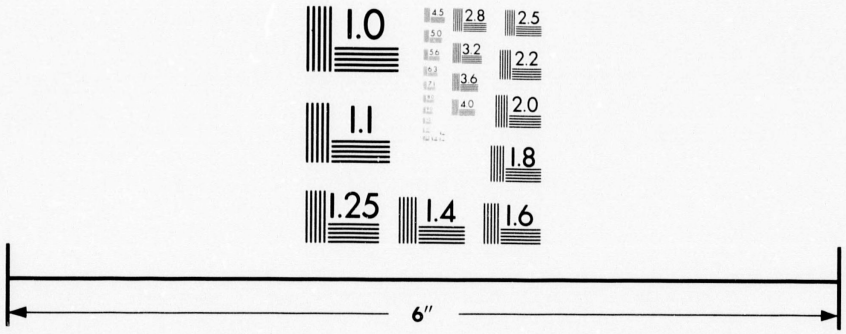
IMAGE EVALUATION
TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Canad

CIHM/ICMH
Microfiche
Series.

CIHM/ICMH
Collection de
microfiches.



Canadian Institute for Historical Microreproductions

Institut canadien de microreproductions historiques

1980

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distortion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments:/ Commentaires supplémentaires:

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☐ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

☑ This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
						✓					

The copy filmed here has been reproduced thanks to the generosity of:

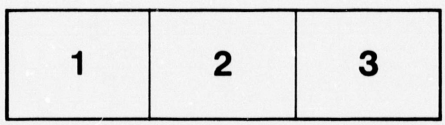
National Library of Canada

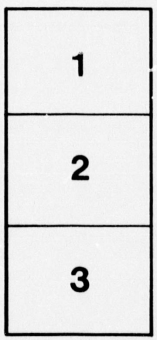
The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

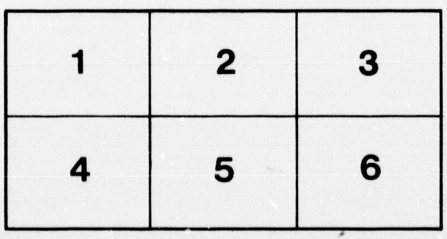
Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:







L'exemplaire filmé fut reproduit grâce à la générosité de:

Bibliothèque nationale du Canada

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

32X

L

A TREATISE

ON THE

LAW OF DOWER

BY

MALCOLM GRÆME CAMERON,

OF OSGOODE HALL, BARRISTER-AT-LAW.

TORONTO:
CARSWELL & CO., LAW PUBLISHERS,
1882.

CAMERON, M G.
KE0222
C35
LC

Entered according to Act of Parliament of Canada, in the year one thousand eight hundred and eighty-two, by CARSWELL & Co., in the office of the Minister of Agriculture.

MOORE & Co.,
PRINTERS, 20 ADELAIDE STREET EAST,
TORONTO.

TO

THE HONOURABLE

JOHN ALEXANDER BOYD,

CHANCELLOR OF ONTARIO,

THIS VOLUME

IS

(WITH HIS PERMISSION)

Respectfully Dedicated

BY

THE AUTHOR.

PREFACE.

THE facilities possessed by the legal profession for the study of the "Law of Dower" are not at present so perfect as to require for any honest attempt towards their improvement much in the way either of explanation or apology. That a suitable book of reference on the subject is required is a thing generally admitted. Expression has been given to this felt want in the *Canada Law Journal*, to an article of the sort in which Journal, the author must ascribe his first impulse towards the preparation of this volume. Thus far, the principal works in this department of legal lore, which have issued respectively from the Canadian, English or American press, are those of Draper, Park and Scribner. The first of these—the only production of the kind up to the present time of Canadian origin—is long since out of date; the other two are, neither of them, without grave defects; the former, partly on account of the mass of ancient law which it contains, and the latter, from the very considerable extent to which it is occupied with the conflicting decisions of the courts belonging severally to the various States of the Union.

The author has, however, much pleasure in acknowledging his obligations to the labours in this field of the above-

named writers, and to the last two particularly, from whose pages he has culled to a very considerable extent the matter to be found in his own work. He makes no pretence to originality; his aim has been that mainly of the faithful compiler; and the most he has to say of his compilation is that he believes that it embraces references to most of the American cases in point, to nearly all of the English cases, and, without exception, to all of the Canadian ones, together with the discussions on some of the more important of them; so that, whatever may be its defects, and no doubt they are many, he ventures to cherish the hope that it may prove itself to be of some practical use to the profession, for whose benefit it has been composed, and to whose indulgence he now, not without trepidation, submits it, as the product of much laborious toil, if nothing more.

The author begs to express his grateful acknowledgments to Mr. John S. Ewart, Barrister-at-Law, who has given most valuable assistance; and to Mr. Loftus E. Dancey, Barrister-at-Law, who has, with great care and industry, prepared the index and table of cases.

M. G. C.

GODERICH, 3*rd October*, 1882.

CONTENTS.

PAGE.

TABLE OF CASES xi

CHAPTER I.

DEFINITION AND NATURE OF DOWER 1-7

CHAPTER II.

MARRIAGE 8-39

CHAPTER III.

DEATH OF THE HUSBAND 40-54

CHAPTER IV.

ALIENS 55-56

CHAPTER V.

ATTAINDER 57-59

CHAPTER VI.

DIVORCE, ELOPEMENT AND ADULTERY 60-65

CHAPTER VII.

THE PROPERTY SUBJECT TO DOWER 66-76

CHAPTER VIII.

THE ESTATE SUBJECT TO DOWER 77-101

CHAPTER IX.

PAGE.
SEISIN AS A REQUISITE OF DOWER.....102-120

CHAPTER X.

DOWER IN ESTATES IN FEE SIMPLE, FEE TAIL, ESTATES ACQUIRED BY EXCHANGE, AND DETERMINABLE ESTATES.....121-155

CHAPTER XI.

DOWER IN ESTATES IN REMAINDER AND REVERSION.....156-167

CHAPTER XII.

DOWER IN ESTATES IN JOINT TENANCY, COPARCENARY AND COMMON.168-177

CHAPTER XIII.

DOWER IN PARTNERSHIP LANDS.....178-182

CHAPTER XIV.

LANDS APPROPRIATED TO PUBLIC USES 183-190

CHAPTER XV.

DOWER IN ESTATES NOT OF INHERITANCE 191-198

CHAPTER XVI.

DOWER IN RENTS AND ANNUITIES.....199-208

CHAPTER XVII.

DOWER IN TRUST AND EQUITABLE ESTATES 209-221

CHAPTER XVIII.

DOWER UNDER THE DOCTRINE OF EQUITABLE CONVERSION.....222-226

CHAPTER XIX.

DOWER IN MORTGAGED ESTATES 227-256

CHAPTER XX.

DOWER AS AGAINST THE VENDOR'S LIEN FOR UNPAID PURCHASE MONEY.....257-260

CHAPTER XXI.

PAGE.
DOWER AS AFFECTED BY ACTS OF THE HUSBAND PRIOR TO THE MARRIAGE AND DURING THE COVERTURE.....261-280

CHAPTER XXII.

DOWER WHERE THE WIFE HAS JOINED IN A CONVEYANCE FRAUDULENT AS TO CREDITORS.....281-287

CHAPTER XXIII.

OF THE NATURE AND QUALITIES OF DOWER DURING THE HUSBAND'S LIFETIME 288-295

CHAPTER XXIV.

OF THE NATURE AND QUALITIES OF DOWER AFTER THE HUSBAND'S DEATH BUT BEFORE ASSIGNMENT 296-301

CHAPTER XXV.

ASSIGNMENT OF DOWER BY THE TENANT OF THE FREEHOLD 302-314

CHAPTER XXVI.

ASSIGNMENT BY METES AND BOUNDS AS AGAINST THE HEIR, DEVISEE, OR ALIENEE OF THE HUSBAND.....315-329

CHAPTER XXVII.

ADMEASUREMENT OF DOWER WHERE THERE HAS BEEN AN EXCESSIVE ASSIGNMENT 330-335

CHAPTER XXVIII.

EVICTION OF THE WIDOW FROM THE ESTATE ASSIGNED HER AS DOWER.....336-340

CHAPTER XXIX.

OF THE NATURE AND QUALITIES OF DOWER AFTER ASSIGNMENT ..341-362

CHAPTER XXX.

PAYMENT OF A GROSS SUM IN LIEU OF DOWER 363-365

CHAPTER XXXI.

THE DOCTRINE OF ESTOPPEL AS AFFECTING THE RIGHT OF DOWER.366-387

CHAPTER XXXII.

RELEASE OF DOWER 388-410

CHAPTER XXXIII.

PAGE.
JOINTURE AND ANTE-NUPTIAL SETTLEMENT AS A BAR OF DOWER..411-441

CHAPTER XXXIV.

DEVISE OR BEQUEST IN LIEU OF DOWER.....442-492

CHAPTER XXXV.

THE STATUTE OF LIMITATIONS AS AFFECTING DOWER.....493-497

CHAPTER XXXVI.

DAMAGES IN ACTIONS OF DOWER 498-528

CHAPTER XXXVII.

COSTS IN ACTIONS OF DOWER 529-539

CHAPTER XXXVIII.

PLEADING AND PRACTICE IN ACTIONS OF DOWER 540-564

APPENDICES:—

THE STATUTES 565-589

THE TABLES 590-600

INDEX 601

PAGE.
11-441

42-492

93-497

98-528

29-539

40-564

65-589
90-600
601

TABLE OF CASES CITED.

A.

Abbott v. Abbott and Godey, 32
Abingdon's case, 318
Abergavenny's case, Lord, 274
Acey v. Simpson, 462
Adams v. Jones, 51
Adams v. Beekman, 155
Adams v. Palmer, 297
Adams v. Barron; 319
Adams v. Adams, 491
Adsit v. Adsit, 460, 462, 489
Agar v. Fairfax, 232
Agricultural Bank v. Rice, 395
Aleway v. Roberts, 522
Alfray v. Alfray, 37
Alison, *in re*, 25
Allen v. Allen, 398
Allen v. Edinburgh Life Ass. Co., 290, 292, 293, 299
Allen v. McCoy, 362
Alexander v. Cunningham, 194
Alling v. Chatfield, 476
Altham's case, 409, 410
Ambler v. Norton, 435
Amiot v. Woodcock, 554
Anderson v. Anderson, 548
Anderson v. Abbott, 483
Anderson's Appeal, 487, 489
Anderson v. Dwyer, 526
Anderson v. Marriott, 531
Anderson v. Trott, 258
Andrews v. Andrews, 347, 424
Apperson v. Boulton, 476
Apple v. Apple, 80, 156, 157
Archer's case, 88, 90
Ardesoife v. Bennett, 483
Argan v. Jones, *Doe d.*, 130,
Armstrong v. Armstrong, 449, 473, 480
Arnold v. Arnold, 80, 156
Arundel v. Phipps, 292
Arundel's case, Earl of, 124
Ashburnham v. Ashburnham, 482
Ashby v. Palmer, 225, 226, 482
Atkins v. Glover, 359
Atkins v. Holmes, 214, 268
Atkinson v. Baker, 194
Att'y-Gen'l v. Grote, 458.
Att'y-Gen'l v. Rowe, 28
Att'y-Gen'l v. Wilkins, 561
Atwood v. Atwood, 165
Aubin v. Daly, 208
Austin v. Austin, 312
Averill v. Loucks, 180
Ayer v. Spring, 323
Ayres v. Willis, 462

B.

Bailey v. Bryce, 476
Bailey v. Duncan, 217, 481
Bailey v. Hammond, 48
Baker v. Wilson, 35
Baker v. Chase, 268
Baker v. Dawbarn, 236, 239
Baker v. Baker, 445, 449, 458, 473
Baldwin v. Snowden, 402
Ball v. Dunsterville, 395
Balmain v. Shore, 182

Bamford v. Bamford, 536, 537
Banbury, Peer., 36
Banks v. Bellamy, 494, 560
Banks v. Sutton, 3, 229, 232, 266
Bank of U. C. v. Thomas, 281
Banning v. Griffin, *Doe d.*, 47
Bancroft v. White, 116
Barbour v. Barbour, 297
Barker v. Barker, 149
Barker v. Parker, 280
Barford v. Street, 131.
Barnett v. Barnett. 521
Barnett v. Gaines, 289
Barnes v. Mawson. 70
Barnes v. Cunningham, 296
Barnes v. Gay, 258, 260
Barrow v. Barrow, 483
Bartholomew v. May, 239
Bartlett v. Van Zandt, 291
Bateman v. Bateman, 216
Bateman v. Ross, 65
Bates' case, 85
Bates v. Bates, 81, 85
Battin v. Bigelow, 42
Beanlien v. Cardigan, 488
Bear v. Snyder, 156
Beardslee v. Beardslee, 83, 128, 156
Beard v. Nutthall, 436, 437
Beaty v. Beaty, 33
Beaty v. Hearst, 316
Beaumont v. Dean, 549
Becker v. Hammond, 458, 475, 478, 539
Bedford's case, Earl of, 123, 125, 202, 269
Bedingfield's case, 337
Beekman v. Hudson, 164
Bell, *Ex parte*, 267
Bell v. Mayor of New York, 233, 250, 251
Bell v. Phyn, 179
Beer v. Ward, 32
Beers v. Strong, 312
Begley v. Gibson, 183, 188
Begley v. St. Patricks, etc., 494
Belfield v. Rowse, 516, 518, 520
Bending v. Bending, 448, 462, 472, 478
Benhams Trusts, *in re*, 47, 49
Bennett v. Robinson, 466
Benson v. Bellasis, 429
Benson v. Olive, 44
Benson v. Scott, 272
Berkeley, Peer., 35, 38
Berkshire, Countess of, v. Vanlore, 110, 127, 196
Berlstein v. Berlstein, 449
Berrien v. Berrien, 224
Berry v. Usher, 47
Belton's estate, *in re*, 218, 232
Bevant v. Pope, 230, 213
Beverly v. Beverly, 43
Bickley v. Bickley, 311, 313
Billings v. Taylor, 71, 322
Birmingham v. Kirwin, 439, 443, 447, 472
Birnie v. Main, 257
Birt v. Barlow, 32
Bishoprick v. Pearce, 316, 518, 529, 530, 532, 554, 558, 559
Bishop v. Bishop, 299
Bishop v. Boyle, 280
Bisland v. Hewett, 257, 258, 271
Bissonet v. Radenhurst, 554
Bitner v. Brough, 289
Black v. Fountain, 248, 292
Blackburne v. Gregson, 258
Blackburn v. Crawford, 37
Blain v. Harrison, 383, 409, 562
Blair v. Thompson, 216, 257, 258
Blake v. Heynard, 562
Blandy v. Widmore, 429
Bligh v. Brent, 73, 75
Blitheman v. Blitheman, 265
Blood v. Blood, 80, 156
Blossom v. Blossom, 321
Blow v. Maynard, 80, 156, 292
Blunt v. Gee, 470, 484
Blunt v. Lack, 482
Blower v. Merret, 492
Bogart v. Patterson, 390
Bolton v. Ballard, 252
Bond v. Kent, 258
Bonter v. Northcote, 396
Boone v. Boone, 482
Booth v. Lindsey, 550
Booth v. Lambert, 310, 331
Boothby v. Vernon, 90, 92
Bostock v. Smith, 62
Bottomley v. Fairfax, 266
Bowne v. Potter, 116, 368
Boustead v. Whitmore, 393
Bowden v. Henderson, 49
Bowen v. Evans, 561
Bowie v. Berry, 214, 220
Bowles' case, Lewis, 91, 100, 115
Bowles v. Poore, 191
Boyd v. Hunter, 345
Boyers v. Newbanks, 307, 342
Boynton v. Boynton, 433, 471, 480, 481, 482, 489, 490
Bradley v. Holdsworth, 75

Bradshaw v. Callaghan, 299
Bragg's case, 68
Bradfords v. Kents, 484, 487, 489
Breakenridge v. King, 555
Breaky v. Breaky, 28, 33
Brealy v. Reed, 19
Brewer v. Van Arsdale, 217
Brocket v. Leighton, 67
Brook v. Brook, 20, 25
Brooks v Everett, 80, 156
Brown v. Caldwell, 448
Brown v. Hood, 562
Brown v. Lapham, 252
Brown v. Parry, 447
Brown v. Pitney, 476
Brown v. Smith, 520
Brown v. Williams, 271
Broom v. Broom, 179
Browning v. Reane, 23
Brury's case, 20
Buchan v. Sumner, 180, 182
Buchanan v. Buchanan, 441
Buck v. McCallum, 326, 390
Buckeridge v. Ingram, 68, 74, 208
Buckingham v. Reeve, 76
Buckingham, Earl of, v. Drury, 433, 439
Buckley v. Buckley, 180
Buckman v. Ives, 48
Buckworth v. Thirkell, 139
Budd v. Hiler, 349
Building and Loan Association v. Carswell, 248, 259
Bullard v. Briggs, 284
Bullard v. Bowers, 232, 252
Buller v. Cheverton, 194
Bullock v. Finch, 310
Bullock v. Griffin, 373
Burdon v. Burdon, 551
Burns v. Burns, 214
Burns v. Lynde, 395
Burnside v. Merrick, 180, 182
Burr v. Sim, 225, 226
Burrell v. Earl of Egremont, 216
Burridge v. Bradyl, 492
Burris v. Page, 194
Burrows v. Cairns, 6
Burton v. Todd, 526
Bushby v. Dixon, 107
Bustard's case, 166
Butcher v. Kemp, 473
Butler v. Ayres, 521
Butler and Baker's case, 113, 122
Butler v. Mountgarret, 36
Buttericke v. Broadhurst, 481, 488 490
Byland v. Hudderston, 482

C.

Cairns v. Chabert, 252
Caldwell v. Bower, 292
Callaghan v. Callaghan, *Doe d.*, 5
Calvert v. Black, 229, 248
Calvin's case, 26
Camden Mut. Ass'n v. Jones, 491
Cameron v. Gilchrist, 500, 509
Campbell, *Re*, 401
Campbell v. Campbell, 178, 232
Campbell v. Hall, 26
Campbell v. Ingelby, 483
Campbell v. Murphy, 252
Campbell v. R. C. Bank, 115, 233, 236, 239
Campbell v. Shields, 361
Canbourne v. Barry, 429
Canley v. Lawson, 424
Canterbury, Viscount, v. Attorney Gen'l, 358
Capper v. Spotteswood, 258
Carpenter v. Schermerhorn, 380
Carpenter v. Weeks, 116
Cardigan v. Armitage 70
Carhampton v. Carhampton, 107
Carr v. Ellison, 225
Carrick v. Smith, 216, 218, 224, 232, 234
Caruthers v. Caruthers, 414, 416, 424, 425, 427, 434, 439
Caroon v. Cooper, 232, 259
Carskadden v. Poorman, 35
Carson v. Murray 425
Carter v. Goodin, 252, 395
Carter v. Walker, 406
Caruthers v. Wilson, 387
Casborn v. English, 213
Castlemain v. Craven, 358
Casey v. Casey, 295
Cass v. Martin, 251
Caston v. Caston, 455, 464, 484
Catherwood v. Caslon, 18
Catlin v. Ware, 395
Cave v. Holford, 130
Chalmer v, Bradley, 225
Chalmers v. Storil, 457, 458, 475, 481
Chandler v. Woodward, 462
Chandos, Peer., 36
Chapin v. Hill, 481
Chaplin v. Chaplin, 202, 208

Chapman v. Cooper, 53
Chappel v. Avery, 454, 469
Charles v. Andrews, 424
Charles v. Charles, 424
Chase's case, 202, 208, 402, 403
Chave v. Chave, 476
Chetwynd v. Fletwood, 482
Chew v. Farmers' Bank, 523
Chewett v. G. W. R. Co., 558
Childs v. Smith, 342, 343
Chinnubbee v. Nicks, 131
Chisholm v. Tiffany, 86, 205, 233
Choteau v. Thompson, 280
Church v. Bull, 451, 464
Church v. Church, 217
Clanahan v. Porter, 323
Clancurry's case, Lord, 26
Claiborne v Henderson, 216
Clarendon v. Hornsby, 320
Clark v. Griffith, 448
Clark v. Stevenson, 392
Clarke v. Bradlaugh, 263
Clay v. Hart, 484
Cleyton v. Aikin, 492
Clemence v. Steere, 362
Clements v. Bostwick, 257
Clements v. Hunt, 37
Clough v. Elliott, 249, 251
Clowes v. Dickenson, 409
Coakley v. Perry, 116, 369
Coates v. Cheever, 71, 322
Cochrane v. Libby, 46, 53, 64
Cocke v. Phillips, 156
Cockrill v. Armstrong, 170
Cogswell v. Tibbetts, 64
Colborne v. Thomas, 258
Colcord v. Swan, 380
Coleman v. Coleman, 484
Coleman v. Glanville, 458, 463, 464, 472, 487, 563
Coles v. Coles, 299
Colthirst v. Bejushin, 310
Collins v. Archer, 561
Collins v. Bishop, 34
Collins v. Carman, 482
Collins v. Carlisle's Heirs, 131
Collins v. Melton, 492
Collins v. Torry, 116
Collins v. Warren, 300
Colson v. Colson, 101
Colt v. Neterville, 75
Colyer v. Finch, 561
Commercial Bank v. Woodruff, 292
Commonwealth v. Stauffer, 466
Compton v. Bearcroft, 25
Comyn v. Kyneto, 70
Conant v. Little, 304, 312, 342, 343, 373
Conger v. Platt, 178, 179, 557
Conover v. Porter, 396
Cook v. Phillips, 317, 500, 514, 532, 558
Cookson v. Cookson, 179, 225
Cooper v. Watson, 429, 484
Coot v. Berty, 61
Coots v. Lambert, 304, 311
Copes v. Pearce, 37
Copp v. Hersey, 249
Corbet's case, 200
Corbet v. Corbet, 415, 435, 439
Cordal's case, 92
Cordell's case, 81
Corriell v. Ham, 453
Connel v. Buckle, 434
Corsellis v. Corsellis, 514
Cory v. Girtchin, 384
Coster v. Clarke, 224
Cottle v. McHardy, 300
Cowman v. Hall, 214
Cowell v. Chambers, 47
Cowley v. Anderson, 111, 168
Cox v. Chamberlin, 130
Cox v. Hand, 554
Cox v. Wells, 395
Crabtree v. Bramble, 223, 225
Craig v. Leslie, 222
Craig v. Templeton, 37, 216, 218, 224, 536, 538, 564
Craig v. Walthall, 470, 484
Crain v. Cavana, 414, 423, 425
Crawford v. Lindsay Peer, 36
Cranson v. Cranson, 268
Crawspay v. Mawle, 179
Craven v. Winter, 297
Creacraft v. Dille, 456, 464
Creagh v. Creagh, 427, 429
Creed, *In re*, 48
Cregier, *In re*, 166
Cressall v. Shelfax, 49
Cresswell v. Byron, 429
Crockett v. Crockett, 362
Crouch v. Puryear, 71
Crump v. Morgan, 23
Crump v. Norwood, 90
Cumming v. Alguire, 80, 562
Cunningham v. Cunningham, 34
Cunningham v. Moody, 223
Cunningham v. Shannon, 448
Curry v. Pringle, 248
Curtis v. Curtis, 527, 536
Curtis v. Hobart, 307

D.

Dabney v. Bailey, 489
Dalrymple v. Dalrymple, 9, 10, 26
Danforth v. Smith, 232, 250, 251
Daniel v. Davison, 384
Daniell v. Hollingshead, 562
Darby v. Darby, 179
Darby v. Lynch, 422
D'Arcy v. Blake, 159, 223
Darila v. Darila, 429
Darnall v. Hill, 373, 385
Dashiel v. Collier, 368
Davenhill v. Fletcher, 492
Davenport v. Farrar, 217
Davidson v. Graves, 215
Davidson v. Bowes, 248
Davidson v. Boomer, 480
Davie v. Briggs, 50
Davies v. Ashford, 225
Davis v. Bartholomew, 395, 396
Davis v. Darrow, 116
Davis v. Dennison, 527
Davis v. Logan, 172
Davis v. McDonald, 388
Davis v. Marshall, 46
Davis v. O'Ferrall, 116
Davis v. Page, 483
Davison v. Waite, 409
Davisson v. Sage, 408
Dawson v. Bell, 458, 463
Dawson v. Bank of Whitehaven, 235, 243
Day v. Solomon, 257
Dayton v. Auldjo, 500
Dean v. Mitchell, 214, 217, 269
Dearborn v. Dearborn, 232
Death v. Handy, 492
Deeth v. Hale, 225
De Gear v. Smith, 258
Delay v. Vinal, 470, 484
Delmonico v. Guillaume, 180
Delver v. Hunter, 523
Demorest v. Helme, 299
Den v. Abingdon, 319
Den v. John, 281
Den v. Miller, 307
Denis v. Denis, 520
Denis's case, 417
Dent v. Clayton, 396, 423
Denton v. Nanny, 248
Derush v. Brown, 120
Deshler v. Berry, 383
De Roos, Peer,, 36
Dev v. Demarest, 380
Devon, Peer,, 36
Dicken v. Hamer, 68, 71, 72, 299, 322
Dickson v. Robinson, 476
Dygert v. Remerschneider, 428
Dillon v. Parker, 458, 485, 487, 489
Dixon v. Cayfere, 225
Dixon v. Dixon, 47, 50
Dixon v. McCue, 476, 487
Dixon v. Ramage, 467
Divine v. Mitchum, 180
Doan v. Davis, 235, 241
Dobson v. Dobson, 501, 513, 515
Dodge v. Dodge, 476
Dodsley v. Varley, 257
Doe v. Bernard, 263
Doe v. Chichester, 481
Doe v. Grazebrook, 32
Doe v. Hutton, 143
Doe v. Jersey, 481
Doe v. Nutt, 299
Doe v. Robinson, 193
Doe v. Scudamore, 90
Doe v. Williams, 47
Dolf v. Basset, 172, 321
Dominick v. Michael, 380
Dongrey v. Topping, 383
Donnelly v. Donnelly, 53
Donoghue v. City of Chicago, 326
Doran v. Reid, 397
Dorchester, Lord, v. Earl of Effingham, 447, 472
Dormer v. Fortescue, 527
Dormer v. Parkhurst, 101
Douglas v. Douglas, 487
Douglass v. McCoy, 409
Douglas v. Saunderson, 35
Dow v. Dow, 67
Dow v. Stock, 105
Dowley v. Winfield, 48
Drake v. Marryat, 45
Drake v. Wigle, 361
Draper v. Baker, 312
Driffill v. Asignees of Cockerline, 258
Druce v. Denison, 429, 458, 481
Drummer v. Pitcher, 481
Drury v. Drury, 266, 420, 433
Drury v. Foster, 396
Drybutter v. Bartholomew, 73
Dudley v. Grayson, 46
Dugan v. Massey, 281
Duhring v. Duhring, 180
Dumaresby v. Fishly, 10
Duncan v. Duncan, 461, 478, 487

Duncan v. Dick, 296
Duncomb v. Duncomb, 100
Duncuft v. Albrecht, 75
Dundas v. Hitchcock, 380, 396
Dunham v. Osborne, 80, 85, 156, 157, 162, 163, 166
Dungey v. Dungey, 250
Dunn v. Snowden, 47, 49
Dunsmure v. Boulderson, 47, 49
Dunwiddie v. Bailey, 560
Durando v. Durando, 156, 162, 166
Durham v. Angier, 496
Durham v. Rohodes, 492
Dwinford v. Lane, 434
Dyke v. Rendall, 424, 427, 437, 439

E.

Eagles, *Re*, 401
Eagle v. Emmett, 47, 50
Earle v. Earle. 394
Eaton v. Simonds, 250, 252
Ebington v. Ebington, 482
Eccleston v. Berley, 526
Edinburgh Life Ass. Co. v. Ferguson, 33, 36
Edmunds v. Groves, 391
Edwards v. Countess of Warwick, 225
Edwards v. Morgan, 481, 487
Egerton's case, Dame, 500
Egerton v. Egerton, 50
Eldredge v. Forrestal, 80, 85, 156, 157
Ellicott v. Welch, 257
Ellicott v. Mosier, 373
Ellis v. Diddy, 385
Ellis v. Lewis, 449, 463
Ellmaker v. Ellmaker, 424
Elond v. Elond, 488
Elwood v. Klock, 161, 165
Emerson v. White, 42, 46
Empey v. Loucks, 516
English v. English, 487
English v. Wright, 116
Essex v. Essex, 179
Estabrook v. Hapgood. 319
Estcourt v. Estcourt, 420, 422
Evans v. Bicknell, 384
Evans v. Evans, 155
Evans v. Morgan, 30, 33
Evans v. Webb, 299
Evertson v. Tappen, 251, 528
Ewing's Heirs v. Savary, 46
Exton v. St. John, 191

F.

