devised his real estate to his son, G. H. in tail, with remainder over, and shortly afterwards died; the executors enter on the real estate. G. H. married the plaintiff Sylvestra, and died in 1861, before the debts were paid and before he had any possession. In 1694 the plaintiff Sylvestra recovered her dower and £227 for damages. The damages were computed from the time of her husband's death, but the debts and legacies were not paid until 1693; and it was held that as to the damages it was carried too far back, and that she ought to have had damages but from the time of debts paid and trusts performed.

The statute 4 Wm. IV. c. 1., s. 44; C. S. U. C. ch. 88, s. 18, fixes the limit for which damages may be recovered at six years. "No arrears of dower nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit." (*b*) In the state of New York the limit is the same, viz. six

(*a*) *Hitchens* v. *Hitchens*, 2 Vern. 408; Prec. in Chy. 188; Cruise's Digest, vol. i., p. 167; Park on Dower, 260 *et seq.*

(*b*) *Barnford* v. *Barnford*, 5 Has. 208; Dart. on Vend. 268.

years, but Mr. Sedgwick says "Such damages are not to be estimated however for the use of any permanent improvements made after the death of the husband by his heirs or by other persons claiming title." (a)

And now in Canada, by the statute 24 Vic. ch. 40, the law is pretty much to the same effect. Subsection 2, of sec. 5, relating to the duties of commissioners appointed to lay out and assign dower, reads as follows, "In making such measurement they shall take into view any permanent improvement made upon the lands, embraced in the said order by any guardian or minor, heir or other owner, since the death of the husband of such widow, or since the time that such lands came to be owned by any person or persons by the alienation of said husband, or by title derived through his, and, if practicable, shall award such improvement within that part of the lands not allotted to such widow, and if not practicable so to award the same, they shall make a deduction from the lands allotted to such widow proportionate to the benefit she will derive from such part of the said improvements as shall be included in the portion assigned to her." From Mr. Sedgwick's work it appears that Chancellor Kent and Mr. Justice Story were divided in opinion as to the computation of damages in dower; but it is to be hoped there can be no doubt how it should be calculated in this country, as the law appears explicit. This provision having only lately come into

(a) Sedgwick on Damages, 131.

Chap. VII. The Measure of Damages in Dower.

force, there have as yet been no decisions upon the subject.

But section 17 of the same statute provides distinctly, "In estimating damages for detention of dower, nothing shall be allowed for the use of permanent improvements made after the alienation by, or death of the husband of the claimant." In *Smith* v. *Norton*, (*a*) the rule as to damages was laid down as follows, "That the damages to which she (*i. e.* the widow) was entitled only from the time of demand made, should be calculated upon the average value of the land during that period irrespective of improvements made by tenant; and that the allowance to be paid to her, should be estimated upon a computation of one-third of the occupation value of the ground only without the buildings. (*b*) The measure of damages to which the dowress may be entitled, differs apparently in some particulars in an action against the heir or against the feoffee of her husband. As against the heir she is entitled according to the value of the land at the time of the assignment of her dower, though the heir has improved the land by drainage, &c., or hath erected buildings. But against the feoffee, it is said, dower shall be as it was in the seisin of the husband; for the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the widow would recover more against the feoffee than he would recover in value, which is

(*a*) 7 U. C. L. J. 263; in appeal 20 U. C. Q. B. 213.

(*b*) Co. Lit. 32 *a*; Rawle on Covenants, 333; *Thompson* v. *Morrow*, 5 Serg. & Rawl. 289.

not reasonable. (1 Inst. 32*a*. Ib. note 193; Per Draper, J., in *Bishoprick* v. *Pearce*, 12 U. C. Q. B. 306.) Where the husband dies seised: *semble*, *per Burns, J.*, that if this were suggested on the record, the tenant would be entitled to damages from the issuing of the writ and to costs also. (*Ryckman* v. *Ryckman*, 15 U. C. Q. B. 266.)

In a declaration in dower, there was no averment that the husband died seised, and no damages were claimed—plea *tout temps prist*—the jury found for the plaintiff, and 1s. damages. *Held* that the damages must be struck out. Where nothing appears on the record to shew that a demand of dower was served: *Semble*, that the master cannot tax costs; *Quære*, as to the proper mode of shewing that a service of demand was "made appear on the trial," so as to entitle the demandant to costs under 13 & 14 Vic. Cap. 58, s. 5. (*a*) To a count in dower under the Statute of Merton, the tenant pleaded *tout temps prist*, the demandant replied a demand and refusal to render dower, before the suing out of the writ; to which the tenant rejoined by a traverse of the demand. The issue having been found for the demandant. *Held* that she was entitled to damages, to be computed from the decease of her husband. (*b*) A suggestion may be entered after final judgment that the landlord died seised of lands, and enquiry shall go concerning the damages since

(*a*) *Davis* v. *McNab*, Trin. Term, 4 & 5 Vic.; *Humphries* v. *Barnett*, 16 U. C. R. 468; *Street* v. *Rowe*, 8 C. P. 218; *Anderson* v. *Marriott*, 2 U.C. L.J. 198.

(*b*) *Watson* v. *Watson*, 10 C. B. 8.

Chap. VII. The Measure of Damages in Dower.

the death, although the tenant be the alienee of the heir. (a) After judgment of seisin in dower on a writ of enquiry, the mesne value of the premises, between the death of the husband and the obtaining judgment, should be assessed. Demandant may also assess as damages her taxable costs in obtaining judgment of seisin, executing the writ of *hab. fac. seisinam*, and her necessary travelling expenses incurred in prosecuting her suit. (b) The demandant's residence on the premises, in the family and at the expense of the heir at law, for part of the time between the death of her husband and her recovering judgment, is not admissible in evidence as a set off to her damages for the detention, though proper to go to the jury in mitigation. (c) A writ of execution for damages and costs in dower was set aside, damages being neither claimed in the declaration nor awarded in the judgment. (d) In dower, the demandant is entitled to damages only when her husband died seised. (e) But where the husband dies seised, unless the tenant pleads *tout temps prist*, the demandant may recover damages without setting forth or shewing a demand. (f) Where there was no suggestion on the record that the husband died seised, and tenant pleaded 1. That he is and always

(a) *Robinet* v. *Lewis*, Dra. Rep. 392.

(b) *Robinet* v. *Lewis*, Dra. Rep. 260.

(c) Ibid.

(d) *Davis* v. *McNab*, Trin. Term, 4 & 5 Vic.

(e) *Jones* v. *Jones*, 2 C. & J. 601; 2 Tyr. 581; *Lockman* v. *Neise*, Eas. Term, 7 Will. IV.; *Dayton* v. *Auldjo*, Eas. Term, 4 Vic.; *Walker* v. *Beelton*, Mich. Term, 4 Vic.;

(f) *Empey* v. *Loucks*, 8 U.C. Q.B. 376.

has been ready to render dower; 2. *Tout temps prist* and a tender of dower and refusal before action brought. Replication to first plea, praying judgment of demandant's dower to be assigned to her; to second plea, a demand and refusal by tenant, the rejoinder to which was demurred to. *Held* that upon this record there could be no assessment of damages (*a*). In another case, the issue being whether there was a demand of dower to entitle demandant to damages, she proved an actual demand of the heir, who was an infant. *Held*, that dower was demandable of the heir, though under fourteen, and that the not assigning dower, though the infant did not refuse to do it, but was prevented by his guardian, was a refusal in law sufficient to entitle plaintiff to damages. (*Corsellis* v. *Corsellis*, Hil. 29 & 30; Car. 2, C. B.; Sellons Prac. vol. 2, p. 210).

(a) *Hawkshaw* v. *Hodgins*, 9 U.C. Q.B. 71.

White v Grimshaw 23 2/3 1773
Cook v Phillips " " 69

CHAPTER VIII.

OF ASSIGNMENT OF DOWER.

Of Assignment of Dower.

Until the precise portion of land which the widow is to have for her dower is assigned to her, she cannot enter into it nor maintain a possessory action to recover it (*a*); and by the 24 Vic. ch. 40, s. 1, "Whenever a widow's right to dower shall have been established in an action for that purpose," she may sue out a writ of assignment directed to the sheriff of the county where the lands lie; which writ is to be in the form hitherto in use in Upper Canada. (*b*)

Unless therefore the parties can agree amongst themselves as to the widow's portion, resort must be had to the assistance of the sheriff; and now when even the right is admitted, the practice is altered by the 24 Vic. ch. 40, s. 1; but still the claimant must resort to the sheriff who appoints commissioners to measure the lands, take evidence, report to the sheriff, who reports to the court, and either party if diseatisfied may appeal, and have it done all over again.

If after the judgment in dower, the sheriff offer to give the demandant seisin of her third part,

(*a*) *Doe Nutt* v. *Nutt*, 2 C & P. 430; *Rose* v. *Simmerman*, 3 Grant's Chy. R. 598; Co. on Lit. 37a.

(*b*) Rule of Court, Feb. 15, 1862.

shewing in certain the parcels, although she refuse to receive it, yet she may enter at any time after, because the certainty appears. But she shall not have an alias *hab. fac. seis.* (*a*)

If a sheriff make an improper or partial assignment of dower, a court of equity will grant relief, and order a new writ of seisin, and that the lands be divided into three parts, and to choose by lot (*b*); and in another case on a bill charging partiality and excess the court set aside the assignment. (*c*)

Unless hindered by the peculiar circumstances of the property, or the nature of the tenancy therein, the widow has a right to have her dower assigned to her in severalty "by metes and bounds." (*d*)

And yet in some cases where the husband was sole seised, the wife shall not be endowed in severalty by metes and bounds. As for example if a man seised of lands in fee took a wife, and enfeoffed eight persons, a writ of dower was brought against these eight persons, and two confessed and the other six pleaded in bar and descend to issue, the demandant shall have judgment to recover the third part of two parts of the land, in eight parts to be divided; and after the issue being found for the demandant against the six, the demandant shall have judgment against them for the third part of six parts of the

(*a*) Dy. 278 b.; Park on Dower, 339; Co. on Lit. note 216, 84 b.

(*b*) *Hoby* v. *Hoby*, 1 Vernon 218.

(*c*) *Sneyd* v. *Sneyd*, 1 Atk. 442; Park on Dower, 272.

(*d*) Park on Dower, 251; Co. on Lit. 84 b. The words in Coke are "openly doth declare the quantity and the certainty of the land."

Chap. VIII. Of Assignment of Dower.

same lands, in eight parts to be divided. Where the husband was seised in common, there the wife cannot be endowed by metes and bounds. (*a*)

If the sheriff doth not return "*per metas et bundas*" it is ill, unless certain closes are assigned by name. (*b*)

Of some property of the husband it is impossible to make an assignment by metes and bounds, because the nature of the thing itself is of such a quality that no division can be made of it, the widow therefore must be endowed in a special manner. As of a mill she may have the third tolldish, or she may be endowed of the entire mill every third month. (*c*) In an old case it was questioned whether a woman could be endowed of a quarry, because it could not be divided by metes and bounds; and it was argued that it might be divided by the profits. (*d*)

It has been held in *Stoughton* v. *Leigh*, that a woman is dowable of iron and other mines (*e*); and the court in speaking of the mode of assignment by the sheriff, said "It was not absolutely necessary that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her might consist wholly of lands set out by metes and bounds, and containing none of the open mines. Or he might include any of the open mines themselves in

(*a*) Co. on Lit. 32 b., sec. 44.
(*b*) Co. on Lit. 32 b., note 196.
(*c*) Park on Dower, 118, 252; Gilb. on Uses, 371.
(*d*) *Thynn* v. *Thynn*, Sty. 68; Park on Dower, 115.
(*e*) 1 Taunton 402.

the assignment to the widow, describing them specifically, if the particular lands in which they should lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them, might, but were not necessarily to be so described, *being part of the land* itself which was assigned. Or the sheriff might divide the enjoyment of any of the particular mines as after mentioned," *i. e.* by directing separate alternate enjoyment for short periods. Mines, quarries, brick kilns, lime kilns, coal oil wells, &c., are not separate inheritances, but merely the mode of enjoyment of a man's own land; and whoever has the right to the soil, has a right to the profit of it; and it seems that although a third part of the profits only is assigned to the wife, she shall thereby have the freehold of a third part of the hereditament itself. (*a*)

Mr. Park appears to think that in making an assignment by the sheriff, the one third of the widow is to be ascertained by reference to a general estimate of the annual value, and this annual value is to be estimated as it was at the time of the death of the husband.

By 24 Vic. ch. 40 if the owner of land acquiesces in an outstanding claim for dower, the commissioners must take into consideration any permanent improvements made by the tenant upon the lands since the death of the husband, or since the time of his alienation, and allot them to the tenant, or if this be im-

(*a*) Park on Dower, 253; F. N. B. 8, note (*b*) 149 (*k*).

