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**BILL.**

An Act to alter the Law of Dower and to regulate proceedings in actions for the recovery of Dower.

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[No. 71 of 1865—1st Session.]

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Hon. Mr. Atty. Gen. MACDONALD.

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OTTAWA:

PRINTED BY MUNTER, ROSE & CO.,  
SALLY STREET.

An Act to alter the Law of Dower and to regulate proceedings in actions for the recovery of Dower in Upper Canada.

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

1. The twenty-eighth chapter of the Consolidated Statutes of Upper Canada, intituled: *An Act respecting the procedure in actions of Dower*, and the Act passed in the twenty-fourth year of Her Majesty's Reign, intituled: *An Act for the better assignment of Dower in Upper Canada*, are repealed upon, from and after the day this Act shall come into force.

Con. Stat. U. C. c. 28, and 24 V. c. 40 repealed.

2. All actions of right of dower, or of dower *unde nihil habet*, shall be brought and carried on according to the provisions of this Act.

Actions of dower, &c., to be brought according to this Act.

3. Dower shall not be recoverable out of any separate and distinct lot, tract or parcel of land which at the time of the alienation by the husband or at the time of his death, if he died, seized thereof, was in a state of nature, and unimproved by clearing for the purposes of cultivation, but this shall not restrict or diminish the right to have woodland assigned to the demandant under the thirty-first section of this Act, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her out of the same lot, tract or parcel.

Dower not to be recoverable out of land in state of nature when aliened or at death of husband, but woodland may be assigned.

4. Every action for dower shall be commenced by writ of summons, and shall be addressed to the person in actual possession of the land out of which dower is claimed, and to every other person who is tenant of the freehold of the same land, and in every such writ, and in every copy thereof, the place and country of the residence and abode of each party defendant shall be mentioned, and the land or property out of which dower is claimed shall be described by the number of the lot or otherwise with reasonable certainty, and such writ shall be tested as in personal actions, and may be according to the form following:

Action to be commenced by summons to party in actual possession.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

Form of summons.

To \_\_\_\_\_ of \_\_\_\_\_ [naming each defendant and the place and county of the residence and abode of each defendant.]

We command you (and each and every of you) that you render to \_\_\_\_\_ who was the wife of \_\_\_\_\_ now deceased, her reasonable dower which falleth to her of the freehold which was of the said \_\_\_\_\_ her late husband, of and in [describe the land and property by the number of the lot, or the part of the lot, concession, name of the Township, City, Town or place, or with such other reasonable

85

certainty as will shew out of what land and property dower is claimed,] and whereof she complains that you deforce her; or that you appear within sixteen days either to disclaim any right or estate of freehold in the said land and property, or to defend yourself against her claim.

Witness, &c.

5

Date of writ, whence issuable and when returnable.

5. Every such writ shall bear date on the day on which it is issued, and shall be issued out of the proper office in the county wherein the lands lie, and shall be in force for six months, and shall be returnable on the sixteenth day after service thereof, and shall be indorsed with the name and place of abode of the Attorney suing out the same, or (if no Attorney) the name and residence of the demandant shall be indorsed thereon in like manner as the indorsements on writs of summons in personal actions, and the same proceedings may be had to ascertain whether the writ was issued by the authority of the Attorney whose name appears indorsed thereon, and who the demandant is and her 15 abode, and as to the staying proceedings upon writs issued without authority as in personal actions.

Notice to be indorsed to defendants to appear and deny tenancy, or to appear only.

6. On every such writ and on each copy thereof shall be indorsed a notice, addressed to the defendants, which may be to the effect following: You are served with this writ to the intent that you may enter 20 an appearance and denial that you are tenant of the freehold of the lands mentioned in this writ, or that you may enter only an appearance, and take notice that unless, within sixteen days of the service hereof you enter an appearance with or without such denial, the demandant will have a right to sign judgment to recover as against you the dower 25 claimed, with costs of suit.

If demandant claims damages for detention, further statement necessary.

7. In case the demandant claims damages for detention of her dower, such notice shall contain a further statement that the demandant claims damages for the detention of her dower from some day to be stated in the notice. 30

Defendant may appear, and deny tenancy; and effect of such denial.

8. Any defendant named in the writ may appear within the time appointed, and with the appearance may file a notice, addressed to the demandant, setting out that he denies that he is tenant of the freehold of the lands mentioned in the writ, which denial shall, as against that individual defendant, be taken to admit the claim of the demandant to 35 dower, as stated in the writ.

Effect of appearance without denial.