Fairweather v. Archibald, 386, 449, 473, 481, 487
Falis v. Falis, 468
Farley v. Starling, 299, 328
Farnshill v. Murray, 23
Farnum v. Loomis, 158
Farnsworth v. Cole, 348
Faulkner v. Daniel, 216
Fearn v. Felica, 391
Featherstone v. McDonnell, 397
Fenton v. Livingstone, 25
Ferguson v. Malone, 553
Filliter v. Phippard, 358
Finch v. Finch, 428
Finch v. Shaw, 561
Finch v. Squire, 74
Findlay v. Smith, 71
Finlay v. Finlay and Rudall, 32
Findley v. Findley, 424
Finn v. Sleight, 116
Firestone v. Firestone, 214, 268
Fitzsimmons v. Fitzsimmons, 476
Fisher v. Grimes, 163, 194, 409
Fisher v. Johnston, 257
Fisher v. Grace, 304, 308, 318
Fisher v. Forbes, 348
Fisher v. Harty, 563
Fisk v. Eastman, 80, 85, 156
Fitzburgh v. Foote, 312
Flack v. Longmate, 231
Flanders v. Lamphear, 232
Flavill v. Ventrice, 136
Fleming, *Doe d.*, 33
Fleming v. Fleming, 35
Fletcher v. Ashburner, 222, 223
Flint v. Smith, 258
Forrest v. Laycock, 232, 235, 248, 270, 279, 284, 291, 292
Forrest v. Trammell, 119
Forrester v. Cotton, 458
Forsaith v. Clark, 47
Foster v. Means, 23
Foster v. Stewart, 361
Foster v. Dwinel, 371
Foster v. Cook, 458, 476
Foster v. Kirby, 551
Foulks v. Rhea, 51
Fowler v. Smith 26

Fowler v. Griffin, 123, 312, 342, 343
Fowler v. Shearer, 380
Fownes v. Ettricke, 37
Fox v. Widgery, 369
France v. Andrews, *Doe d.*, 46
Frank v. Frank, 483
Fraser v. Gunn, 304, 497
Frazer v. Richardson, 554
Frazer v. Jones, 561
French v Lord, 187, 383, 403
French v. Pratt, 319, 336, 338, 340
French v. Peters, 319, 336, 338
French v. Crosby, 404
French v. Davies, 449, 456, 458
Frost v. McCullough,
Frost v. Deering, 395, 396
Fry v. Noble, 536, 537, 538
Fuller v. Wright, 289
Fuller v. Yates, 448
Fullmer v. Dougan, 554
Fulton v. Fulton, 462
Fulwood's case, 344
Furness v. Mitchell, 393
Fust v. Fust, 486
Fyan v. Henry, 431

G.

Gage v. Ward, 253
Gaines v. Relf, 31, 37
Gaines v. Gaines, 214, 268
Galbraith v. Greene, 111
Galbraith v. Gedge, 180, 181
Galbraith v. Gray, 297
Galt v. Bush, 258
Galton v. Hancock, 239
Gamble v. Gummerson, 288,290
Gamock v. Cliffs, 347
Gangwere's estate, *Re*, 438
Gano v. Gilruth, 562
Gardner v. Greene, 156, 157, 372
Gardner v. Gardner, 395
Gardiner v. Miles,
Garlick v. Strong, 292
Garrard v. Tuck, 554
Garth v. Cotton, 361
Gartshore v. Chalie, 429
Gatling v. Rodman, 385
Gaunt v. Wainman, 372
Gawen v. Ramtes, 205
Geer v. Hamblin, 161, 164, 166
Gelzer v. Gelzer, 413, 414, 417,424
Germain v. Shuert, 373
German v. Grooms, 494
George v. Thomas, 37
George v. Jesson, *Doe d.*, 48
Gervoye's case, 436
Gibson v. Crehore, 233, 251, 252
Gibson v. Gibson,413, 414, 437, 444 449
Gilchrist v. Ramsay, 397
Giles v. Gullion, 190
Giles v. Giles, 37
Gilkison v. Elliott, 427
Gill v. Philips, 45
Gillam v. Gillam, 487
Gilliland v. Martin, 47
Gilliland v. Reid, 532, 556
Gillis v. Brown, 194
Giman v. Byrne, 211
Gladstone v. Ripley, 424
Glass v. Glass, 560
Glefold v. Carr, 558
Goldsmith v. Goldsmith, 478
Gomperty v. Kensit, 19
Goodfellow v. Goodfellow, 472
Goodburn v. Stevens, 180, 181, 182
Goodhue, *Re*, 297
Goodman v. Moore, 378
Goodridge v. Warberton, 377
Goodright v. Mead, 264
Goodwin v. Goodwin, 194, 482
Gore v. Perdue, 307
Gordon v. Gordon, 214, 557
Gordon v. Stevens, 450
Gorum v. Parrott, 553, 561
Gosling v. Warburton, 476
Gould v. Warnack, 427, 428
Gourlay v. Gourlay, 555, 563
Gore v. Cather, 280, 334, 405
Governor v. Bell, 46
Governor v. Jeffreys, 46
Govier v. Hancock, 65
Graham v. Graham, 528, 560
Graham *etux* v. Law, 33, 35, 62
Graham v. Dunigan, 352
Grant v. Mills, 258
Gray v. McCune, 396, 406
Grayson v. Deakin, 472, 473
Greatrex v. Carey, 458
Greaves v. Greaves, 19
Green, *In re*, 49
Green v. Green, 180
Green v. Putnam, 85, 156
Green v. Liter, 103
Green v. Causey, 271
Greenwood v. Curtis, 26
Greenwood v. Ligon, 289

Gressall v. Shelfox, 47
Gretton v. Hayward, 482
Griesbach v. Freemantle, 225
Grieve v. Woodruff, 303, 535, 536
Grigby v. Cox, 328
Grovesnor v. Durston, 476
Guidet v. Brown, 383
Guigward v. Mayrant, 462
Gully v. Ray, 217, 220, 370
Gurly v. Gurly, 427, 429
Gwynne v. Cincinnati, 185

H.

Hagen v. Thursber, 536
Hains v. Gardner, 116
Hale v. James, 324, 536
Hale v. Plummer, 180, 181
Hall, *In re*, 50
Hall, *Ex parte*, 19
Hall v. Penfold, *Doe d*, 46
Hall v. Savage, 395, 396
Hall v. Hall, 403, 428, 462, 481, 489
Hall v. Hill, 445, 458, 473
Ham v. Ham, 111, 170, 171, 231
Hamblin v. Bank of Cumberland, 116
Hambly v. Trott, 361
Hamilton, v. Hughes, 217, 220
Hamilton, Duke of, v. Lord Mohun, 232, 528
Hamilton v. Jackson, 427
Hamilton v. Buckwalter, 455, 464
Hanby, *In re*, 48
Hancock v. Hancock, 483
Hancock v. Peaty, 22
Hanger v. Fry, 312
Harding v. Alden, 296
Harding v. Cardiff, 190
Hargreaves v. Parsons, 75
Harriman v. Gray, 383, 406, 407
Harris v. Harris, 539
Harris v. Morden, 532, 556
Harris v. Cooper, 25
Harrison v. Eldredge, 254, 280, 405
Harrison v. Harrison, 458
Harrod v. Harrod, 17
Harrow v. Johnson, 279
Hart v. McCollum, 496
Hartshorne v. Hubbard, 232
Hartshorne v. Hartshorne, 251
Harvey v. Harvey, 33, 34, 521
Harvey v. Alexander, 292
Harvey v. Ashley, 397, 433
Harvey v. Pearsall, 511
Harvill v. Holloway, 171
Haworth v. Herbert, 65
Haskill v. Fraser, 111, 119, 170, 171
Hastings, Peer., 36
Hastings v. Stevens, 252
Hastings v. Cruncleton, 362.
Hastings v. Dickenson, 413, 414
Havens v. Havens, 448
Hawkshaw v. Hodgins, 500
Hawley v. James, 131, 217, 220, 263
Hawes' case, 501
Heald's petition, 424
Heed v. Ford, 217, 220
Heigham v. Bedenfield, 265
Hender v. Rose, 481
Henderson v. Stephens, 554
Henderson v. Cargill, 37
Henderson v. Weis, 34
Hendrickson v. Hendrickson, 297
Heney v. Low, 115, 232, 233, 234, 246, 251
Henley v. Webb, 366
Herbert v. Wren, 204, 478
Herbert v. Tuckal, 35
Hervey v. Hervey, 37, 417
Heseltine v. Siggers, 75
Heth v. Cocke, 229, 248, 385
Hetherington v. Graham, 62
Heward v. Scott, 390
Hewson v. Reid, 458
Heyns v. Villars, 137
Hickman v. Upsall, 48
Higgins, *In re*, 112
Hildreth v. Jones, 252
Hill v. Hill, 385
Hill v. Hibbett, 35
Hill v. Mitchell, 67
Hill v. Ressegien, 289
Hill *et ux* v. Greenwood, 390
Hill v. Adams, 433
Hilleary v. Hilleary, 298
Hilliard v. Phaly, 38
Hillier v. Fletcher, 548
Hinchman v. Stiles, 251
Hinton v. Hinton, 213, 230, 482
Hiscock v. Joycox, 178
Hitchcock v. Carpenter, 116
Hitchcock v. Harrington, 111, 116
Hitchen v. Hitchen, 81, 161, 164, 232, 447, 519
Hobbs v. Harvey, 253
Hoby v. Hoby 71, 322, 332

Hodgins v. McNeil, 10, 21, 25, 80
Hodsal v. Webb, 431
Hody v. Lunn, 402
Hoffman v. Savage, 354
Hoig v. Gordon, 383, 384
Holdernesse v. Carmarthan, 208
Holdrich v. Holdrich, 448, 458, 461, 463, 472
Holloman v. Holloman, 338
Holloway v. Radcliffe, 225
Holmes v. McGee, 353
Holmes v. Blogg, 397
Holroyd v. Holroyd, 179
Honsburgh v. Fritz, 554
Honywood v. Forster, 476
Hood v, Beauchamp, 36
Hoogland v. Watt, 406
Hooker v. Hooker, 94
Hoopes v. Dundas, 465
Hoot v. Sorrell, 292
Hopewell v. De Pinna, 47, 48
Hopkins *re* Barnes v. Hopkins, 270
Houghton v. Houghton, 179
House v. House, 251
Howse v. Chapman, 74
House v. Jackson, 81, 157
Howard v. Cavendish, 68, 319
Howard v. Mansfield, 331
Howard v. Wilson, 390
Howard v. Priest, 180, 182
Howells v. Jenkins, 476
Hubbard v. Lees, 35, 46
Huffman v. Askin, 391
Hughes v. Watson, 397
Hughes v. Kearney, 258
Hugley v. Gregg, 368
Hugunin v. Cochrane, 260
Hull v. Commonwealth, 48
Hull v. State of Texas, 49
Humble v. Mitchell, 75
Humphries v. Burton, 316
Humphries v. Barnet, 500, 531, 532
Hunter v. Jones, 373
Huntington, Peer., 36
Huntley, Peer., 36
Hutchins v. Carlton, 371
Hutchinson v. Sargent, 472
Hutton, *In re*, 50
Hyatt v. Ackerson, 116
Hyde v. Hyde and Woodmansee, 26
Hyde v. Barton, 252

I.

Iaege v. Bossieux, 280
Ilderton v. Ilderton, *Doe d.*, 28, 296
Ilvis v. McCreary, 427
Incledon v. Northcote, 447, 456
Ingram v. Morris, 263, 271
Innes v. Jackson, 243
Innis v. Campbell, 47
Inwood v. Twyne, 225
Irvin v. Thompson, 395
Irvine v. Sibbetts, 469
Irving v. De Kay, 450
Isherwood v. Oldknow, 346

J.

Jackson v. Cooley, 35
Jackson v. Miller, 45
Jackson v. Ety, 46, 47
Jackson v. Cody, 47
Jackson v. Bonehan, 47
Jackson v. Claw, 53
Jackson v. Waltermire, 116
Jackson v. Kip, 128, 129
Jackson v. Edwards, 172, 174, 175, 321
Jackson v. Jackson, 179
Jackson v. Innes, 235
Jackson v. Parker, 235, 243
Jackson v. O'Donaghy, 300
Jackson v. Brownson, 362
Jackson v. Vanderheyden, 380
Jackson, *Doe d.*, v. Woodruff, 397
Jackson v. Churchill, 448
Jacques v. The Public Admr., 23
James v. Fields, 258
Jamieson v. Fisher, 25, 427, 433
Jenkins v. Bodley, 562
Jenkins v. Jenkins, 23
Jennings v. Smith, 462
Jennison v. Hapgood, 252
Jewell v. Harrington, 119
Johnson v. Kincade, 23
Johnson v. Lawson, 37
Johnson v. Hocker, 46
Johnson v. Hamilton, 50
Johnson v. McGill, 116
Johnson v. Nyce, 289
Johnson v. Neil, 312
Johnson v. Richardson, 490
Johnston v. Vandyke, 297

Jones v. Brewer, 304, 307, 336, 338, 342, 373
Jones v. Collier, 458
Jones v. Cleaveland, 497
Jones v. Gardiner, 289
Jones v. Hollopeter, 403
Jones v. Jones, 240, 319
Jones v. Powell, 373
Jones v. Waller, 44
Joyce v. De Moleyns, 56:
Judd v. Pratt, 458

K.

Kain v. Fisher, 348, 349
Kay v. Smith, 398
Keeler v. Eastman, 362
Keeler v. Tatnell, 373
Keene v. Boycott, 397
Kelly v. Stinson, 448
Kelly v. Harrison, 291
Kendrew v. Shewan, 289
Kennedy v. Nedrow, 386, 448
Kennedy v. McAliley, 387
Kenneth v. Abbott, 37
Kennerly v. Missouri Ins. Co., 190, 297
Kent v. Burgess, 26
Kent v. Kent, 513, 515, 520, 522
Kerr v. Leishman, 475
Keyes v. Keyes, 23
Kiddall v. Trimble, 523
Kidder v. Blaisdell, 47, 53, 116
Kideney v. Cockburn, 36
Kidney v. Coussmaker, 481, 489
Killen v. Campbell, 431
Kimball v. Kimball, 116
King v. Paddock, 50
King v. Bates, 74
King v. Frost, *Doe d.*, 149
King v. Longnor, 395
Kingman v. Sparrow, 76
Kinsey v. Woodward, 462
Kintner v. McRae, 214, 268, 269
Kirkman v. Kirkman, 430
Kirkman v. Miles, 225
Kitzmiller v. Rensselaer, 405
Klingenann, In goods of, 33
Klutts v. Klutts, 259
Knight v. Barber, 75
Knight v. McLean, 526
Knight v. Nepean, *Doe d.*, 47, 48, 49
Knighton v. Young, 471

L.

Lacy v. Anderson, 424
Laidlaw v. Jackes, 295, 450, 494, 495, 497
Laing v. Avery, 496
Lamar v. Scott, 67, 296
Lamb v. Lamb, 482
Lambe v. Orton, 47, 49
Lampet's case, 389
Lane v. Goodwin, 19
Lanfair v. Lanfair, 253
Lansdowne v. Lansdowne, 358
Lapp v. Lapp, 458, 462
Laramee v. Evans, 17
Larrowe v. Beam, 562
Lasher v. Lasher, 464
Latour v. Teesdale, 27
Lavender v. Blackstone, 292
Lawrence v. Brown, 123, 342, 343, 385, 387
Lawrence v. Miller, 297
Lawrence v. Lawrence, 445, 449, 463
Lawson v. Morton, 217, 220, 329
Lawson v. Montgomery, 403
Leach, *Re*, 80
Leach v. Dennis, 107, 494, 496
Leach v. Shaw, 304, 494
Leader v. Barry, 33
Lealand's Appeal, 402
Learned v. Cutler, 397
Learned v. Corley, 50
Leary v. Dunham, 289
Leavitt v. Lamprey, 163, 164, 396
Lee v. Cox, 429
Lee v. Lindell, 173
Lee v. McKinley, 472, 486
Lee v. Stewart, 433
Lee v. Willock, 47
Leigh, Peer., 35
Lemon v. Lemon, 447
Lenfers v. Henke, 304
Leonard v. Steele, 449
Lessee v. West, 380
Lessee of Scott v. Ratliffe, 47
Levering v. Heighe, 423, 427, 433
Lewis, *In re*, 51
Lewis v. Coxe, 394
Lewis v. Lewis, 289, 482
Lewis v. Smith, 452, 464
Leys v. Price, 441.
Light v. Light, 490. 491
Lightley v. Clouston, 361

Liles v. Fleming, 426
Lillingston's case, 274
Lindsay v. Gibbon, 527
Lindsey v. Stevens, 217
Lindsey v. Lindsey, 233, 235, 242, 551
Linfoot v. Duncombe, 503, 511
Link v. Edmondson, 131, 263
Lisle, Peer., 36
Little Miami Ry. Co. v. Jones, 187
Littlefield v. Crocker, 383, 406
Littleton v. Littleton, 268
Lively v. Pachal, 373
Livingstone v. Byrne, 384
Lloyd v. Petitjean, 26
Lloyd v. Deakin, *Doe d.*, 48
Lloyd v. Conover, 173, 255, 321
Lloyd v. Lloyd, 219, 224, 268, 465, 471
Lockett v. James, 281
Lockman v. Ness, 116, 500
Logan v. Phillips, 424
Lomax v. Rider, 53
Longvill's case, 318
Lopsley v. Greerson, 29
Lord v. Lord, 472
Loring, *Ex parte*, 258
Loring v. Steineman, 47, 50
Losee v. Murray, 33, 556
Lossee v. Armstrong, 500, 525, 536, 538
Lothrop v. Foster, 395
Loubat v. Nourse, 180, 181
Loughead v. Stubbs, 294, 564
Lovell v. Gibson, 279
Low v. Burrow, 191, 193
Low v. Sparks, 563
Lowes v. Lowes, 458, 472
Lowrey v. Fisher, 281
Lucas v. Calcraft, 536, 538
Lucas v. Sawyer, 297
Lufkin v. Curtis, 395
Lund v. Woods, 270
Lyle v. Elwood, 34
Lynch v. O'Hara, 34, 115, 119, 234
Lynn v. Chaters, 258
Lyster v. Kirkpatrick, 130, 211

M.

Machell v. Clarke, 128, 129, 264, 265
Macknet v. Macknet, 489
Magee v. Mellon, 380
Malloney v. Horan, 281, 404
Manly v. Curtis, 44
Manhattan Co. v. Evertson, 281, 286
Mann v. Edson, 84, 119
Maundrell v. Maundrell, 130
Manning v. Laboree, 166, 369
Mannsfield's case, 436
Mantz v. Buchanan, 338
Marchmont, Peer., 36
Markham v. Merrett, 397
Marrice v. Marrice, 491
Marriott, *Re*, 482
Marsh v. Hutchison, 40, 41, 42
Marshall v. Smith, 494
Martin v. Dwelly, 380
Martin v. Martin, 385, 4[illegible]8 425
Martin v. McGlashan, 558
Martin v. Gale, 398
Martindale v. Clarkson, 219, 229, 248, 259, 291
Massie v. Sebastian, 380
Master v. Cookson, 48
Mathers v. Bennett, 528
Matheson v. Malloch, 117
Mathewson v. Smith, 252
Matlock v. Lee, 342
Matlock v. Matlock, 180, 181
Matthews v. Matthews, 174
Mayo v. Brown, 38
Meggott v. Meggott, 536
Meigs v. Dimock, 257, 258
Melizet's Appeal, 190, 481
Mellish v. Mellish, 526
Merrill v. Rumsey, 98
Merritt v. Thompson, 47
Meserve v. Meserve, 312, 314
Mette v. Mette, 25
Meyer v. Mohr, 375
Miall v. Brian, 463, 472
Middleborough v. Rochester, 23
Middleton v. Shelly, 270
Milledge v. Lamar, 155.
Miller v. Beates, 42, 47, 53
Miller v. Talley, 89
Miller v. Stump, 221
Miller v. Wiley, 281, 283, 290, 299, 390, 404, 405, 407, 409
Miller v. Wilson, 281
Miller v. Ostrander, 397
Mildmay's case, Sir Anthony, 124
Mills v. Davis, 397
Mills v. Mills, 448
Mills v. Van Voorhis, 270
Milner v. Lord Harewood, 193, 434

Minaker v. Ashe, 119
Minaker v. Haukins, 119
Minton v. Clifton, 476
Mitchell v. Hyde, 547
Mitchell v. Miller, 312
Mitchell v. Mitchell, 375
Mitchell v. McGaffey, 258
Mitchell v. Word, 375.
Monkton v. Att'y-General, 35
Montgomery v. Bruere, 116
Moody v. King, 149
Moore v. Esty, 80, 85, 116, 128, 156
Moore v. Rollins, 71, 322
Moore v. New York, 185
Moore v. Shinners, 280
Moore v. Butler, 485.
Moore v. Frost, 496
Mordaunt v. Thorold, 522
Morris v. Kearsley, 179
Morrison v. Morrison, 491
Morse v. Thorsell, 260
Morton v. Barrett, 45
Mosely v. Taylor, 366
Mosher v. Mosher, 172, 321
Mullaly v. Walsh, 48
Muller v. Thingrod, 476
Murphy v. Murphy, 424, 458
Mundy v. Mundy, 373, 536, 560

Mc.

McAnnany v. Turnbull, 292
McArthur v. Porter, 255, 257, 259
McArthur v. Webb, 408
McCallister v. Brand, 487
McCartee v. Teller, 414, 416, 423, 427, 433
McCartee v. Camel, 47
McClure v. Harris, 257, 258
McCoppin v. McGuire, 398
McCormick v. Taylor, 307, 330, 331.
McCulloch v. McCulloch, 26
McCullough v. Allen, 454
McCullough v. Irvine, 362
McCully v. Smith, 300
McDaniel v. Douglas, 489, 491
McDearmid v. McDearmid, 403
McDonald v. Boice, 279
McDonald v. McDonald, 258
McDonald v. McMillan, 107, 116, 118, 496
McDonald v. McIntosh, 494
McElroy v. Wathen, 501
McFarland v. Febiger, 395
McGarry v. Thompson, 450
McGaughey v. Henry, 131
McGill v. Squier, 390
McGregor v. McGregor, 475
McGuin, *In re*, 401
McIlwaine v. Gethen, 465
McIntosh v. Wood, 210, 563
McLardy v. Flaherty, 105
McLean v. Laidlaw, 214, 382
McLean v. Horton, 556
McLellan v. Meggatt, 112, 122, 494, 564
McLellan v. McLellan, 458, 472, 478
McLemore v. Mabson, 289
McLennan v. Grant, 458, 472, 478
McMahon v. McMahon, 19
McMahon v. Russell, 233
McMahon v. Kimball, 271
McMillan v. Robbins, 352
McMorris, *Re*, 218, 235, 242
McNally v. Church, 391
McNeely v. Rucker, 402
McNish v. Pope, 215

N.

Napper v. Sanders, 43
Nash v. Preston, 213, 230
Nash v. Spofford, 380
Nason v. Allen, 116, 157
Naz. Lit. Inst. v. Lowe, 257, 258, 280
Neal v. Wilding, 36
Neff v. Thompson, 62
Nelson v. Harwood, 380
Nepean v. Knight, *Doe d.*, 47, 49
Newham v. Raithby, 46
Newman v. Jarkins, 47
Newman v. Newman, 481
New River Co. v. Graves, 73
Nicholas v. Lansdale, 47
Nims v. Bigelow, 292
Noel v. Jevon, 213, 230
Noel v. Ewing, 190, 297
Nokes v. Milward, 31
Nolan v. Cherry, 553
Nolan v. Reid, 539, 547, 553
Norcott v. Gordon, 447, 458, 492
Norris v. Clark, 472
Norris v. Norris, 50
Northcutt v. Whipp, 85, 123, 155, 156
Northumberland v. Aylesford, 485
Norton v. Smith, 114, 115, 234, 326

Norwood v. Marrow, 288, 342, 343, 369
Nottley v. Palmer, 480

O.

Oakes v. Hill, 45
O'Brien v. Elliott, 375
O'Connor v. Beatty, 290
O'Driscoll v. Roger, 487
Ogden v. McArthur, 408
Ogdensburgh, Bank of, v. Arnold, 231
O'Hara v. Chaine, 472, 473
Oldham v. Gale, 214, 268
Oldham v. Wolley, 48
Oldnall v. Deakin, *Doe d.*, 44, 48
Oliver v. Richardson, 525, 536
Omichund v. Barker, 45, 46
Onslow v. Onslow, 430
Osborn v. Allen, 47, 48
Ostrander v. Spickard, 462
Otis v. Parshley, 80, 156, 157
Outhwaite v. Outhwaite, 536
Owen v. Robbins, 217
Owen v. Slatter, 385

P.

Padbury v. Clark, 476
Paine v. Chapman, 259
Paine v. Gripton, 470
Paine's case, 123, 136, 202
Palmer v. Danby, 216
Palmes v. Danby, 229, 232, 234
Pancoast's Lessee, v. Addison, 46
Parham v. Parham, 426
Paris' case, 166
Parks v. Hardey, 318
Parks v. Brooks, 289
Parker v. Bleeke, 262
Parker v. Parker, 252, 348
Parker v. Sowerby, 444, 445, 463, 473
Parker v. Downing, 489
Parkinson v. Francis, 45
Parnell v. Parnell, 23
Parsons v. Perns, 105
Parsons v. Winslow, 464
Parteriche v. Powlet, 350
Partington's case, 110
Partridge v. Partridge, 265
Patch v. Keeler, 318, 319
Patrick v. Shaver, 473, 478
Patterson v. Black, 50
Pearson v. Pearson, 458
Peay v. Peay, 151
Peeke, *Ex parte*, 258
Pendrell v. Pendrell, 37
Pennefather v. Pennefather, 429
Penrice v. Penrice, 501, 502
People v. Gillis, 194
Pepper v. Dixon, 472, 473
Perkins v. Little, 67
Perry v. Calhoun, 314
Peter v. Beverly, 222
Petty v. Petty, 268
Phelan v. Phelan, 553, 554, 564, 301, 307
Phelps v. Phelps, 487
Phene, *In re*, 47, 49, 50
Phillips v. Medbury, 469
Phillips v. Phillips, 178, 179, 182, 561
Phillips v. Zimmerman, 516, 525
Philly v. Sanders, 221
Phipps v. Moore, 33
Pierce v. Williams, 308, 315, 318
Piers v. Piers, 37
Pickering v. Appelby, 75
Pickering v. Stanford, 480
Pifer v. Ward, 480
Pinckney v. Pinckney, 489
Pinkham v. Gear, 312
Pinner v. Pinner, 120
Pitts v. Snowden, 458
Pixley v. Bennett, 383
Platner v. Sherwood, 40
Plunkett v. Holmes, 90
Poor v. Horton, 196
Porter v. Noyes, 289
Portsmouth, Earl of, v. Bunn, 74
Potter v. Potter, 382
Potter v. Wheeler, 172, 321
Potts v. Meyers, 115
Powell v. Monson, 343, 395
Powell v. Mon. and B. Mfg. Co., 326
Power v. Shiel, 439
Pratt v. Taliaferro, 226
Preis v. Preis, 29
Prescott v. Trueman, 288
Preston v. Lyons, 34
Priddy v. Rose, 208
Priest v. Cummings, 397
Primmur v. Stewart, 47
Pringle v. Dunkley, 470
Prole v. Soady, 482
Prosser v. Bank of England, 54
Puckett v. State, 47, 50

Pulker v. Evans, 80
Pultney v. Darlington, 225, 483
Purdy v. Purdy, 221
Purefoy v. Rogers, 88, 89, 90, 91
Purrington v. Pierce, 324
Pusey v, Desbouvrie, 481, 489, 490

Q.

Quarles v. Lacey, 284, 291
Quarrington v. Arthur, 71
Queen Ann's Co. v. Pratt, 271
Queen v. Millis, 10, 18
Quin v. McKibbin, 531, 532

R.