Chap. VIII. Of Assignment of Dower.

practicable they must make a deduction from the widow's portion; and here is a clear distinction made between parties willing to grant the widow her rights, and those who resist them. In the first case the annual value is estimated as it was at the time of the alienation by the husband; and in the second as it was at the time of the death of the husband, though there does not appear to be much justice in the rule, more particularly in Canada, where adventitious circumstances so frequently enhance the value of property three and [illegible]d in the space of a very few years. In the case of an exchange a widow is put to her election, and the sheriff must endow her of the land she chooses. In all cases where the dower is set out by agreement, the safest and most proper course is to have a written instrument describing the lands by metes and bounds.

CHAPTER IX.

PRACTICE IN DOWER.

Practice in Dower.

Touching practice in an action of dower where tenant makes default, the proper course appears to be as follows:

1st. Serve notice of demand on tenant.

2nd. Serve declaration, with notice to plead.

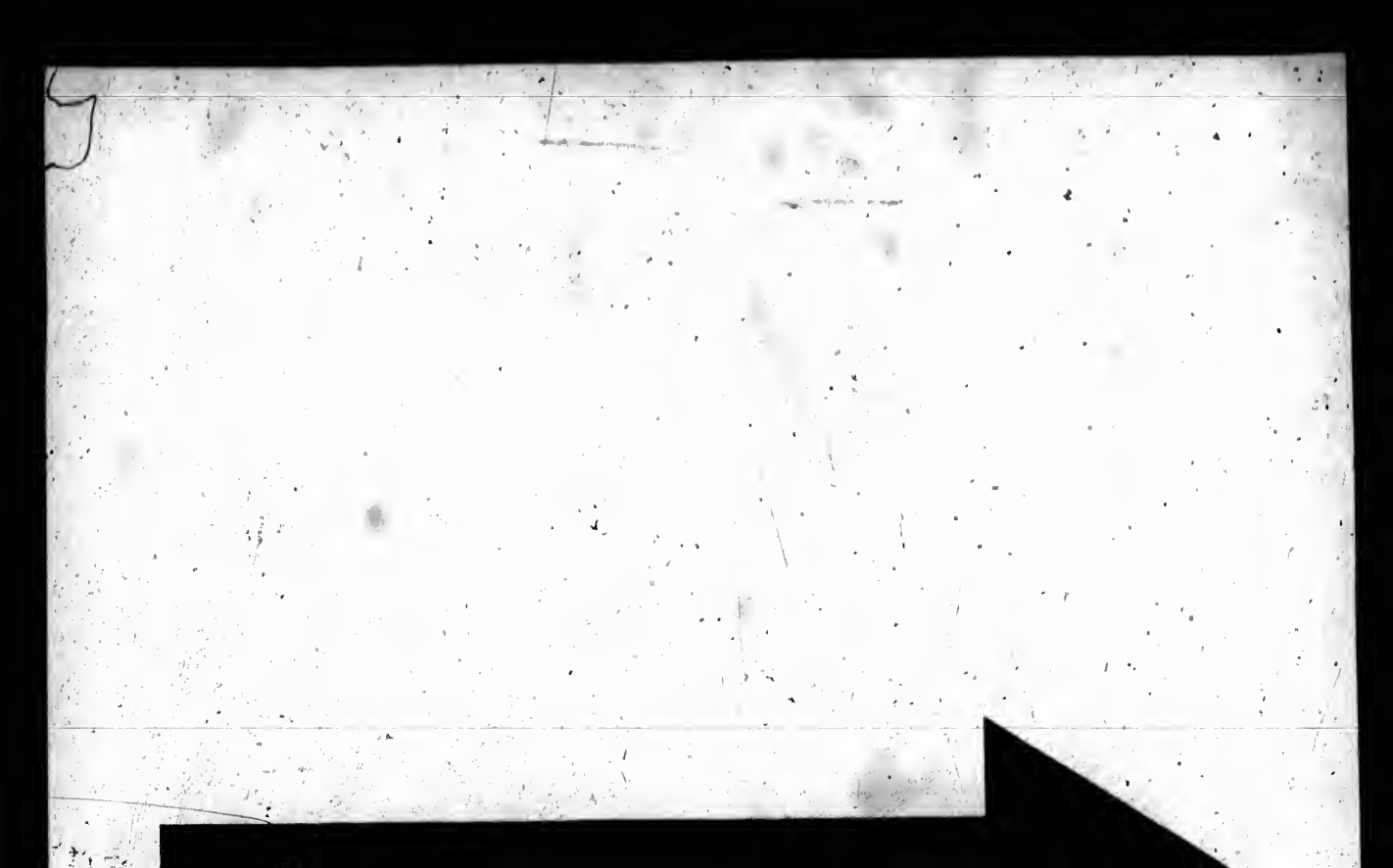
3rd. Search for plea and make affidavit of default, and sign interlocutory judgment.

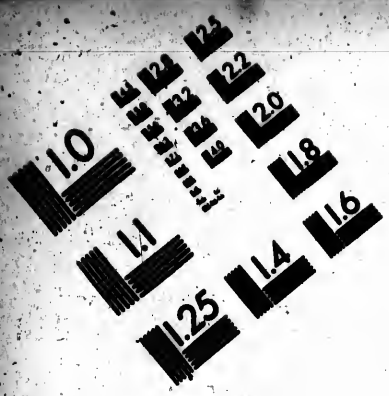
4th. File suggestion that demandant on, &c., had caused a demand in writing of her dower in the lands described in the declaration to be made of the tenant, more than one month and less than one year before the commencement of this suit, and that the tenant did not at any time offer to assign to the demandant her dower.

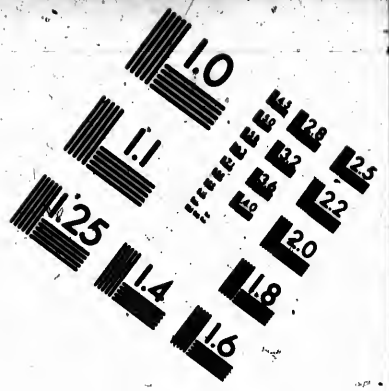
5th. Endorse on suggestion a notice to the following effect: "Take notice that you are to plead to the within suggestion within eight days, otherwise judgment."

6th. Serve copy of suggestion, and make affidavit of service.

7th. Make up judgment roll containing declaration, with an entry of *nil dicit*. The suggestion with an entry of *nil dicit*, and judgment that the demandant do recover her costs of suit against tenant,







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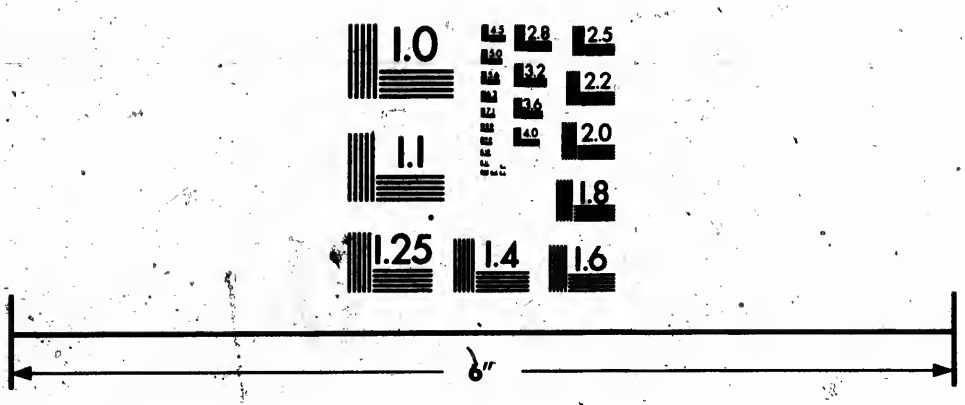

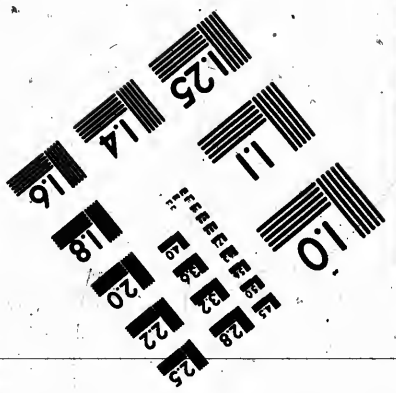

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according to the form of the statute, &c., which said costs amount to $ ——, and that she have execution therefor.

8th. Sue out *hab. fac. seis.* and *fi. fa.* for costs. (*a*) Where infant tenants refuse to plead, the demandant should apply for an order *nisi* that unless the tenants plead within a given time, demandant may assign John Doe as their guardian. When the time granted has expired, make an affidavit of service and an affidavit that no plea has been filed, and apply to make the order absolute. (*b*)

The following are the forms of the orders made:

"Upon reading the affidavits and papers filed, I do order that unless the above named infant tenants shall plead in this cause by guardian within three days after service hereof, the demandant may assign John Doe for guardian of the infant tenants A. B. & C. D., and enter judgment thereon for default of a plea, and take all necessary proceedings in this cause in the ordinary way."

Order absolute thereon.

"Upon reading the order made in this cause on, &c., by &c., That unless, &c. (reciting order *nisi*), and upon reading the affidavit of service thereof, and an affidavit that no plea has been pleaded, I do order that the above named demandant may assign John Doe for guardian of the infant tenants A. B. & C. D., and enter judgment thereon for default of

(*a*) *Street* v. *Rowe*, 8 U.C. C.P. 218.
(*b*) *Robinson* v. *Blanchard*, 9 U.C. L.J. 28.

a plea, and take all necessary proceedings in the cause in the ordinary way." (*a*)

Since 13 & 14 Vic. chap. 38, the nisi prius record in dower may be made up the same as in personal actions. (*b*)

Security for costs may be obtained in an action of dower, on the ground that demandant is resident out of the province. (*c*)

Tenant may plead to the whole declaration "*ne unques accouple*" and "*ne unques seisie que dower*," or "*non tenure;*" or he may plead the latter to part and the two former to the residue; but *non tenure* to the whole cannot be pleaded with other pleas in bar. (*d*)

Particulars of the premises cannot be obtained by the demandant. (*e*)

The C. L. P. Act applies to actions of dower. Defendant put in three pleas: 1. Denying the husband's seisin. 2. The marriage. 3. That before the action the demandant had assigned her right. *Held* that the first two pleas might be allowed together, but that the third must be struck out. (*f*)

(*a*) That there may be judgment by default, though the tenant be an infant, vide Cro. Jac. 111; Sellon's Prac. vol. 2, 208; *Phelan* v. *Phelan*, Dra. Rep. 386; *Robinson* v. *Blanchard*, 9 U.C. L.J. 28.

(*b*) *Williams* v. *Rider*, 1 Prac. Rep. 41.

(*c*) *Nolan* v. *Reid*, 1 Prac. Rep. 264.

(*d*) *Nolan* v. *Reid*, 1 Prac. Rep. 266.

(*e*) *Nolan* v. *Cherry*, 1 Prac. Rep. 277.

(*f*) *Street* v. *Dolsen*, 2 Prac. Rep. 306; vide C.L.P. Act, 1856, ss. 130, 135, 182.

Chap. IX. Practice in Dower.

It is irregular in an action of dower to style the parties in the cause demandant and *respondent*, and affidavits so entitled cannot be read. (*a*)

An action for dower may be maintained against a mortgagee in fee in possession. (*b*)

Demandant in dower is not entitled under the C. L. P. Act to an order to inspect the conveyance deed to her late husband, when the same is in the hands of a purchaser of the lands for value, and without notice that they were subject to dower, as in such a case no bill for a discovery could have been maintained before the C. L. P. Act. (*c*)

An infant plaintiff or defendant is liable to costs. (*d*)

The replication to a plea of *alien nè* need not lay a venue as to the place of birth within the allegiance, nor state of what parents or when the demandant was born, and is properly concluded to the country. *Alien nè* is a plea in bar. (*e*)

The exact number of acres of land of which dower is demanded is not material. (*f*)

In an action of dower, judgment was given in favour of the tenant, in June, 1856. In August, the tenant died, and the entry of judgment was delayed by the difficulty in procuring the affidavit of

(*a*) *Ferguson* v. *Malone*, 1 U.C.R. 519.
(*b*) *Walker* v. *Boulton*, Mich. Term, 7 Vic.
(*c*) *Gomm* v. *Parrott*, 3 Jur. N.S. 1150; 26 L.J.C.P. 279.
(*d*) *Phelan* v. *Phelan*; Drs. Rep. 386, per Cur.
(*e*) *Robinet* v. *Lewis*, Drs. Rep. 44.
(*f*) *Garrard* v. *Tuck*, 8 C. B. 231; 18 Jur. 871; 18 L.J. C.P. 338.

disbursements, &c. The demandant brought another action against the heirs of the tenant, for dower in the same land; and in April, 1857, an application was made to allow the judgment given in June to be entered *nunc pro tunc*. *Held* too late. (*a*).