9. Any defendant named in the writ may appear within the time appointed, and by filing an appearance without such denial shall be taken to admit that he is tenant of the freehold, and shall not afterwards be allowed to deny the same. 40

Tenant in possession not also tenant of freehold, to give notice to his landlord under penalty for neglect.

10. Every tenant in possession who is not also tenant of the freehold who is served with a writ under this Act, shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years unimproved rent of the premises in the possession of such tenant to the per- 45 son under whom he entered into possession; to be recovered by action of debt to be brought in either of the Superior Courts of Common Law in Upper Canada.

Landlord may apply to Court to be substituted.

11. The landlord or other person under whom such tenant as is mentioned in the next preceding section, may, if he has not been served 50 with the writ of dower, apply to the Court or a Judge upon affidavit,

that he is tenant of the freehold and is advised and believes that there is good ground for disputing the demandant's claim to dower, and the Court or Judge may, after summons to or rule upon the demandant, order that such applicant be substituted as defendant in the action, in lieu of the tenant in possession, upon such conditions as shall to the Court or Judge appear just.

tuted as defendant.

12. If no person be in actual occupation of the lands of which the demandant claims dower, the writ shall nevertheless be served on the tenant of the freehold, who shall be named therein.

If no person in actual occupation, writ nevertheless to be served on tenant of freehold.

13. The writ of summons may be served in Upper Canada, and the service shall be personal whenever that is practicable; but the demandant may, on affidavit, apply from time to time, either to the Court out of which the writ issued or to a Judge of either Court in chambers, and if it appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of defendant or that he wilfully evades service of the same, and has not appeared thereto, such Court or Judge may, by rule or order, grant leave to the demandant to proceed as if personal service had been effected, subject, however, to such conditions as to the Court or Judge seems fit.

Writ of summons to be served personally except in certain cases.

14. In all cases where the tenant of the freehold resides out of Upper Canada, the demandant may issue a writ of summons in the form above set forth, by giving a sufficient number of days, not less in any case than twenty-one, for the defendant to appear, according to the distance of the place of the defendant's residence and having due regard to the means of and reasonable time for postal or other communication; which writ of summons shall bear the same indorsement and notice or notices as the writ of summons hereinbefore set forth, making such changes as the nature of the case renders indispensable.

How writ of summons may be served where tenant resides out of U. C.

15. Upon the Court or Judge being satisfied that such writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof on the defendant, so resident out of Upper Canada, and that it came to his knowledge, and that he has not appeared, such Court or Judge may from time to time direct that the demandant may proceed in the action in like manner as if the defendant had been served under this Act in Upper Canada, subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case.

Where writ served or reasonable efforts to serve defendant resident out of U. C. have failed but writ has come to defendant's knowledge, Court may direct demandant to proceed.

16. Any defendant named in the writ may, within the time appointed, file an appearance and acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the demandant may have judgment for her dower therein, and may take the proceedings authorized by this Act to have the same assigned to her, unless the parties shall otherwise agree, and he shall forthwith serve the demandant with a copy of such appearance, acknowledgment and consent, together with an affidavit of the day of the entering and filing the same in the proper office; and in every such case, when the defendant so admits the right to recover, the demandant may enter judgment of seizin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified, but she shall not be entitled to tax or recover the costs of suit or entering such judgment against the defendant.

Defendant may file appearance, and acknowledge tenancy.

Judgment of seizin and writ of assignment thereon.

If appearance and denial filed, demandant may take issue and proceed to trial.

**17.** In case an appearance be entered with a denial by the defendant that he is tenant of the freehold, the demandant may at once, and without further pleadings, take issue on that denial, and make up an issue book, setting out the writ, the appearance and denial and the issue thereon, and may give notice of trial and proceed to trial as in personal actions, and, if she obtains a verdict, she shall be entitled to costs and to enter judgment of seizin of her dower, as against such defendant. 5

If appearance only entered demandant may declare.

**18.** In case only an appearance be entered, the demandant may at once declare, and when damages are claimed in the writ, they may also be claimed in the declaration, which may be in the effect following : 10

In the (the style of the Court).

County of } The day of 18  
to wit : }

Form of declaration.

A.B., widow, (as the case may be) who was the wife of C.B., deceased, by her Attorney, demands against (the defendant) the third 15 part of (the land and premises as described in the writ) with the appurtenances in the (township, &c.,) of in the said County of as the dower of the said A.B. of the endowment of C.B., deceased, heretofore her husband, whereof she has nothing (and if damages are claimed) and she also claims damages for the detention from her of her 20 endowment in the said lands from the day of 18 and she claims \$

To what extent C. L. P. Act shall apply.