Ralston v. Ralston, 348
Randall v. Randall, 179
Randolph v. Doss, 111
Rank v. Hanna, 173, 321
Rankin v. Oliphant, 562
Rathbone v. Dyckman, 448
Rawdon v. Rawdon, 23
Rawlings v. Adams, 214
Rawlins v. Loundes, 258
Ray v. Pung, 130
Raborg v. Hammond, 46
Raynard v. Spence, 472, 487
Read v. Passor, 30
Reaves v. Garrett, 487
Reed v. Dickerman, 484, 491
Reed v. Morrison, 373
Reed v. Ranks, 118
Reg. v. Allison, 30
" v. Bell, 24
" v. Billinghurst, 19
" v. Bramley, 38
" v. Brighton, 21
" v. Brompton, 26, 27, 32
" v. Burton-upon-Trent, 19
" v. Chadwick, 20
" v. Harborne, 29, 48, 49, 50, 54
" v. Lady Portington, 41
" v. Lumley, 49
" v. Millis, 18
" v. Roblin, 24
" v. Secker, 15, 25
" v. Sewell, 45
" v. Stockland, 33
" v. St. Faiths, 19
" v. St. Giles-in-the-Fields, 20
" v. Tibshelf, 19
" v. Twinning, 29, 49, 54
Reg. v. Wroxton, 19
Reid v. Foster, 514
Reid v. Laing, 10
Reid v. Reid, 115
Revel v. Fox, 33
Reynolds v. Reynolds, 156, 157, 161, 162, 485
Rice v. Lumley, 47, 48
Richardson v. Skolfield, 262
Richardson v. Wyatt, 180
Richardson v. Wyman, 281
Rickard v. Talbird, 409
Rickman v. Ives, 48
Riddell v. Gwinnell, *Doe dem*, 318, 323
Ridgway v. Masting, 281
Ridgway v. Newbold, 316, 321, 562
Ripley v. Ripley, 458, 487
Ripley v. Waterworth, 179, 193
Risely v. Sheppard, 45
Rivers v. Rivers, 428
Roadley v. Dixon, 472, 458
Roberts v. Eddington, 45
Roberts v. Smith, 476
Robertson, *Re*, Robertson v. Robertson, 5, 235, 242, 246, 248
Robinet v. Lewis, 326, 516, 554
Robinet v. Pickering, 323, 326
Robins v. Robins, 271, 272
Robinson v. Bates, 281, 383, 409
Robinson v. Codman, 156
Robinson v. Miller, 161, 164, 217, 300, 307, 312
Robinson v. Robinson, 225
Robinson v. Townsend, 208
Robinson v. Wilson, 432, 472
Roblin v. Roblin, 18
Rockwell v. Morgan, 322
Rody v. Rody, 295
Roe v. Hasland, 48
Rook v. Worth, 225
Rooker v. Rooker and Newton, 33
Roper v. Roper, 462
Roscommon's case, Earl, 48
Roscommon, Peer., 36
Rose v. Reynolds, 424
Rose v. Simmerman, 290, 292, 299
Ross v. Wilson, 172
Rowe v. Hamilton, 425
Rowe v. Hasland, 49, 50, 53
Rowe v. Power, 304, 306, 311, 313
Rowe v. Wert, 252
Rowley v. Adams, 182
Rowland v. Rowland, 268
Rowton v. Rowton, 216

Ruding v. Smith, 26
Runyan v. Stewart, 254
Ruscombe v. Hare, 235
Russel v. Austin, 536
Rust v. Baker, 47
Rutherford v. Rutherford, 258
Ryckman v. Ryckman, 317, 500, 531, 532

S.

Sadlier v. Butler, 476
Safford v. Safford, 156, 161, 162
Salter v. Butler, 194
Sammers v. Payne, 133
Sanborn v. Sanborn, 179
Sanbourne v. Barry, 430
Sanford v. Jackson, 453, 455, 456, 464
Sanford v. McLean, 271, 272, 397
Sarsfield v. Sarsfield, 373, 378
Saunders v. Leslie, 258
Savage v. Burnham, 450
Saville v. Saville, 483
Sayer v. Glossop, 30
Schnebly v. Schnebly, 319
Scott v. Hancock, 252, 338
Scott v. Hunter, 281
Scratch v. Jackson, 500, 518, 532, 556
Seabrook v. Seabrook, 448
Seaman v. Vawdrey, 70
Seeley v. Jago, 224, 225
Selleck v. Selleck, 424
Sellman v. Bowen, 523
Sewell v. Corp, 45
Seymour's case, 128, 129
Shaeffer v. Weed, 280
Share v. Anderson, 383
Shattuck v. Gregg, 73, 304, 313
Shaw v. Boyd, 397, 427, 433
Shaw v. Shaw, 462
Shaw v. Thompson, 195
Shearer v. Ranger, 288
Sheldon v. Bliss, 439
Sheppard v. Sheppard, 218, 232, 235, 236
Sherman v. Newton, 482
Sherman v. Parsill, 258
Sherwood v. Vandenburgh, 116, 217
Shoemaker v. Walker, 156, 157, 158, 275
Shotwell v. Sedan, 373
Shurtz v. Thomas, 381
Sidney v. Sidney, 441
Sillick v. Booth, 50
Sills v. Lang, 555
Simpson's Appeal, 373
Simpson v. Gutteridge, 437, 439
Simpson v. Jones, 435
Simpson v. Leach, 178
Simpson v. Simpson, 280, 560
Simpson v. Thomaston Bank, 116
Singleton v. Singleton, 333
Singree v. Welch, 284
Sisk v. Smith, 217
Sisson v. Giles, 483
Skinner v. Ainsworth, 248, 290
Slade v. Nepean, *Doe d.*, 47, 49
Slane, Peer,, 35
Slater v. Slater, 115
Slatter v. Slatter, 485
Slegall v. Slegall, 62
Smart v. Waterhouse, 491
Smiley v. Wright, 384
Smith's Appeal, 124
Smith v. Claxton, 225
Smith v. Handy, 397
Smith v. Hubbard, 257
Smith v. Ingalls, 368
Smith v. Kinskern, 460
Smith v. Knowlton, 42, 47, 50
Smith v. Martin, 391
Smith v. Paysenger. 385
Smith, *Re*, 47, 49
Smith v. Smith, 181, 212, 434
Smith v. Spencer, 154, 536
Smith v. Stanley, 254
Smith v. Tebbitt, 36
Smothers v. Mudd, 48
Snelgrove v. Snelgrove, 489, 562
Sneyd v. Sneyd, 114, 332
Snow v. Stevens, 252
Sopwith v. Maughan, 485, 489
Sottomayer v. De Barros, 25
Spangle v. Stanley, 78
Sparrow v. Kingman, 116, 369
Spears Burton, 37, 53
Spencer v. Scurr, 71
Spencer v. Roper, 47
Spiller v. Andrews, 501
Spiva v. Jeter, 439
Springle v. Shields, 289, 325
Sprint v. Hicks, 207
Spurr v. Tremble, 47
Spyer v. Hyatt, 235
Squire v. Compton, 232
Squire v. Harder, 377
Stoffard v. Buckley, 74, 208
Stafford, Peer., 36

Stafford v. Trueman, 122, 554
Standon v. Standon, 38
Stark v. Hunton, 454, 464, 484
Starr v. Peck, 10
Stasblchmidt v. Lett, 462
State v. Moore, 47
St. Clair v. Williams, 338
Stearns v. Swift, 396
Steiger v. Hillen, 523
Stetson v. Day, 352
Stevens v. Moss, 38
Stevens v. McNamara, 42, 47, 48
Stevenson v. Brown, 470.
Stevens v. Owen, 73, 396
Stevens v. Smith, 217.
Stevens v. Stevens, 70, 309, 319, 342, 343.
Stewart v. Blakenay, 179, 180, 182
Stewart v. Alison, 46
Stewart v. Hunter, 472, 473, 486
Stewart v. Kay, 564
Stewart v. Menzies, 10
Stewart v. McMartin, 448.
Stewart v. Stewart, 263, 271
Stilley v. Folger, 424
Stiner v. Cawthorne, 311
Stinson v. Sumner, 409
Stockwell v. Sargent, 349, 353
Stoner v. Walton, 33
Stoney v. Bank of Charleston, 385
Stormont Election Petition, 301
Stoors v. Barker, 384
Stoughton v. Leigh, 67, 68, 70, 71, 204, 269, 273, 321, 322, 330
Stonvenal v. Stephens, 50
Strahan v. Sutton, 444, 447, 462
Stratfield v. Stratfield, 478
Stratford v. Powell, 485, 487
Strathin v. Best, 481
Streatfield v. Streatfield, 482
Street v. Dolson, 553
Street v. Rowe, 532
Sumner v. Conant, 394
Sumner v. Hampson, 180
Sumner v. Partridge, 137
Summers v. Babb, 281, 323, 383, 409
Surgeson v. Sealey, 46
Sussex, Peer., 35
Sutcher v. Kemp, 472
Sutton v. Burrows, 347
Sutton v. Rolfe, 112, 171
Swaine v. Perine, 229, 251, 268, 279, 375, 426, 536
Swannock v. Lyford, 266, 267
Swayne v. Fawkener, 74
Symmes v. Drew, 354

T.

Talbot v. Armstrong, 257
Talbot v. Hill, 348
Tarpley v. Gannaway, 231
Taylor's case, 111
Taylor v. Birmingham, 468
Taylor v. Fowler, 255, 405
Taylor v. Kearn, 260
Taylor v. Linley, 472, 475
Taylor v. Moore, 292
Taylor v. Taylor, 472
Tederton v. Tederton, 39
Teed v. Carruthers, 258
Tempest v. Kilner, 75
Templeton v. Tyrel, 19
Tevis v. McCreary, 437
Tew v. Winterton, 436, 438, 526
Thibodo v. Collar, 256, 559
Thomas v. Gammel, 397
Thomas v. Harris, 381
Thomas v. Thomas, 47, 49
Thompson, *Re*, Bigger v. Dickson, 559
Thomson v. Boyd, 246
Thompson v. Cochran, 257
Thompson v. Hoop, 484
Thompson v. Morrow, 325
Thompson v. Stacey, 347
Thompson v. Thompson, 259, 260, 369, 560
Thompson v. Vance, 131, 194
Thompson v. Watts, 429
Thompson v. Nelson, 444, 456
Thorndike v. Spear, 116
Thorn v. Ingram, 257
Thorne v. Rolfe, 47
Thornton v. Dixon, 179
Thoroughgood's case, 105
Thorpe v. Richards, 236, 238, 536
Thrasher v. Pinckard, 289
Throgmorton v. Walton, 42
Thynn v. Thynn, 68, 71, 500, 501
Timberlake v. Parish, 462, 481
Titus v. Neilson, 251
Tobias v. Ketchum, 473
Tomlinson v. Hill, 255
Tomkins v. Forder, 528
Tomknis v. Ladbrooke, 485
Torrey v. Minor, 382
Tongue v. Tongue, 19

Took v. Glascock, 129
Tooke v. Hardeman, 487, 490
Tooker v. Annesley, 299
Toronto & Lake Huron Ry. Co. v. Crookshank, 297
Totten v. Stuyvesant, 172, 321
Townsend v. Ash, 73
Townsend v. Devaynes, 179
Townsend v. Tickell, 113
Townsend v. Townsend, 408, 425
Towsley v. Smith, 117, 122
Tracey, Peer., 36
Trafford v. Boehm, 225
Travers v. Gustin, 457
Trevelyan v. Trevelyan, 86
Trower v. Knightley, 225
True v. Ranney, 23
Tucker v. Field, 236
Tucker v. Vance, 300
Tunstall v. Trappes, 130
Turner v. Meyers, 22, 23
Turner v. Street, 226
Turner v. Turner, 208
Tuite v. Miller, 289
Tyssen v. Benyon, 485

U.

Underwood v. Wing, 49
United States v. Buford, 45
United States v. Duncan, 462,481, 489
Upshaw v. Upshaw, 484. 489
Usher v. Richardson, 383, 396,403
Usticke v. Peters, 476

V.

Van v. Barnett, 225
Vanarsdale v. Vanarsdale, 462
Vance v. Campbell, 470
Vance v. Lord Dungannon, 483
Vance v. Vance, 413, 414
Van Duyne v. Thayre, 246, 270
Van Norman v. Beauprie, 288,289, 290, 294
Van Orden v. Van Orden, 470
Varney v. Stevens, 352
Vartie v. Underwood, 248
Vaughan v. Holdes, 105
Vaux, Peer., 36
Vernon's case, 312, 412, 413, 414, 415, 417
Villa Real v. Lord Galway, 458
Villers v. Handley, 550
Vincent v. Spooner, 425
Vizard v. Longdale, 424, 427, 433
Vulliamy v. Huskisson, 36

W.

Wadleigh v. Gluies, 380
Wailes v. Cooper, 562
Wambaugh v. Schanck, 47
Wait v. Wait, 61
Wake v. Wake, 481, 487, 489
Wakefield v. Childs, 526, 527
Waldron v. Coombe, 45
Waldron v. Tuttle, 46
Walker v. Boulton, 500, 564
Walker v. Denne, 225
Walker v. Griswold, 252
Walker v. Hall, 386, 387
Walker v. Neville, 501
Walker v. Powers, 255, 280
Walker v. Walker, 427, 429
Watkins, *Re*, 316
Walmsley v. Bull, 458, 557
Walmsley v. Walmsley, 485
Wallace v. Moore, 502, 521
Wallace v. McCullough, 395
Walsh v. Kelly, 408, 425
Walters v. Jordan, 61
Walton v. Hill, 485
Wannacot v. Fillater, 116
Warbutton v. Warbutton, 473
Ward v. Crotty, 292
Ward v. Duloney, 23
Ward v. McIntosh, 116
Ward v. Sheppard, 362
Warfield v. Castleman, 373
Warner v. Van Alstyne, 217, 257, 259
Warsley v. Warsley, 427
Watkins v. Thornton, 156
Watson v. England, 49
Watson v. King, 50
Watson v. Quilter, 558
Watson v. Spratley, 75
Watson v. Watson, 517
Weale v. Lower, 43
Weaver v. Gregg, 176, 185
Weaver v. Sturtevant, 383, 404
Webb, *In re*, 48
Webb v. Earl of Shaftesbury, 457
Webb v. Evans, 454, 464
Webster v. Birchmore, 47, 49, 50
Wedge v. Moore, 116, 252

Weekley v. Weekley, 75
Weir v. Humphrey, 81, 85, 204
Weir v. Tait, 156, 157
Welch v. Anderson, 482
Welker v. Israel, 221
Wentworth v. Wentworth, 310
Westacott v. Cockerline, 463, 484
Westfaling v. Westfaling, 194
Wetherell v. Wetherell, 458
Wharton, *Re*, 226
Wheatly v. Best, 204, 269
Wheatly v. Calhoun, 216
Wheeldale v. Partridge, 222, 225
Wheeler v. Morris, 233, 270
Wheeler v. MacWilliams, *Doe d.*, 31, 33, 35
Whilden v. Whilden, 462
Whistler v. Webster, 481
White v. Bastedo, 236, 239
White v. Grimshaw, 500, 532
White v. Mann, 50
White v. Panther, 7, 353
White v. Story, 318
White v. White, 388, 403, 460, 478
White v. Willis, 73
Whitely v. Whitely, 485
Whitehead v. Clinch, 522
Whitehead v. Cummins, 271, 272
Whiteside's Appeal, 47, 48
Whithed v. Mallory, 268
Whiting v. Whiting, 128
Whittington v. Andrews, 70
Whittuck v. Waters, 46
Whyte v. Nashville, 352, 353
Wightman v. Wightman, 23
Wigmore's case, 10
Wilcox v. Purchase, 47, 49
Wilde v. Fort, 130
Wilhelm v. Wilhelm, 318
Wilkie v. Meir, 470
Wilkinson v. Kent, 476
Wilkinson v. Parish, 172, 174, 321
Willet v. Brown, 181
Willett v. Beatty, 257, 259
Williams v. Armory, 156, 157
Williams v. Chitty, 433, 434, 435
Williams v. Commissioners of Coburgh, 394
Williams v. Cox, 204
Williams v. Jekyl, 194
Williams v. Lambe, 561
Williams v. Lee, 556
Williams v Reynolds, 293, 299
Williams v. Rider, 554
Williams v. Vansittart, 556
Williams v. Williams, 292
Williams v. Woods, 257, 258
Willoughby v. Middleton, 483
Wilmarth v. Brydges, 80
Wilson v. Davisson, 257, 258, 271
Wilson v. Hayne, 455, 464, 484
Wilson v. Hodges, 42
Wilson v. Lord Townshend, 483
Wilson v. Oatman, 324
Wilson v. Taylor, 289
Wilson v. White, 386
Winchester, Bishop of, v. Knight, 361
Windham v. Portland, 342
Wing v. Ayer, 238
Winship v. Lamberton, 281
Winslow v. Chiffelle, 180
Wintour v. Clifton, 487
Wiscot's case, 90, 98
Wiseley v. Findlay, 462
Wiswall v. Hall, 287
Wolfe v. Washburn, 45
Wood v. Gaynon, 350
Wood v. Goodridge, 395
Woodhull v. Longstreet, 173, 321
Wood v. Keyes, 329
Wood v. Seely, 385
Wood v. Shurly, 414
Wood v. Wood, 19, 450, 454
Woodruff v. Cook, 380
Woods v. Wallace, 251
Woods v. Woods, 47, 53
Woodward v. Dowse, 62
Woodworth v. Paige, 281, 285, 383, 409
Woolaston v. Banes, *Doe d.*, 39
Wooley v. Magie, 217, 220
Woolsey v. Finch, 62
Worgan v. Ryder, 536, 538
Worthen v. Pearson, 476
Worthington v. Wiginton, 485, 487
Wright v. Shaw, 380
Wright v. Skinner, 29
Wylie v. Wylie, 179

Y

Yancy v. Smith, 297
Young v. Gregory, 319
Young v. Tarbell, 252, 307, 330

Z.

Zouch v. Parsons, 397
Zouch, Peer., 36

ADDENDA ET CORRIGENDA.

Page 7, after "alien," add "But see *Davenport* v. *Davenport*, 7 U. C. C. P. p. 401."

Page 13, note (*r*), instead of "see ante p. 8," read "see ante p. 19."

Page 18, note (*u*), for "10 Cea." read "10 Cl."

Page 25, add to end of note (*v*), "*Jamieson* v. *Fisher*, 2 Er. and App. 242."

Page 60, add to end of note (*a*), *Frampton* v. *Frampton*, L. R. 21 Ch. D. 164."

Page 115, line 17, for "position," read "portion."

Page 121, index to chapter X., for "*derivations*," read "*derivativus*."

Page 149, line 23, for "will," read "rule."

Page 164, line 3, for "invested in," read "invested with."

Page 197, line 9, for "dissieseth," read "disseiseth."

Page 197, line 27, for "notified," read "noticed."

Page 203, note (*p*), for "Park," read "Perk."

Page 211, note (*e*), for "*Giman* v. *Byrne*, 8 U. C. L." read "*Gorman* v. *Byrne*, 8 Ir. C. L."

Page 258, note (*d*), for "6, 16 and 18 Chy." read "6, 16 and 18 Gr."

Page 294, line 7, for "of," read "off."

Page 297, line 3, for "had," read "has."

Page 336, line 12, for "but," read "for."

Page 368, line 14, for "will," read "rule."

Page 372, add to end of note (*x*), "*Dittrick* v. *O'Connor*, 7 U. C. R. 448."

Page 394, line 8, for "requires," read "required."

Page 424, line 14, for "on," read "or."

Page 429, note (*a*), line 1, for "Ven." read "Vern."

Page 432, line 3, after "husband," add "being."

Page 435, line 22, after "analogy," add "would be."

Page 450, note (*w*), after "272," add "S. C. 29, Gr. 287."

Page 457, note (*s*), page 458, note (*t*), and page 481, note (*a*), for "*Chalmers* v. *Stoul*," read "*Chalmers* v. *Storil*."

Page 458, line 5, for "as," read "on."

Page 458, line 17, for "part," read "fact."

Page 458, note (*t*), for "*Holdick* v. *Holdick*, 2 T. & C." read "2 Y. & C."; and same case, page 472, note (*k*), for "2 V. and C.," read "2 Y. & C."

Page 462, line 8, for "privity," read "priority."

Page 462, line 22, for "demises," read "devises."

Page 464, line 9, after "*viduitate*," add "is."

Page 464, line 10, for "has," read "as."

Page 471, note (*j*), for "22 Md." read "22 Ind."

Page 473, after end of note (*n*), add "See also, *Rody* v. *Rody*, 29 Gr. 324."

Page 474, line 9, for "there," read "then."

Page 475, note (*p*), page 476, line 16, page 477, lines 15 and 31, for "*Chalmers* v. *Stone*," read "*Chalmers* v. *Storil*."

Page 478, line 28, for "conveyed," read "devised."

Page 479, line 33, after "estate," add "should."

Page 482, line 3, for "will," read "rule."

Page 486, line 13, after "take," add "both dower and jointure, but shall make election," and omit all words after "take" to end of paragraph.

Page 492, note (*t*), for "P. Mis." read "P. Wms."

Page 497, note (*n*), for "27 Chy." read "27 Gr."

Page 528, line 13, for "amounts," read "accounts."

Page 560, add to note (*c*), "S. C., O. P. R. vol. 9, p. 14."

Page 564, line 4, omit the words "although not."

Page 564, add to note (*s*), "See also *McFarland* v. *McFarland*, O. P. R. vol. 9, p. 73."

A TREATISE

ON THE

LAW OF DOWER.

A TREATISE ON THE LAW OF DOWER.

CHAPTER I.

DEFINITION AND NATURE OF DOWER.

1. *Dower among the Romans.*
2. *Dos of the Civil Law.*
3. *Dower not known to the Saxons*
4. *Dower at Common Law.*
5-7. *Definition of Dower.*
8. *Rights of Quarantine.*
9. *Dower paramount to debts.*
10. *Classification of Dower.*
11. *Commencement of Dower.*
12. *Requisites to perfect the right of Dower.*

1. Dower among the Romans signified the marriage portion which the wife brought to her husband; over which he only acquired a right of enjoyment or *usus fructus*, during the marriage, whether it consisted of land or moveables, and it reverted to the wife at his death (*a*). Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*, which signified in England that kind of estate to which the civil law in its original state had nothing that bore a resemblance.

2. In the Civil Law this term imported the marriage portion which the wife brought the husband, either in land or in money, and corresponded, to some extent, with the

(*a*) Co. on Litt. note a, vol. I. p. 567.

maritagium of the Common Law. The Latin term *dos*, therefore, is properly translated, not by the word *dower*, but by *dowry*, things entirely different in their nature (*b*).

3. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution. From the laws of King Edmund (*c*), the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in Gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands, upon condition that she remained chaste and unmarried (*d*). Some (*e*) have ascribed the introduction of Dower to the Normans, as a branch of their local tenures; but there does not seem to be any feodal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia*, and *dotalitium*) by the Emperor Frederick the Second, who was contemporary with our King Henry III. It is possible that Dower may be, with us, the relic of a Danish custom, since, according to the historians of that country, it was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for its existence is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children (*f*). "The relation of husband and wife," says Sir Joseph Jekyll, "as it is the nearest, so it is the earliest; and therefore the wife is the proper object of the kindness and care

(*b*) Scribner on Dower, vol. i. p. 3.
(*c*) Wilk, 75.
(*d*) Somner Gavelk, 51; Co. Litt. 33; Bro. Dower, 70.
(*e*) Wright 192.
(*f*) Bract. l. 2, c. 39; Co. Litt. 30, Blk. Comm. pp. 102, 103.

of the husband. The husband is bound by the law of God and man to provide for her during his life; and after his death the moral obligation is not at an end; but he ought to take care of her provision during her own life" (*g*). From the earliest period of the existence of the Common Law of England, a very extraordinary degree of favour was bestowed upon this provision for the support of a wife surviving her husband. The reason of this was, that by the old law, if there had been no such provision, the wife would, in case of her surviving her husband, have been left desolate; unless, indeed, some special provision had been made for her at the time of marriage; for the personal estates even of the richest were in those days very inconsiderable; and, before trusts came into general use, the husband could convey to his wife no real estate during his life, nor could he devise it to her by will, except under certain limited conditions, till the statute of Henry VIII. (*h*). According to Lord Bacon, "the tenant in dower is so much favoured, as that it is the common by-word in the law, that the law favoureth three things; (1) Life; (2) Liberty; (3) Dower." It cannot be denied that at the present day many of the reasons which lead to the extraordinary watchfulness of the law over the interests of the dowress do not exist.

4. The severity of the Common Law has been greatly lessened, and conveyances to uses permit of conveyances from husband to wife. The right of separate property in the wife, and the protection thrown around her with respect to her separate earnings, are well recognized.

The right of Dower in this Province has also been greatly extended, so that it may, with a great deal of force, be said that modern legislation is approaching the extreme, and

(*g*) *Banks* v. *Sutton*, 2 P. W. 702.
(*h*) Co. Litt. 567.

in some cases the interest of the widow is protected at the expense of the other relations of the husband.

5. Dower at Common Law, may be defined to be an estate for life to which a wife is entitled after the decease of her husband in the third part of every estate of inheritance of which her husband was solely seized, 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 natural life, whether she has had issue by her husband or not, and provided she be past the age of nine years at the time of her husband's death (*i*).

6. This definition does not, of course, cover what is known as Equitable Dower, under the Statute which will be treated of hereafter.

7. The right of a widow to Dower did not originate from any legislative or other law, but as Blackstone says, from that ancient collection of unwritten maxims and customs called the Common Law, however compounded, or from whatever fountains derived which had subsisted immemorially.

8. Connected with her right of Dower, a widow is entitled to reside in her late husband's mansion for forty days after his death, and to receive her reasonable maintenance during that period. This is called quarantine, and is the period within which her portion of the lands may be assigned to her (*j*).

If, during this forty days or quarantine, she was ejected, she might have her writ *de quarentina habenda* (*k*). But if she married within the forty days she lost her quaran-

(*i*) Litt. cap. 19, vol. I. p. 569, et seq.
(*j*) Park, 250.
(*k*) Park, 250, note b; Gilbert, Dow. 372.

tine (*l*). It has been made a question whether a woman staying in her husband's house during her quarantine may defend the possession thereof by force (*m*).

The right of quarantine still exists, and may be enforced in this country. *Vide* the judgment of Hagarty, J., in *Cooper* v. *Watson* (*n*).

The right to quarantine extends only to the possession of the mansion or dwelling house, and not to any other part of the premises (*o*).

The widow is also entitled during the forty days to what is termed paraphernalia (*p*). By the Statute of Merton, 20 Henry 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 the recovery thereof (*q*).

This was the origin of damages in Dower, now limited to six years by our Statute (*r*).

9. Dower was intended for the sustenance of the widow and the nurture and education of the children, and is paramount to the debts of the husband even owing to the Crown (*s*).

10. Originally, Dower was divided into *five* parts, viz: (1) Dower by the Common Law, as that the wife should have half the husband's lands, or, in some places, the whole,

(*l*) Co. Litt. 34 b, 32 b.
(*m*) Dy. 161 a; Park, 250, note b.
(*n*) 23 U. C. R. 345.
(*o*) *Doe d. Callaghan* v. *Callaghan*, 1 U. C. C. P. 348.
(*p*) *Doe d. Callaghan* v. *Callaghan*, supra; Wm.'s Exors. 491.
(*q*) Reese, vol. I. p. 261.
(*r*) C. S. U. C. cap. 88, sec. 18; Rev. Stat. Ont. cap. 108, sec. 16.
(*s*) Co. Litt. 31 a; Draper Dow. p. 3; 1 Roper on Husb. and Wife, 411; Williams on Real Property, 4th ed. 190; *Re Robertson*, *Robertson* v. *Robertson*, 24 Gr. 442; 25 Gr. 276, 486.

in some only a quarter; (2) Dower *ad ostium ecclesiæ*, which is where tenant in fee simple, of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please of his lands, at the same time specifying and ascertaining the same, on which the wife after the husband's death may enter without further ceremony; (3) Dower *ex assensu patris*; which is only a species of Dower *ad ostium ecclesiæ* made when the husband's father is alive, and the son, by his consent expressly given, endows his wife with parcel of his father's land. In either of these cases there must (to prevent frauds) be made in *facie ecclesiæ et ad ostium ecclesia, non enim valent facta in lecto mortali nec in camera aut alibi ubi clandestina fuere conjugia*; (4) Dower by the custom and (5) Dower *dela plus belle*.