If the heir, being of full age, assign excessive dower, he has no remedy at law. If the sheriff assign excessive dower, the heir may have a *scire facias* to obtain an assignment *de novo;* or if the heir under age assign excessive dower, he may have relief by writ of admeasurement of dower. (*Stoughton* v. *Leigh*, 1 Taunt. 402.)

(*a*) *Stafford* v. *Trueman*, 2 U. C. Prac. R. 154.

CHAPTER X.

COSTS.

Costs.

"In case it appears on the trial that a demand in writing had been made of the dower claimed from the tenant one month before action brought, and that the action was brought within a year from such demand, costs shall be allowed to the demandant, whether damages be recoverable or not, in the same manner as costs are allowed to a plaintiff or defendant in personal actions: but if it appears on the trial that the tenant offered to assign the dower demanded before action brought, the demandant shall not recover costs." (13 & 14 Vic. ch. 58, s. 5.)

In an action where a demand is averred in the declaration, and judgment allowed to go by default, costs may be recovered. (*Harris* v. *Morden*, 17 U. C. Q. B. 278; *Humphries* v. *Burnett*, 16 U. C. R. 465; *Street* v. *Rowe*, 8 C. P. 213; *Anderson* v. *Marriott*, 2 U. C. L. J. 198. In *Ryckman* v. *Ryckman*, the defendant pleaded "*tout temps prist.*" Replication, a demand and refusal. Rejoinder, denying the refusal. There was no suggestion that the husband died seised. The evidence shewed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land, but she declined, saying that she could not work the land, and would rather have compensation, and no portion was in fact marked out. *Held*,

that the issue must be found for the tenant, as the husband did in fact die seised: *semble, per Burns, J.*, that that should have been suggested on the record, and the demandant would then have been entitled to damages from the suing out of the writ, and consequently to costs. (3 U. C. L. J. 215; 15 U. C. Q. B. 266.)

To an action of dower alleging a demand made pursuant to the statute, the tenants pleaded "*tout temps prist.*" The demandant replied that she requested her dower more than one month, and less than one year before action, but that the tenants did not endow her, and that the judgment for the said damages and endowment shall wait till the said issue is tried. The tenants joined issue. The evidence proved a demand, and that the tenant said demandant might have dower but did nothing. *Held*, that an issue was sufficiently formed upon the record, and that upon the evidence the demandant was entitled to a verdict and to costs. (*Reid* v. *Foster et al.*, 19 U. C. Q. B. R. 298.)

Security for costs may be obtained in an action of dower, on the ground that demandant is resident out of the province. (*Nolan* v. *Reid*, 1 Prac. Rep. 264.) Draper, J., considered that the statute 13 & 14 Vic. ch. 58, was not intended to interfere with any right to costs existing under the old practice, or to render necessary a demand in cases where the demandant would before have been entitled to costs without it. That the plea of "*tout temps prist*" admitted a right to damages from the commencement of the suit to the issuing, if not to the execu-

Chap. X. Costs.

tion of the writ of enquiry, without any suggestion that the husband died seised. And that on these pleadings therefore the demandant might strictly have recovered such damage and consequently the costs: but as this was not insisted on, on the trial, and the verdict was just, he concurred in refusing to interfere. (*Bishoprick* v. *Pearce*, 12 U. C. Q. B. 306.) In the case of *Quin* v. *McKibbin*, 12 U. C. Q. B. 328, there was no suggestion in the declaration that the husband died seised and no claim for damages. The tenant pleaded "*tout temps prist.*" Replication, a demand and refusal. Rejoinder, taking issue on the refusal. It was proved that after demand served on the tenant, under 13 & 14 Vic. ch. 58, s. 5, he went to the demandant's attorney and said that he was ready and willing to assign dower whenever she would come for it, to which the attorney replied that the tenant must take his own course. The jury found for demandant and one shilling damages; and a rule having been obtained for a new trial: *held*, *per Draper*, *J.*, and *Burns*, *J.*, that such rule should be discharged. *Per Draper*, *J.*, that by pleading "*tout temps prist*" the tenant had admitted a right to damages at least from the beginning of the action, which would carry costs. *Per Burns*, *J.*, that the offer proved was insufficient, and in effect amounted to a refusal, and the demandant should therefore have costs; but that there could be no damages, as the husband was not proved to have died seised. *Robinson*, *C. J.*, dissenting, on the ground that the evidence shewed no such refusal as could do away with the effect of

the offer proved, and that the offer was sufficient under the statute to exempt the tenant from costs.

The equitable right to dower entitles a widow to costs, if it is disputed by the party to whom the estate has been sold by the heir at law. (*a*)

An infant plaintiff or defendant is liable to costs in dower. (*b*)

By the 24 Vic. ch. 40, s. 13, "In all cases coming under sec. 1 of this act, the costs of proceeding hereunder shall follow the suit, and shall be recoverable by writ of *fi. fa.* from the goods and chattels or lands of the defendant in such suit: and in all other cases, all such costs shall be in the discretion of the court or judge issuing the writ of assignment of dower; provided that in both classes of cases all costs in appeal shall be in the discretion of the court of appeals."

Where a dower suit was not occasioned by any difficulty as to the assignment or mode of payment of the dower, but solely by the defendant not having admitted the title, till he put in his answer to her bill, she was allowed her costs up to the hearing. (*c*)

(*a*) *Smith* v. *Spencer et al.*, 2 Jur. N. S. 778.
(*b*) *Phelan* v. *Phelan*, Dra. Rep. 386 *per Cur.*
(*c*) *Harris* v. *Harris*, 11 W. R. 62; 7 L. T. N. S. 411.

DOWER FORMS.

Plea—Tout temps prist.

Dower Forms.

That from the time of the death of the husband of the demandant to the time of her, the demandant's, marriage with the plaintiff B., the tenant has always been, and still is, ready to render to the demandant, and since her marriage, to her and her now husband, her dower of and in the lands and premises, with the appurtenances, and rendereth the same here in court to the demandant.

Replication.

That the said tenant was not always ready to render to the demandant from the time of the death of her said husband to the time of the demandant's marriage with the plaintiff B., and since her said marriage to her now husband, her dower of and in the lands and premises with the appurtenances in the declaration mentioned; and the demandant avers that after the demandant's marriage to her now husband, and more than one month and less than one year before the commencement of this suit, to wit., on, &c., she demanded from the tenant her dower of and in the said lands and premises with the appurtenances, but the said tenant did not render dower to the demandant, but wholly neglected and refused so to do, and this they are ready to verify; where-

for she prays judgment of the court of her dower, and also damages for the detention of the same. Dower Forms.

Rejoinder.

That he did not refuse to render dower to the said demandant, as in the said replication alleged. (*Bishoprick et ux.* v. *Pearce*, 12 U. C. Q. B. 306; vide also *Hawkshaw* v. *Hodgins*, 11 U. C. Q. B. 71.)

Alien, &c.

That demandant is an alien born, and was not, nor has, at any time become a subject of her Majesty by naturalization or otherwise, and that her husband was also an alien, born in foreign parts, and out of the allegiance of her Majesty the Queen, to wit., in the United States of America, and is not a subject of her Majesty by naturalization, denization, or otherwise; and the tenant avers that the said A. B., the husband of the said demandant, sold and conveyed the said land to the tenant before the twenty-third day of November, A.D. 1849.

Vide 12 Vic. ch. 197, which enables aliens to hold and enjoy property in this country with equal rights to Canadians, except that of voting: a liberal enactment, scarcely necessary for the encouragement of settlers in the present advanced state of the country, —and perhaps more than doubtful in policy, considering the unsettled state of public affairs among our neighbours.

Form of postea for demandant as to part, and non-seisin as to residue.

Afterwards, that is to say, on the day and at the place within contained, before the Honourable ——,

Dower Forms.

one of her Majesty's Justices of the Court of Queen's Bench or Common Pleas, assigned to take the assizes in and for the county of ———, came as well the within demandant as the within named tenant by their respective attorneys within named. And the jurors of the jury, whereof mention is within made, being summoned also come, who to speak the truth of the several matters within contained being chosen, tried, and sworn as to the two messuages, two workshops, and one garden, with the appurtenances, in the township of ———, in the county of ———, parcel of the tenements within specified, whereof, &c., upon their oath say, that the within A. B., late husband, &c., after the day when he married the said (*demandant*) was seised of the said two messuages, two workshops, and one garden, parcel of the tenements within specified, whereof, &c., of such an estate whereof he could endow the said demandant; and as to the residue of the tenements within specified, with the appurtenances, the jurors aforesaid, upon their oath aforesaid, say, that the within named A. B., late the husband, &c., neither on the day when he married the said demandant, nor ever after, was seised of the said tenements within specified, with the appurtenances, whereof, &c., of such an estate as he could thereof endow the said demandant as the said C. D. (*tenant*) has within in pleading alleged.

Form of judgment thereon.

Therefore it is considered that the said (*demandant*) do recover against the said (*tenant*) her seisin of the said third part of the said two messuages, two

workshops, and one garden, with the appurtenances, parcel of the tenements within specified, whereof, &c., to hold to her in severalty by metes and bounds; and also $———, for her costs of suit: and the said (*tenant*) in mercy, &c., and thereupon the said (*demandant*) prays a writ of our lady the Queen to be directed to the sheriff of the county aforesaid, to cause her to have full seisin of the said third part of the said two messuages, two workshops, and one garden, with the appurtenances, parcel, &c., and also $ ———, for her costs of suit; and it is granted to her accordingly. Dower Forms.

Form of postea where tenant pleads ne unques seisie, and jury find for demandant, and assess damages.

Afterwards, &c., ——— say that A. B., husband of the said E. B., in the declaration mentioned, died seised of the land as in the said declaration mentioned; and the jurors aforesaid, upon their oath aforesaid, further say that the A. B. being as aforesaid seised of the said estate, died so seised thereof six years before the commencement of the above suit; and that the said lands in the declaration mentioned, are worth by the year, in all issues besides reprises, £75; and they assess the damages of the said E. B., (*demandant,*) over and above her costs and charges by her about her suit in this behalf expended, at £ ——.

FORMS OF PLEAS IN DOWER.

Forms of Pleas in Dower.

1. *Tout temps prist.*

That from the time of the death of the husband of the said demandant, he hath always been ready and is still ready to render to the demandant her dower of the said tenements and premises, with the appurtenances in the declaration mentioned, and rendereth the same here in court to the said A. B. (*demandant.*)

2. *Tender and refusal to accept.*

That from the time of the death of the husband of the said A. B. (*demandant*) he hath always been ready to render to the said A. B. her dower of the said tenements and premises, with the appurtenances in the declaration mentioned, and that before the commencement of this suit, to wit. on, &c., he tendered and offered to the demandant her dower of and in the said lands and premises with the appurtenances, to receive which she wholly refused; and that he is still ready and willing to render to the demandant her dower of the said tenements, with the appurtenances, and rendereth the same here in court to the said A. B.

3. *Ne unques accouple.*

That the said A. B. (*demandant*) ought not to have her dower in this behalf as having been the

wife of the said (*husband*) deceased, because the said A. B. never was accoupled to the said (*husband*) in lawful matrimony. Forms of Pleas in Dower.

The plea of *ne unques accouple*, which is the only plea whereby the lawfulness of a marriage can be put in issue, is only to be pleaded in a *real action*. Therefore the certificate of the ordinary is not necessary in any personal or mixed action. (Sellon's Prac., vol. 2, p. 207; Salk 437 1 Lev. 41.)

Replication thereto.

That she ought not to be barred from having her dower aforesaid, because she says that she, the said (*demandant*,) on the —— day of ——— A.D., &c., was accoupled to the said (*husband*) deceased, in lawful matrimony, at ———, &c. (Wentworth's System of Pleading, vol. 10, p. 158; *Williams* v. *Lee*, and *Williams* v. *Vansittart*, 2 U. C. C. P. 175.)

A replication to a plea of "*ne unques accouple*," alleging a marriage in *Scotland*, may conclude to the country; and in such replication it is not necessary to state that the marriage was had at any place in England by way of venue. (*Ilderton* v. *Ilderton*, 2 H. B. 145.)

4. *Adultery.*

That the demandant in the life time of her late husband, and during her coverture with him, voluntarily and of her own accord, left her husband, and from thence and until the time of his death voluntarily and of her own accord lived away from him, and during her coverture with her said husband, continually and until the death of her said husband,

Forms of Pleas in Dower.

of her own accord and without the license or consent, and against the will of her husband, lived away from him in adultery, with one A. B. And the said tenant further avers that the said husband of the said demandant was not at any time after she left his house, or after she lived in adultery with the said A. B., voluntarily or in any manner reconciled to her. (*Hetherington* v. *Graham*, 6 Bing. 135; *Woodward* v. *Dowse*, 8 Jur. N. S. 413; Bac. Abr. tit. Dower, p. 142.