**19.** The several enactments in the Common Law Procedure Act relative to pleas, demurrers, replications and subsequent pleadings, and the periods appointed within which the same must be pleaded, and in 25 which notice of trial must be given and countermanded, and as to amending pleadings; and as to practice not herein provided for, and making all or any other amendments, and as to the authority of the Court or of a Judge in such matters, and also the rules of Court, from time to time in force, relative to pleading and practice, shall so far as they 30 can be made applicable, and are not at variance with this Act, be in force and apply to and regulate the course and practice of pleading and procedure in actions of dower.

Special cases may be stated.

**20.** Special cases may be stated by leave of the Court or a Judge, in like manner as in other actions. 35

Mode of estimates of damages of detention of dower, &c.

**21.** In estimating damages for the detention of dower or the yearly value of the lands, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds, the value of permanent improvements made after the alienation of the lands by the husband or after the death of the husband, shall not be taken into 40 account, but such damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of land in the particular locality.

Action must be brought within twenty years of death of husband and after one month notice of demand.

**22.** No action of dower shall be brought but within twenty years 45 from the death of the husband of the demandant, nor until the expiration of one calendar month after service of a written demand thereof, on the tenant of the freehold unless such tenant be resident out of the Province, in which case the Court or Judge may, upon affidavit made by, or on behalf of the demandant shewing sufficient reason, permit the de- 50 mandant to commence the action without making such demand.

**23.** No such action shall be hereafter maintained in case the demandant has joined in a deed to convey the land or to release her dower therein to a purchaser for value, although the acknowledgment required by law at the time may not have been made or taken, or though any informality may have occurred or happened in the making, taking or certifying such acknowledgment.

Action not to be maintained in case demandant has joined in deed.

**24.** All actions of dower which shall be pending at the time this Act shall come into force, may be continued and carried on to judgment in like manner as if this Act had not been passed.

Pending action may be continued as if this Act not passed.

**25.** Unless where it is in this Act expressly declared to the contrary, costs shall be taxed and allowed to, and be recoverable by either party in an action of dower in like manner as in personal actions, and writs of execution to levy the same, and damages where damages have been adjudged may be sued out and executed as in personal actions.

When costs recoverable.

**26.** After judgment has been rendered in the demandant's favor to recover dower, whether with or without costs or damages, she shall be entitled to sue out a writ of assignment of dower founded upon such judgment directed to the sheriff of the county in which the lands lie, in which writ shall be set forth the lands out of which the demandant has recovered judgment to recover her dower.

After judgment for demandant, she may sue out writ of assignment of dower.

**27.** The sheriff on receipt of such writ shall, by writing under his seal of office, appoint two resident freeholders of his county, who are rated on the assessment roll for real estate of a value not less than two thousand dollars, and a licensed deputy provincial surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the same writ, to be commissioners to admeasure the dower, and the sheriff shall in such writing set out a copy of the writ of assignment, and shall name therein a day on or before which the commissioners shall make and return to him a report of their proceedings, and determination in the execution of the duty assigned to them.

Sheriff thereupon to appoint certain parties to be Commissioners to admeasure the dower, &c.

**28.** In case of the death of, or refusal by any or all of the commissioners so appointed, the sheriff shall, from time to time, in like manner, appoint another or others to perform the duty of such as die or refuse.

In case of death or refusal of any of commissioners, sheriff may appoint others.

**29.** Every commissioner so appointed shall, before entering upon the execution of his duty, take and subscribe an affidavit in the form or to the effect following, which oath any commissioner appointed to take affidavits in the Superior Courts of Common Law, is hereby empowered to administer, and the said commissioners shall annex to their report the affidavits sworn by them, and return them to the sheriff.

Oath of commissioners.

"I, \_\_\_\_\_, do swear that I am not of kin to the demandant (*naming her*) nor to the defendants (*naming him or them*) nor in any way interested in the lands out of which the assignment of dower is to be made by me, and that I will honestly, impartially, and to the best of my skill and ability execute and perform the duties imposed upon me by the appointment of \_\_\_\_\_ Esquire, Sheriff, of the County of \_\_\_\_\_ as a Commissioner for the admeasurement of dower between the said demandant and the said defendants according to law."

Form of oath.