In Canada, however, Dower by custom never could exist (*t*), and Dower *ad ostium ecclesiæ*, and Dower *ex assensu patris* were abolished by Statute (*u*). Dower *dela plus belle*, which arose out of feudal tenure, expired naturally ages ago (*v*). So that in Canada there is but one of the old kinds of Dower, viz: Dower by Common Law, and two new kinds, viz: Dower out of Equitable Estates (*w*), and Dower where the husband had a right of entry or action; but such Dower must be sued for or obtained within the period during which such right of entry or action might be enforced (*x*).

11. From the definition of Dower we have given, it will be apparent that the wife's enjoyment of her Dower cannot begin until the death of her husband; and even then, not

(*t*) *Burrows* v. *Cairns*, 2 U. C. R. 288; Leith's Real Property, p. 82.
(*u*) C. S. U. C. cap. 84, sec. 3; Rev. Stat. cap. 126, sec. 4.
(*v*) Woodeson's Laws of England, vol. II. p. 23; Draper on Dow. p. 3.
(*w*) C. S. U. C. cap. 84, sec. 1; Rev. Stat. c. 126, sec. 1.
(*x*) C. S. U. C. cap. 84, sec. 2; Rev. Stat. cap. 126, sec 2.

until the portion of the estate to which she is entitled is allotted to her. During her husband's lifetime, her right is said to be inchoate; upon his death, the right becomes consummate. After her Dower has been set apart, she becomes a tenant for life of the portion so set apart for her.

The claim to dower is extinct upon the death of the widow (*y*).

12. We will first consider the requisites to perfect the widow's right to Dower. These are (1) Marriage. (2) Death of the husband. But there are some classes of cases in which, even when these requisites are found, the widow would not be entitled to dower. For instance (1) If divorced a *vinculo matrimonii* during coverture. (2) Voluntary elopement and adultery. (3) If the husband has been attainted of treason. (4) If the husband is an alien.

(*y*) *White* v. *Panther*, 1 Knapp, 226.

CHAPTER II.

MARRIAGE.

1. *When right of Dower attaches.*
2. *The regular and the irregular Marriage, and the distinction between Marriage per verba de presenti and per verba de futuro cum copula.*
3-10. *Introduction of the Marriage Law in Ontario, and the Statutes relating thereto.*
11-17. *The Marriage contract.*
18-29. *The impediments to Marriage.*
30-31. *Parties to a Marriage contract.*
32. *Lex loci contractus and Lex Domicilii.*
33. *Marriages invalid where celebrated.*
34-35. *Marriages valid where celebrated, but invalid elsewhere.*
36. *Marriages in Ireland.*
37. *Domicile.*
38-39. *Presumption of Marriage.*
40-54. *Proof of Marriage.*

1. The right to Dower *attaches* upon the land immediately upon *marriage*, or as soon thereafter as the husband becomes seised (*a*).

2. No peculiar circumstances were requisite at *Common Law* to the valid celebration of marriage. The consent of the parties was all that was required, and as marriage was said to be a contract *jure gentium*, that consent was all that was required by nature or public law. By the Common Law, males of the age of 14 and females of the age of 12 were capable of contracting marriage. The formalities to be observed depended upon the doctrines of the ecclesiastical courts. Marriages were divided into two classes, the

(*a*) Park on Dower, p. 3.

regular and the *irregular*. In the regular marriage everything was presumed to be complete and consummated both in ceremony and in substance according to the prescribed formalities of the ecclesiastical law. In the irregular marriage everything was presumed to be complete in substance, but not in ceremony. Irregular marriages comprised marriages *per verba de presenti* and marriages *per verba de futuro cum copula* (*b*). A marriage *per verba de presenti* consisted in a mutual promise of present marriage between persons competent thereto. As when the man said to the woman, "I do take thee to my wife," who then answered, "I do take thee to my husband." No other ceremony was considered essential, nor did consummation by sexual intercourse add anything to its validity (*c*). It is said that the contract thus entered into in contemplation of the ecclesiastical law amounted to complete matrimony; that it was indissoluble by any agreement of the parties, and rendered any subsequent marriage of either of them with any third person absolutely void (*d*). A promise *per verba de futuro* has regard to the future acts of the parties for its completion, and the marriage which it contemplates may never take place. But where *copula* ensues upon the promise, and there are no circumstances to disconnect the cohabitation from the previous mutual engagement, the present consent essential to matrimony, according to some of the authorities, is supposed to be exchanged between the parties at the moment of the intercourse; and the marriage thus contracted and consummated is considered equivalent

(*b*) *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. R. 65-67; Shelf Mar. and Div. 26; Jacob's note, 1 App. Roper H. & W.; 2 Kent 87; Bishop Mar. and Div. 66; Scribner on Dower, vol. I. p. 59.

(*c*) Swinburne on Spousals, 8; *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 66, 82, 87; Shelf Mar. and Div. 27; Bishop Mar. and Div. 66, 67, and cases there cited; Scribner on Dower, vol. I. p. 59.

(*d*) Park on Dower, 8; Swin. Spousals, 9, 13, 15; Shelf Mar. and Div. 27, 33, 34; Opinion of Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. R. 69, 100.

in legal effect to a contract *de verba presenti* (*e*). The legal presumption thus made, though but slightly founded in nature or reality, is held to be abundantly recommended by its equity and the just check which it imposes on perfidy (*f*). There was no recognition of any ecclesiastical authority in forming the connection, and it was considered entirely in the light of a civil contract (*g*).

3. 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 being legally united. Many marriages were celebrated by commanding officers, magistrates, surgeons, etc., which, in law, were illegal and invalid (*h*).

4. The Act of 1792 (*i*) introduced the marriage law as it then existed in England, excepting some clauses of the Act 26 Geo. II. cap. 33. It introduced the Acts 25 Henry VIII. cap. 22; 28 Henry VIII. cap. 7; 28 Henry VIII. cap. 16, and 32 Henry VIII. cap. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England (*j*). A statute (*k*) was passed in 1793 legalizing all such marriages, and declar-

(*e*) Macq., H. and W. 56; Shelf Mar. and Div. 26; *Reid* v. *Laing*, 1 Shaw Ap. Cases 440; *Stewart* v. *Menzies*, 2 Rop. B. Ap. Cases, 547, 591; Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hag. Con. R. 66, 67; 4 Eng. Ec. 490-1; 1 Fras. Dom. Rel. 188; Scribner on Dower, vol. I. p. 94.

(*f*) Macq. H. and W. 6; Scribner on Dower, vol. I. p. 94; *The Queen* v. *Millis*, 10 Clark and Fin. 534; Kent's Com. 87 and note; App. No. 1 Roper H. and W. 447-8; 2 Bright H. and W. 370-2; Wigmore's Case, 2 Salk. 438; *Starr* v. *Peck*, 1 Hill, 270; *Dumaresly* v. *Fishly*, 3 A. K. Marsh, 369.

(*g*) 2 Kent's Com. 86, 87.

(*h*) Draper on Dower, p. 8.

(*i*) 32 Geo. III. cap. 1.

(*j*) *Hodgins* v. *McNeil*, 9 Gr. 307.

(*k*) 33 Geo. III. cap 5.

ing them to be good and valid in law, to all intents and purposes (*l*). That statute, after reciting 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 marriage, 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 enacted. 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." And it was further enacted (*m*) that certificates of such marriages might, at any time within three years from the passing of the Act, be obtained from the magistrate of the district where the parties had contracted matrimony and recorded in the office of the Clerk of the Peace in a register, and that an attested copy of such register should be sufficient evidence of such marriage.

(*l*) Draper on Dower, 8.
(*m*) 33 Geo. III. cap. 5, sec. 2.

5. By this Act Justices of the Peace were authorized to perform the marriage ceremony, but it was provided that as soon as there should be five parsons of the Church of England doing duty in any one district, the authority of the justices should cease. A penalty was imposed for performing the ceremony thereafter, and any such marriage declared void. The Statute 38 Geo. III. cap. 4, authorized ministers of the Church of Scotland, or Lutherans, or Calvinists, to celebrate matrimony between any two persons not legally disqualified to contract marriage, one of whom had 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 of the marriage (*n*).

6. The Statute 59 Geo. III. cap. 15, extended the provisions of the 33 Geo. III. cap. 5, and directed how parties might preserve the evidence of their marriage and birth of their children. This Act was passed in 1818 (*o*).

7. The Statute 11 Geo. IV. cap. 36, assented to second of March, 1831, declared, "That the marriage or marriages 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 2 points out the method of preserving the evidence of such marriages (*p*).

(*n*) Draper on Dower, 9.
(*o*) Draper on Dower, 9.
(*p*) Draper on Dower, 10.

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 shows the mode of preserving the evidence of such marriage in the Clerk of the Peace's office (*q*).

8. By the Statute 20 Vic. cap. 66, it was enacted that ministers of any denomination might solemnize marriage, and that the return respecting the marriage was to be made to the Registrar of the County in which the marriage took place (*r*).

9. The Statutes 10 and 11 Vic. cap. 18, and 24 Vic. cap. 46, and 32 Vic. cap. 30, amended by 33 Vic. cap. 22, relate to the solemnization of marriage.

10. By the Statute 20 Vic. cap. 46 (*s*), it is enacted that the ministers of every church and religious denomination, duly ordained or appointed according to the rights and ceremonies of the churches or denomination to which they respectively belong, and resident in Ontario, may, by virtue of such ordination or appointment, and according to the rights and usages of such churches or denominations respectively, solemnize marriage, between any two persons not under a legal disqualification to contract such marriage. By section 2, it is enacted that no minister shall celebrate the ceremony of marriage unless duly authorized to do so by license under the hand and seal of the Lieut.-Governor, or his deputy duly authorized in that behalf, or by a certificate given under the Act, or unless the intention of the two persons to intermarry has been proclaimed publicly, either

(*q*) Draper on Dower, 10.

(*r*) Rev. Stat. cap. 124, sec. 1. For an explanation of the meaning of canonical and legal disqualifications, see ante page 8.

(*s*) C. S. U, C. cap. 672, sec. 1; Rev. Stat. cap. 124, sec. 1.

in the church or chapel in which one of the parties has been in the habit of worshipping, or in some church, chapel, etc., with which the minister who performed the ceremony is connected in the local municipality, etc., where one of the parties has, for the space of fifteen days, immediately preceding, had his usual place of abode, such proclamation to be on a Sunday, immediately before the service begins, or immediately after it ends, or at some intermediate part of the service (*t*).

SECTION 3 provides for the granting of a certificate instead of a license (*u*).

SECTION 4 provides for the issuing of licenses or certificates (*v*).

SECTION 5 provides for the validity of licenses signed by official persons who have vacated their offices (*w*).

SECTION 6 provides for the punishment of persons who issue licenses or certificates without being properly authorized to do so (*x*).

SECTION 7 provides for the appointment of deputy issuers of licenses or certificates. The sub-sections of section 7 make certain provisions concerning deputy issuers (*y*).

SECTION 8 provides for the manner in which deputies are to sign licenses (*z*)

(*t*) C. S. U. C. cap. 72, sec. 2; 37 Vic. cap. 6, secs. 2, 4, last part; Rev. Stat. cap. 13, sec. 2.
(*u*) 37 Vic. cap. 6, sec. 3; 39 Vic. cap. 3, sec. 2.
(*v*) 37 Vic. cap. 6, sec. 4.
(*w*) 38 Vic. cap. 8, sec. 1; Rev. Stat. cap. 13, sec 2.
(*x*) 38 Vic. cap. 8, sec 2.
(*y*) 38 Vic. cap. 8, sec 3; 39 Vic. cap. 3, sec 4.
(*z*) 38 Vic. cap. 8, sec. 4.

SECTION 9 provides for the return of unissued licenses to the Provincial Secretary (*a*).

SECTION 10 provides for the expenses incident to providing licenses and certificates (*b*).

SECTION 11 and its sub-sections provide for the form of affidavit to be made before license or certificate is granted (*c*).

SECTION 12 provides that if the issuer has personal knowledge or reason to suspect that the affidavit is untrue, he shall, before issuing the license or certificate, require further evidence to his satisfaction in addition to the affidavit (*d*).

SECTION 13 provides that the father, if living, of any party under twenty-one years of age (not being a widower or widow), or, if the father is dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of the guardians, if there are more than one, or in case there is no such guardian, then the mother of the minor, if the mother is unmarried, shall have authority to give consent to the marriage (*e*).

SECTION 14 provides for the payment of fees for the the license or certificate (*f*).

SECTION 15 provides that it shall not be a valid objection to the legality of marriage that the same was not solemnized in a consecrated church or chapel, or within any particular hours (*g*).

(*a*) 38 Vic. cap. 8, sec. 5.
(*b*) 37 Vic. cap. 6, sec. 9.
(*c*) 37 Vic. cap. 6, sec. 5; 39 Vic. cap. 3, sec. 1, first part.
(*d*) 37 Vic. cap. 6, sec. 7; 39 Vic. cap. 3, sec. 1, last part.
(*e*) 37 Vic. cap. 6, sec. 6.
(*f*) 37 Vic. cap. 6. sec 8.
(*g*) C. S. U. C. (cap.) 92, sec. 3; *Regina* v. *Secker*, 14 U. C. R. 604, English Stat. 26 Geo. III. cap. 33, sec. 8, prohibited marriages in any other place than a church or public chapel, except by public license.

SECTION 16 provides that ministers marrying must, if required, give a certificate of the marriage, and may demand a fee of twenty-five cents for such certificate (*h*).

SECTION 17 provides that every minister shall enter in a book to be kept by him for that purpose, a true record of the marriage, and shall specify all the particulars given in Schedule B. to the Act respecting the registration of births, marriages and deaths (*i*).

SECTION 18 provides that the Clerk of the Peace shall, at the expense of the County, furnish to ministers the books and printed forms necessary for their use (*j*).

SECTION 19 provides that such books shall be the property of the church to which the clergyman belongs at the time of the first marriage which he records therein (*k*).

SECTION 20 provides that 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 all the duties imposed by this Act, or by the Act respecting the registration of births, marriages, and deaths, upon a minister or 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 (*l*).

SECTION 21 provides that no minister, who performs any marriage ceremony after banns published, or after a license or certificate under this Act issued, shall be subject to any action or liability for damages or otherwise, by

(*h*) C. S. U. C. cap. 72, sec. 4.
(*i*) C. S. U. C. cap. 72, secs. 5, 6.
(*j*) C. S. U. C. cap 72, sec 13.
(*k*) C. S. U. C. cap. 72, sec. 14.
(*l*) C. S. U. C. cap. 672, sec 11.

reason of there having been any legal impediment to the marriage, unless at the time when he performed the ceremony he was aware of the impediment (*m*). It is provided by Statute that the Lieut.-Governor may appoint a deputy for the purpose of executing marriage licenses (*n*). It has been held in Quebec that marriage in a Roman Catholic Church is a *sacrament, and a spiritual and religious bond*, over which the Superior Court *has no jurisdiction*, and that civil marriage does not exist under our law, the law merely giving civil effect to a religious marriage validly celebrated, by regularly ordained ministers authorized to keep marriage registers (*o*).

11. The contract of marriage is in its essence a consent on the part of a man and woman to cohabit with each other, and with each other only. The religious element does not require anything more of the parties, and therefore it is not essential that all the words of the marriage service should be repeated by the man and woman, or should be actually said; but the ceremonies required by law, such as the publication of banns and the like, having been complied with, the hands of the parties having been joined together, and the clergyman having pronounced them to be husband and wife, if they understand that by that act they have agreed to cohabit together and with no other person, they are married (*p*).

12. As the free assent of the mind is essential to every contract, and constitutes its very essence, it follows that where an apparent consent to a contract of marriage is the result purely of compulsion, fear or violence, the material

(*m*) 37 Vic. cap. 6, sec. 10.

(*n*) 37 Vic. cap. 8, sec. 1; 40 Vic. cap. 7, Sched. A; Rev. Stat. cap. 13, sec. 2.

(*o*) *Laramee* v. *Evans*, U. C. L. J. 1880, p. 335.

(*p*) *Harrod* v. *Harrod*, 1 K. & J. 4; 18 Jur. 853.

element to its validity is wanting, and it is therefore void. A marriage thus procured may be treated as null in every court in which its validity is drawn in question (*q*).

13. A marriage procured by fraud may be dissolved upon the application of the party who has been deceived. But such a marriage is not *ipso facto* void (*r*). Intoxication to such a degree as to deprive a man of all sense and volition is sufficient to render a marriage voidable (*s*). Such an alliance may become a good marriage by ratification.

14. In *Frank* v. *Carson* (*t*), it was held that a written contract was not essential to the validity of a *Jewish Marriage* which had been solemnized without the usual forms and ceremonies of the Jewish service and faith, and that such a marriage was valid though there existed in relation to it a written contract not produced.

15. A marriage between English subjects celebrated according to the Church of England, but not in the presence of a priest in holy orders, is valid at the Common Law (*u*).

16. A person whose baptismal and surname were A. H. was married by banns by the name of G. S., having been known in the parish where he resided and was known by that name only from his first coming into the parish till his marriage, which was about three years; it was held that the

(*q*) Park on Dower, 16; Scribner on Dower, 120; Shelf on Mar. and Div. 213; Bishop on Mar. and Div. 119, 121.

(*r*) Scribner on Dower, 122

(*s*) *Roblin* v. *Roblin*, C. L. T. vol. I, p. 434.

(*t*) 15 U. C. C. P. 135.

(*u*) *Catherwood* v. *Caslon*, 13 M. and W. 261; *Regina* v. *Millis*, 10 Cea. and Fin. 534; 7 Jur. 911, 983; *Rex* v. *Mainwaring*, 1 Dear and B. C. C. R. 134, 139; Draper on Dower, 19.

marriage was valid (*v*), but otherwise where the right name is designedly concealed (*w*), but both parties must be privy to such mispublication (*x*). A marriage by license under a false name is valid (*y*).

17. A marriage is *valid* though celebrated *without banns or license* first had and obtained, unless both parties were aware at the time of the ceremony of the absence of banns and license (*z*). A marriage celebrated in Scotland without banns or license is good (*a*).

18. The right to Dower does not attach upon a marriage *void* in law. The impediments to marriage are of two kinds *Canonical and Civil.* The first interposes obstructions to the celebration of marriage, the other affects its validity notwithstanding its actual solemnization in due form. The canonical disabilities are consanguinity, affinity and impotence. They render a marriage voidable only.

19. The civil disabilities are prior marriage undetermined, idiocy, lunacy or mental incapacity, and want of age. These disabilities, with the exception of the last, make the contract void *ab initio*, because the parties are incapable of contracting. Marriage procured by duress is also considered void.

(*v*) *Rex* v. *Billinghurst*, 3 M. and S. 250; *Rex* v. *St. Faiths*, Newton, 3 D. and R. 348.

(*w*) *Tongue* v. *Tongue*, Moore P. C. C. 90; *Rex* v. *Tibshelf*, 1 B. and Ad. 190.

(*x*) 4 Geo. IV. cap. 76, sec. 22; *Rex* v. *Wroxton*, 1 N. and M. 712; 4 B. and Ad. 641; *Brealy* v. *Reed*, 2 Curt. 833; Midgley, fc., *Wood* v. *Wood*, 30 L. J. Mat. Cases, 57; 4 S. and T. 267; *Templeton* v. *Tyrel*, 2 L. R. P. 420; 41 J. N. Mat. 86; 27 L. J. 429; 21 W. R. 81; *Gomperty* v. *Kensit*, 13 L. R. Eq. 369; 41 L. J. cap. 382; 26 L. J. 95; 20 W. R. 313, V. C. B.

(*y*) 3 L. T. N. S. 820; 7 Jur. N. S. 218; 30 L. J. Mat. Cases, 361; *Lane* v. *Goodwin*, 3 G. and D. 610; 4 Q. B. 361; 7 Jur. 372; 12 L. J. Q. B. 157; *Rex* v. *Burton upon Trent*, 3 M. and S. 537; Beaver, fc., *McMahon* v. *McMahon*, 2 S. and T. 230.

(*z*) *Greaves* v. *Greaves*, 2 L. R. P. 423; 41 L. J. Mat. 66; 26 L. J. 745; 20 W. R. 802.

(*a*) *Ex parte* Hall, 1 Rose 30.

20. A marriage *de jure* is one that is neither void nor voidable in law.

A marriage *de facto* is one that is open to legal objection not from any want of the requisite solemnities, but from pre-existing impediments, or other causes rendering it liable to be dissolved *ab initio*, and therefore voidable and liable to be entirely annulled by decree of the proper tribunal. Such a marriage is valid in law and carries with it all the incidents of the marriage *de jure* until such decree is pronounced. And if no decree of separation be actually made during the lifetime of both the parties, the marriage is then considered no longer voidable, but shall stand; for after the death of either of the parties it is too late to apply for the avoidance of the marriage contract. Therefore all marriages not absolutely void including, those that are voidable, but which have not been dissolved during the lifetime of the parties confer a right to dower (*b*).

21. In England, the 5 and 6 William IV., cap. 54, sec. 2 (passed 31st August, 1835), enacts that all marriages which shall thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be null and void. The prohibited degrees are those declared by 28 Henry VIII., cap. 7, sec. 11, to be prohibited by God's law (*c*).

22. The Statutes 28 Henry VIII., cap. 16, 32 Henry VIII., cap. 38, 26 George II, cap. 33, declare marriages with a deceased wife's sister invalid (*d*). Lord Lyndhurst's

(*b*) Co. Lit. 32 a, 33 b; 1 Roper, H. and W. 333; 2 *Ibid*, 462; 2 Bright, H. and W. 385; Park on Dower, 14, 21; 1 Bl. Com. 434 and note; Bishop Mar. and Div. 57; Brury's Case 5, Co. 98 b; Scribner on Dower, 109.

(*c*) For a table of the prohibited degrees, see Shelf on Mar. and Div., 169; Bishop on Mar. and Div. 259, note.

(*d*) *Regina* v. *St. Giles-in-the-Fields*, 1 S. P.; *Regina* v. *Chadwick*, 11 A. and E. 173; 12 Jur. 174; 17 L. J. Q. B. 81. This law extends to an illegitimate as well as to a legitimate child of his late wife's parents. *Brook* v. *Brook*, 9 H. L. Cas. 193; 7 Jur. N. S. 422; 9 W. R. 461; 4 L. T. N. S. 93; S. C. 3 Sm. and G. 481; 4 Jur. N. S. 317; 27 L. J. Chy. 401. Affirmed.

Act, 5 and 6 William IV., cap. 54, declares such marriages not merely voidable, but actually null and void *ab initio*. It has been decided in Canada that Lord Lyndhurst's Act does not apply to the colonies, and that although such marriages are unlawful and voidable, if their validity has not been called in question till after the husband's death, they must be treated as valid, and the issue legitimate *de facto*, although not so *de jure* (*e*).

23. The marriage of a man with a daughter of the half-sister of his deceased wife is null and void; and the fact that one of the parties is illegitimate does not alter the case (*f*).

24. Impotence is such an incurable incapacity as admits of neither copulation nor procreation. Impotence does not render a marriage void, but only voidable; and consequently, unless sentence is passed during the lifetime of both the parties, the marriage, notwithstanding this impediment, is good (*g*).

25. There are, as we have seen, cases in which the contract of marriage is in its own nature a mere nullity. The case of *bigamy* in particular is an example of this. "If a man seized of lands, tenements or rent, etc., in fee, take a 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 living the same husband, she marrieth another husband who is seized of land in fee, and the second husband die, she shall not have dower of his land *causa patet*" (*h*).

(*e*) *Hodgins* v. *McNeil*, 9 Gr. 307; Park on Dower, 21.

(*f*) *Reg.* v. *Brighton*, 1 B. & S. 447; 30 L. J. M. C. 197; 9 W. R. 831; 5 L. T. N. S. 56.

(*g*) Bishop on Mar. and Div., 228; Scribner on Dower, 139.

(*h*) Perk, ss. 304, 305; Taylor on Evidence, 904; 1 Salk. 120; Cro. Eliz. 858; Park on Dower, 15.

26. Mr. Park (*i*) says: "It was formerly held that a wife of an *idiot* should be endowed, but Sir W. Blackstone is of opinion that the law would be otherwise now, on the ground of the decision that an idiot, being incapable of consent, cannot contract marriage, and that marriages of persons found lunatic by inquisition are declared void to all intents and purposes by the Statute Law (*j*). This Statute is, however, limited to cases where a commission of lunacy has issued. If it is clear that at the time of entering into the contract the mind was diseased, the Court will not enter into a consideration of the extent of the derangement, but will declare the marriage null and void (*k*).

27. In *Hancock* (falsely called *Peaty*) v. *Peaty*, 1 L. R. D. 341, Lord Penzance says: "It was strenuously argued also on the part of the respondent that a marriage duly celebrated was not to be lightly annulled, and it was rather hinted than asserted that a less degree of sanity would be sufficient to make a marriage valid than would be required for the making of a will and for some other purposes. But the court here has not, as in many testamentary cases, to deal with varieties or degrees in strength of mind, with the more or less failing condition of intellectual power in the prostration of illness or the decay of faculties in extended age. The question here is one of health or disease of mind; and if the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power."

(*i*) Page 8.

(*j*) 15 Geo. II., cap. 30.

(*k*) *Hancock* (falsely called *Peaty*) v. *Peaty*, 1 L. R. D. 335-36; L. J. Mat. Cas. 57; *Turner* v. *Meyers*, 1 Hagg. Con. R. 414.

28. Whatever may have been the ancient law upon the subject, it is now well settled that the marriage of an idiot or insane person confers no right to Dower. This rule is based upon the principle that the consent of a free and rational agent is essential to the validity of a marriage contract (*l*). When unsoundness of mind is relied upon to defeat the marriage contract it must be shown to have existed at the time the contract was entered into; subsequent insanity does not avoid it (*m*). No decree of nullity is necessary in cases either of idiocy or insanity as preliminary to the right to insist upon the existence of the disability in any proceeding in which the question may legitimately arise. The question may be raised and decided in an action for Dower for distribution, or in any other proceeding affecting rights or claims depending upon the validity or invalidity of the alleged marriage contract (*n*).

29. The disability arising from *want of age* produces substantially the same effect as a canonical disability. The marriage may be avoided by either of the parties when the party labouring under the disability arrives at the age of consent (*o*).

(*l*) Park on Dower, 16; Shelf on Mar. and Div. 183; 1 Bl. Com. 438; *Turner* v. *Meyers*. 1 Hagg. Con. R. 414; *Browning* v. *Reane*, 2 Phill. R. 69; 2 Kent, 75, 76; Roper on Husband and Wife, 339; Lambert on Dower, 17; Bishop on Mar. and Div. cap. 9; *Jenkins* v. *Jenkins*, 2 Dana (Ky.) 102; *Crump* v. *Morgan*, 3 Ire.. Eq. (N. C.) 91; *Foster* v. *Means*, 1 Speer's Eq. (S. C.) 569; *Farnshill* v. *Murray*, 1 Bland Md.), 479; *True* v. *Ranney*, 1 Fost. N. H. 52; *Keyes* v. *Keyes*, 2 Fost. N. H. 553; *Ward* v. *Duloney*, 23 Missis, 410; *Rawdon* v. *Rawdon*, 28 Ala. 565.

(*m*) Shelf on Mar. and Div. 190; Bishop on Mar. and Div. 180; *Parnell* v. *Parnell*, 2 Hagg. Con. R. 169; Page on Divorce, 185 note.

(*n*) Park on Dower, 17; 2 Kent, 76; Bishop on Mar. and Div. 187; 2 Greenl. Ev. 464; *Wightman* v. *Wightman*, 4 John. Ch. 343; *Jacques* v. *The Public Admr.*, 1 Bradf. Sur. 499; *Middleborough* v. *Rochester*, 12 Mass. 363; *Jenkins* v. *Jenkins*, 2 Dana, 102; *Foster* v. *Means*, 1 Speer's Eq. (S. C.) 569; *Johnson* v. *Kincade*, 2 Ired. Eq. 470; *Rawdon* v. *Rawdon*, 28 Ala. 565; Scribner on Dower, vol. 1. p. 119.

(*o*) Bishop on Mar. and Div. 46, 56; Shelf on Mar. and Div. 154; Scribner on Dower, vol. i. p. 110.

30. 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 (*p*).

"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* (*q*). Lord Coke also adds:—"If a man taketh a wife of the age of seven years and after alien his land, and after the alienation the wife attaineth to the age of nine years, and after the husband dieth the wife shall be endowed, for albeit she was not absolutely dowable at the time of the marriage; yet she was conditionally dowable, viz., if she attained to the age of nine years before the death of the husband, for by his death the possibility of dower is consummate."