Replications to the plea of adultery.

1. That she did not, during the lifetime of her husband, voluntarily elope from his house and live in adultery with said A. B.

2. Reconciliation and condonation. (Roscoe on Real Actions, p. 224.)

5. *Alien née.*

That the demandant is an alien, born in foreign parts, and out of the allegiance of our lady the Queen, and within the allegiance of a foreign state, to wit. the United States of America, and is not a subject of our lady the Queen by naturalization, denization or otherwise. (Bac. Abr. tit. Dower, p. 120; *Robinet* v. *Lewis*, Dra. Rep. 44.)

Replication thereto.

That she is a natural born subject of our lady the Queen, born in the allegiance of our lady the Queen, (*as the case may be,*) to wit. in the then province of Pennsylvania, and not an alien born in foreign parts, or within the allegiance of a foreign state, as in the

said plea alleged. (*Haskell* v. *Fraser*, 12 U. C. C. P. 383.) Forms of Pleas in Dower.

6. *Non tenure.*

As to the lands and tenements mentioned in the said demand of the said A. B., (*demandant,*) and whereof, &c., he the said C. D. says that he cannot render to the said A. B. her dower thereof, or any part thereof, because he says he is not, nor at the day of the filing the declaration of the said A. B., or any time since, has been tenant thereof, or of any part thereof, as of freehold; and this he is ready to verify: wherefore as to the said lands and tenements he prays judgment of the said writ, &c.

NOTE.—The same persons are liable in dower as before the passing of 13 & 14 Vic. ch. 58, and *non tenure* is therefore still a good defence. (*Harris* v. *Stratton*, 17 U. C. Q. B. 520.)

7. *Plea that lands were devised in lieu of dower, and accepted by widow in satisfaction thereof.*

That during the coverture, to wit., on, &c., J. B. was seised in fee of certain other lands, particularly described in the plea, and by his last will duly executed, devised to the said A. B., (*demandant,*) in full bar and satisfaction of her dower, a certain portion of the said land, (*stated in the plea,*) to hold to her during her life: that after making this will the said J. B. died without revoking it, &c., seised of the said premises, &c., after whose death the said A. B. agreed to and ratified the said devise. (*Breakenridge* v. *King*, 4 O. S. 180; see also *Walton* v. *Hill*, 8 U. C. Q. B. R. 562.)

Forms of Pleas in Dower.

8. *Plea of land exchanged, and election of widow to be endowed in other lands.*

That A. B., the husband of the said demandant, during the coverture was seised in fee of the lands mentioned in the demandant's declaration, and also of certain other lands in the township of, &c., and that during the coverture he exchanged the lands in the declaration mentioned for the said lands in the township of, &c., with one C. D., whereby the demandant became entitled to dower in either of the said lands at her election. And the tenant further says that the said demandant elected to be endowed of the lands in the township of, &c., and released her dower therein in consideration of £50. (*Towsley* v. *Smith*, 12 U. C. Q. B. 555; *Breakenridge* v. *King*, IV. O. S. 180.)

9. *Statute of limitations.*

That demandant's right to dower in the premises mentioned in the declaration accrued to her more than twenty years next before the commencement of this action. (*McDonald* v. *McIntosh*, 8 U. C. Q. B. 388.)

10. *Assignment before action.*

That after demandant's right accrued, and before the commencement of this suit, the demandant conveyed and assigned her dower in the said premises in the declaration mentioned to one A. B. (*Street* v. *Dolsen*, 2 U. C. Prac. R. 306.)

11. *Release by deed.*

That before the commencement of this suit, and during the lifetime of her said husband, the de-

mandant on, &c., barred her dower of and in the lands and premises in the declaration mentioned by deed jointly with her said husband (*or as the case may be*) to one A. B., pursuant to the statute in such case made and provided. Forms of Pleas in Dower.

12. *Ne unques seisie que dower.*

That the said (*demandant*) ought not to have dower of the tenements aforesaid with the appurtenances, of the endowment of the said (*husband,*) because he says that the said (*husband*) neither on the day he married the said (*demandant,*) nor ever afterwards, was seised of the tenements aforesaid, with the appurtenances, whereof, &c., of such an estate as he could thereof endow the said (*demandant.*) *Potts* v. *Meyers*, 14 U. C. Q. B. 499; Wentworth's System of Pleading, vol. x., p. 160.)

13. *Husband alive.*

That A. B., the husband of the said (*demandant*) in the declaration mentioned, was alive at the time of the commencement of this action. Replication, that A. B., the husband of the said (*demandant,*) died at ——, and is buried there. *Thorne* v. *Rolph*, Dyer 185; Bac. Abr. tit. Dower, p. 132.)

It is stated by Mr. Park, p. 248, that this issue on a writ of dower, is not triable by a jury, but by the court *per testes*. Being a mere question of fact however, it is presumed that in Canada it would be left to a jury. A continuous unexplained absence from home for seven years is presumptive evidence of death. Proof of that fact throws the *onus probandi* on the opposite party. (Taylor on Ev., 127.)

Forms of Pleas in Dower.

Such issues have been tried in England by juries. (*R.* v. *Harborne*, 2 A. & E. 544; *Watson* v. *King*, 1 Stark 121.)

14. *Treason.*

That A. B., the husband of the said (*demandant*,) during his lifetime, and during the seisin of the said A. B. of the lands mentioned in the declaration, was attainted of treason. (Roscoe on Real Actions, p. 222; Hawkins P. C. c. 49; Bac. Abr. tit. Dower, p. 121.)

15. *A reference to arbitration and assignment by arbitrators of certain specified lands in satisfaction of dower.* (*McLean* v. *Horton*, 9 U. C. Q. B. 685.)

N.B.—This plea must shew that the assignment had been actually made.

16. *Detinue of charters.*

It is a good plea in bar of dower that demandant detains from the heir such charters, unless they be in a bag sealed, or a box locked, and it is sufficient to say that she detains from him such bag or box of charters; but if the bag or box be open, then he must shew them in certain, and conclude by adding that if she will deliver them to him, he is, and has always been, ready to render her dower; and upon this if she delivers them to him, she shall have judgment for her dower; but if she denies such detainer, and it be found against her, she shall be barred for ever; and it is to be observed—1st. These charters ought to concern the land or the reversion of the land whereof dower is demanded. 2nd. Such de-

tainer is no bar of dower for more lands than the charters concern. 3rd. No one can plead this plea but the heir. Forms of Pleas in Dower.

The reason why such detinue of charters is a good plea for the heir, seems to be because the inheritance by law is cast upon him immediately after the ancestor's death, without any act of his concurring; and therefore he cannot provide against the injury done him by any precaution or covenant whatsoever; but a stranger who comes to the land by conveyance, and his own act, ought to take care to have all the deeds and writings necessary for the defence of his title, delivered to him at the same time, or to secure himself by proper covenants; and if he has not so done it is his own folly; and he shall take no advantage thereof, by pleading it in bar of the demandant, but must pursue his remedy by an action of detinue. In what cases the heir himself shall be considered as a stranger, and cannot plead detinue of charters *vide* 9 Co. 18; Perk. 358; Dyer 230 pl. 52; Roscoe on Real Actions, 223; Bac. Abr. tit. Dower, p. 143: but if the heir has himself delivered the charters to the widow, he cannot plead detinue, for then she has them by his own act. (Park on Dower, 295.)

If the wife be *enciente*, the heir presumptive cannot plead detinue of charters, for the wife may keep them for the infant. (Roscoe on Real Actions, 224; Park on Dower, 296.)

The following pleas may also be pleaded, viz:—

1. Jointure.
2. Divorce a vinculo matrimonii.

Forms of Pleas in Dower.

3. Payment in full satisfaction of dower.

4. That demandant was under dowable age. (Sellon's Prac., vol. 2, 206.)

5. That he holds jointly wtth A. not named. (Park on Dower, 287.)

DOWER.

Dower.

The demandant claiming through seisin of her husband:—Pleas, 1. *Ne unques seisie que dower.* 2. *Ne unques accouple.* 3. That demandant and her husband were both aliens born, and not naturalized before he sold. The loss of most of the deeds affecting the title, was proved (or rather presumed) from the burning of the house of the owner in fee, but a deed was proved to the demandant's husband and brother as joint tenants by production of a memorial from the registry office, and the death of the demandant's husband before his brother, and co-joint tenant, was also proved.

On a motion to enter a nonsuit (a verdict for the plaintiff having been entered): *held*, the demandant could not, without specially pleading it, rely upon the tenants being estopped by taking a conveyance from her husband after marriage, nor from shewing that the seisin of the demandant's husband was as joint tenant with his brother, and that he died first. 2. That secondary evidence of the loss of the deeds was admissible.

Form of plea.

Demandant is an alien born, and was not, nor has at any time, become a subject by naturalization or otherwise: that her husband was also an alien born, not naturalized before he sold and conveyed away

Dower. his interest in the lands, if he had any, and that defendant and the occupiers for the time being have enjoyed the same as of right, and without interruption for twenty years next before the said J. H. became a British subject, if ever he became so. (*Haskell* v. *Fraser*, 12 C. P. 383.)

Replication.

That demandant had become a British subject by naturalisation, and that her husband J. was a British subject by naturalization at the time he conveyed these lands, and that defendants and the occupiers, &c., have not enjoyed, &c.

RULE OF COURT.

February 15th, 1862.

It is ordered, That the form of writs of assignment of dower, to be used under the stat. 24 Vic. ch. 40, shall be as follows: Rule of Court.

The writ of assignment of dower required to be issued after a judgment in an action of dower has been entered in favour of the demandant, shall be in the form hitherto in use in Upper Canada.

And the writ of assignment of dower, required to be issued under the 2nd clause of the said statute, when the right of dower is acquiesced in by the owner of the estate, may be as follows.

Upper Canada, County of ——— } Victoria, by the Grace of God, &c.

To the Sheriff of the County of ———

Greeting.

Whereas A. B., widow, who was the wife of C. D., deceased, demands against E. F. the third part of (*here describe the estate in which dower is claimed, as in other writs of assignment of dower*), as the dower of the said A. B. as the endowment of the said C. D., heretofore her husband. And whereas it has been made appear to us, in our Court of Queen's Bench (*or C. P., as the case may be*) in Upper Canada, that the said E. F. is the owner of the said real estate out of which such dower is claimed, and that he acquiesces in the said claim, and is willing to

Rule of Court.

assign to the said A. B. her proper dower, but that the said A. B. and E. F. are not agreed as to the admeasurement thereof: We therefore command you, that without delay you do deliver to the said A. B. seisin of her third part of the said ———, with the appurtenances, to hold to her in severalty by metes and bounds; and that you do proceed in the execution of this our writ according to the provisions of the statute in that behalf, passed by the Legislature of our Province of Canada in the twenty-fourth year of our reign.

Witness, &c.

(When the demandant has married again since the death of her late husband, under whom she claims dower, her name and description must be made such as to suit the circumstances.)

AN ACT RESPECTING THE PROCEDURE IN ACTIONS OF DOWER.

CON. STAT. U. C., CH. 28, P. 223.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

ACTION OF.

Action of Dower commenced by declaration.

1. The action of dower at law shall be commenced by filing a declaration or plaint (in the form heretofore used) in the office of one of the clerks of the Crown and Pleas, or of the deputy clerk of the Crown and Pleas, in the county where the action is brought. (13, 14 Vic. ch. 58, sec. 1.)

VENUE.

Venue.

2. An action of dower shall be brought in the county or united counties, wherein the lands or tenements of which dower is sought to be recovered, are situate, and the declaration may be served on the tenant of the freehold in any part of Upper Canada. (*a*)

(*a*) In an action where a demand is avered in the declaration, and judgment allowed to go by default, costs may be recovered. (*Harris* v. *Morden*, 17 U. C. Q. B. 278; *Humphries* v. *Barnett*, 16 U. C. R. 465; *Street* v. *Rowe*, 8 C. P. 213; *Anderson* v. *Marriott*, 2 U. C. L. J. 198; 14 U. C. Q. B. 161.)

In *Ryckman* v. *Ryckman*, the defendant pleaded "*Tout temps prist.*" Replication, a demand and refusal. Rejoin-

SERVICE.

Time and manner of serving declaration and notice.

3. A copy of such declaration, and of the notice hereinafter prescribed, may be served by any literate

---

der denying the refusal. There was no suggestion that the husband died seized. The evidence showed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land; but she declined, saying that she could not work the land, and would rather have compensation; and no portion was in fact marked out. *Held*, that the issue must be found for the tenant.