**30.** After taking and subscribing such affidavit, the commissioners each and every one of them shall, for all purposes in the fulfilment of the duties by law required of them, be considered as officers of the Court

Commissioners, when sworn to be

officers of the Court.

out of which the writ of assignment issued, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceeding as a sheriff in the discharge of his duty.

Their duties.

**31.** It shall be the duty of the Commissioners—

To admeasure dower by bounds, &c.

1. To admeasure; designate and lay off, without delay, by sufficient marks, descriptions, boundaries or monuments, one third of the lands and premises mentioned in the writ of assignment according to the nature of the land whether meadow, arable, pasture or woodland, being a part of the lot or parcel of land or premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such, and premises;

To ascertain improvements, &c.

2. To ascertain and determine what permanent improvements have been made upon such lands and premises, since the death of the demandant's husband or since the time her said husband alienated the same to a purchaser for value, and if it can be done, they shall award the dower 15 out of such parts of the lands as do not embrace or contain such permanent improvements, but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the demandant in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such 20 permanent improvements;

Where Commissioners cannot assign by metes, &c., they shall assess a yearly sum of money.

3. If, from peculiar circumstances, such as there being a mill or mills or manufactory, upon the land, the commissioners cannot make a fair and just assignment of dower by metes and bounds, they shall assess a yearly sum of money being as near as may be one third of the 25 clear yearly rents of the premises, after deducting any rates of assessments payable thereon, and in assessing such yearly sum they shall make allowances and deductions for permanent improvements as above provided for, and in their report to the sheriff, they shall state the amount of such yearly sum and set forth all the evidence taken by them 30 in relation to the same, such evidence to be reduced to writing and taken upon oath, which any one of the commissioners is hereby authorized to administer, and to be subscribed by the witness examined;

Evidence to be on oath.

Such sum to be a lien in lands unless otherwise directed.

4. Such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless the commissioners specially direct otherwise, 35 and make the same issuable and payable out of specific portion of such lands, and the same shall be recoverable by distress as for rent or by action of debt against the tenant of the freehold for the time being;

Report of Commissioners.

5. The report of the commissioners shall be in writing subscribed by them and directed to the sheriff, and shall contain a full statement of 40 their proceedings, and where the dower is assigned by metes and bounds shall distinctly point out and describe the same, and the posts, stones or other monuments designating the boundaries, and for the purpose of planting and marking such posts, stones or monuments, they may, if necessary, employ chain bearers and labourers. 45

Sheriff may enlarge time for report.

**32.** The sheriff may in his discretion, upon the request of the commissioners, enlarge the time for making their report, for not more than ten days, and he shall, within twenty-four hours after the receipt there-



of, endorse thereon the day and hour of such receipt, and he shall then forthwith return the writ of admeasurement of dower together with the report and all papers annexed thereto, to the office wherein the suit was commenced and carried on; and the deputy clerk of the Crown, into whose office such writ and other papers have been returned shall, on the application of either party, transmit the same to the proper principal office in Toronto, in like manner, and on the same conditions as he is required to transmit any record of *Nisi Prius* and subject to the same liabilities, in case of his default.

Report to be returned to Deputy Clerk Crown.

10 **33.** Either party may, after the expiration of ten days from the filing of the sheriff's return to the writ of assignment, provided such ten days have elapsed before the first day of the term next after such filing—and if not, then within the first four days of the succeeding term—apply for and the Court may grant a rule calling upon the opposite party to show cause why the Commissioners' report should not be set aside upon grounds apparent on the report and papers filed therewith and upon such other grounds as the Court may see fit, the same being supported by affidavit and every such ground being set forth in the rule—and the Court after hearing the parties may order the report to be varied or amended, if in their judgment they have sufficient matter before them to amend by—or may annul and set aside the report and may appoint three new commissioners or direct that the sheriff shall do so, and such new commissioners shall have the same powers and execute the same duties and be subject to the same conditions and responsibilities as are in that behalf hereinbefore expressed, and the report of such new commissioners shall be treated as if no other report had been previously made, and shall be dealt with and proceeded upon accordingly.

Either party may apply for rule to show cause why report should not be set aside on grounds.

**34.** If the report is moved against upon the ground of any misconduct or fraud on the part of the commissioners, the Court may, in its discretion, make them parties to the rule, and if wilful misconduct or fraud be established in the opinion of the Court, the report may be set aside and the commissioners be adjudged to pay to the parties injured all the costs which have been incurred and have been rendered useless by such misconduct or fraud, and all the costs of the rule to set aside the report: and such payment may be enforced by the like process and proceedings as are or may be in use to compel a sheriff to pay costs of rule or summary proceeding against him.