31. The Statute 26 Geo. II., cap. 33, declares that marriages of infants by license and without publication of banns, and by consent of parents, are illegal, and sec. 11 of that Act declares them void. That section, however, is not in force in Ontario, and such marriages therefore are not void in this Province (*r*). They are, however, illegal

(*p*) Park on Dower, 8, 9; Draper on Dower, 7.

(*q*) Co. on Litt. 33 a; Bissett on Estates for Life, 69; Park on Dower, 18; Draper on Dower, 7.

(*r*) *Regina* v. *Roblin*, 21 U. C. R. 352; *Regina* v. *Bell*, 15 U. C. R 287.

and in breach of the usual bond conditioned that no impediment exists (*s*). Where banns have been published and there has been no dissent then expressed by parents or guardians, the non-age of the husband is no objection to the validity of the marriage even under this Statute (*t*). It was held in *Hodgins* v. *McNeil* (*u*), that Lord Lyndhurst's Act, 5 and 6 Wm. IV., cap. 54, does not extend to the colonies.

32. 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* (*v*). The rule that 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 parties belong (*w*); and therefore a marriage in the United States between parties domiciled in Canada, who cannot contract marriage here, would be held illegal here. It has been held, on appeal to the House of Lords, that marriage with a deceased wife's sister, although celebrated in a foreign country where such marriages are held to be legal, is illegal in England (*x*).

(*s*) *Hodgins* v. *McNeil*, 9 Gr. 307.

(*t*) *Regina* v. *Secker*, 14 U. C. R. 604.

(*u*) 9 Gr. 305.

(*v*) Alison, *In re*, 31 L. T. 638; 23 W. R. 226; *Brook* v. *Brook*, 7 Jur. N. S. 1183; Draper on Dower, 12; *Harris* v. *Cooper*, 31 Q. B. 182; 22 L. J. Chy. 401; *Sottomayer* (otherwise *De Barros*) v. *De Barros*, 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 415; 26 W. R. 456; 27 W. R. 917; 5 P. D; 49 L. J. P. 1; 41 L. T. 281; Story on Conflict of Laws, 113 a; Bishop on Mar. and Div. 130.

(*w*) Story on Conflict of Laws, 84; Huberus de conflictu legum, lib. i. tit. 3, sec. 8; *Compton* v. *Bearcroft*, Bull N. P. 114; 2 Kent's Com. 92; *Mette* v. *Mette*, 28 L. J. Prob. 117; *Brook* v. *Brook*, 7 Jur. N. S. 422; Draper on Dower, 13.

(*x*) *Brook* v. *Brook*, 7 Jur. N. S. 422; *Fenton* v. *Livingstone*, 5 Jur. N. S. 1183.

33. It is well settled as a general proposition that a marriage invalid where it is celebrated is everywhere invalid (*y*); but there are certain exceptions to that rule. They are briefly stated by Mr. Bishop as follow: First.—Cases in which the parties cannot contract marriage in accordance with the local law where they are. Secondly.—Those wherein, on various grounds, a local law has sprung up in the foreign country applicable to sojourners from other countries under which they are married, differing from the general *lex loci contractus*, yet recognized as well by it as by the law of their domicile. To which may be added, thirdly: The case of a victorious invading army carrying with it the laws of its own country for the protection of persons within its lines and general range of dominion" (*z*).

34. A marriage contracted in a country where *polygamy* is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English matrimonial court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations (*a*).

(*y*) Bishop on Mar. and Div. 132; *Kent* v. *Burgess*, 11 Sim. 361; *Greenwood* v. *Curtis*, 6 Mass. 358, 378; *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. R. 54; *McCulloch* v. *McCulloch*, Ferg. 257; Scribner on Dower, vol. i. pp. 140, 141.

(*z*) Bishop on Mar. and Div. 133; see also *Ruding* v. *Smith*, 2 Hagg. Con. R, 371; Roger's Ec. Law, 652; *Kent* v. *Burgess*, 11 Sim. 361; Lord Clancurry's Case, Cruise on Dignities, 276; *Lloyd* v. *Petitjean*, 2 Curt. Ec. 251; Calvin's Case, 7 Co. 1, 17 b; *Campbell* v. *Hall*, Cowp. 204-209; *Rex* v. *Brampton*, 10 East, 282, 288; *Fowler* v. *Smith*, 2 Cal. 39; Poynter on Mar. and Div. 289; Woodd. Dig. 238 note; 1 Burge Col. and For. Laws, 199; 2 Roper on Hus. and Wife, 497; Shelf on Mar. and Div. 78-87; Scribner on Dower, vol. i. p. 142.

(*a*) *Hyde* v. *Hyde and Woodmansee*, 1 L. R. D. 130; 12 Jur. N. S. 414; 35 L. J. Mat. Cases, 57; 14 W. R. 517; 14 L. T. N. S. 188.

35. It has been decided that *British subjects resident in a British settlement* abroad are governed with respect to marriage by the law which existed in England 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, by custom at Madras, it is necessary to obtain (*b*). 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, 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, continuing down to the period of the husband's death. 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 presenti* 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 (*c*).

(*b*) *Latour* v. *Teesdale*, 2 Marsh, 243 S. C. 8 Taunt. 830; Draper on Dower, 13.

(*c*) *Rex* v. *Brampton*, 10 East, 286.

36. *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 Statute 5 and 6 Vic., cap. 26; and such marriages celebrated before that Act are legal marriages in this country (*d*). A marriage celebrated in Scotland will entitle the woman to Dower in England (*e*).

37. *Domicile* is the place at which a person has his principal residence, and that is generally construed to be the place at which he keeps his wife and family. In the case of infants and married women, their domicile is that of their parents or husband. A domicile may be either orginal or acquired. The original domicile is that at which the parents of the person are domiciled at the time of his birth, and usually agrees (under English law) with his nationality (*f*). 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 of actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto* (*g*).

38. There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct and satisfactory disproof. The maxims *semper presumitur pro matrimonio, and omnia presumuntur ritè et solemniter acta*, which raised the presumption of law that a special license existed authorizing a marriage, can only be repelled by strong, distinct, satisfactory and conclusive evidence to the

(*d*) *Doe d. Breaky* v *Breaky*, 2 U. C. R. 349.
(*e*) *Ilderton* v. *Ilderton*, 2 H. Bl. 145.
(*f*) Brown's Law Dictionary, 123.
(*g*) *Att'y-Gen'l* v. *Rowe*, 31 L. J. Ex. 314; 6 L. T. N. S. 438; Draper on Dower, 13.

contrary; and every reasonable possibility of a fact in favour of the presumption must be rebutted. It requires the strongest evidence to repel the *presumptio juris* (*h*). Where no direct evidence of the performance of the ceremony of marriage is given, but there is evidence of cohabitation and reputation, this will not justify the presumption of a marriage; in fact, a presumption would then be raised that a crime had been committed (*i*).

39. The doctrine on this subject is thus laid down in Best on Presumptions, page 64 :—"It is a *presumptio juris*, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum prohibitum*, or even done any act involving a civil penalty, such as loss of dower, etc. And this presumption is not confined to proceedings instituted with the view of punishing the supposed offender, but holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or indirectly.

40. *Direct proof of the marriage* is commonly made by the testimony of witnesses present at the celebration, or by an examined or certified copy of the register of the marriage, where such registration is required by law, with proof of the identity of the parties. Direct proof of marriage is not required, except upon the trial of indictments for polygamy or adultery, or in actions for criminal conversation. Nor, except in these instances, is it necessary to prove any license, publication of banns, or compliance with any other Statute formality, unless some

(*h*) *Preis* v. *Preis*, 2 H. L. Cas. 331; 13 Jur. 569.

(*i*) *Wright* v. *Skinner*, 17 U. C. C. P. 317; *Rex* v. *Twining*, 2 B. and Ald. 386; *Rex* v. *Harborne*, 2 E. and E. 540: *Lopsley* v. *Greerson*, 1 H. L. Cas. 498; Best on Evidence, sec. 334.

Statute expressly requires it as preliminary evidence (*j*). Marriages 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 (*k*).

41. Prior to the Statute 20 Vic., cap. 66, passed 10th June, 1857, evidence of marriage was always to be sought for in the office of the clerk of the peace (*l*), but by that Statute it was enacted that after first of January, 1858, returns of marriages were to be made to the registrar of the county in which the marriage took place.

42. The Statute (*m*) provides that every clergyman or minister shall immediately after he has solemnized a marriage, enter into a book to be kept by him for that purpose a true record of the marriage, which record shall specify all the particulars given in Schedule "B" to the Act respecting the registration of births, marriages and deaths. The R. S. O., cap. 36, sec. 7, provides that every clergyman, minister, or other person authorized by law to marry, shall keep a registry, showing the persons whom he has married. Section 11 of the same Statute provides that every marriage shall be reported to the registrar of the division within which the marriage is celebrated within ninety days from the date of the marriage. The clerk of the municipality of each city, town, village, etc., except within Algoma, Nipissing, etc., shall be the division registrar (*n*). The Provincial Secretary shall be the registrar-

(*j*) Hubb, Ev. Succes. 239; Green, L. Ev. 461.

(*k*) Taylor on Evidence, 297; *Evans* v. *Morgan*, 2 C. & J. 453; *R.* v. *Allison*, R. & R. 169; *Read* v. *Passor*, Rea R. 232; 1 Esp. 216; Roscoe's N. P. Ev. 2; *Sayer* v. *Glossop*, 2 C. & K. 694; 2 Exch. 409; 12 Jur. 465; 17 L. J. Exch. 300.

(*l*) 33 Geo. III. cap. 5.

(*m*) C. S. U. C. cap. 72, S. S. 5, 6; Rev. Stat. cap. 124, sec. 17.

(*n*) 39 Vic. cap. 2, sec. 2; 40 Vic. cap. 7, Sched. A. 23; Rev. Stat. cap. 36, sec. 3.

general of the Province (*o*). The division registrars shall make returns to the registrar-general on or before the 15th days of January and July, in each of the forms containing the original entries, certified under his hand of the marriages of the previous six months (*p*).

43. The registrar-general shall cause the original returns of marriage to be arranged, indexed, bound, and kept in his office (*q*). All persons shall be entitled to search these records and to require and receive extracts duly certified by the registrar-general or inspector, which extracts shall be evidence of the entry certified, and *prima facie* evidence in any Court of law or equity in this Province of the facts therein stated (*r*).

44. *A certificate* of marriage by a 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, was held to be sufficient to establish the marriage against the evidence of cohabitation and reputation of marriage with another person alive a the time of the second marriage, defects of form in such cases being cured by 11 Geo. IV., cap. 36 (*s*). A certificate of marriage by the clergyman or other person in whose presence it was celebrated, is not of itself evidence of the statements contained therein unless it be proved as an examined copy of the register (*t*). But a certificate of marriage, if proved to have been kept in the custody of a person

(*o*) 39 Vic. cap. 2, sec. 1; Rev. Stat. cap. 36, sec. 2.
(*p*) 39 Vic. cap. 2, sec. 5; Rev. Stat. cap. 26, sec. 6.
(*q*) 39 Vic. cap. 2, sec. 17; Rev. Stat. cap. 36, sec. 18.
(*r*) 39 Vic. cap. 2, sec. 18; Rev. Stat. cap. 36, sec. 19.
(*s*) *Doe d. Wheeler* v. *Mac Williams*, 2 U. C. R. 77.
(*t*) Anon Lofft, 328; *Nokes* v. *Milward*, 2 Add. 386; *Gaines* v. *Relf*, 12 How. U. S. 472; Scribner on Dower, vol. ii. p. 196.

whom it affects, may be read as collateral proof (*u*). Such certificate also, or other document of the like character, may be read as evidence confirmatory of the proof by reputation and cohabitation (*v*). Proof of marriage in Chili was established by the production of a certified extract of the entry of the marriage in the marriage register, proved to be kept in Chili, in compliance with the requirements of the laws of Chili, and to be admissible in Chili, upon the Court being satisfied of the identity of the parties named in the certificate and of the curate or rector who gave the certificate (*w*). A copy of the register of a foreign marriage is not evidence to prove a marriage unless it is required to be kept by the law of the country to which it belongs, or by the law of this country (*x*). A certificate of a marriage in a foreign country, not purporting to be a copy of an entry in a registry of marriages kept by the law of that country, but only containing a reference to the registry, cannot be received as evidence of the marriage, although it would be evidence of the marriage in the foreign courts (*y*).

The ground of this decision is, that although the cause of action must be judged of according to the law of the country where it originated, those rules of evidence must be adopted which are in force in the country where the action is brought (*z*).

(*u*) Per Dallas, C.J., in *Beer* v. *Ward*, cited Hubb. Ev. Succes. 237; *Birt* v. *Barlow*, 1 Doug. 171; Scribner on Dower, vol. ii. p. 196.

(*v*) *Doe* v. *Grazebrook*, 4 Ad. and El. N. S. 406; *Rex* v. *Brampton*, 10 East, 287.

(*w*) *Abbott* v. *Abbott and Godey*, 4 S. and T. 254; 29 L. J. Mat. Cases, 57; *Coode* v. *Coode*, 1 Curt. 755, 766, 767.

(*x*) *Leader* v. *Barry*, 1 Esp. 353; *Abbott* v. *Abbott and Godey*, 4 S. & T. 254; 29 L. J. Mat. Cases, 57; Perth, Peer. 2 H of L. Cas. 865, 873, 874, 876, 877.

(*y*) *Finlay* v. *Finlay and Rudall*, 31 L. J. Mat. Cases, 149.

(*z*) Taylor on Ev. 7th Ed. p. 65.

45. The certificate of a foreign ambassador under the seal of the legation is sufficient evidence of the country by which he is accredited (*a*).

46. In a suit for dissolution of marriage it appeared that the petitioner and respondent *lived together for five years* in Virginia, and were received in society *as man and wife;* that, by the law in force in Virginia, when the cohabitation began no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriage required to be kept; and that, in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not be obtained. It was held that there was sufficient proof of the marriage, and that the identity of the parties might be proved by circumstantial evidence (*b*).

47. In actions of Dower, evidence of *cohabitation and reputation* of marriage will be sufficient. It is not necessary to prove the marriage by persons who were present at the ceremony. Cohabitation for three years as man and wife is sufficient evidence of a marriage in questions of title, but not on an indictment for bigamy, for the Court will not presume facts which tend to prove a person guilty of a crime (*c*). A marriage may be established by prepon-

(*a*) Klingenann, In goods of, 32 L. J. Prob. 16; 3 S. & T. 18.

(*b*) *Rooker* v. *Rooker and Newton*, 33 L. J. Mat. Cases, 42; 3 S. & T. 526; 9 Jur. N. S. 1329; 12 W. R. 807.

(*c*) *Stoner* v. *Walton*, Mich. Term. 5 Vic., upheld in *Phipps* v. *Moore*, 5 U. C. R. 16; *Graham etux* v. *Law*, 6 U. C. C. P. 310. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 262; *Doe Wheeler* v. *Mac Williams*, 2 U. C. R. 80; *Doe d. Breaky* v. *Breaky*, 2 U. C. R. 350; *Rex* v. *Stockland*, Burr. 508; 1 W. Bl. 367; *Stoner* v. *Walton*, 6 O. S. 190; *Phipps* v. *Moore*, 5 U. C. R. 16; *Beaty* v. *Beaty*, 17 U. C. C. P. 484; *Losee* v. *Murray*, 24 U. C. R. 586; *Doe d. Breaky* v. *Breaky*, 2 U. C. R. 349; *Doe d. Fleming*, 4 Bing. 266; *Revel* v. *Fox*, 2 Ves. Sr. 270; *Harvey* v. *Harvey*, 2 W. Bl. 877; Taylor on Evidence, 114, 371, 495; *Evans* v. *Morgan*, 2 C. R. N. J. 453; *Leader* v. *Barry*, 2 Esp. 353, and see the cases cited in Scribner on Dower, vol. ii. p. 193, note 2.

derating repute and by conduct, even though the repute is divided (*d*). A marriage may be established by repute even though there be no positive evidence in support of the marriage from any member of the family (*e*). But the presumption arising from reputation may be rebutted by proof that the woman formerly lived with another man, so as to raise the same presumption of marriage with him. Where the demandant in an action of Dower relied upon cohabitation and reputation as evidence of a marriage, said to have taken place in the United States, and failed, the Court under the circumstances refused a new trial (*f*); and where the demandant relied upon such evidence of an alleged marriage in Ireland many years previous, and there was a second verdict for the defendant, the Court refused to interfere (*g*). The presumption which arises of marriage having taken place between the parties by reason of a man and woman having for many years cohabited and lived together as husband and wife, is a rebuttable one, and after the death of the man the evidence of the woman alone, on which the Court placed full reliance, was received for that purpose, although she was then interested in negativing the fact of marriage (*h*). The evidence of neighbours and mere acquaintances of habit and repute, must extend through a long series of years to raise the presumption of an agreement on both sides to live together as husband and wife; but if the *consensus* is once proved, lapse of time is unimportant, and where there is evidence of express

(*d*) *Lyle* v. *Elwood*, 19 L. R. Eq. 98; 44 L. J. cap. 164; 23 W. R. 157; but see *Henderson* v. *Weis*, 25, Grant 69, in which it was held that the repute must be uniform and general, and that a divided repute will not suffice: see also *Cunningham* v. *Cunningham*, 2 Dow. 482.

(*e*) *Collins* v. *Bishop*, 48 L. J. cap. 31; *Harvey* v. *Harvey*, 2 W, Bl. 877.

(*f*) *Street* v. *Dolson*, 14 U. C. R. 537.

(*g*) *Lynch* v. *O'Hara*, 6 U. C. C. P. 259. 268, 269.

(*h*) *Preston* v. *Lyons*, 24 Gr. 142.

acknowledgment a very short cohabitation in accordance therewith will be sufficient for this purpose (*i*). Where the evidence to the fact of marriage was conflicting, the Court offered the plaintiff the opportunity of obtaining better evidence, or an issue to try the question, and if refused directed the bill to be dismissed (*j*).

48. Where a marriage has in fact been proved, evidence of reputation and cohabitation is not sufficient to establish a prior marriage (*k*). General reputation is sufficient evidence of marriage to entitle a son to inherit property though the father is still living (*l*). Where a woman lives and cohabits with two men there is no presumption (*m*).

49. *Entries made by a parent or relation in Bibles*, prayer books, missals, almanacs, or, indeed, in any other book, or in any document or paper, stating the fact and date of the marriage, are received as the written declarations of the deceased persons who respectively made them (*n*). Entries in a family Bible or Testament will be admissible, even without proof that they have been made by a relative; for, as this book is the ordinary register of families, and is usually accessible to all its members, the presumption is that the whole family has more or less adopted the entries contained in it, and thereby given them authenticity (*o*). This pre-

(*i*) *Hill* v. *Hibbett*, 25 L. T. 183; 19 W. R. 250.

(*j*) *Baker* v. *Wilson*, 6 Gr. 603.

(*k*) *Doe d. Wheeler* v. *Mac Williams*, 3 U. C. R. 165.

(*l*) *Doe d. Fleming* v. *Fleming*, 4 Bing. 266; 12 Moore 500.

(*m*) *Graham* v. *Law*, 6 U. C. C. P. 310, 313.

(*n*) Berkeley, Peer. 3rd quest. 4 Camp, 401; Leigh, Peer. Pr. Min. 310; Slane, Peer. Pr. Min. pt, 2, p. 49, 5 Cl. and Fin. 41 S. C; *Herbert* v. *Tuckal*, T. Ray, 84; *Jackson* v. *Cooley*, 8 Johns. 128, 131; *Douglas* v. *Saunderson*, 2 Dall. 116; *Carskadden* v. *Poorman*, 10 Watts, 82; Sussex, Peer. 11 Cl. and Fin. 85, 98; Taylor on Evidence, vol. i. 7th ed. p. 552.

(*o*) Berkeley, Peer. 4 Camp. 421; *Monkton* v. *Att'y-Gen'l*, 2 Russ. and Myl. 162, 163; *Hubbard* v. *Lees*, 35 L. J. Ex. 169; 1 Law Reports Ex. 255; 4 H. and C. 418 S. C; Taylor on Evidence, vol. i. 7th ed. p. 552.

sumption, however, will not prevail in favour of an entry in another book, however religious its character may be; but proof must be given, either that the entry was made by some member of the family (*p*), or that it has been acknowledged or treated by a relative as a correct family memorial (*q*), or, at least, if ancient, that it was made at the time when it purports to have been written. The *correspondence* of deceased members of the family (*r*) will, on proof of the handwriting, be received (*s*), as will also recitals in *marriage settlements* (*t*) and other family deeds (*u*), descriptions in wills (*v*) and the like.

50. A patent from the Crown issued in 1848 to M. A. T., describing her as the wife of B. T. In 1853 she conveyed to L., not describing herself as a widow. It was held that the patent was some evidence of her being married when it issued, but the Court being left to draw inferences as a jury, presumed in favour of the validity of her deed made in 1853, that she was then sole and competent to convey (*w*).

(*p*) Tracey, Peer. cited Hubb. Ev. of Suc. 673; *Crawford* v. *Lindsay*, Peer. 2 H. of L. Cas. 558-560.

(*q*) *Hood* v. *Beauchamp*, 8 Sim. 26.

(*r*) Huntingdon, Peer. Att'y-Genl's Rep. 357; *Kideney* v. *Cockburn*, 2 Russ. and Myl. 168; Leigh, Peer. Pr. Min. pt. 2, p. 140; Hastings, Peer. Pr. Min. 196; *Butler* v. *Mountgarret*, 6 Ir. Law R. N. S. 77; 7 H. of L. Cas. 633 S. C.

(*s*) Marchmont, Peer, Pr. Min. 345, 353; Airth. Peer. Pr. Min. 105.

(*t*) *Neal* v. *Wilding*, 2 Str. 11 51; De Roos, Peer. 2 Coop. 541, 542; Chandos, Peer. Pr. Min. 27; Stafford, Peer. Pr. Min. 110; Zouch, Peer. Pr. Min. 276; Devon, Peer. by Nicholas, 1832, App. pp. 44, 46; Lisle, Peer. Pr. Min. 116, 127; Banbury, Peer. Pr. Min. 6, 117; Vaux, Peer. Pr. Min. 44; Huntley, Peer. Pr. Min. 15; Roscommon, Peer. Pr. Min. 36.

(*u*) *Smith* v. *Tebbitt*, 1 Law Rep. P. and D. 354; 36 L. J. Pr. and Mat. 35 S. C.

(*v*) *Vulliamy* v. *Huskisson*, 3 Y. and C. Ex. R. 82; De Roos, Peer. 2 Coop. 541; Lisle, Peer. by Nicholas 51, 53; Taylor on Evidence, vol. i. 7th ed. pp. 552, 553.

(*w*) *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

51. *The declarations of the husband*, made during the time the parties were cohabiting as husband and wife, affirming the marriage, are admissible as evidence of the fact declared (*x*). Letters of the parties, addressing each other as husband and wife, and the will of the deceased husband designating the demandant as his wife, are also admissible (*y*). A separation deed executed by the deceased husband, wherein he acknowledges the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of the registry of marriage from the parish registry in Ireland, were held sufficient against infant defendants, adult defendants by their answer admitting the marriage (*z*). The plaintiff having put in a will in which the testator spoke of H. as his wife, was not estopped from denying the marriage (*a*).

52. The oral or written declarations of *deceased members of the family* of the parties are competent evidence if made *ante litem motam* (*b*). But declarations of marriage cannot be given in evidence unless made by the parties themselves or by members of the family (*c*). The *declarations of a deceased clergyman* that he had celebrated a certain marriage are equally inadmissible with those of other strangers in blood or affinity to the parties (*d*). A declaration by a

(*x*) *Pendrell* v. *Pendrell*, Cas. Temp. Hardwicke, 79; 2 Str. 925; Bull N. P. 113; 8 East. 196 note.

(*y*) *Alfray* v. *Alfray*, 2 Lee 547; 6 Eng. Eccl. R. 238; *Hervey* v. *Hervey*, 2 W. Bl. 877; *Gaines* v. *Relf*, 12 How. N. S. 472; *Kenneth* v. *Abbott*, 4 Ves. Jr. 802; *Giles* v. *Giles*, 1 Keen., 685; 15 Eng. Chy. R.

(*z*) *Craig* v. *Templeton*, 8 Gr. 483.

(*a*) *George* v. *Thomas*, 10 U. C. R. 604.

(*b*) Stark, Ev. 510; *Fownes* v. *Ettricke*, 2 Lee, 257; 6 Eng. Eccl. Rep. 116; *Clements* v. *Hunt*, 1 Jones L. 400; *Copes* v. *Pearce*, 7 Gill. 247; *Henderson* v. *Cargill*, 31 Missis. 367; *Spears* v. *Burton*, Ibid, 547; *Blackburn* v. *Crawford*, 3 Wallace, U. S. Rep. 175.

(*c*) *Johnson* v. *Lawson*, 9 Moore, 187; S. C. 2 Bing. 86; 9 E. C. L. R. 329.

(*d*) *Piers* v. *Piers*, 2 H. L. Cas. 331; 13 Jur. 569.

clergyman that a friend of the wife's had forbidden the banns the second time they were published, is not admissible as a fact, but as evidence that the clergyman had confessed that he had married without banns (*e*).

53. It sometimes becomes important in actions for Dower to show at *what time the marriage* of the demandant took place, as her right is subject to all charges and liens upon the land created prior thereto. Where direct evidence of the marriage is given, no difficulty upon this point can well arise; but this class of evidence is not always accessible to the parties interested (*f*). The conduct of the parties and all other evidence available in proof of the fact of marriage may also be useful in establishing the time; for the period of the first occurrence of facts indicative of a subsisting marriage will supply an inference of the time when the marriage state commenced (*g*). From the treatment of a child as legitimate by the parents there arises a presumption (of course open to rebuttal), not only that the parents were married, but also that their marriage was anterior to the child's birth (*h*). The time of the marriage may also be proved by the declarations of the parties themselves, under the restrictions to which hearsay evidence is subject (*i*). The declarations of parents that a child was born before or after wedlock fall under this head, since they are declarations of the time of marriage relatively to the time of birth (*j*). The registry of the

(*e*) *Standon* v. *Standon*, Peake, 30, 31; 6 T. R. 331, N.

(*f*) Scribner on Dower, vol. ii. p. 198.

(*g*) Berkeley, Peer. Hub. Ev. Succes. 260.

(*h*) *Mayo* v. *Brown*, 2 Lee 391; 6 Eng. Eccl. R. 168; Hub. Ev. Succes. 260; Scribner on Dower, vol. ii. p. 199.

(*i*) *Hilliard* v. *Phaly*, 8 Mod. 180.

(*j*) *Stevens* v. *Moss*, Cowp. 591; *Rex* v. *Bramley*, 6 T. R. 330; Hubb. Ev. Succes. 259; Scribner on Dower, vol. ii. p. 199.

marriage is evidence, even between strangers, of the time of the marriage (*k*).

54. In England, upon the plea of *ne unques accouple*, a writ goes to the bishop for a certificate of the marriage (*l*), except the marriage be celebrated out of England, in which case it must be tried by a jury (*m*), but it is otherwise in Ontario, as here the Statute provides for the trial of all issues of fact by the unanimous verdict of twelve jurors (*n*).

(*k*) *Doe d. Wollaston* v. *Banes*, 1 M. and Rop. 386.

(*l*) Sellin's, Practice, vol. ii. p. 207; Ros. on Real Actions, 220.

(*m*) *Tederton* v. *Tederton*, 2 H. B. 145.

(*n*) 32 Geo. III., cap. 2; C. S. U. C. cap. 31, sec. 2; amended by 32 Vic. cap. 6, sec. 18, and 36 Vic. cap. 8, sec 18; see also R. S. O. cap. 55, secs. 252, 253.

CHAPTER III.

DEATH OF THE HUSBAND.

1. *Right of Dower Inchoate until husband's death.*
2-3. *Natural and civil death.*
4. *Onus of proof of death.*
5-10. *Evidence of death.*
11-18. *Presumption of death of the husband.*

1. *During the lifetime of the husband the right to Dower is inchoate.* Upon his death this right becomes consummated and perfected.

2. It is the *natural*, and not the *civil* death of the husband that is here referred to. "For if the husband entered in religion, the wife shall not be endowed until he be naturally dead" (*a*). So, "if a man seized in fee take a wife and enter into religion and be professed, his heir shall inherit presently; yet his wife shall not have Dower during the natural life of her husband; for the husband cannot be professed in religion during the marriage without the assent and agreement of his wife; and if he be so without her assent, the profession is void (*b*). But it is said this question cannot now arise even in England; for

(*a*) Co. Litt. 33 b, 132 b.