As the husband did in fact die seized, *Semble*, per Burns, J., that that should have been suggested on the record, and the demandant would then have been entitled to damages from the suing out of the writ, and consequently to costs. (3 U. C. L. J. 215; 15 U. C. Q. B. 266.)

To an action of dower alleging a demand made pursuant to the statute, the tenants pleaded "*Tout temps prist.*" The demandant replied that she requested her dower more than one month, and less than one year, before action, but that the tenant did not endow her, and that the judgment for the said damages and endowment shall wait till the said issue is tried. The tenants joined issue. The evidence proved a demand, and that the tenants said demandant might have dower, but did nothing. *Held*, that an issue was sufficiently formed upon the record, and that upon the evidence the demandant was entitled to a verdict and to costs. (*Reid* v. *Foster et al*, 19 U. C. Q. B. R. 298.)

Security for costs may be obtained in an action of dower on the ground that demandant is resident out of the Province. (*Nolan* v. *Reid*, 1 Prac. Rep. 264.)

Draper, J., considered that the stat. 13 & 14 Vic. ch. 58, was not intended to interfere with any right to costs existing under the old practice, or to render necessary a demand in cases where the demandant would before have been entitled to costs without it; that the plea of "*tout temps prist*" admitted a right to damages from the commencement of the suit to the issuing, if not to the execution of the writ of enquiry, without any suggestion that the husband died seised; and that on these pleadings, therefore, the demandant might strictly have recovered such damage, and consequently the costs; but as this was not insisted on at the trial, and the verdict was just, he concurred in refusing to interfere. (*Bishoprick* v. *Pearce*, 12 U. C. Q. R. 306.)

But see Rykman v Rykman & Humphries v Barnett: supra: see Grimshaw also White 23 QB 75.

person personally, within one year from the filing thereof, on the tenant of the freehold, if within the jurisdiction of the court; and if not, then upon the tenant of the land of which dower is demanded; and if such tenant do not plead, agreeably to the notice, the demandant therein, upon affidavit of the due service of such declaration and notice being filed, may proceed thereon as in personal actions. (13, 14 Vic. chap. 58, sec. 2.)

4. The notice referred to in the last section may be in the following form:

Form of action.

In the Queen's Bench (*or* Common Pleas).

A. B., who was (or *is*, as the case may be) the widow of C. D., deceased, demandant, and E. F., tenant.

In the case of *Quinn* v. *McKibbin*, 12 U. C. Q. B. 823, there was no suggestion in the declaration that the husband died seised, and no claim for damages. The tenant pleaded *tout temps prist*. Replication, a demand and refusal. Rejoinder, taking issue on the refusal. It was proved that after demand served on the tenant, under 13 & 14 Vic. ch. 58, sec. 5, he went to the demandant's attorney and said that he was ready and willing to assign dower whenever she would come for it; to which the attorney replied that the tenant must take his own course. The jury found for demandant, and one shilling damages; and a rule having been obtained for a new trial, *held*, per Draper, J., and Burns, J., that such rule should be discharged. Per Draper, J., that by pleading *tout temps prist*, the tenant had admitted a right to damages at least from the bringing of the action, which would carry costs. Per Burns, J., that the offer proved was insufficient, and in effect amounted to a refusal, and the demandant should therefore have costs; but that there could be no damages, as the husband was not proved to have died seised. Robinson, C. J., dissenting, on the ground that the evidence showed no such refusal as could do away with the effect of the offer proved, and that the offer was sufficient, under the statute, to exempt the tenant from costs.

Take notice, that a declaration, of which the annexed is a true copy, was this day filed in the office of the Clerk of the Crown and Pleas (or *Deputy*, as the case may be), at ———— in the County of (or *United Counties* of, as the case may be); and unless you plead thereto within twenty days from the service hereof, judgment will be signed against you by default, and subsequent proceedings and execution thereof follow thereon, according to law.

Dated the —— day of —— , 18 .

J. K., attorney, &c.,

Residing at ——, in the County of ——— (or *United Counties* of, as the case may be).

To E. F., of the town of —— (as the case may be), the above tenant.

VACANT POSSESSION.

Proceedings if possession vacant.

5. If the land of which dower is demanded be vacant, and the tenant of the freehold cannot be personally served with a declaration as hereinbefore provided, then service may be made as in actions of ejectment; but such service, when not personal upon the tenant, must be allowed by the court or a judge thereof; and after filing the declaration and the affidavit of such service, and the order or rule of allowance thereof, the demandant may, after the time for pleading has expired, proceed thereon as if personal service had been effected. (13, 14 Vic. ch. 58, s. 3.)

6. When the tenant of the land has not been personally served with the declaration, and the demandant proceeds to the trial of the right of dower in the land, the demandant, before the entry of any

verdict in favour of such right, shall prove the marriage, *seisin*, and death of the husband, in the same manner as if the tenant pleaded, traversing such marriage, *seisin* and death. (13, 14 Vic. ch. 58, s. 4.)

What to be proved if defendant does not appear.

COSTS.

7. In case it appears on the trial that a demand in writing had been made of the dower claimed from the tenant one month before action brought, and that the action was brought within a year from such demand, costs shall be allowed to the demandant, whether damages be recoverable or not, in the same manner as costs are allowed to a plaintiff or defendant in personal actions; but if it appears on the trial that the tenant offered to assign the dower demanded before action brought, the demandant shall not recover costs. (13, 14 Vic. ch. 85, sec. 5.)

When costs shall be allowed.

TENANT TO NOTIFY LANDLORD.

8. In case a declaration or plaint in dower be delivered to any tenant, not being tenant of the freehold, such tenant shall forthwith give notice thereof to his landlord, or to the servant, attorney, agent, bailiff or receiver of his landlord, under the penalty of forfeiting to the person of whom he holds, three years' improved or rack-rent of the premises so demised, holden or in the possession of such tenant, to be recovered by action of debt in any Court of Record in Upper Canada. (13, 14 Vic. ch. 58, sec. 6.)

Tenant in possession to give notice to landlord.

OCCUPANT NOT BEING TERRE TENANT.

9. A recovery had against a mere occupier of the land, and without notice to the terre tenant, shall

Effect of a recovery against a mere occupant not being terre tenant.

have no greater effect than a recovery in ejectment for the quantity of land assigned as dower in such recovery would have had. (13, 14 Vic. ch. 58, s. 6.)

Form of a declaration in dower (*a*).

In the Queen's Bench (*or* Common Pleas).

County of ——, } The——day of——A.D. 18 ,
To wit. } A. B., widow, who was the wife of C. D., deceased, by J. K. her attorney, demands against E. F. the third part of lot number (*describe premises*), and of ten messuages, ten barns, ten stables, two dwelling houses, four gardens, four orchards, two thousand acres of pasture land, two thousand acres of woodland, and two thousand acres of other land, with the appurtenances, in the township of ——, in the county of ——, as the dower of the said A. B. of the endowment of C. D. deceased, heretofore her husband, who died seised of said lands, whereof she has nothing.

J. K.,
Attorney for A. B., demandant.

Form of declaration in dower and for mesne profits.

(*Same as above, and proceed after the word* "nothing") and the said A. B. also claims damages for the detention from her of her endowment in the said lands from the death of her said husband, and the one-third of the mesne profits arising from the

(*a*) In a writ or count in dower, the exact number of acres of land in respect of which dower is demanded, is not material, &c. (*Gerrard* v. *Tuck*, 8 C. B. 231; 18 Jur. 871; 18 L. J. C. P. 338.)

said lands from the death of her said husband; and the demandant claims £——.

J. K.,
Attorney for A. B., demandant.

(For form of notice to be endorsed on declaration, see sec. 4.)

Form of issue and suggestion of service of demand of dower one month before action brought, &c.

(Copy declaration and pleadings here.)

The demandant, A. B., joins issue on the pleas of the said tenant, E. F., above pleaded, and suggests that one month before the commencement of this suit, and within a year prior to the commencement thereof, she caused a notice in writing, demanding her dower in the said lot number — to be served on the said E. F., and requiring that dower be set out to her thereon, that her husband died seised thereof, and that she had been heretofore deforced thereof.

J. K., Attorney, &c.

Form of issue book.

(Copy above, and add the words, "Therefore let a jury come," &c.)

Form of demand of dower.

To A. B., of the township of —, in the county of —.

Take notice, that E. F., of the——of——, widow of C. D., deceased, demands of you her dower of and in lot No.—, in the —— concession of the township of——, in the county of ——, of which said lot her husband died seized, and of which she has nothing;

and unless you shall cause her said dower to be assigned to her within one month from the date of the service upon you of this notice, an action will be brought against you to recover her said dower, and you will be put to the costs thereof.

J. K.,

Attorney for E. F., of the of .

Dated the — day of ——A.D., 18 .

Form of record.

The same as in personal actions (*a*).

(*a*) *Williams* v. *Rider*, 1 U. C. Prac. Rep. 41.)

AN ACT RESPECTING DOWER.

CON. STAT. U. C., CH. 84.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

WIDOWS TO BE ENTITLED TO DOWER IN CERTAIN CASES.

Dower out of equitable estate.

1. When a husband dies beneficially entitled to any land, for an interest which does not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land. (4 W. 4, ch. 1, ss. 13, 14, 15.)

Dower when husband had a right of entry.

2. When a husband hath been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced. (4 Wm. IV. ch. 1, sec. 14.) (*a*)

(*a*) Action must be brought within twenty years from death of the husband. (*German* v. *Grooms*, 6 U.C.Q.B. 414; *McDonald* v. *McIntosh*, 8 U. C. Q. B. 388.)
McLellan et ux v. *Meygatt et al*, 7 U. C. R. 31.

DOWER ABOLISHED IN CERTAIN CASES.

Certain Dower abolished.

8. No widow shall be entitled to dower *ad ostium ecclesiæ*, or dower *ex assensu patris*. (4 Wm. IV. ch. 1, sec. 15.

HOW DOWER MAY BE BARRED.

Dower may be barred by joint deed of husband and wife.

4. A married woman may bar her dower in any lands or hereditaments in Upper Canada, by joining with her husband in a deed or conveyance thereof in which a release of dower is contained. (2 Vic. ch. 6, sec. 3.)

When may be barred by separate deed of wife.

5. A married woman may also bar her dower in any lands or hereditaments, by executing, either alone or jointly with other persons, a deed or conveyance, to which her husband is not a party, containing a release of such dower. (37 Geo. III. ch. 7, sec. 1.

When wife to be examined as to her consent.

6. A married woman barring her dower by a deed or conveyance to which her husband is not a party, shall be examined by one of the judges of the Courts of Queen's Bench or Common Pleas in Upper Canada, or the judge of the County Court, or chairman or presiding magistrate of the Court of Quarter Sessions, or two justices of the peace for the county in which she resides or happens to be, touching her consent to be barred of her dower. (37 Geo. III. ch. 7, sec. 1; 3 Wm. IV. ch. 9, sec. 1; 2 Vic. ch. 6; 50 Geo. III. ch. 10, sec. 1.)

Certificate of consent.

7. If such married woman, upon being so examined, gives such consent, and the same appears to the judge, chairman, or presiding magistrate, or justices examining her, to be voluntary, and not the effect of

coercion on the part of her husband or of any other person, such judge, chairman or presiding justice or justices shall certify on the back of the deed to the following effect (37 Geo. III. ch. 7, sec. 2):

Form.

Form. We, A. B. and C. D., of the county of ——, in the Province of Canada, Esquires, two of Her Majesty's justices of the Peace in and for the said county (or *I, a judge*, &c., as the case may be), do certify that E. F., wife of G. F., personally appeared before us (or *me*, as the case may be), and being duly examined by us (or *me*) touching her consent to be barred of her right of dower of and in the lands in the within deed mentioned, it did appear to us (or *me*) that the said E. F. did give her consent thereto freely and voluntarily, without coercion or fear of coercion on the part of her husband or of any other person. (Signed) A. B.

C. D.

Dated at——.

(3 Wm. IV. cap. 9, sec. 1.)

Who to certify out of Upper Canada.

8. A married woman, being within the United Kingdom of Great Britain and Ireland, or any of Her Majesty's colonies, or the United States of America, and there barring her dower by any deed or conveyance to which her husband is not a party, shall be examined as mentioned in the sixth section of this act, by the mayor or chief magistrate of a city or town, if in the United Kingdom, or, if in a colony or one of the United States, by a judge of the supreme court of the colony or state; and if she gives such consent, and the same appears to the person so

examining to be free and voluntary, and not the effect of any coercion as aforesaid, such person shall certify on the back of the deed to the effect prescribed by the seventh section of this act. (48 Geo. III. ch. 7, sec. 1.)

Certificate, how verified.