Court may order thereon.

If moved against for misconduct or fraud, commissioners may be made parties to rule.

**35.** The rule to set aside the report may be discharged, with or without costs, and the Court may order the party at whose instance or on whose complaint or representation the commissioners may have been made parties to the rule, to pay such commissioners their costs of answering the same, and if the rule be discharged, or if the report be not moved against within the proper time, or if the Court refuse to grant a rule to shew cause, the report shall thenceforth be final and conclusive on all parties to the dower action; and a copy of such report, certified by the Clerk of the Crown under the seal of the Court, shall be registered in the registry office of the county or place where the lands lie, for which service the Registrar shall be entitled to receive one dollar.

As to cos's of rule.

When Report final, copy to be registered in County Registry.

50 **36.** After such registration the demandant shall be entitled to sue out a writ, directed to the proper sheriff commanding him to put her into possession of the lands and premises assigned and admeasured to

After Registration demandant may

sue out writ  
of possession:

her for her dower, and to levy all such costs as by the judgment and any rule of Court, or either, shall have been awarded to her against the tenant.

If Judgment  
against de-  
mandant and  
costs award-  
ed defendant  
may issue  
*fi. fa.*

**37.** In case judgment shall have been given against the demandant, and costs be awarded to be paid by her to the defendant by such judgment or by any rule of Court, such defendant may issue a writ of *fi. fa.* to recover the same.

Mode of pro-  
curing atten-  
dance of wit-  
nesses before  
Commission-  
ers.

**38.** In case it is desired by either party to produce any witnesses before the commissioners, such party may, on application to the Court out of which the writ of assignment issued, or to any Judge of either of the Superior Courts of Common Law, on affidavit that the evidence of any such witness is necessary, obtain an order commanding the attendance of any such witness before the said commissioners, and if in addition to the service of such order, an appointment of time and place of attendance in obedience thereto, signed by one of the commissioners, be served on the person whose evidence is required either with or after the service of the order, non-attendance shall be deemed a contempt of Court, and shall be punishable accordingly; but the person required to attend shall be entitled to be paid the same fees, allowance and conduct money as if he had been subpoenaed as a witness in an ordinary suit, and no witness shall be obliged to attend more than two consecutive days.

Remunera-  
tion of Com-  
missioners,  
&c

**39.** The commissioners shall be entitled to receive from the demandant the sum of four dollars for each day's attendance, not however to exceed (two), and may also charge at the rate of twenty cents for every hundred words for drawing up their report, and ten cents for every hundred words of each copy furnished by them to either party.

By whom  
costs to be  
paid.

**40.** The demandant shall pay the cost of suing out and the cost of the commissioners in executing the suit of assignment of dower, and making the report thereof, but each party shall pay their own costs of witnesses or of attorney or counsel attending before the said commissioners.

Demandant  
and tenant  
may by  
instrument  
agree upon  
assignment,  
or money or  
lien, and du-  
plicate may  
be registered  
and entitle  
demandant to  
hold lands, &c

**41.** The demandant and the tenant of the freehold may, by any instrument under their respective hands and seals executed in the presence of two credible witnesses, agree upon the assignment of dower, or upon a yearly sum or a gross sum to be paid in lieu and satisfaction of dower; and a duplicate of such instrument, proved by the oath of one of the subscribing witnesses, which oath any commissioner duly appointed for taking affidavit may administer, shall be registered in the registry office of the county where the lands lie, and shall entitle the demandant to hold the land so assigned to her, against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for or to sue for and recover, in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by such tenant of the freehold; and such instrument so registered shall be a lien upon the land for such yearly or other sum, and shall be a bar to any other action, suit or proceeding by the demandant for dower in the lands mentioned therein.

Certain  
clauses not to  
apply when

**42.** The several clauses of this Act, numbered from twenty-six to forty, both inclusive, shall not apply to or affect cases in which the

right to dower became consummate by the death of the husband before the eighteenth day of May, which was in the year of our Lord one thousand eight hundred and sixty-one. right to dower became consummate before 18th May, 1861.

13. In all cases not otherwise provided for by this Act, the pleadings and proceedings shall be regulated by the law as it was in force in Upper Canada, relative to suits and actions of dower, before the tenth day of August, which was in the year of our Lord one thousand eight hundred and fifty. Made of proceedings where not prescribed

14. This Act shall apply to Upper Canada only.

To apply to U. C. only. Short title.

15. This Act may be cited as *The Dower Act of Upper Canada.*