(*b*) Perk. sec. 307; Gilb. Dower, 401; *Marsh* v. *Hutchison*, 2 Bos. & P. 232, note a; Park on Dower, 249; 2 Crabb. Real Prop. 130; per Kent Chancellor in *Platner* v. *Sherwood*, 6 John, cap. 129; Scribner on Dower, vol. i. page 618.

when the Roman Catholic religion prevailed in that country, and professed persons were legally established there, it was held that a profession in religion, in any foreign country, did not work a disability in England; (*c*) and since the Reformation, as there can be no legal profession in the latter country, the ancient disability arising therefrom has entirely ceased (*d*).

3. Civil death occurs when a person alive, or possibly alive, is adjudged dead by the law (*e*). Those attainted of treason or felony are, with exceptions, held to be civilly dead, yet the wife may not be endowed until the actual death of the husband (*f*). It is stated in the old law books that the wife of a man who is banished by abjuration or by Act of Parliament, shall recover her dower in his lifetime, for this is a civil death (*g*). In *Cotten* v. *Westcott* (*h*) it was said by Coke, C.J., that in Wayland's case, (*i*) the wife brought her writ of Dower after Wayland's banishment, and it was held the same did not lie; although she was afterwards held entitled to her jointure. But in the case of the wife of Sir Robert Belknap (*j*), Belknap was banished, and his wife had Dower. Doddridge, J., observed that in 10 Ed. III. (*k*), the wife of Matravers brought a

(*c*) Co. Litt. 132 b.

(*d*) *Rex* v. *Lady Portington*, 1 Salk. 162; Park on Dower, 249; Scribner on Dower, vol. i. page 618.

(*e*) *Post*, cap. 5.

(*f*) Co. Litt. 33 b; but see *Marsh* v. *Hutchison*, 2 Bos. & P. 232, note (a), where it is said that Sir Edward Coke goes so far as to lay it down generally that dower arises on the natural, not on the civil, death of the husband. This dictum, however, he does not otherwise support than by instancing the case of profession, which exception, if well founded, seems to proceed upon reasons not altogether applicable to the cases of abjuration and exile.

(*g*) Park on Dower, 250.

(*h*) 3 Bulstr. 187, 188.

(*i*) 18 Ed. I.

(*j*) Temp. H. IV.; Moore, 851.

(*k*) 1 Roll. R. 400.

writ of Dower, her husband being in banishment, and it was held maintainable (*l*). It would also seem that if the husband is transported for life he would be considered as civilly dead, so as to let in his wife's claim to Dower (*m*).

4. If the defendant denies that the demandant's husband is dead, the onus of proof is upon the demandant, and this leads to the enquiry as to what evidence is sufficient to establish the fact of death. The general rule is that the existence of a person being once shown, he is presumed to continue in life, and the onus rests upon the party asserting his death (*n*).

This presumption seems to be merely the application to this case of the common rule of evidence, that the last proved state of things shall be considered as subsisting at the time of the enquiry. Out of such a rule it seems reasonable to except cases where the state of things must, from their nature, after the lapse of a certain period, suffer a specific change. And although in the duration of human life no term can be fixed as an *ultimum tempus*, the extreme infrequency of the prolongation of life beyond a century, led to the adoption of that period in the civil law as one at which the presumption of life was not in force. Civilians

(*l*) Park on Dower, 249, note; Stearnes' Real Act, 285, 2nd ed.; Christian's note, 1 Bl. Com. 133; opinion of Lord Eldon in *Marsh* v. *Hutchison*, 2 B. & P. 226, 231 and note; Scribner on Dower, vol. i. p. 619. See also *Marsh* v. *Hutchison*, 2 Bos. & P. 232 note (a), where it is observed that, with respect to abjuration for felony, though the dower of the wife was originally forfeited by the attainder, with which it was attended, yet as the 1 Ed. VI. cap. 12 removed that forfeiture, it should seem that between that time and the 21 Jac. I. cap. 28, which abolished the privilege of sanctuary, and consequently put an end to abjuration altogether, the wife might have been entitled to dower on this civil death of the husband.

(*m*) *Marsh* v. *Hutchison*, 2 Bos. & P. 232 and note (a).

(*n*) *Throgmorton* v. *Walton*, 2 Roll Rep. 461; *Wilson* v. *Hodges*, 2 East, 312; *Battin* v. *Bigelow*, 1 Pet. C. C. R. 452; *Stevens* v. *McNamara*, 36 Maine, 176; *Miller* v. *Beates*, 3 S. & R. 490, 493; *Smith* v. *Knowlton*, 11 N. H. 191; *Emerson* v. *White*, 9 Frost (N. H.) 482; 1 Greenl. Ev. 41; Scribner on Dower, vol. ii. p. 206.

accordingly held that there was no presumption of life in the case of persons who, if living, would be above a hundred years old (*o*). And in Scotland, probably on the same authority, it has been decided that the death of a man might be presumed after the lapse of a hundred years from the date of an instrument in which he was named (*p*).

There are some traces of the recognition in the Common Law of even a shorter term than a hundred years as sufficient of itself to repel the presumption of life. Lord Hale said that if a feoffment be made to the use of A. for ninety-nine years, if he shall so long live, and, after his death, to the use of B. in fee, this shall not be contingent, for it shall be presumed his life will not exceed ninety-nine years; but that it had been otherwise if it had been made but for twenty-one years (*q*).

In two cases the possibility of the particular tenant living longer than the term of eighty years was disregarded in determining the nature of the remainder (*r*).

But where the term was only sixty years, the Court took into consideration the possibility of the duration of the life exceeding the term (*s*).

So upon the trial, in 1732, of an issue directed by the Court of Exchequer, the deposition of a witness examined in 1672 was offered to be read without any evidence of his being dead; but Reynolds, C.B., refused to admit it; saying, however, that if proper searches and enquiry had been made, and no account could be given of the party, he would

(*o*) Hub. Ev. Succes. 168.

(*p*) *Ibid*; Morison, Presumption XVI.; Scribner on Dower, vol. ii. p. 206.

(*q*) *Weale* v. *Lower*, Pollexf. 67; Lord Coke had previously gone to the extent of saying that it was "a common intendment that a man should die within five thousand years," 10 Rep. 50.

(*r*) *Napper* v. *Sanders*, Hutt. 118; Lord Derby's case, Litt. Rep. 370.

(*s*) *Beverly* v. *Beverly*, 2 Vern. 131; Fearne Con. Rem. 4.

have admitted it at such a distance of time (*t*). The lapse of fifty years has been held insufficient to warrant the presumption that a collector of tithes was dead (*u*); but the book of such a person, written in 1679, was admitted in evidence in 1753, because it was not reasonable to suppose that he was then alive (*v*). And it was held in an ejectment tried in 1828 that the death of four persons mentioned, in a settlement dated in 1689, whose title would supersede that of the lessor of the plaintiff claiming as heir, might be presumed from the lapse of time (*w*).

5. The most positive evidence of death is the testimony of those who can prove that they were present when it occurred, or that having been acquainted with the person of the deceased when alive, they have seen his body after life was extinct. The medical attendants of the deceased in his last illness, who may be presumed to be best able to discriminate between real and merely apparent death, are the most competent, and, accordingly, most usual witnesses. This mode of proof has often the advantage over an extract from the register of establishing at the same time the identity of the deceased (*x*). The evidence of a person who was present at the deathbed and the burial is *prima facie* evidence without proof of identity.

6. The fact of death may also be established by documentary evidence. Where parish or other registers are required by law to be kept, entries therein of the death or burial of the deceased, are, for all ordinary judicial purposes,

(*t*) *Benson* v. *Olive*, 2 Strange, 920.

(*u*) *Manly* v. *Curtis*, 1 Price, 225.

(*v*) *Jones* v. *Waller*, 1 Price, 229; 3 Gwill, 847.

(*w*) Per Vaughan, B; *Doe d. Oldnall* v. *Deakin*, 3 C. & P. 402; 14 E. C. L. R. 369; Hubb. Ev. Success. 168, 169; Scribner on Dower, vol. ii. 207.

(*x*) Hubb. Ev. Succes. 165; Scribner on Dower, 207.

evidence of the fact stated. This evidence should be accompanied with some proof of the identity of the party whose decease is to be established with the party named in the writing (*y*).

7. The Ontario Statute provides for the registration of deaths, and that a record shall be kept in the office of the registrar-general, and that extracts of such records shall be *prima facie* evidence in any Court of Law or Equity in this Province of the facts therein stated (*z*).

The Statute 32 Vic. cap. 30, sec. 18 (*a*), contained a provision respecting the registration and mode of proof of deaths similar to that provided for by the Statute just mentioned (*b*).

8. At Common Law a certificate of a mere matter of fact, not coupled with any matter of law, cannot be received as evidence, even though given by a person in an official situation (*c*). If the person was bound to record the fact then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate being extra judicial, is merely the unsworn statement of a private person, and will therefore be rejected (*d*). So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its

(*y*) *Risely* v. *Sheppard*, 21 W. R. 782; *Parkinson* v. *Francis*, 15 Sim. 160; Bull, N. P. 247; Hubb. Ev. Succes. 160; 2 Greenl. Ev. 278 d.

(*z*) Rev. Stat. cap. 36, secs. 12, 13, 16, 18, 19.

(*a*) 32 Vic. cap. 30, sec. 18, amended by 33 Vic. cap. 22, and repealed by 39 Vic. cap. 2, sec. 26, which latter Statute was repealed by R. S. O. cap. 36.

(*b*) R. S. O. cap. 36.

(*c*) *Omichund* v. *Barker*, Willes, R. 549, 550.

(*d*) *Sewell* v. *Corp.*, 1 C. & P. 392; *Drake* v. *Marryat*, 1 B. & C. 473; *Roberts* v. *Eddington*, 4 Esp. 88; *Waldron* v. *Coombe*, 3 Taunt. 162; 2 Ph. Ev. 125; *R.* v. *Sewell*, 8 Q. B. 161; *Oakes* v. *Hill*, 14 Pick. 442, 448; *Wolfe* v *Washburn*, 6 Cowen, 261; *Jackson Miller*, id. 751; *U. S.* v. *Buford*, 3 Pet. 12, 29; *Gill* v. *Phillips*, 6 Mart. La. Rep. N. S. 298, 300, 301; *Morton* v. *Barrett*, 19 Maine, 109.

effect to other facts by stating those also in the certificate, but such parts of the certificate will be suppressed (*e*). Even the certificate of the Sovereign under the sign manual cannot be received (*f*).

Certificates of death are admissible as evidence without proof of the identity of the persons mentioned in them, with the persons as to whom the fact recorded by them is sought to be established (*g*).

Entries in the family bible are evidence without proof of handwriting.

9. *Family reputation* and the *declarations* of *deceased relatives*, made when they had no interest to misrepresent the truth, are also admissible to prove the fact of death (*h*).

In order to let in evidence of reputation or declarations of deceased relatives, a necessity to resort to it ought first to be shewn, as that better evidence cannot be obtained (*i*).

10. *Hearsay* is good evidence to prove a relative beyond

(*e*) *Johnson* v. *Hocker*, 1 Dall. 406, 407; *Governor* v. *Bell*, 3 Murph, 331; *Governor* v. *Jeffreys*, 1 Hawks, 207; *Stewart* v. *Alison*, 6 Serg. & R. 324, 329; Taylor on Evidence, 1487.

(*f*) *Omichund* v. *Barker*, Willes R. 550.

(*g*) *Davis* v. *Marshall*, 5 P. T. 470; *Jackson* v. *Ety*, 5 Coll. 314; *Surgeson* v. *Sealy*, 2 Atk. 412; *Hubbard* v. *Lees*, L. R. 1 Ex. 255. See also *Doe d. Hall* v. *Penfold*, S. C. p. 536; *Doe France* v. *Andrews*, 5 Q. B. 756.

(*h*) Hubb. Ev. Succes. 165; 2 Greenl. Ev. 278 J.; 1 Phil. Ev. 4th ed., 250, 263, note 98; *Raborg* v. *Hammond*, 2 Har. & Gill, 42, 52; *Pancoast's Lessee* v. *Addison*, 1 Har & J. 350, 356, 357; *Cochrane* v. *Libby*, 18 Maine, 39; *Waldron* v. *Tuttle*, 4 N. H. 378; *Emerson* v. *White*, 9 Foster (N. H.), 482; *Ewing's Heirs* v. *Savary*, 3 Bibb. 235; *Dudley* v. *Grayson*, 6 Mon. 259. But see *Whittuck* v. *Waters*, 4 Carr. & Payne, 375; 19 E. C. L. R. 427, which is said in the notes to Phillips on Evidence, not to have been fully considered. 1 Phil. Ev. 4th ed. 264 note; *Newham* v. *Raithby*, 1 Phil. 315; Scribner on Dower, vol. ii. 210.

(*i*) Hub. Ev. Succes. 166.

the sea dead, and the common reputation and belief of it in the family gives credit to such evidence (*j*).

A recital of the death of a prior tenant for life in a private Act of Parliament, is, upon an application by a subsequent tenant for life for payment of the income, insufficient evidence of the death (*k*)

11. The fact of death may also be proved by *presumptive* as well as by direct evidence (*l*).

Where a person goes abroad and has not been heard of for *seven years*, he will, at the expiration of that time, be presumed to be dead (*m*).

And the same rule holds generally with respect to persons away from their usual places of resort, and of whom no

(*j*) Bull, N. P. 294, citing *Grimwade* v. *Stephens*, Kent, 1697; *Doe d. Banning* v. *Griffin*, 15 East, 293; *Doe* v. *Williams*, Cowper, 621. See also *Kidder* v. *Blaisdell*, 45 Maine, 461; *Lessee of Scott* v. *Ratliffe*, 5 Pet. 81; *Jackson* v. *Cody*, 9 Cow. 140; *Nicholas* v. *Lansdale*, Litt. Sel. Cases, 21; *Jackson* v. *Etz*, 5 Cow. 314; *Jackson* v. *Boneham*, 15 John, 226; Hubb. Ev. Succes. 166, 167.

(*k*) *Cowell* v. *Chambers*, 21 Beav. 619; *Berry* v. *Usher*, 4 Jur. 5.

(*l*) *Webster* v. *Birchmore*, 13 Ves. Jur. 362; *Thorne* v. *Rolfe*, Anders, 20 p. 42; Dyer, 185 a.; Bendl; 86; Scribner on Dower, vol. ii. p. 211.

(*m*) *Doe d. Slade* v. *Nepean*, 2 N. & M. 219; S. C. Nom. *Doe d. Knight* v. *Nepean*, 5 B. & Ad. 86; S. C. in Error, *Nepean* v. *Doe d. Knight*, 2 M. & W. 894; *Lambe* v. *Orton*, 6 Jur. N. S. 61; 20 L. J. Chy. 286; 1 L. J. N. S. 290; Phene, *In re*, 5 L. R. Chy. App. 139; 39 L. J. Chy. 316; 22 L. T. 111, 18 W. R. 303; *Thomas* v. *Thomas*, 2 Dr. and Sm. 298; 13 W. R. 225; 11 L. T. N. S. 479; *Re* Smith, 31 L. J. R. M. 182; *Gressall* v. *Shelfox*, 9 Jur. 890; *Wilcock* v. *Purchase*, 9 Jur. 890; *Dunsmure* v. *Boulderson*, 5 Jur. 958; *Dunn* v. *Snowden*, 32 L. J. Ch. 104; *In re* Benham's Trusts, L. R. 4 Eq. 416; *Hopewell* v. *De Pinna*, 2 Camp. 113; *Doe d. Baning* v. *Griffin*, 15 East, 293; *Lee* v. *Willock*, 6 Ves. Jr. 606; *Rust* v. *Baker*, 8 Sim. 443; *Dixon* v. *Dixon*, 3 Bro. C. C. 510; *Newman* v. *Jarkins*, 10 Pick. 515; *Miller* v. *Beates*, 3 S. & R. 490; *Loring* v. *Steineman*, 1 Met. 204; *Smith* v. *Knowlton*, 11 N. H. 191; *Forsaith* v. *Clark*, 1 Foster, N. H. 409; *Stevens* v. *McNamara*, 36 Maine, 176; Whiteside's Appeal, 23 Pa. St. 114; *Osborn* v. *Allen*, 2 Dutch, 388; *Spurr* v. *Tremble*, 1 A. K. Marsh. 278; *Eagle* v. *Emmett*, 4 Bradf. 117; *Puckett* v. *State*, 1 Sneed, 355; *Rice* v. *Lumley*, 10 Ohio St. 596; *Merritt* v. *Thompson*, 1 Hilton, N. Y. C. p. 55; *Primm* v. *Stewart*, 7 Texas, 178; *Wambaugh* v. *Schanck*, Penningt. 229; *Woods* v. *Woods*, 2 Bay, 476; *Spencer* v. *Roper*, 13 Ired. 333: *McCartee* v. *Camel*, 1 Barb. ch. 455; *State* v. *Moore*, 11 Ired, 160; *Gilleland* v. *Martin*, 3 McLean, 490; *Innis* v. *Campbell*, 1 Rawle, 373.

account can be given (*n*). This period has been adopted as the ground of such presumption in analogy to the statute of 1 Jac. I. cap. 11, relating to bigamy, and to the statute of 19 Car. II. cap. 6, relating to the continuance of lives on which leases are held (*o*).

By both of the statutes above cited, there must concur, in order to raise this presumption, absence for seven years and the non-receipt of intelligence concerning the party for the whole of that period (*p*); and the absence must be with reference to some particular place, and the non-receipt of intelligence must be with reference to some person or persons.

Letters from the absent person written within seven years are admissible to show that he was alive within that period (*q*). But mere hearsay statements that he had been seen by others within that time are not admissible (*r*).

A person ought not to be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would

(*n*) *Doe d. Lloyd* v. *Deakin*, 4 B. & A, 433; 6 E. C. L. R. 476; *Doe d. George* v. *Jesson*, 6 East, 85; *Roe* v. *Hasland*, 1 W. Bl. 404; *Bailey* v. *Hammond*, 7 Ves. Jur. 590; *Master* v. *Cookson*. 2 Eq. Abr. 414; *Buckman* v. *Ives*, 6 L. J. N. S. ch. 197; S. C. Nom. *Rickman* v. *Ives*, 1 Jur. 234; *Doe d. Oldham* v. *Wolley*, 8 B. & C. 22; S. C. Nom. *Oldnall* v. *Deakin*, 2 M. & R. 195; 3 C. & P. 402; Earl Roscommon's Case, 6 C. & T. 97; *Dowley* v. *Winfield*, 14 Sim. 277; S. C. 8 Jur. 972; Webb, *In re*, 6 Ir. Eq. R. 255. See also *Mullaly* v. *Walsh* 6 Ir. R. C. L. 314; *Hickman* v. *Upsall*, 20 L. R. Eq. 136; 23 W. R. 776; Hanby, *In re*, 25 W. R. 427; Creed, *In re*, 1 Drew, 235; *Stevens* v. *McNamara*, 36 Maine, 176; Whiteside's Appeal, 23 Pa. St. 114; *Rice* v. *Lumley*, 10 Ohio St. 596; *Osborn* v. *Allen*, 2 Dutch. 388; *Hull* v. *Commonwealth*, Hardin, 479; Scribner on Dower, 212.

(*o*) *Doe d. Knight* v. *Nepean*, 5 B & Ad. 86; 27 E. C. L. R. 42; Best Presump. 140; Scribner on Dower, vol. ii. 212.

(*p*) Scribner on Dower, 212.

(*q*) *Hopewell* v. *De Pinna*, 2 Camp. 113; *Rex* v. *Harborne*, 2 A. and E. N. S. 756; 29 E. C. L. R. 161; Dowl. P. C. 636.

(*r*) *Smothers* v. *Mudd*, 9 B. Mon. 490; Scribner on Dower, vol. ii. 213.

not be heard of though alive (*s*). There is no presumption of law as to the time when the death actually took place. This is a mere matter of evidence (*t*), and the onus of proving that it occurred at any particular time within the seven years lies upon the person who claims a right, to the establishment of which that fact is essential (*u*).

The fact of a person not having been heard of for five or six years, though certainly not sufficient to establish the presumption of death, raises a considerable suspicion of the death of the party; and when a sufficient time has run to confirm that suspicion, which is the only effect of the length of time, the presumption has relation to the commencement of the period of the uncertainty as to his existence (*v*).

12. There is no presumption of law of the *continuance of life*, though an inference of fact may be drawn that a person alive and in health on a certain day was alive a short time afterwards (*w*).

(*s*) *Watson* v. *England*, 14 Sim. 28; 9 Jur. 1062; *Bowden* v. *Henderson*, 2 Sm. and G. 360.

(*t*) *Doe d. Slade* v. *Nepean*, 2 N. & M. 219. S. C. Nom. *Doe d. Knight* v. *Nepean*, 5 B. and Ad. 86; S. C. in Error, *Nepean* v. *Doe d. Knight*, 2 M. and W. 894; *Rowe* v. *Hasland*, 1 W. Bl. 404, and the cases *supra*.

(*u*) *Rex* v. *Inhabitants of Harborne*, 2 A. & E. 540; 29 E. C. L. R. 161; *Nepean* v. *Knight*, 2 M. and W. 894; Phene, *In re*, 5 L. R. Chy. App. 139; 39 L. T. Chy. 316; 22 L. T. 111; 18 W. R. 303; *Lambe* v. *Orton*, 6 Jur. N. S. 61; 29 L. J. Chy. 286; 1 L. T. N. S. 290; *Thomas* v. *Thomas*, 2 Dr. & S. 298; 13 W. R. 225; 11 L. T. N. S. 47; *Re* Smith, 31 L. J. (P. & M.) 182; *Cressall* v. *Shelfax*, 9 Jur. 890; *Wilcock* v. *Purchase*, 9 Jur. 890; *Dunsmure* v. *Boulderson*, 5 Jur. 958; *Dunn* v. *Snowden*, 32 L. J. Ch. 104; *In re* Benham's Trusts, L. R. 4 Eq. 416.

(*v*) *Webster* v. *Birchmore*, 13 Ves. Jr. 362.

(*w*) Phene's Trusts, *In re*, 5 L. R. Chy. App. 139; *Doe d. Slade* v. *Nepean*, 2 N. & M. 219; S. C. Nom. *Doe d. Knight* v. *Nepean*, 5 B. & Ad. 86; S. C. in Error, *Nepean* v. *Doe d. Knight*, 2 M. & W. 894; *Rex* v. *Inhabts. of Harborne*, 2 A. & E. 540; E. C. L. R. vol. xxix. p. 161; *Reg.* v. *Lumley*, L. R. 1 C. C. 196; *Rex* v. *Inhabts. of Twinning*, 2 B. & A. 386; *In re* Green Settlement, L. R. 1 Eq. 288; *Underwood* v. *Wing*, 4 D. M. & G. 633; 8 H. L. C. 183; *Hull* v. *State of Tex.*, App. 593.

13. The presumption of death may be raised within a shorter period than seven years.

Under special circumstances (*x*), if the party whose death is assumed is aged (*y*), infirm or ill (*z*) when last heard from, or had been exposed to extraordinary peril, as by shipwreck, or if he had gone to sea on a vessel that had never been heard from (*a*).

On the other hand the cause of the absentee's departure, the terms of intercourse on which he had lived with his relatives, or the state of communication between this and the country where he resided, may be such as to make the want of intelligence concerning him easily consistent with the supposition of his continued existence (*b*).

The death of a legatee is presumed after he has not been heard of for seven years, and there is no presumption of law that he lived beyond the first day of the seven years; but the onus of proving that he survived a given day lies on those who claim under him; and the fact that the person who takes in case of a lapse, whether as next of kin or as residuary legatee, is the one to commence proceedings to obtain payment of the money to himself, does not shift the

(*x*) *Rowe* v. *Hasland*, 1 W. Bl. 404; *King* v. *Paddock*, 18 John. 141; *Smith* v. *Knowlton*, 11 N. H. 191; *Puckett* v. *State*. 1 Sneed. 355; *Eagle* v. *Emmet*, 4 Bradf. 117; 1 Greenl. Ev. 41.

(*y*) Per Lord Denman, 4 Nev. & Mann. 344.

(*z*) *Webster* v. *Birchmore*, 13 Ves. Jr. 362; Swinburne on Wills, part 6, par, 13; Scribner on Dower, vol. ii. p. 213; *Stonvenal* v. *Stephens*, 2 Daly (N. Y.) 319; *Davie* v. *Briggs*, 97 U. S. (70th) 628.

(*a*) *Watson* v. *King*, 1 Stark, 121, 2 E. C. L. R. 322; S. C. 4 Camp. 272; *Rex* v. *Harborne*, 2 A. & E. 544; L. R. 7 Eq. 498; *Sillick* v. *Booth*, 1 Y. & C. N. C. 117; S. C. 11 L. J. N. S. Ch. 41; *Dixson* v. *Dixon*, 3 Bro. C. C. 510; *Norris* v. *Norris*, Rep. temp. Finch, 419; *Patterson* v. *Black*, Park on Ins., second Amer. ed. 433, 434; *Johnson* v. *Hamilton*, 1 Tyrw. & G. 45, 574; *Egerton* v. *Egerton*, MSS. (1836), cited Hubb. Ev. Succes. 173; 1 Greenl. Ev. 41; 2 *Ibid*, 278; *Loring* v. *Steineman*, 1 Met. 204, 211; *White* v. *Mann*, 13 Shep'l. 367; *King* v. *Paddock*, 18 John. 141; *In re* Hutton, 1 Curt. Eccl. R. 595; *Learned* v. *Corley*, 43 Miss. 687.

(*b*) *In re* Hall, 1 Wallace, Jr. 85; Scribner on Dower, vol. ii. p. 214.

onus of proof (*c*). So that if property has been left by will to an absent husband, the onus would rest on the widow claiming Dower of showing that he was alive at the death of the testator, because if dead there could be no seisin.

14. In the case of *Doe d. Hagerman* v. *Strong* (*d*), it was proved that A. was last seen in this Province in December, 1827, and was never afterwards heard of. A *fi. fa.* against A.'s lands was placed in the sheriff's hands on the 13th July, 1833, tested the 29th of June, 1833; the heir of A. brought ejectment against the purchaser at the sheriff's sale, under an execution against A., and attempted to recover upon the ground that, after twenty-two years had elapsed since A. was last heard of, the presumption that he did not die until the expiration of the seventh year was at an end, and that the purchaser at the sheriff's sale must show that he did not die until after the seventh year, and that the jury should be directed to find whether he did or did not die within the seven years. But it was held that the proper direction 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 so long, and also that it was incumbent on the heir of A., and not upon the purchaser at the sheriff's sale, to show when A. died. In one of the cases cited (*e*) a testator died on the 5th of January, 1861, having bequeathed his residuary estate, equally, between his nephews and nieces. One of his nephews, N., was born in 1829, had gone to America in 1853, had frequently written home until August 1858, when he wrote from on board an American ship of war, but from that time

(*c*) Lewes, *In re*, 6 L. R. Chy. 356; 40 L. J. Chy. 602; 24 L. T. 533; 19 W. R. 617, affirming decision of Malins, V.C., 11 L. R. Eq. 236; 23 L. T. 692; *Adams* v. *Jones*, 39 Ga. 479; *Foulks* v. *Rhea*, 7 Bush. (Ky.) 568.

(*d*) 4 U. C. R. 510, affirmed 8 U. C. R. 291.

(*e*) Phene's Trusts, L. R. 5 Chy. App. 137.

no letter had been received from him, and nothing was afterwards heard about him except that he was entered in the books of the American navy as having deserted on the 16th of June, 1860, while on leave. It was held (reversing the decision of James, V.C.), that his personal representatives had not established a title to any share of the testator's estate, and that it must be divided between the nephews and nieces who were proved to have survived the testator. It was also held over-ruling on this point, *Lambe* v. *Orton* (*f*), *Dunn* v. *Snowden* (*g*), *Thomas* v. *Thomas* (*h*), and *in re* Benham's Trusts (*i*), that there is no presumption of law in favour of the continuance of life.

15. Lord Denman, in *Rex* v. *Inhabitants of Harborne* (*j*), cited *in re* Phene's Trusts, p. 151, says: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact (*i. e.*, as to death at a particular time, or of the continuance of life), without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. I am aware that Mr. Justice Bayley founds his decision on the ground of contrary presumption, but I think that the only questions in such cases are what evidence is admissible, and what inference may fairly be drawn from it."

16. In the application of the rules for presuming death, regard is to be had to the subject of the claim and the nature of the proceedings in which the question arises.