9. Any certificate under the last section of this act shall, if granted by a mayor or chief magistrate, be under the common seal of the city or town over which such mayor or chief magistrate presides, or under the seal of office of such mayor or chief magistrate; and if granted by a judge, such certificate shall be verified by the seal of the person administering the government of the colony or state of which the person certifying is a judge. (48 Geo. III. ch. 7, ss. 2, 3.)

Unless the husband is a party, dower not barred without acknowledgment.

10. No deed or conveyance of a married woman, to which her husband is not a party, shall be effectual to bar her dower, unless the directions contained in the sixth, seventh, eighth and ninth sections of this act (*as the case may be*) are complied with. (37 Geo. III. ch. 7, sec. 1.)

Fee for certificate.

11. A fee of one dollar may be demanded for any certificate under this act. (50 Geo. III. ch. 10, sec. 2; 3 Wm. IV. ch. 9, sec. 2.)

AN ACT FOR THE BETTER ASSIGNMENT OF DOWER IN UPPER CANADA.

24 VIC. CHAP. 40.

Assented to 18th May, 1861.

Her Majesty, by and with the advice, &c., enacts as follows:

Writ of assignment of dower upon judgment.

1. Whenever a widow's right to dower shall have been established in an action for that purpose, she shall be entitled to sue out from the court in which such action shall have been brought, upon the judgment entered in such action, a writ of assignment of dower, directed to the sheriff of the county where the lands lie out of which dower has been adjudged to her, which writ shall be in the form hereinafter provided for. (*a*)

Writ of assignment of dower where owner acquiesces in claim but parties are not agreed as to the admeasurement of dower.

2. Where there exists an outstanding claim for dower in any real estate in Upper Canada, and the owner of such real estate acquiesces therein, and is willing to assign dower, but the parties are not agreed as to the admeasurement thereof, it shall be lawful for either of them to apply to a judge of either of the superior courts of common law in Upper Canada, or to the judge of county court (or union of counties) in which the lands lie out of which dower is demanded, for a writ of (*b*) assignment of dower

(*a*) This form is not given.

(*b*) Form given by rule of court 15th February, 1862, vide supra.

under the provisions of this act; and such judge upon being satisfied by evidence on affidavit that the parties agree as to the existence of the right of dower, shall order such a writ to the proper sheriff in that behalf.

Sheriff to appoint three freeholders as commissioners.

8. The sheriff to whom such writ is directed, shall appoint three reputable and disinterested freeholders commissioners for the purpose of making admeasurement of the dower, by an order which shall specify the lands of which dower is to be admeasured, and the time at which the commissioners shall report.

They shall be sworn.

4. The commissioners so appointed, before entering upon their duties, shall be sworn before the sheriff who appointed them, or before some officer authorized to take affidavits, that they will faithfully and impartially discharge the duty and execute the trust reposed in them by such appointment; and if the persons so appointed commissioners, or either of them, shall die, resign, or neglect, or refuse to serve, others may be appointed in their places by the sheriff who appointed the first commissioners, and shall take the same oath.

Other may be appointed in case of death, &c.

Duties of commissioners.

5. The commissioners so appointed shall execute their duties as follows:

To admeasure one-third of lands and fix monuments.

1. They shall admeasure and lay off, as speedily as possible, the one-third of the lands embraced in the order for their appointment as the dower of such widow, designating such part with posts, stones, or other permanent monuments.

2. In making such measurement, they shall take into view any permanent improvement made upon the lands embraced in the said order by any guar-

dian of minor, heir, or other owner since the death of the husband of such widow, or since the time that such lands came to be owned by any person or persons by the alienation of the said husband, or by title derived through his, and if practicable shall award such improvement within that part of the lands not allotted to such widow, and if not practicable so to award the same, they shall make a deduction from the lands allotted to such widow, proportionate to the benefit she will derive from such part of the said improvements as shall be included in the portion assigned to her.

To avoid assigning dower of improvements after alienation by husband, if practicable, &c.

3. If, from the improvements upon such lands or other peculiar circumstances, the said commissioners shall find that an assignment of such dower cannot be made, so as to be fair and just to all parties by metes and bounds, they shall assess the amount of a yearly sum of money in lieu thereof; and in assessing the said annuity, they shall take evidence of all the facts and circumstances relating to the said lands and the improvements thereon, making allowances for such improvements in the same way as would have been done if the assignment had been made by metes and bounds, and shall with their return to the sheriff, return all the evidence upon which they have acted, to be taken in writing on oath and subscribed by the witnesses.

Annuity in lieu of dower, when the same cannot be fairly assigned.

Their return in such case.

4. Such annuity shall be a lien upon the entire of the said lands, unless the said commissioners shall think it just to confine the lien to a part thereof, and shall be recoverable in such payments as the said commissioners shall direct, by distress in the

Annuity to be a lien with right of distress.

same manner as rent, in addition to the usual personal remedy against the owner of the land.

Commissioners to make return.

5. The said commissioners shall make their return as directed to the sheriff, with a full and ample report of their proceedings, with the quantity courses and distances of the land admeasured and allotted to the widow, with a description of the posts, stones, and other permanent monuments thereof.

May employ surveyor.

6. They may employ a surveyor with necessary assistants, to aid them in such admeasurement.

Time may be enlarged by Sheriff for return.

6. The sheriff may, upon the application of the said commissioners, or other party, enlarge the time for making their report, and may by order, compel such report, or discharge such commissioners neglecting to make the same, and appoint others in their places; and such report when made and confirmed,

Report to be filed within 30 days, &c., and registered.

shall be filed with the proceedings in the cause thirty days thereafter; and a certified copy thereof may be registered in the registry office for the county where the lands are situated.

Report may be set aside by Sheriff.

7. The sheriff to whom such report shall be made may, at the time for receiving the same, or at such other time to which the hearing shall have been adjourned, on good cause shewn, set aside the said report, and appoint as often as may be necessary new commissioners, who shall proceed in the manner hereinbefore directed; and if not set aside, the

Or confirmed.

sheriff shall by order to be endorsed upon the writ, confirm the said report and admeasurement.

Report conclusive in 30 days unless appeal.

8. The report so made and confirmed, shall, at the expiration of thirty days from the date of such confirmation, unless appealed from, be binding and con-

clusive upon all the parties to the action in which the writ of assignment of dower was issued, and the sheriff shall, at the expiration of thirty days from the date of such confirmation, unless the same be appealed from, deliver possession of the land admeasured to the claimant for her dower; and she may hold the same subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession.

Sheriff to deliver possession.

9. Within thirty days after the order of confirmation of the report of the commissioners, any party interested may appeal from such order in the Court in which the proceedings have been carried on, in the manner hereinafter directed.

Appeal from order of confirmation within 30 days.

10. Such appeal shall be filed with the sheriff granting the order, but shall not be effectual or valid for any purpose until a bond to the adverse party shall be executed by the appellant and filed with the said sheriff, with security to be approved by him, and to be evidenced by an endorsement on such bond, in the penal sum of one hundred dollars, conditioned for the diligent prosecution of such appeal, and for the payment of all costs that may be adjudged by the court against such appellant; and no other notice shall be necessary to perfect such appeal.

Proceedings in appeal.

Security.

11. It shall be the duty of the sheriff with whom such appeal bond shall be filed, to transcribe the order of evidence, report, and other proceedings had before him, together with the said appeal, and to certify the same under his official seal, and to transmit the same to the proper officer of the court appealed to; and the court shall proceed at the next

Sheriff to certify proceedings to the court.

ensuing term after such transmission, and not later than the second term after the making of the order appealed from, to review the proceedings upon the said application, and shall do therein what shall be just.

In case of reversal of order, court shall certify same.

12. In case of the reversal of the order of confirmation, the court shall cause the same to be certified to the sheriff making such order, to the end that new commissioners may be appointed, or a new admeasurement may be had, as the said court may direct; or the court may itself appoint such commissioners.

Costs to follow the suit.

13. In all cases coming under section one of this Act, the costs of proceedings hereunder shall follow the suit, and shall be recoverable by writ of *fieri facias*, from the goods and chattels, or lands of the defendant in such suit; and in all other cases all such costs shall be in the discretion of the court or judge issuing the writ of assignment of dower; provided that in both classes of cases all costs in appeal shall be in the discretion of the court of appeals.

Proviso.

Hearing of appeal.

14. The hearing of an appeal shall be brought only in the ordinary practice, as in cases of an appeal from the county court, and the court may, by rule direct further returns from any sheriff whenever the same shall be necessary.

Superior Courts to frame proper writs.

15. The superior courts of common law shall frame a form of writ of assignment of dower, and *fieri facias* for costs, adapted to the provisions of this Act, and any other Act in force in Upper Canada relating to Dower, and shall settle the fees to be

Fees.

allowed to the sheriff, commissioners, and all others for services.

Act limited to U. C., &c.

16. This Act shall be confined to Upper Canada, and shall not affect cases where the right to Dower has become consummate by the death of the husband before the passing thereof.

Damages for detention of dower.

17. In estimating damages for detention of dower, nothing shall be allowed for the use of permanent improvements made after the alienation by or death of the husband of the claimant.

Limitation of actions for dower.

18. No action for dower shall be brought but within twenty years from the death of the husband of the person claiming dower, nor until one calendar month's notice in writing, demanding the same has been given by the claimant to the tenant of the freehold.

Not to be brought if claimant joined in deed.

19. Nor shall any such action be hereafter brought in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time may not have been had, or though any informality may have occurred in respect thereof.

THE ACT FOR THE BETTER ASSIGNMENT OF DOWER.

(*From the Upper Canada Law Journal.*)

The Act for the better assignment of dower.

The law of dower in Upper Canada has always been a subject of much perplexity to the lawyer, and of more or less oppression to the land owner.

While dower was, in theory, for the support of the widow, in practice it yielded her little or nothing and, worse still, caused much loss to the owner of the fee.

This being the case, the aim of the dowress was rather to levy a money compensation than to have the enjoyment of one-third of a bush lot, which, owing to the existence of the primeval forest, she could not cultivate; or even one-third of a lot partly cleared, of which, for want of means, she could make no use.

In truth, no greater punishment could, in many cases, be inflicted upon the claimant than to admit her claim and to permit her to take possession of that which apparently she so earnestly prized. But even here there was a difficulty: parties, owing probably to the fact that the claim for one-third of the land was only a pretence, could not agree upon the portion to be assigned, and an action for dower, with its attendant expenses, was the consequence.

Then suppose the right to dower conceded, was it just to allow the widow to have not only one-third of the lot as left by her deceased husband, but at the same time, in consequence of her own neglect to claim immediate dower, to give her, by way of damages for detention, the benefits of subsequent improvements? Was it fair to carve out of the centre of a farm one-third of it, so as to render the working of the remainder ruinously expensive? Was it right for the law capriciously to impoverish any of Her Majesty's subjects, without, at least, a corresponding benefit to her who put the law in motion? These and similar questions, without number, were daily asked, but owing to the vexatious state of the law, could not be satisfactorily answered.

The Act for the better assignment of dower.

The legislature has at length made an attempt to place the law of dower upon a more satisfactory footing in passing the Act 24 Vic. cap. 40, entitled "An Act for the better assignment of Dower in Upper Canada." It is confined to Upper Canada, and does not affect cases where the right to dower has become consummate by the death of the husband before 18th May, 1861. (Sec. 16.)

It is by this Act enacted, that "in estimating damages for detention of dower nothing shall be allowed for the use of permanent improvements made after the alienation by, or death of, the husband of the claimant" (sec. 17); and that "no action for dower shall be brought but within twenty years from the death of the husband of the person claiming dower, nor until one calendar month's notice, in writing demanding the same, has been given by the

The Act for the better assignment of dower.

claimant to the tenant of the freehold" (sec. 18). It is also very properly enacted, that no such action shall be hereafter brought "in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time may not have been had, or though any informality may have occurred in respect thereof." (Sec. 19.)

The leading features of the Act, however, are two. First, to provide facilities for the issue of a writ of assignment of dower; and, secondly, to provide a means whereby the assignment of dower may be, as far as possible, reasonable and just.

FACILITIES FOR ISSUE OF A WRIT.

Where there exists an outstanding claim for dower in any real estate in Upper Canada, and the owner of the real estate acquiesces therein and is willing to assign dower, but the parties are not agreed as to the admeasurement, it is made lawful for either of the parties to apply to a judge of either of the superior courts of common law, or to the judge of the county court of the county in which the lands lie, out of which dower is demanded, for a writ of assignment of dower. (Sec. 2.) It must be made to appear to the satisfaction of the judge, by evidence on affidavit (intitled, it is presumed, in one of the courts) that the parties agree as to the existence of the right of dower. This is the foundation of the summary jurisdiction. When it is established to the satisfaction of the judge, he is authorized, without suit or other proceeding, to order the writ of assignment of

dower to issue to the sheriff of the county in which the land lies, out of which the dower is demanded. So, whenever a widow's right to dower is established in an action for that purpose, she is entitled to sue out from the court in which the action is brought a writ of assignment of dower, under the provisions of the Act. The writ must, of course, in this case be sued out upon the judgment, and in any case be directed to the proper sheriff. (Sec. 1.)