(*f*) 6 Jur. N. S. 61.
(*g*) 2 Dr. & Sm. 201.
(*h*) 2 Dr. & Sm. 298.
(*i*) L. R. 4 Eq. 416.
(*j*) 2 A. & E. 540, 544.

Where the proceeding relates to the possession of real estate and not to the inheritance, an ill-founded presumption of death can rarely produce a worse effect than that of giving, for a time, the enjoyment of the land to a party not entitled to it; the corpus of the property in the meanwhile, remaining entire, and the possession being recoverable by the party to whom it, of right, belongs (*k*). These considerations apply with peculiar force to a proceeding for the recovery and assignment of Dower. The law imposes upon the husband the duty to make provision for the support and maintenance of his wife while he is living, and confers upon her a right to the enjoyment of a portion of his estate, for the same purpose after his death. If, then, the presumption of death, arising from unexplained absence, or from circumstances, be sufficient to support a possessory action by the heir, or by a stranger, it is manifest that it should also entitle the wife to the enjoyment of her Dower. The assignment could work the husband no injury should he return; for in that event the proceeding would go for nothing; and in the meantime the wife would have derived her support from the source whence by law she was entitled to demand it. This reasoning might not apply with the same force where the husband had aliened the lands, and Dower was demanded of the grantee; but no good reason is perceived for exempting him from the operation of a rule of evidence sanctioned by long usuage and well established in the law (*l*).

17. The law always presumes *against the commission of crime;* and, therefore, where a woman, twelve months

(*k*) *Rowe* v. *Hasland*, 1 W. Bl. 404; *Lomax* v. *Rider*, 7 Bro. P. C. 145; 4 B. & Ald. 434; 6 E. C. L. R. 477; *Miller* v. *Beates*, 3 S. & R. 490-492; Scribner on Dower, vol. ii. 214.

(*l*) Scribner on Dower, vol. ii. 214, 215; *Cochrane* v. *Libby*, 18 Maine, 39; *Kidder* v. *Blaisdell*, 45 Maine, 461; *Jackson* v. *Claw*, 18 John. 346; *Donnelly* v. *Donnelly*, 8 B. Mon. 113; *Woods* v. *Woods*, 2 Bay, 476; *Chapman* v. *Cooper*, 5 Rich. L. 452; *Spears* v. *Burton*, 31 Missis. 547.

after her first husband was last heard of, married a second husband and had children by him, it is to be presumed that the first husband was dead at the time of the second marriage (*m*).

Where upon a question as to the validity of a marriage between A. and C., it appears that A.'s first wife B. was alive in a distant colony twenty-six days before the second marriage, the sessions or a jury are justified in finding the second marriage to be void (*n*).

18. Evidence which the Court of Chancery may in uncontested cases consider sufficient to prove a death, is not necessarily binding or conclusive upon, or to be accepted as satisfactory by, the Bank of England (*o*).

When banks, before allowing any transfer of stock, may, if the circumstances of the case appear to them to make it expedient, require evidence of the death of any person claiming a right to make the transfer, and where they have the discretion of requiring whatever evidence they think necessary, and they exercise that discretion not unreasonably and *bona fide*, the exercise of it will not be interfered with, although the Court of Chancery, in a similar case, would accept as satisfactory the evidence refused by the banks (*p*).

(*m*) *Rex* v. *Twinning*, 2 B. & A. 386.

(*n*) *Rex* v. *Harborne*, 4 N. & M. 341; 2 A. & E. 540; 1 H. & N. 36.

(*o*) *Prosser* v. *Bank of England*, 13 L. R. Eq. 611; 41 L. J. Ch. 327; 26 L. T. 60; 20 W. R. 362.

(*p*) *Ibid.*

CHAPTER IV.

ALIENS.

1. *Rights of the widow of an alien.*
2. *Definition of an alien.*
3. *Rights of aliens under old law and under Provincial Statutes.*

1. It was before stated that no woman could be endowed unless there had been marriage and death of the husband. But some widows are never entitled, even where these exist. We will first consider the rights of the widow of an alien.

2. An alien is defined in general terms to be one who is born out of the allegiance of the King or commonwealth (*a*). Formerly, an alien could not be endowed at Common Law unless she be Queen Consort; and the widow of an alien was not entitled to dower as a general rule (*b*).

3. Aliens were at Common Law incapable of taking by descent or inheritance, and if a man left no other relations but aliens, his land escheated to the lord (*c*). Various provincial statutes (*d*) were from time to time passed, giving aliens the same rights as natural born subjects. Finally,

(*a*) Scribner on Dower, vol. i., 143.
(*b*) Leith's Blackstone, p. 78.
(*c*) Leith and Smith's R. P. pp. 282, 283.
(*d*) 9 Geo. IV. cap. 21; 2 Wm. IV. cap. 7; 4 and 5 Vic. cap. 7; 8 Vic. cap. 107; 12 Vic. cap. 197; 18 Vic. cap. 6; 22 Vic. cap. 1.

it was enacted that on and from the twenty-third day of November, 1849, every alien should be deemed to have had, and should hereafter have, the same capacity to take by gift, conveyance, descent, devise, or otherwise howsoever, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in this Province as natural born or naturalized subjects of Her Majesty (*e*). It was also enacted that the real estate in this Province of any alien dying intestate should descend and be transmitted as if the same had been the real estate of a natural born or naturalized subject of Her Majesty (*f*). It was further enacted that nothing in the said Act contained, should alter, impair, or affect, or be construed to alter, impair or affect, in any manner or way whatsoever, any right or title legally vested in, or acquired by any person or persons whomsoever, before the twenty-third day of November, 1849 (*g*). It is submitted that these statutes place aliens and the widows of aliens, with respect to their right to dower, upon exactly the same footing as natural born or naturalized subjects of Her Majesty. If the statutes give the alien power to transmit by hereditary descent, then his widow will be entitled to dower. There seems to be no ground whatever for saying that the statutes mentioned did not so provide.

(*e*) C. S. C. cap. 8, sec. 9: 29 Vic. cap. 16, sec. 1; Rev. Stats. cap. 97, sec. 1.

(*f*) 29 Vic. cap. 16, sec. 1; Rev. Stats. cap. 97, sec. 2.

(*g*) C. S. cap. 8, sec. 9; 29 Vic. cap. 16, sec. 1; Rev. Stats. cap. 97, sec. 3.

CHAPTER V.

ATTAINDER.

1-2. *Old law as to attainder.*

3. *Laws in force in Canada.*

4. *Dower where there is a forfeiture of the estate during coverture.*

5. *Wife not entitled until actual death of husband.*

1. It was formerly the law that if the husband had been attainted of treason or other felony, the wife could not be endowed.

2. By the Common Law a person attainted was not only incapable of himself of inheriting or transmitting his own property by heirship, but obstructed the descent of lands or tenements to his posterity in all cases where they were obliged to derive their title through him from any remote ancestor (*a*). A person attainted was neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue either immediately from himself or mediately through himself from any remote ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feodal property, was blotted out, corrupted and extinguished forever; the

(*a*) Leith & Sm.'s R. P. p. 286.

consequence of which was that estates thus impeded in their descent resulted back and escheated to the lord (*b*).

3. By 32 and 33 Vic. cap. 29, secs. 55 and 56, which re-enacts similar sections of the Con. Stat. Ca. cap. 116. It is enacted that, "except in cases of high treason and of abetting, procuring or counselling the same, no attainder shall extend to the disinheriting of any heir, or to the prejudice of the right or title of any person other than the right or title of the offender during his natural life only, and any person to whom after the death of any such offender the right or interest to or in any lands, tenements or hereditaments should or would have appertained, if no such attainder had taken place, may enter into the same;" and by 4 Wm. IV. cap. 1, R. S. O. cap. 105, sec. 8, the effect of corruption of blood, which prevented tracing descent through an ancestor attainted, is abolished without exception even in cases of treason (*c*). So that, except in case of high treason, and of abetting, procuring or counselling the same, the widow would be entitled to dower after the death of her husband.

4. Where a forfeiture of the estate of the husband occurs during coverture, it is clear that the right of the wife to be endowed after the husband's death will not be impaired, except in the cases just mentioned. The seisin of the husband is not thereby divested; he is simply deprived of the right of enjoyment during the term of his natural life, and the estate descends at his death to his legal representatives charged with the incident of dower which had attached previously to the forfeiture. Even if the forfeiture were duly established before the marriage, it is submitted, that

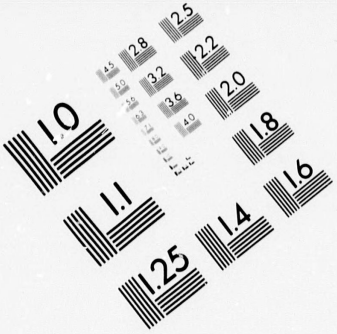
(*b*) Leith & Sm.'s R. P. p. 286.
(*c*) Leith & Sm.'s R. P. p. 287.

since the passing of the statutes just referred to, the wife's right to dower remains intact. For the effect of these statutes seems to be that the property of the offender does not escheat to the Crown, but that he is merely deprived of the right of enjoying what he would but for his crime have enjoyed. The object seems to have been to prevent the interests of his heirs from being injuriously affected by his acts. If the effect of the statue is, that the property of the offender escheats to the Crown, as before, as far as the offender is concerned, then, if the attainder preceded the marriage, the wife would not be entitled to dower, because there would have been no seisin during the marriage, and seisin is essential in order to confer the right to dower (*d*).

5. The wife is not entitled to be endowed until the actual death of the husband (*e*).

(*d*) But see Leith & Sm.'s R. P. 278.
(*e*) *Ante* cap. 3.




1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0
11.2
12.5
14.0
16.0
18.0
20.0
22.0
25.0
28.0
32.0
36.0
40.0
45.0
50.0
56.0
63.0
71.0
80.0
90.0
100.0
112.0
125.0
140.0
160.0
180.0
200.0
224.0
250.0
280.0
320.0
360.0
400.0
450.0
500.0
560.0
630.0
710.0
800.0
900.0
1000.0
1120.0
1250.0
1400.0
1600.0
1800.0
2000.0
2240.0
2500.0
2800.0
3200.0
3600.0
4000.0
4500.0
5000.0
5600.0
6300.0
7100.0
8000.0
9000.0
10000.0
11200.0
12500.0
14000.0
16000.0
18000.0
20000.0
22400.0
25000.0
28000.0
32000.0
36000.0
40000.0
45000.0
50000.0
56000.0
63000.0
71000.0
80000.0
90000.0
100000.0
112000.0
125000.0
140000.0
160000.0
180000.0
200000.0
224000.0
250000.0
280000.0
320000.0
360000.0
400000.0
450000.0
500000.0
560000.0
630000.0
710000.0
800000.0
900000.0
1000000.0
1120000.0
1250000.0
1400000.0
1600000.0
1800000.0
2000000.0
2240000.0
2500000.0
2800000.0
3200000.0
3600000.0
4000000.0
4500000.0
5000000.0
5600000.0
6300000.0
7100000.0
8000000.0
9000000.0
10000000.0
11200000.0
12500000.0
14000000.0
16000000.0
18000000.0
20000000.0
22400000.0
25000000.0
28000000.0
32000000.0
36000000.0
40000000.0
45000000.0
50000000.0
56000000.0
63000000.0
71000000.0
80000000.0
90000000.0
100000000.0
112000000.0
125000000.0
140000000.0
160000000.0
180000000.0
200000000.0
224000000.0
250000000.0
280000000.0
320000000.0
360000000.0
400000000.0
450000000.0
500000000.0
560000000.0
630000000.0
710000000.0
800000000.0
900000000.0
1000000000.0
1120000000.0
1250000000.0
1400000000.0
1600000000.0
1800000000.0
2000000000.0
2240000000.0
2500000000.0
2800000000.0
3200000000.0
3600000000.0
4000000000.0
4500000000.0
5000000000.0
5600000000.0
6300000000.0
7100000000.0
8000000000.0
9000000000.0
10000000000.0
11200000000.0
12500000000.0
14000000000.0
16000000000.0
18000000000.0
20000000000.0
22400000000.0
25000000000.0
28000000000.0
32000000000.0
36000000000.0
40000000000.0
45000000000.0
50000000000.0
56000000000.0
63000000000.0
71000000000.0
80000000000.0
90000000000.0
100000000000.0
112000000000.0
125000000000.0
140000000000.0
160000000000.0
180000000000.0
200000000000.0
224000000000.0
250000000000.0
280000000000.0
320000000000.0
360000000000.0
400000000000.0
450000000000.0
500000000000.0
560000000000.0
630000000000.0
710000000000.0
800000000000.0
900000000000.0
1000000000000.0
1120000000000.0
1250000000000.0
1400000000000.0
1600000000000.0
1800000000000.0
2000000000000.0
2240000000000.0
2500000000000.0
2800000000000.0
3200000000000.0
3600000000000.0
4000000000000.0
4500000000000.0
5000000000000.0
5600000000000.0
6300000000000.0
7100000000000.0
8000000000000.0
9000000000000.0
10000000000000.0
11200000000000.0
12500000000000.0
14000000000000.0
16000000000000.0
18000000000000.0
20000000000000.0
22400000000000.0
25000000000000.0
28000000000000.0
32000000000000.0
36000000000000.0
40000000000000.0
45000000000000.0
50000000000000.0
56000000000000.0
63000000000000.0
71000000000000.0
80000000000000.0
90000000000000.0
100000000000000.0
112000000000000.0
125000000000000.0
140000000000000.0
160000000000000.0
180000000000000.0
200000000000000.0
224000000000000.0
250000000000000.0
280000000000000.0
320000000000000.0
360000000000000.0
400000000000000.0
450000000000000.0
500000000000000.0
560000000000000.0
630000000000000.0
710000000000000.0
800000000000000.0
900000000000000.0
1000000000000000.0
1120000000000000.0
1250000000000000.0
1400000000000000.0
1600000000000000.0
1800000000000000.0
2000000000000000.0
2240000000000000.0
2500000000000000.0
2800000000000000.0
3200000000000000.0
3600000000000000.0
4000000000000000.0
4500000000000000.0
5000000000000000.0
5600000000000000.0
6300000000000000.0
7100000000000000.0
8000000000000000.0
9000000000000000.0
10000000000000000.0
11200000000000000.0
12500000000000000.0
14000000000000000.0
16000000000000000.0
18000000000000000.0
20000000000000000.0
22400000000000000.0
25000000000000000.0
28000000000000000.0
32000000000000000.0
36000000000000000.0
40000000000000000.0
45000000000000000.0
50000000000000000.0
56000000000000000.0
63000000000000000.0
71000000000000000.0
80000000000000000.0
90000000000000000.0
100000000000000000.0
112000000000000000.0
125000000000000000.0
140000000000000000.0
160000000000000000.0
180000000000000000.0
200000000000000000.0
224000000000000000.0
250000000000000000.0
280000000000000000.0
320000000000000000.0
360000000000000000.0
400000000000000000.0
450000000000000000.0
500000000000000000.0
560000000000000000.0
630000000000000000.0
710000000000000000.0
800000000000000000.0
900000000000000000.0
1000000000000000000.0
1120000000000000000.0
1250000000000000000.0
1400000000000000000.0
1600000000000000000.0
1800000000000000000.0
2000000000000000000.0
2240000000000000000.0
2500000000000000000.0
2800000000000000000.0
3200000000000000000.0
3600000000000000000.0
4000000000000000000.0
4500000000000000000.0
5000000000000000000.0
5600000000000000000.0
6300000000000000000.0
7100000000000000000.0
8000000000000000000.0
9000000000000000000.0
10000000000000000000.0
11200000000000000000.0
12500000000000000000.0
14000000000000000000.0
16000000000000000000.0
18000000000000000000.0
20000000000000000000.0
22400000000000000000.0
25000000000000000000.0
28000000000000000000.0
32000000000000000000.0
36000000000000000000.0
40000000000000000000.0
45000000000000000000.0
50000000000000000000.0
56000000000000000000.0
63000000000000000000.0
71000000000000000000.0
80000000000000000000.0
90000000000000000000.0
100000000000000000000.0
112000000000000000000.0
125000000000000000000.0
140000000000000000000.0
160000000000000000000.0
180000000000000000000.0
200000000000000000000.0
224000000000000000000.0
250000000000000000000.0
280000000000000000000.0
320000000000000000000.0
360000000000000000000.0
400000000000000000000.0
450000000000000000000.0
500000000000000000000.0
560000000000000000000.0
630000000000000000000.0
710000000000000000000.0
800000000000000000000.0
900000000000000000000.0
1000000000000000000000.0
1120000000000000000000.0
1250000000000000000000.0
1400000000000000000000.0
1600000000000000000000.0
1800000000000000000000.0
2000000000000000000000.0
2240000000000000000000.0
2500000000000000000000.0
2800000000000000000000.0
3200000000000000000000.0
3600000000000000000000.0
4000000000000000000000.0
4500000000000000000000.0
5000000000000000000000.0
5600000000000000000000.0
6300000000000000000000.0
7100000000000000000000.0
8000000000000000000000.0
9000000000000000000000.0
10000000000000000000000.0
11200000000000000000000.0
12500000000000000000000.0
14000000000000000000000.0
16000000000000000000000.0
18000000000000000000000.0
20000000000000000000000.0
22400000000000000000000.0
25000000000000000000000.0
28000000000000000000000.0
32000000000000000000000.0
36000000000000000000000.0
40000000000000000000000.0
45000000000000000000000.0
50000000000000000000000.0
56000000000000000000000.0
63000000000000000000000.0
71000000000000000000000.0
80000000000000000000000.0
90000000000000000000000.0
100000000000000000000000.0
112000000000000000000000.0
125000000000000000000000.0
140000000000000000000000.0
160000000000000000000000.0
180000000000000000000000.0
200000000000000000000000.0
224000000000000000000000.0
250000000000000000000000.0
280000000000000000000000.0
320000000000000000000000.0
360000000000000000000000.0
400000000000000000000000.0
450000000000000000000000.0
500000000000000000000000.0
560000000000000000000000.0
630000000000000000000000.0
710000000000000000000000.0
800000000000000000000000.0
900000000000000000000000.0
1000000000000000000000000.0
1120000000000000000000000.0
1250000000000000000000000.0
1400000000000000000000000.0
1600000000000000000000000.0
1800000000000000000000000.0
2000000000000000000000000.0
2240000000000000000000000.0
2500000000000000000000000.0
2800000000000000000000000.0
3200000000000000000000000.0
3600000000000000000000000.0
4000000000000000000000000.0
4500000000000000000000000.0
5000000000000000000000000.0
5600000000000000000000000.0
6300000000000000000000000.0
7100000000000000000000000.0
8000000000000000000000000.0
9000000000000000000000000.0
10000000000000000000000000.0
11200000000000000000000000.0
12500000000000000000000000.0
14000000000000000000000000.0
16000000000000000000000000.0
18000000000000000000000000.0
20000000000000000000000000.0
22400000000000000000000000.0
25000000000000000000000000.0
28000000000000000000000000.0
32000000000000000000000000.0
36000000000000000000000000.0
40000000000000000000000000.0
45000000000000000000000000.0
50000000000000000000000000.0
56000000000000000000000000.0
63000000000000000000000000.0
71000000000000000000000000.0
80000000000000000000000000.0
90000000000000000000000000.0
100000000000000000000000000.0
112000000000000000000000000.0
125000000000000000000000000.0
140000000000000000000000000.0
160000000000000000000000000.0
180000000000000000000000000.0
200000000000000000000000000.0
224000000000000000000000000.0
250000000000000000000000000.0
280000000000000000000000000.0
320000000000000000000000000.0
360000000000000000000000000.0
400000000000000000000000000.0
450000000000000000000000000.0
500000000000000000000000000.0
560000000000000000000000000.0
630000000000000000000000000.0
710000000000000000000000000.0
800000000000000000000000000.0
900000000000000000000000000.0
1000000000000000000000000000.0
1120000000000000000000000000.0
1250000000000000000000000000.0
1400000000000000000000000000.0
1600000000000000000000000000.0
1800000000000000000000000000.0
2000000000000000000000000000.0
2240000000000000000000000000.0
2500000000000000000000000000.0
2800000000000000000000000000.0
3200000000000000000000000000.0
3600000000000000000000000000.0
4000000000000000000000000000.0
4500000000000000000000000000.0
5000000000000000000000000000.0
5600000000000000000000000000.0
6300000000000000000000000000.0
7100000000000000000000000000.0
8000000000000000000000000000.0
9000000000000000000000000000.0
10000000000000000000000000000.0
11200000000000000000000000000.0
12500000000000000000000000000.0
14000000000000000000000000000.0
16000000000000000000000000000.0
18000000000000000000000000000.0
20000000000000000000000000000.0
22400000000000000000000000000.0
25000000000000000000000000000.0
28000000000000000000000000000.0
32000000000000000000000000000.0
36000000000000000000000000000.0
40000000000000000000000000000.0
45000000000000000000000000000.0
50000000000000000000000000000.0
56000000000000000000000000000.0
63000000000000000000000000000.0
71000000000000000000000000000.0
80000000000000000000000000000.0
90000000000000000000000000000.0
100000000000000000000000000000.0
112000000000000000000000000000.0
125000000000000000000000000000.0
140000000000000000000000000000.0
160000000000000000000000000000.0
180000000000000000000000000000.0
200000000000000000000000000000.0
224000000000000000000000000000.0
250000000000000000000000000000.0
280000000000000000000000000000.0
320000000000000000000000000000.0
360000000000000000000000000000.0
400000000000000000000000000000.0
450000000000000000000000000000.0
500000000000000000000000000000.0
560000000000000000000000000000.0
630000000000000000000000000000.0
710000000000000000000000000000.0
800000000000000000000000000000.0
900000000000000000000000000000.0
1000000000000000000000000000000.0
1120000000000000000000000000000.0
1250000000000000000000000000000.0
1400000000000000000000000000000.0
1600000000000000000000000000000.0
1800000000000000000000000000000.0
2000000000000000000000000000000.0
2240000000000000000000000000000.0
2500000000000000000000000000000.0
2800000000000000000000000000000.0
3200000000000000000000000000000.0
3600000000000000000000000000000.0
4000000000000000000000000000000.0
4500000000000000000000000000000.0
5000000000000000000000000000000.0
5600000000000000000000000000000.0
6300000000000000000000000000000.0
7100000000000000000000000000000.0
8000000000000000000000000000000.0
9000000000000000000000000000000.0
10000000000000000000000000000000.0
11200000000000000000000000000000.0
12500000000000000000000000000000.0
14000000000000000000000000000000.0
16000000000000000000000000000000.0
18000000000000000000000000000000.0
20000000000000000000000000000000.0
22400000000000000000000000000000.0
25000000000000000000000000000000.0
28000000000000000000000000000000.0
32000000000000000000000000000000.0
36000000000000000000000000000000.0
40000000000000000000000000000000.0
45000000000000000000000000000000.0
50000000000000000000000000000000.0
56000000000000000000000000000000.0
63000000000000000000000000000000.0
71000000000000000000000000000000.0
80000000000000000000000000000000.0
90000000000000000000000000000000.0
100000000000000000000000000000000.0
112000000000000000000000000000000.0
125000000000000000000000000000000.0
140000000000000000000000000000000.0
160000000000000000000000000000000.0
180000000000000000000000000000000.0
200000000000000000000000000000000.0
224000000000000000000000000000000.0
250000000000000000000000000000000.0
280000000000000000000000000000000.0
320000000000000000000000000000000.0
360000000000000000000000000000000.0
400000000000000000000000000000000.0
450000000000000000000000000000000.0
500000000000000000000000000000000.0
560000000000000000000000000000000.0
630000000000000000000000000000000.0
710000000000000000000000000000000.0
800000000000000000000000000000000.0
900000000000000000000000000000000.0
1000000000000000000000000000000000.0
1120000000000000000000000000000000.0
1250000000000000000000000000000000.0
1400000000000000000000000000000000.0
1600000000000000000000000000000000.0
1800000000000000000000000000000000.0
2000000000000000000000000000000000.0
2240000000000000000000000000000000.0
2500000000000000000000000000000000.0
2800000000000000000000000000000000.0
3200000000000000000000000000000000.0
3600000000000000000000000000000000.0
4000000000000000000000000000000000.0
4500000000000000000000000000000000.0
5000000000000000000000000000000000.0
5600000000000000000000000000000000.0
6300000000000000000000000000000000.0
7100000000000000000000000000000000.0
8000000000000000000000000000000000.0
9000000000000000000000000000000000.0
10000000000000000000000000000000000.0
11200000000000000000000000000000000.0
12500000000000000000000000000000000.0
14000000000000000000000000000000000.0
16000000000000000000000000000000000.0
18000000000000000000000000000000000.0
20000000000000000000000000000000000.0
22400000000000000000000000000000000.0
25000000000000000000000000000000000.0
28000000000000000000000000000000000.0
32000000000000000000000000000000000.0
36000000000000000000000000000000000.0
40000000000000000000000000000000000.0
45000000000000000000000000000000000.0
50000000000000000000000000000000000.0
56000000000000000000000000000000000.0
63000000000000000000000000000000000.0
71000000000000000000000000000000000.0
80000000000000000000000000000000000.0
90000000000000000000000000000000000.0
100000000000000000000000000000000000.0
112000000000000000000000000000000000.0
125000000000000000000000000000000000.0
140000000000000000000000000000000000.0
160000000000000000000000000000000000.0
180000000000000000000000000000000000.0
200000000000000000000000000000000000.0
224000000000000000000000000000000000.0
250000000000000000000000000000000000.0
280000000000000000000000000000000000.0
320000000000000000000000000000000000.0
360000000000000000000000000000000000.0
400000000000000000000000000000000000.0
450000000000000000000000000000000000.0
500000000000000000000000000000000000.0
560000000000000000000000000000000000.0
630000000000000000000000000000000000.0
710000000000000000000000000000000000.0
800000000000000000000000000000000000.0
900000000000000000000000000000000000.0
1000000000000000000000000000000000000.0
1120000000000000000000000000000000000.0
1250000000000000000000000000000000000.0
1400000000000000000000000000000000000.0
1600000000000000000000000000000000000.0
1800000000000000000000000000000000000.0
2000000000000000000000000000000000000.0
2240000000000000000000000000000000000.0
2500000000000000000000000000000000000.0
2800000000000000000000000000000000000.0
3200000000000000000000000000000000000.0
3600000000000000000000000000000000000.0
4000000000000000000000000000000000000.0
4500000000000000000000000000000000000.0
5000000000000000000000000000000000000.0
5600000000000000000000000000000000000.0
6300000000000000000000000000000000000.0
7100000000000000000000000000000000000.0
8000000000000000000000000000000000000.0
9000000000000000000000000000000000000.0
10000000000000000000000000000000000000.0
11200000000000000000000000000000000000.0
12500000000000000000000000000000000000.0
14000000000000000000000000000000000000.0
16000000000000000000000000000000000000.0
18000000000000000000000000000000000000.0
20000000000000000000000000000000000000.0
22400000000000000000000000000000000000.0
25000000000000000000000000000000000000.0
28000000000000000000000000000000000000.0
32000000000000000000000000000000000000.0
36000000000000000000000000000000000000.0
40000000000000000000000000000000000000.0
45000000000000000000000000000000000000.0
50000000000000000000000000000000000000.0
56000000000000000000000000000000000000.0
63000000000000000000000000000000000000.0
71000000000000000000000000000000000000.0
80000000000000000000000000000000000000.0
90000000000000000000000000000000000000.0
100000000000000000000000000000000000000.0
112000000000000000000000000000000000000.0
125000000000000000000000000000000000000.0
140000000000000000000000000000000000000.0
160000000000000000000000000000000000000.0
180000000000000000000000000000000000000.0
200000000000000000000000000000000000000.0
224000000000000000000000000000000000000.0
250000000000000000000000000000000000000.0
280000000000000000000000000000000000000.0
320000000000000000000000000000000000000.0
360000000000000000000000000000000000000.0
400000000000000000000000000000000000000.0
450000000000000000000000000000000000000.0
500000000000000000000000000000000000000.0
560000000000000000000000000000000000000.0
630000000000000000000000000000000000000.0
710000000000000000000000000000000000000.0
800000000000000000000000000000000000000.0
900000000000000000000000000000000000000.0
1000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000.0
1250000000000000000000000000000000000000.0
1400000000000000000000000000000000000000.0
1600000000000000000000000000000000000000.0
1800000000000000000000000000000000000000.0
2000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000.0
2500000000000000000000000000000000000000.0
2800000000000000000000000000000000000000.0
3200000000000000000000000000000000000000.0
3600000000000000000000000000000000000000.0
4000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000.0
5000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000.0
6300000000000000000000000000000000000000.0
7100000000000000000000000000000000000000.0
8000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000.0
12500000000000000000000000000000000000000.0
14000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000.0
25000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000000000000.