The Act for the better assignment of dower.

Form of Writ.

The Legislature has not given the form of the writ intended, but, on the contrary, declared that the superior courts of common law shall frame a writ of assignment of dower, and *fieri facias* for costs, adapted to the provisions of this Act and any other Act in force in Upper Canada relating to dower." (Sec. 15.)

DUTY OF SHERIFF UPON RECEIPT OF WRIT.

It is made the duty of the sheriff to whom the writ is directed, to appoint three reputable and disinterested freeholders commissioners, for the purpose of making admeasurement of the dower. The appointment must be by an order which shall specify, 1. The lands of which dower is to be admeasured; and 2. The time at which the commissioners shall report. (Sec. 3.)

OATH OF COMMISSIONERS.

Before entering upon their duties the commissioners must take an oath of office. No form of oath is given, but it must be to the effect that "they

The Act for the better assignment of dower.

will faithfully, honestly, and impartially discharge the duty and execute the trust reposed in them by the appointment." The oath may be administered by the sheriff who made the appointment, or before some officer authorized to take affidavits. (S. 4.) There is no obligation on the part of any person to accept of the appointment. It may be refused, and even if accepted, it would appear, may be neglected without any very serious consequences. It is, however, to be presumed that any person who takes the oath "faithfully, honestly and impartially" to discharge the duty will not be guilty of neglect.

PROVISION IN CASE OF DEATH OR RESIGNATION OF COMMISSIONERS.

If the persons appointed commissioners or any or either of them die, resign, neglect or refuse to serve, others may be appointed in their places by the sheriff. Persons so appointed must take the oath before mentioned.

GENERAL DUTY OF COMMISSIONERS.

The commissioners are required "as speedily as possible" to lay off the one-third of the lands embraced in the order for that appointment as the dower of the widow. The part so admeasured and laid off must be by the commissioners designated with posts, stones, or other permanent monuments. (Sec. 5, sub-sec. 1.)

RULE TO BE OBSERVED AS TO IMPROVEMENTS.

In making the admeasurement, the commissioners are required to take into view any permanent im-

provement made upon the lands embraced in the order, by any guardian or minor heir, or other owner, since the death of the landlord, or since the time that the lands came to be owned by any person or persons by the alienation of the husband, or by title derived through him. If practicable, the commissioners must award the improvement within that part of the dower not allotted to the widow. If not practicable so to award it, they shall make a deduction from the lands allotted to the widow proportionate to the benefit she will derive from such part of the improvements as may be included in the portion assigned to her. (Sec. 5, sub-sec. 2.)

The Act for the better assignment of dower.

POWER TO AWARD ANNUITY IN LIEU OF DOWER.

It is not, under all circumstances, imperative upon the commissioners to make an actual assignment of dower. If, from the improvements upon the land, or *other peculiar* circumstances, the commissioners find that an assignment of dower cannot be so made as to be fair and just to all parties by metes and bounds, they may assess the amount of a yearly sum of money in lieu thereof. In assessing the annuity they must take evidence of all facts and circumstances relating to the lands and the improvements thereon, making allowances for the improvements in the same way as would have been done had the assignment been made by metes and bounds. The evidence should be taken in writing on oath, and be subscribed by the witnesses. It must be returned to the sheriff. (Sec. 5, sub-sec. 3.)

The Act for the better assignment of dower.

ANNUITY—ITS EFFECT, AND HOW RECOVERABLE.

The annuity will be a lien upon the entire of the lands unless the commissioners think it just to confine it to a part, and then only to such a part. It will be payable as the commissioners may direct, and recoverable by distress in the same manner as rent. The usual personal remedy against the owners of the land may also be preferred and be had. (Sec. 5, sub-sec. 4.)

EMPLOYMENT OF A SURVEYOR.

When an admeasurement is necessary, the commissioners may employ a surveyor, with necessary assistants, to aid them in the admeasurement. (Sec. 5, sub-sec. 6.)

REPORT OF COMMISSIONERS.

The report or return must be by the commissioners directed to the sheriff, with a full and ample report of their proceedings, with the quantity, courses, and distances of the land admeasured and allotted to the widow, with a description of the posts, stones, and other permanent monuments thereof. (Sec. 5, sub-sec. 5.)

CONTROLLING POWER OF SHERIFF—CONFIRMATION OF REPORT.

The sheriff is empowered, upon the application of the commissioners, or of either party, to enlarge the time for making the report. He may also, by order, compel the report or discharge the commissioners neglecting to make the same, and appoint others in their places. (Sec. 6.) When the report is made,

The Act for the better assignment of dower.

he may, at the time for receiving it, or at such other time to which the hearing shall have been adjourned on good cause shewn, set aside the report, and appoint new commissioners as often as may be necessary. If not set aside, the sheriff is required by order to be endorsed on the writ, to confirm the report and admeasurement. (Sec. 7.)

REPORT, WHEN ABSOLUTE.

The report, when made and confirmed, is to be filed with the proceedings in the cause thirty days thereafter. (Sec. 6.) The report so made and confirmed at the expiration of thirty days from the date of confirmation, unless appealed from, is binding and conclusive upon all parties to the action in which the writ of assignment of dower was issued. (Sec. 8.)

RIGHT OF APPEAL.

Any party interested may appeal from the order of confirmation of the report of the commissioners in the court in which the proceedings have been carried on. The appeal must be made within thirty days after the order of confirmation. (Sec. 9.)

MODE OF APPEAL, BOND, &c.

The appeal must be filed with the sheriff who granted the order. It will not, however, be effectual or valid for any purpose, until a bond to the adverse party is executed by the appellant, and filed with the sheriff with security to be approved by him. The approval must be evidenced by an endorsement on the bond. The bond itself must be in the penal sum of $100, and conditioned for the dili-

The duty for the better assignment of dower.

gent prosecution of the appeal, and payment of all costs that may be adjudged by the court against the appellant. (Sec. 10.)

DUTY OF SHERIFF WHEN BOND APPROVED.

It is made the duty of the sheriff with whom the appeal bond is filed—1. To transcribe the order, evidence, report, and other proceedings had before him, together with the appeal. 2. To certify the same under his official seal; and, 3. To transmit the same to the proper officer of the court appealed to. (Sec. 11.)

REVIEW OF PROCEEDINGS BY THE COURT.

The court to which the appeal is made, is required to proceed at the next ensuing term after the transmission, and not later than the second term after the making of the order appealed from, to review the proceedings upon the application, and to do therein "what shall be just." (Sec. 11.)

HEARING OF APPEAL.

The hearing shall be brought on by the *ordinary* practice as in cases of an appeal from the county court, and the court may by rule direct further returns from any sheriff whenever the same shall be necessary. (Sec. 14.)

PROCEEDINGS UPON REVERSAL.

In case of the reversal of the order of confirmation, the court is to cause the same to be certified to the sheriff making the order, to the end that new commissioners may be appointed or a new admeasure-

ment be had, as the court may direct. (Sec. 12.) The court itself may, if it see fit, appoint the commissioners. (*Ib.*) The Act for the better assignment of dower.

DUTY OF SHERIFF IF NO APPEAL.

If there be no appeal within the time limited for the purpose, it is the duty of the sheriff to deliver possession of the land admeasured to the claimant for her dower, and she may hold the same, subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession.

COSTS.

In all cases where a widow's right to dower is established in an action for that purpose, the costs of proceedings for the assignment of dower follow the suit, and are recoverable by writs of *fieri facias* from the goods and chattels or lands of the defendant in the suit. (Sec. 13.) In all other cases the costs are in the discretion of the court or judge that issues the writ of assignment of dower. (*Ib.*) But in both classes of cases all costs in appeal are in the discretion of the court of appeal. (*Ib.*) Power is conferred upon the Superior Courts of Common Law to settle the fees to be allowed to the sheriff, commissioners, and all others for services. (Sec. 15.)

REGISTRY OF REPORT.

A certified copy of the report may be registered in the registry office for the county where the lands are situate. (Sec. 6.)

PARTITION AND SALE OF REAL ESTATE.

CON. STAT. U. C., CHAP. 86.

Case of tenant in dower by courtesy or for life, if sale be made such tenant shall be entitled out of proceeds, and how.

30. Whenever the estate of any tenant in dower, or of any tenant by the courtesy or for life to the whole or to any part of the estate, has been admitted by the parties, or ascertained by the court to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court shall first determine whether such estate ought to be exempted from the sale, or whether the same should be sold; and in making such determination, regard shall be had to the interests of all the parties; and if a sale be ordered including such estate, all the estate and interest of every such tenant shall pass thereby, and the purchaser, his heirs and assigns, shall hold such premises freed and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be to any undivided share or to the whole or any part of the premises sold; and the court shall direct the payment of such sum in gross out of the purchase money to the person entitled to such dower or estate by courtesy or for life, as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate. (20 Vic. ch. 65, sec. 24.)

ARREARS OF DOWER.

CONSOL. STAT. U. C., CHAP. 88, SEC. 18.

No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit. (4 Wm. IV. ch. 1, sec. 44.)

No arrears of dower to be recovered for more than six years.

Short form of barring dower in conveyancing.

CON. STAT. U. C., CHAP. 91, P. 910.

And the said (A. B.), wife of the said (*grantor*), hereby bars her dower in the said lands.

AN ACT RESPECTING MARRIAGES IN UPPER CANADA.

CONSOL. STAT. U. C., CHAP. 72.

Minister of any denomination may solemnize marriage.

1. The ministers and clergymen of every church and religious denomination in Upper Canada, duly ordained or appointed according to the rites and ceremonies of the churches or denominations to which they respectively belong, and resident in Upper Canada, may, by virtue of such ordination or appointment, and according to the rites and usages of such churches or denominations respectively, solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract such marriage. (20 Vic. ch. 66, s. 1; 11 Geo. IV. ch. 36, sec. 8.)

No minister to solemnize marriage unless authorized by license or after publication of banns.

2. But no minister or clergyman shall celebrate the ceremony of marriage between any two persons, unless duly authorized so to do by license under the hand and seal of the governor, or, if not so authorized, then unless the intention of the two persons to intermarry be proclaimed openly and in an audible voice in the church, chapel, meeting-house, or place of public worship of the congregation or religious community with which the minister or clergyman is connected, on three several Sundays, immediately before the service begins, or immediately after it ends, or at some intermediate part of the service, together with the number of such proclamation, as

being the first, second or third time of asking. (38 Geo. III. ch. 4, sec. 4; 11 Geo. IV. ch. 36, sec. 5.)

No valid objection that it was not in a church or chapel, &c.

3. It shall not be a valid objection to the legality of a marriage that the same was not solemnized in a consecrated church or chapel, or within any particular hours. (38 Geo. 3, ch. 5, sec. 6.)

Ministers marrying must give certificate, if required.

4. Every clergyman or minister who celebrates a marriage in Upper Canada, shall, if required at the time of the marriage by either of the parties thereto, give a certificate of the marriage under his hand specifying the names of the persons married, the time of the marriage, and the names of two or more persons who witnessed it, and specifying also whether the marriage was solemnized pursuant to license or after publication of banns; and the clergyman or minister may demand twenty-five cents for the certificate, from the person requiring it. (20 Vic. c. 66, sec. 2.)

Fee for certificate.

Minister to enter marriage in a book, &c.

5. Every clergyman or minister shall, immediately after he has solemnized a marriage, enter in a book, to be kept by him for the purpose, a true record of the marriage; and shall, on or before the first day of February in every year, return a certified list of all marriages by him solemnised during the year ending on the thirty-first day of December next preceding, to the registrar of the county in which the marriages have taken place, and shall, at the time of making the return, pay or transmit to the registrar one dollar as his fee thereon. (20 Vic. cap. 66, sec. 3.)

To make a yearly return to the Registrar.

6. (For form of record see statute.)

7. On receipt by the registrar of any such list, he shall file the same among the papers of his office,

Registrar's fees for copies.

and record the same in a book to be kept by him for the purpose; and in case of the death or absence of the witnesses to a marriage, such register, or a certified copy, shall be sufficient evidence of the marriage, and the registrar shall give a certified copy of a marriage record to any person demanding the same, on payment of fifty cents. (20 Vic. ch. 66, sec. 3.)

Minister's fees.

8. Every clergyman or minister, before solemnizing a marriage, may demand from either of the parties thereto the sum of two dollars, to enable him to pay the sum to be paid or transmitted by him to the registrar, and to remunerate the clergyman or minister for the trouble and expense attendant on preparing and transmitting such certified list to the registrar. (20 Vic. ch. 66, sec. 3.)

Parties may give what additional remuneration they think fit.

9. But nothing in this act shall prevent the payment to the clergyman or minister of any further remuneration the parties choose to make. (20 Vic. ch. 66, sec. 3.)

In case of death or removal, Minister's successor to make return to Registrar.

10. In case of the death or removal of a minister or clergyman before making his annual return, his successor or any other person having the legal custody of the book referred to in the fifth section, shall return to the registrar a certified copy of all marriages therein recorded, and the registrar shall record the same as if the return had been made by the minister or clergyman who celebrated the marriages. (20 Vic. ch. 66, sec. 4.)

Quakers' marriages declared valid.

11. Every marriage duly solemnized between members of the Religious Society of Friends, commonly called Quakers, according to the rights and usages thereof, shall be valid; and the duty imposed

by this act upon a minister and clergyman, shall, with regard to such marriage, be performed by the clerk or secretary of the society, or of the meeting at which the marriage is solemnized. (20 Vic. ch. 66, sec. 7.)

Fine for neglecting to return certified list

12. Every clergyman, minister, clerk, secretary or other person, who in any year refuses or neglects to return the certified list required of him by this act, on or before the first day of February, shall forfeit for each day's delay after that day, the sum of four dollars, which sum shall be recoverable with costs before any magistrate of the county in which the person resides, and shall be applied according to law. (20 Vic. ch. 66, sec. 37.)

Clerks of Peace to furnish books and printed forms, at the expense of the county.

13. The clerk of the peace of every county shall, at the expense of the county, from time to time, on demand, furnish all clergymen or ministers and others in the county required by this act to make returns, with the books to be kept, and with printed blank forms for the lists to be returned; and such books shall have columns and headings printed on every page, according to the form given in the sixth section; and the books and forms shall be of such size and form as to admit of the necessary entries being conveniently made therein. (20 Vic. ch. 66, sec. 8.)

Said books, &c., to be the property of the church to which Clergyman belongs.

14. The book, by whomsoever furnished, shall be the property of the church or denomination to which the clergyman or minister, clerk or secretary belongs at the time of the first marriage which he records therein. (20 Vic. ch. 66, sec. 3.)

MARRIAGE LICENSE FUND.

Marriage license fund.

15. The portion of the marriage license fund arising in Upper Canada, shall be at the disposal of the Legislature, for public purposes of interest in Upper Canada. (13 & 14 Vic. ch. 70.)

AN ACT FOR THE BETTER PREVENTING OF CLANDESTINE MARRIAGES.

26 GEO. II., CHAP. 33.

Whereas great mischiefs and inconveniences have arisen from clandestine marriages; for preventing thereof for the future, *Be it enacted, &c.*, That from and after the twenty-fifth day of March, in the year of our Lord one thousand seven hundred and fifty-four, all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which public chapel banns of matrimony have been usually published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubrick prefixed to the office of matrimony in the Book of Common Prayer, upon *three Sundays preceding the solemnization* of mar- See 2 Bar. 302.
riage, during the time of morning service, or of evening service (if there be no morning service in such church or chapel upon any of those Sundays), *immediately after the second lesson*: and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church or chapel belonging to such parish or chapelry wherein each of the said persons shall dwell; and where both or either of the persons to be married shall dwell in any extra parochial place (having no church or

Doug. 624, and 21 G. 2, c. 33.

chapel wherein banns have been usually published), then the banns shall in like manner be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extra parochial place; and where banns shall be published in any church or chapel belonging to any parish adjoining to such extra parochial place, the parson, vicar, minister or curate, publishing such banns, shall, in writing under his hand, certify the publication thereof in such manner as if either of the persons to be married dwelt in such adjoining parish; and that all other the rules prescribed by the said rubrick concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place whatsoever.

What two to sign publication, and marriage to be solemnized, &c.

II. *Provided always*, That no parson, vicar, minister or curate, shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married, seven days at the least before the time required for the first publication of such banns respectively, deliver or cause to be delivered to such parson, vicar, minister or curate, a notice in writing of their true christian and surnames, and of the house or houses of their respective abodes within such parish, chapelry, or extra parochial place as aforesaid, and of the time during which they have dwelt, inhabited or lodged, in such house or houses respectively.

Notice of the names, &c., of the parties to be given to the Minister seven days before, &c.

III. *Provided always*, That no parson, minister, vicar or curate, solemnising marriages after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censure for solemnising such marriages without consent of *parents or guardians* whose consent is required by law, unless such parson, minister, vicar or curate, shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his, her or their dissent to such marriage, such publication of banns shall be absolutely void.

But when given, publication void.

IV. *And it is hereby further enacted*, That no license of marriage shall, from and after the said twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, be granted by any archbishop, bishop, or other ordinary or person having authority to grant such licenses, to solemnise any marriage in any other church or chapel, than in the parish church or public chapel of or belonging to the parish or chapelry, within which the usual place of abode of one of the persons to be married shall have been for the space of four weeks immediately before the granting of such license; or where both or either of the parties to be married shall dwell in any extra parochial place, having no church or chapel wherein banns have been usually published,

Licenses to be granted in the church of such parish only, where one of the parties shall have resided, &c.

then in the parish church or chapel belonging to some parish or chapelry adjoining to such extra parochial place, and in no other place whatsoever.

Places which may be deemed, &c.

V. *Provided always, and be it enacted by the authority aforesaid*, That all parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually celebrated every Sunday, may be deemed extra parochial places for the purposes of this act, but not for any other purpose.

Archbishop of Canterbury's right.

VI. *Provided always*, That nothing hereinbefore contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his and their proper officers, of the right which hath hitherto been used, in virtue of a certain statute made in the twenty-fifth year of the reign of the late king Henry the Eighth, entitled, An Act concerning Peter Pence and Dispensations; of granting special licenses to marry at any convenient time or place.

Surrogate to take an oath of office, &c.

VII. *Provided always*, That from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, no surrogate deputed by any ecclesiastical judge, who hath power to grant licenses of marriage, shall grant any such license before he hath taken an oath before the said judge faithfully to execute his office, according to law, to the best of his knowledge, and hath given security by his bond, in the sum of one hundred pounds, to the bishop of the diocese, for the due and faithful execution of his said office.

VIII. And whereas many persons do solemnize matrimony in prisons and other places without pub-

lication of banns of license of marriage first had and obtained; therefore, for the prevention thereof, be it enacted, that if any person shall, from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, solemnize matrimony in any other place than a church or public chapel where banns have been usually published, unless by special license from the Archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless license of marriage be first had and obtained from some person or persons having authority to grant the same, every person knowingly and willingly so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported to some of his Majesty's plantations in America for the space of fourteen years, according to the laws in force for the transportation of felons: and all marriages solemnized from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, in any other place than a church or such public chapel, unless by special license as aforesaid, or that shall be solemnized without publication of banns or license of marriage from a person or persons having authority to grant the same, first had and obtained, shall be null and void to all intents and purposes whatsoever.

Persons convicted of solemnizing matrimony without, &c., except by special license, to be transported, and the marriages null.

IX. *Provided*, That all prosecutions for such felony shall be commenced within the space of three years after the offence committed.

Prosecutions within three years.

X. *Provided always*, That after the solemnization of any marriage, under a publication of banns, it

Proof of parties dwelling in the Parishes, &c. not necessary to the validity of such marriage.

shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish or chapelry wherein the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage.

Marriages by license without consent, &c. parties not being a widower or widow, but under age, void.

XI. *And it is hereby further enacted*, That all marriages solemnized by license after the said twenty-fifth day of March, one thousand seven hundred and fifty-four, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of such of the parties father, so under age (if then living), first had and obtained, or, if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother (if living and unmarried), and if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery; shall be absolutely null and void to all intents and purposes whatsoever.

See 2 Dur. 208.

XII. "And whereas it may happen that the guardian or guardians, mother or mothers, of the parties to be married, or one of them, so under age as aforesaid, may be *non compos mentis*, or may be in parts

beyond the [illegible] may be induced unreasonably and by undue [illegible] to abuse the trust reposed in him, her or [illegible] refusing or withholding his, her or their consent to the marriage;" *Be it therefore enacted*, that in case any such guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid, shall be *non compos mentis*, or in parts beyond the seas, or shall refuse or withhold his, her or their consent to the marriage of any person, it shall and may be lawful for any person desirous of marrying, in any of the above mentioned cases, to apply by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of Great Britain for the time being, who is and are hereby empowered to proceed on such petition in a summary way; and in case the marriage proposed shall, upon examination, appear to be proper, the said Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal for the time being, shall judicially declare the same to be so by an order of court, and such order shall be deemed and be taken to be as good and effectual, to all intents and purposes, as if the guardian or guardians, or mother of the person so petitioning, had consented to such marriage.

Parties may apply to the Lord Chancellor, &c.

XIII. *And it is hereby further enacted*, That in no case whatsoever shall any suit or proceeding be had in any ecclesiastical court in order to compel a celebration of any marriage in *facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de præsenti* or *per verba de futuro*, which shall be entered into after the twenty-fifth day of

No suit in Ecclesiastical Court to compel marriage in facie ecclesiæ.

March in the year one thousand seven hundred and fifty-four; any law or usage to the contrary notwithstanding.

Churchwardens to provide books.

XIV. And for preventing undue entries and abuses in registers of marriages, that on or before the twenty-fifth day of March in the year one thousand seven hundred and fifty-four, and from time to time afterwards as there shall be occasion the church-wardens and chapel-wardens of every parish or chapelry shall provide proper books of vellum or good and durable paper, in which all marriages and banns of marriages respectively, there published or solemnised shall be registered, and every page thereof shall be marked at the top with the figure of the number of every such page, beginning at the second leaf with number one; and every leaf or page so numbered shall be ruled with lines at proper and equal distances from each other, or as near as may be; and all banns and marriages published and celebrated in any church or chapel or within any such parish or chapelry, shall be respectively entered, registered, printed, or written upon or as near as conveniently may be to such ruled lines, and shall be signed by the minister, vicar, parson or curate, or by some other person in his presence and by his direction; and such entries shall be made as aforesaid on or near such lines in successive order where the paper is not damaged or decayed by accident or length of time, until a new book shall be thought proper or necessary to be provided for the same purposes, and then the directions aforesaid shall be observed in every such new book; and all books provided as aforesaid shall be deemed to belong to

To be figured by the Minister and kept for public use.

every such parish or chapel respectively, and shall be carefully kept and preserved for public use.

Marriages to be in the presence of two witnesses, and be registered.

XV. And in order to preserve the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, *Be it enacted*, that from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, all marriages shall be solemnized in presence of two or more credible witnesses besides the minister who shall celebrate the same; and that immediately after the celebration of every marriage, an entry thereof shall be made in such register to be kept as aforesaid; in which entry or register it shall be expressed, that the said banns or license; and if both or either of the parties married by license, be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form or to the effect following; that is to say:

And signed &c.

Form.

A. B. of { the / this } Parish

and G. D. of { the / this } Parish

were married in this { Church / Chapel } by { Banns / License } with

consent of { Parents / Guardians } this day of

in the year

by me, F. F. { Rector. / Vicar. / Curate. }

This marriage was solemnized between us, { A. B. / C. D. }

in the presence of { E. F. / G. H. }

Persons convicted of making a false entry, or of forging, &c., any such entry, or of destroying such register, to suffer death.

XVI. *And be it further enacted*, by the authority aforesaid, that if any person shall, from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, with intent to elude the force of this act, knowingly, and willingly, insert, or cause to be inserted in the register book of such parish or chapelry as aforesaid, any false entry of any matter or thing relating to any marriage; or falsely make, alter, forge, or counterfeit, or cause, or procure to be falsely made, altered, forged, or counterfeited, or act or assist in falsely making, altering, forging, or counterfeiting any such entry in such register; or falsely make, alter, forge, or counterfeit, or cause, or procure to be falsely made, altered, forged, or counterfeited, or assist in falsely

making, altering, forging, or counterfeiting any such license of marriage as aforesaid; or utter, or publish as true, any such false, altered, forged, or counterfeited register as aforesaid, or a copy thereof, any such false, altered, forged, or counterfeited license of marriage, knowing such register or license of marriage respectively to be false, altered, forged, or counterfeited; or if any person shall, from and after the said twenty-fifth day of March, wilfully destroy, or cause or procure to be destroyed, any register book of marriages, or any part of such register book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

XVII. *Provided always*, That this act, or anything therein contained, shall not extend to the marriages of any of the Royal Family.

XVIII. Provided likewise, That nothing in this act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively, nor to any marriages solemnized beyond the seas.

PRINTED AND PUBLISHED BY W. C. CHEWETT & CO., KING ST. EAST, TORONTO.