28
25
32
22
36
20
1.8

CHAPTER VI.

DIVORCE, ELOPEMENT AND ADULTERY.

1. *Divorce à vinculo matrimonii.*
2. *How Divorces procured in Ontario.*
3. *Divorce a mensa et thoro.*
4. *Effect of adultery of husband on dower.*
5. *Effect of wife's adultery on right of dower.*
6. *Woolsey v. Finch.*
7. *There must be a going away.*
8. *Elopement and adultery may be shown at trial.*
9. *Voluntary reconciliation restores right of wife to dower.*
10. *Husband is not bound to become reconciled.*
11. *Dower in lands purchased and sold during elopement.*

1. A divorce *à vinculo matrimonii* makes the marriage void *ab initio* and bars the wife's right to dower (*a*). Referring to the Common Law rule, as laid down by Lord Coke, that a divorce *à vinculo matrimonii* bars the wife's right to dower, Mr. Bright says (*b*): "The points laid down in the above authorities seem to apply to divorces *à vinculo matrimonii* granted by the ecclesiastical courts where the marriage is declared null and void *ab initio*. What are the effects of a divorce *à vinculo matrimonii* granted by Act of Parliament does not very clearly appear. It is deemed essential, however, in all Divorce Acts in which the husband is the suitor, to insert a clause excluding the wife from dower (*c*).

(*a*) Co. on Litt. 31 a.
(*b*) 2 Bright H. and W. p. 366.
(*c*) Macqueen on H. and W. 211; 2 Bright H. and W. 367.

2. There is no Court in Ontario having the power to grant Divorces. Parliament alone has the power.

3. A divorce *a mensa et thoro* is no bar (*d*).

4. A divorce dissolving the marriage contract on the ground of the adultery of the husband does not deprive the wife of her right of dower in his estate (*e*).

5. By the statute of Westr. 2 (*f*), it enacted that 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. If the wife be forcibly taken away from her husband, and continue with the man against her will, her right to dower will not be forfeited (*g*). "If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower" (*h*). But, although taken away by force, if she afterwards voluntarily remain with the adulterer, she will be barred of her dower (*i*). If, after such voluntary residence, the wife be detained against her will, or if she leave the adulterer, or he turn her away, and her husband be not voluntarily reconciled to her, she will, in all such cases, be excluded from dower (*j*). Whether the wife leave her husband with or without his consent, and live in adultery, she will, nevertheless, forfeit her dower, if there be no subsequent reconciliation between them (*k*).

So adultery is a bar to dower, although committed after

(*d*) Co. on Litt. 32 a.
(*e*) *Wait* v. *Wait*, 4 Comst. 95; Scribner on Dower, vol. ii. p. 515.
(*f*) 13 Ed. I. cap. 34.
(*g*) Co. Litt. 32 b.; Perk. 354.
(*h*) Perk. 354.
(*i*) Co. Litt. 32 b.; 2 Inst. 435.
(*j*) Co. Litt. 32 b.; Perk. 354; *Walters* v. *Jordon*, 13 Ired. L. 361.
(*k*) 2 Inst. 435, 436; Harg. Co. Litt. 32 a note (10); *Coot* v. *Berty*, 12 Mod. 232; Rep. Temp. Holt, 232.

the husband and wife have separated by mutual consent (*l*). If the wife leaves her husband's house in consequence of his cruelty, and commits adultery without reconciliation, she is barred of her right to dower (*m*).

6. In *Woolsey* v. *Finch*, Hagarty, C.J., quoting from the judgment of Willis, J., in *Woodward* v. *Dowse*, says, page 134: "Where a man so conducts himself towards his wife as to render it unsafe or unreasonable that she should be compelled to live with him, he sends her forth with authority to pledge his credit for necessaries; but still she is bound to conduct herself properly. The question is, whether within the words and meaning of the Statute the plaintiff did consent and remain with the adulterer without being reconciled. If she has done that she has forfeited her dower. The best construction of the Statute seems to be that the leaving *sponte* is not of the essence of the offence which leads to the forfeiture. It is enough, if having left her husband's house, the woman afterwards commits adultery." He quotes Sir E. Coke: "For the cause of the bar of her dower is not the manner of her going away, but the remaining away with the adulterer in avoutry without reconciliation; this is the bar of the dower. Though she remains with the avouterer on any of the lands or manors of the husband, yet she shall be barred of her Dower by this branch (*nisi vir sponte, etc.*), without the husband's free reconciliation, albeit it hath been otherwise holden; and the reason they yielded is because it is no elopement; whereas it appeareth before that the words *reliquerit et abierit* are not of the substance of the bar of dower, but

(*l*) *Hetherington* v. *Graham*, 6 Bing. 135; 19 E. C. L. R. 31; Scribner on Dower, vol. ii. pp. 499, 500.

(*m*) *Woolsey* v. *Finch*, 20 U. C. C. P. 132, affirmed in *Neff* v. *Thompson*, 20 U. C. C. P. 211, disapproving of *Graham* v. *Law*, 6 U. C. C. P. 310; *Bostock* v. *Smith*, 34 Beav. 57; *Woodward* v. *Dowse*, 10 C. B. N. S. 722; 8 Jur. N. S. 413; 31 L. J. C. P. 70; 9 W. R. 870; *Slegall* v. *Slegall*, 2 Brock, 256; *Hetherington* v. *Graham*, 3 M. and P. 399; 6 Bing. 139.

the adultery and the remaining with the adulterer as is above said." "I think," he continues, "it is impossible more distinctly to lay down the law, that if the wife leaves her husband's house from what cause, and commits adultery, the penalty imposed by the Statute attaches." Hagarty, C.J., continuing, says: "I cannot see any distinction in the case where the husband deserts his wife, his compelling her to leave by violence, or her leaving in consequence thereof, or his abandoning her without provision, alike fail to warrant or excuse her subsequent voluntary living in adultery. The distinction between any of these cases would be too thin, in my judgment, to admit the application of a different rule of law to each. I am satisfied that the case in this Court (*Graham* v. *Law*, 6 U. C. C. P. 310) would have been decided differently if *Woodward* v. *Douse* had then been in existence."

7. It seems there must be a going away in some sense, for it is said that if the wife remain in adultery upon an estate belonging to her husband, this is not an elopement, and therefore does not fall within the Statute (*n*). So if the lands were of the joint purchase of the husband and wife; "because the husband is to see that none such live within his land (*o*), or though the wife live within the house of a free tenant of the manor which is her husband's" (*p*). Upon this subject Perkins has the following observations (*q*): "If a man seized of two manors in fee take a wife, and when he is dwelling in one manor the wife goes to the other manor, and when she is there lives in adultery, it is said that by doing so she shall not lose her dower, because it cannot be intended an elopement from her hus-

(*n*) Gilb. on Dower, 402; Park Dow. 224; 2 Crabb. R. P. 1191; 1 Bright H. and W. 539; Scribner on Dower, vol. ii. p. 501.

(*o*) 8 Ed. II. Dow. 153; Park Dow. 224.

(*p*) *Ibid.*

(*q*) Perk. 355.

band, for she resides in the proper manor of her husband, when the law cannot intend that she can dwell upon the manor of her husband without his agreement." He adds, however, "*tamen quære.*" Lord Coke, in discussing this point, maintains that if the wife leave her husband's house of habitation it is an elopement within the Statute (*r*). It has been decided in New Hampshire that a wife does not forfeit her dower by committing adultery upon the premises of her husband (*s*).

8. The fact of elopement and adultery may be shown upon the trial in an action by the wife for the recovery of her dower. But in such action, if the adultery of the demandant be relied upon as a bar to her claim, the tenant is bound to prove the fact affirmatively (*t*). Proof of the second marriage of the demandant within three years after her first husband left home, but after there was a reputation in the family of his death, without showing that he was then alive, is not sufficient evidence that she was guilty of adultery (*u*).

9. We have seen that by the Statute of Westminster the Second, if the husband, after the wife has been guilty of adultery within the terms of the Act, become reconciled to her and suffer her to live with him, she shall be restored to her dower. But in order to have this effect, the reconciliation must be voluntary and without the coercion of the Ecclesiastical Courts (*v*). According to Lord Coke, cohabitation alone is not sufficient to prove a voluntary reconciliation by the husband. "Cohabitation," he says, "is not sufficient without reconciliation made by the husband

(*r*) 2 Inst. 436; Scribner on Dower, vol. ii. p. 501.
(*s*) *Cogswell* v. *Tibbetts*, 3 N. H. 41; Scribner on Dower. vol. ii. p. 505.
(*t*) *Cochrane* v. *Libby*, 18 Maine (6 Shepl.) 39.
(*u*) *Ibid.* Scribner on Dower, vol. ii. p. 505.
(*v*) Co. Litt. 32 B.; 2 Inst. 436; Perk. 354.

sponte, so as cohabitation only in the same house with her husband availeth her not" (*w*). It seems to be established, however, that cohabitation of the husband and wife after the elopement, without compulsion, is sufficient evidence of reconciliation (*x*). If elopement be pleaded in bar of dower, and issue be joined upon a reconciliation, the defendant will not be permitted to prove any other elopement besides that mentioned in the plea, because there might have been many elopements of the wife and subsequent reconciliations, and the demandant can only be prepared to support her replication of a reconciliation after the particular elopement specified in the defendant's plea (*y*).

10. The husband will not be obliged to take his wife back again after she has eloped from him and committed adultery (*z*).

11. If, during the elopement, the husband purchase lands and alien them, or sell those of which he was seised at the time of his wife's leaving him, and he afterwards become reconciled to her, she will be entitled to dower of all such lands (*a*).

(*w*) 2 Inst. 436.

(*x*) *Haworth* v. *Herbert*, Dyer, 106 b.; Park on Dower, 225; 1 Bright H. and W. 541, pl. 16; Crabb R. P. 1189; *Bateman* v. *Ross*, 1 Dow. 245; Scribner on Dower, vol. ii. p. 506.

(*y*) *Haworth* v. *Herbert*, Dyer, 106 b. pl. 22; 1 Bright H. and W. 539, pl. 10; 2 Crabb R. P. 1189; Park on Dower, 225.

(*z*) *Govier* v. *Hancock*, 6 Term Rep. 603; 1 Roper H. and W. 561; 1 Greenl. Cruise, 199 note.

(*a*) Co. Litt. 33 a note 8; 13 Rep. 23; 1 Roper H. and W. 559; 1 Washb. R. P. 196, pl. 4; Scribner on Dower, vol. ii. p. 506.

CHAPTER VII.

THE PROPERTY SUBJECT TO DOWER.

1-2. *Distinction between property and estate in Dower.*
3. *Dower out of realty only.*
4. *All real hereditaments subject to Dower.*
5. *Dower in mines.*
6. *Stoughton* v. *Leigh.*
7. *Dower in wild lands.*
8. *Shares in companies.*
9. *Buckeridge* v. *Ingram.*
10. *The late English decisions.*
11. *Decisions in the United States.*
12. *Dower in water granted for hydraulic purposes.*

1. In considering the subject of dower, it is important to keep in view the distinction between the *class* or species of property upon which that right may attach, and the *estate* or degree of interest which must exist therein as a requisite to its inception. For example, *land* is a species of property, which, as a general rule, is subject to dower; but it is not upon every *interest* in land that this estate will attach, even though such interest may, in the full legal acceptation of the term, be regarded as real estate. Thus, an estate for life is an interest in land; it is denominated real property; but according to the rules of the Common Law it is not subject to dower.

Again, there are classes of property which are not subject to dower, because they are strictly *personal* in their nature; and with regard to these it makes no difference what the extent of the interest or the nature of the title may be.

2. The enquiry, therefore, in respect of the property which may be subject to dower, involves considerations of a twofold character. First, as to the nature and qualities of the property itself, irrespective of the title by which it is held; and, secondly, as to the interest or estate, which it is essential should exist therein, in order to confer, as an incident thereof, the right of dower. One branch of this enquiry relates to the *Res* or Thing; the other to the extent and duration of the right to the enjoyment thereof. To the consideration of the former the present chapter will be devoted (*a*).

3. The word *Dower* is a technical term, and in its legal signification as well as in its popular sense, is ordinarily understood to be applicable only to real property (*b*).

The words of Littleton (*c*) are, "Tenant in Dower is where a man is seised of certain *lands* or *tenements*." The signification of the word "lands" is well-known (*d*), but the extent of the word "tenements" has frequently been made the subject of discussion in consequence of its being the only word contained in the Statute *De Donis*. From the commentary of Lord Coke upon the fourteenth section of Littleton (*e*), it appears that, to constitute a tenement, it is not necessary that the thing itself lie in tenure; it is sufficient if it is issuing out of, or concerning, or annexed to, or exercisable with, corporeal inheritances which may be holden. The term is properly applicable only to such property as is classed with realty, whereas the word "hereditaments," which is omitted by Littleton in his definition

(*a*) Scribner on Dower, vol. i. p. 186.

(*b*) *Perkins* v. *Little*, 1 Greenl. R. 148; *Brockett* v. *Leighton*, 7 Greenl. R. 383; *Dow* v. *Dow*, 36 Maine, 211; *Lamar* v. *Scott*, 3 Stobh. 562; *Hill* v. *Mitchell*, 5 Ark. 608, 611; Scribner on Dower, vol. i. p. 187.

(*c*) Litt. sec. 36.

(*d*) Co. Litt. 4 a; *Stoughton* v. *Leigh*, 1 Taunt. 409; Park on Dower, 50.

(*e*) Co. Litt. 20 a; 2 Ves. Jr. 663.

of the estate of dower, has a more extended signification, and applies to rights purely of a personal nature as well as to those which savour of the realty (*f*).

4. All real hereditaments, whether corporeal or incorporeal, are, unless there is some special reason to the contrary, subject to dower (*g*).

The following instances, in which the right of dower in this description of property is recognized, are collected from the old books of the law. Dower may be had of a manor; (*h*) of an advowson, in gross or appendant; (*i*) of tithes, pensions, or other ecclesiastical profits which come to the Crown by the Statutes of 27 Henry VIII., 31 Henry VIII. and 1 Edward VI. (*j*). A rent service (*k*), rent charge, (*l*) and rent seck (*m*) are also subject to dower. So of a common certain, in gross or appendant (*n*); and the widow has been held dowable of franchises, parcel of an honor (*o*), and of all tenures of which a widow is capable of holding (*p*). But with regard to those things which usually lie in appendancy, as a common appendant, an advowson appendant, franchises appendant and the like, it is to be remarked that they are not things to which the widow can make an independent, substantive claim for dower, for that would be to sever the appendancy. The right of dower in heredita-

(*f*) Park on Dower, 50; Scribner on Dower, vol. i. p. 187.

(*g*) *Buckeridge* v. *Ingram*, 2 Ves. Jr. 664; *Stoughton* v. *Leigh*, 1 Taunt. 409; *Dicken* v. *Hamer*, 1 Drew & Sm. 284; Co. Litt. 6 a, 19 b, 20 a; 154 a; Park on Dower, 51, 52; Scribner on Dower, vol. i. p. 187.

(*h*) Bragg's Case, Godb. 135; Gouldsb. 37; Cro. 4.

(*i*) Fitzh N. B. 148-50; Co. Litt. 32 a; Perk. secs. 342, 343; *Howard* v. *Cavendish*, Cro. Jac. 621.

(*j*) Co. Litt. 159 a, 32 a; *Thynn* v. *Thynn*, Style's R. 99.

(*k*) Perk. sec. 345.

(*l*) Perk. sec. 347.

(*m*) Co. Lit;. 32 a; Perk. sec. 347.

(*n*) Perk. sec. 342; Fitzh N. B. 148. See Godb. 21.

(*o*) *Howard* v. *Cavendish*, Cro. Jac. 622.

(*p*) *Thynn* v. *Thynn*, Styles R. 69.

ments of this description, many of which are indivisable in their nature, exists only where she is entitled to be endowed of the entirety of the thing to which they are appendant (*q*).

All liberties and profits savoring of the realty in which the husband is seised of an estate of inheritance, by the Common Law are also subject to dower (*r*).

Thus the widow has been held dowable of a piscary; (*s*) of offices, (*t*), such as the office of a bailiff or parker, (*u*), the office of the Marshalsea of the King's Bench, (*v*) and of the custody of the jail of Westminster Abbey (*w*). And she has been held dowable of a fair; (*x*), a market (*y*); a dovehouse; (*z*) of courts, fines, heriots, etc.; (*a*), and of a mill (*b*), and it is laid down by Perkins, that "if a man grant to me and my heirs to take yearly so many estovers in his wood in Dale, as I and my heirs will burn in the same manor of Dale, and I take a wife and die, my wife shall not have dower of the estovers" (*c*); but, "if a man grant to me and my heirs to take yearly out of his meadow three loads of hay, and I take a wife and die, my wife shall have dower thereof" (*d*). He adds, however, "*tamen quære.*" In respect of the doubt

(*q*) Hughes' Writs, 192; Park on Dower, 114, 115; Scribner on Dower, vol. i, p. 188.

(*r*) Park on Dower, 51.

(*s*) Co. Litt. 32 a; Bracton 98-208; Brit. 247; Flet. 1, 5, c. 23.

(*t*) Styles Pr. Reg. 122; Fitzh. N. B. 18, 149.

(*u*) Co. Litt. 32 a; Fitzh. N. B. 8 (K.) Marg.; Perk. sec. 242; Gilbert on Dower, 371.

(*v*) Co. Litt. 32 a; Fitzh. N. B. 8 (K) Marg. See Hughes on Writs, 192.

(*w*) Co. Litt. 32 a; Thelval. Dig. 67, lib. viii. cap. 5, sec. 2.

(*x*) Co. Litt 32 a; Fitzh. N. B. 8 (K.) n.; Bro. Ass. pl. 471; Fitzh. Sci. Fa. 122; Gilb. Uses, 371.

(*y*) Gilb. Uses, 371; Fitzh. N. B. 8 (K) n.

(*z*) Co. Litt. 32 a.

(*a*) *Ibid.*

(*b*) Perk. sec. 342; Gilb. Uses; Fitzh. N. B. 8 (K.) a.

(*c*) Sec. 341.

(*d*) Sec, 343, referring to the following authorities: 12 Edward III. Dower, 157; 11 Edward 2, Dower, 85.

thus suggested by Perkins, Mr. Greening, in a note to this section remarks: "It is difficult to imagine any doubt for this *quære*, unless from an apprehension that such a grant gave a mere personal privilege; but it would give an estate in fee simple (*e*); and the profit being a hereditament lying in *prendre*, the wife is dowable of it as of a common in gross, or tithes" (*f*).

In Kentucky it has been held that where the husband dies seised of a ferry, the widow may be endowed of one third the profits, or of the use of it for a third of the time, in alternate periods (*g*).

5. In the early case of *Comyn* v. *Kyneto* (*h*), decided in the second of James I., it was insisted in argument; "That an ejectment lies not of a coal mine because it is *quoddam proficuum subtus solum*, and an *habere facias possessionem* cannot be had thereof." But the objection was not allowed: "for," said the Court, "it is a profit well known and whereof the law takes *bon conusance*, and therefore an ejectment well lies thereof. And Tanfield said it was adjudged in this Court in the case of Mr. Wyld, that an ejectment lies of a boyllary of salt; and it was cited to be likewise here adjudged between Lawson and Williams that this action will lie for a coal mine." It has been remarked that this is the first case in which it was held that ejectment would lie for a coal mine (*i*).

On the strength of this decision, and the additional authorities referred to in the note (*j*), Mr. Burton has not hesitated to state as a clear proposition in law, that mines

(*e*) *Stoughton* v. *Leigh*, 1 Taunt. 402.

(*f*) Note to sec. 343, Greening's ed. of Perkins.

(*g*) *Stevens* v. *Stevens*, 3 Dana, 373; Scribner on Dower, vol. i. p. 189.

(*h*) *Comyn* v. *Kyneto*, Cro. Jac. 150.

(*i*) *Whittingham* v. *Andrews*, 1 Show. 364; S. C. 1 Salk. 255; 4 Mod. 143.

(*j*) Co. Litt. 6 a; Prest. Touch. 96; *Barnes* v. *Mawson*, 1 M. and S. 77; *E. of Cardigan* v. *Armitage*, 2 B. and C. 197; *Seaman* v. *Vawdrey*, 16 Ves. Jr. 390.

may be made the subject of conveyance by livery if actually opened; and that an interest in mines unopened may exist independently of any estate in the surface of the land (*k*). It is now well settled law that dower may exist in mines or quarries if they have been opened during the lifetime of the husband (*l*).

6. The leading case upon the subject is *Stoughton* v. *Leigh* in which it was held that the widow was dowable of all her husband's mines of lead and coal, as well of those which were in his own landed estates, as of 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 any estate of inheritance; and that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or those claiming under him since his death. Dower is not due of mines unopened at the death of the husband (*m*). But if once opened, it is not necessary that the husband should have worked them down to the time of his death: nor that the working should be continued by the heir (*n*).

The distinction taken between mines which have been

(*k*) Burton on Real Prop. sec. 1164; 1 Washb. R. P. p. 5, par 12, and authorities there cited; Scribner on Dower, vol. i. p. 190.

(*l*) *Thynn* v. *Thynn*, Styles' Pr. Reg. 67, 68; *Hoby* v. *Hoby*, 1 Vern. 218; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Dicken* v. *Hamer*, 29 Law J. Rep. (N. S.) Chy. 778; 1 Dr. and Sm. 284; Macq. H. and W. 170; 1 Cruise tit. 6, ch. 2; Burton on Real Prop. 1164; Smith on Real and Per. Prop. 137; 4 Kent, 41; 1 Wash. on Real Prop. p. 5, par. 12; 1 Hilliard on Real Prop., second ed. p. 140; *Quarrington* v. *Arthur*, 10 M. and W. 335; *Coates* v. *Cheever*, 1 Cow. 460; *Billings* v. *Taylor*, 10 Pick. 460; *Moore* v. *Rollins*, 45 Maine, 493; *Findlay* v. *Smith*, 6 Munf. 134; *Crouch* v. *Puryear*, 1 Rand. 258; *Spencer* v. *Scurr, Master of the Rolls*, Ct. 10 W. R. 878; 25 Monthly Law Rep. 121; Scribner on Dower, vol. i. p. 194.

(*m*) *Dicken* v. *Hamer*, 19 L. J. Rep. (N. S.) Chy. 778; 1 Dr. and Sm. 284; Fitzh. N. B. 332 c,; Draper on Dower, 33, 34; Scribner on Dower, vol. i. p. 194, 195.

(*n*) *Stoughton* v. *Leigh*, 1 Taunt. 402; *Coates* v. *Cheever*, 1 Cow. 460; *Moore* v *Rollins*, 45 Maine, 493.

opened and those which have not, appears to rest upon the theory that it is an act of waste for a dowress or any other tenant for life to open mines, and therefore it is not permissible for her to do so. Bracton states it as one of the principles regulating the right of Dower, that a widow cannot claim a thing in Dower unless she may use and enjoy it *sine vasto exilio et destructione* (*o*). But Mr. Burton gives entirely a different reason for this rule. An interest in unopened mines on the lands of another unaccompanied by any estate in the surface of the land, and where no possession has been taken, he likens to an estate in remainder, and supposes that no right of Dower attaches upon such interest upon the same principle that it is excluded from estates in remainder (*p*).

Although the dowress has no power to open mines herself she has power to prevent the remainderman from opening them; and she may claim one third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but she is not entitled to one third of the royalties as corpus (*q*).

7. In this Province it is provided by law that wild lands shall not be subject to Dower. The R. S. O. (*r*) contains the following provision: "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, fencing, or otherwise, for the purposes of cultivation or occupation; but this shall not restrict or diminish the right to have wood-

(*o*) Brac. 316, pl. 1, 2; Gilb. on Dower, 390, 391.

(*p*) Scrib. on Dower, vol. i. p. 195; Burton on Real Prop. 1164; see *post*, cap. 11.

(*q*) *Dicken* v. *Hamer*, 29 Law J. Rep. (N. S.) Chy. 778; 1 Dr. and Sm. 284.

(*r*) R. S. O. cap. 126, sec. 3.

land assigned to the dowress under the thirty-fifth section of 'The Dower Proceedure 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 of the same lot, tract, or parcel."

It would seem that dower is recoverable in a lot of wild land, where it is used in connection with the dwelling house and improved land of the husband (*s*).

8. Shares in incorporated companies are generally considered personal property, and this without reference to the nature of the property held by them, or the business in which they may be engaged. At the present day, when a company is incorporated, it is usual to provide, by express enactment, that the stock of such company shall be deemed personalty. But the absence of such provision would not, it is apprehended, materially affect the question; for the weight of authority is decidedly in favor of the proposition, that shares in corporations are to be held and treated as personal estate at Common Law. Hence, shares in the stock of an incorporated company are not, as a general rule, subject to dower (*t*).

But this question is not entirely free from difficulty. Cases are to be found in the reports which appear to conflict with the conclusion above expressed. A distinction has also been taken between the case of lands vested in a joint stock company as a corporation, and not in the individual shareholders of such company, and of lands vested in the shareholders with a grant of the mere power of *management* to the corporation. In the latter case the shares of the company have been held to be real estate (*u*).

(*s*) *White* v. *Willis*, 7 Pick. 193; *Shattuck* v. *Gregg*, 23 Pick. 88; *Stevens* v. *Owen*, 12 Shep. 94; cases decided in the U. S., where the law as to wild land is substantially the same as in Ontario.

(*t*) Scribner on Dower, vol. i, p. 203.

(*u*) *Drybutter* v. *Bartholomew*, 2 P. Wms. 127; *New River Co.* v. *Graves*, 2 Vern. 431; *Townsend* v. *Ash*, 3 Atk. 336-337-338; *Bligh* v. *Brent*, 2 Y.

9. In *Buckeridge* v. *Ingram* (*v*), shares in a company engaged in the navigation of the River Avon, under the Statute of 10 Anne, were held to be real estate, and so subject to dower, and the authority of this case has since been recognized in several other cases (*w*). By the Statute of 10 Anne, the mayor, aldermen and common council of the City of Bath, the successors and assigns, or such persons as they should appoint, were authorized to improve the navigation of the River Avon, and to charge tolls on persons and property transported thereon. By an agreement executed between the corporate authorities of the one part, and the Duke of Beaufort and several other persons on the other part, the Duke and his associates undertook to do the work in consideration of being allowed to take the tolls. By the 11th article of the agreements it was provided that "no survivorship shall at any time take place between the said parties and undertakers: but if any or either of them shall happen to die, the share or part of such so dying, shall descend and go to the heirs and assigns of the party or parties so dying." The Master of the Rolls held that the right to take the tolls was an incorporeal hereditament arising out of realty, and therefore a "tenement." He observed: "I have no difficulty in saying that wherever a perpetual inheritance is granted, which arises out of lands, or is in any way connected with, or, as it is emphatically expressed by Lord Coke, exercisable within it, is that sort of property the law denominates real." Mr. Scribner, in his valuable work on dower, says (*x*):—One important

and Coll. 288; *Lord Stafford* v. *Buckley*, 2 Ves. Sr. 170, 182; 3 Kent, 340 note, 5th Edition; *Swayne* v. *Fawkener Show*, P. C. 207; 2 Parsons on Con. 315; 1 Greenl. Cruise 39; Redf. on Railw. 38-39; Pierce on Railw. 127; 1 Hilliard on Real Prop. 73; Scribner on Dower, Vol. 1, pp. 203-211-212.

(*v*) *Buckeridge* v. *Ingram*, 2 Ves. Jr, 652.

(*w*) *Howse* v. *Chapman*, 4 Ves. Jr. 542; *Finch* v. *Squire*, 10 Ves. Jr. 42; *The King* v. *Bates*, 3 Price 357; *The Earl of Portsmouth* v. *Bunn*, 1 Barn. and Cress. 703.

(*x*) Scribner on Dower, Vol. 1, p. 205.

feature in this case is sometimes overlooked. The company or association that succeeded to the rights and duties of the City of Bath, under the power of appointment contained in the original Act, was not incorporated (*y*), in which respect it differed from the New River Company, and the point decided did not really touch the question whether shares in the stock of a corporation are real or personal property. With regard to both these companies, it is remarked by Mr. Wordsworth, that the property given to them was real property, which they were to manage for the good of all. They had no power of converting it into any other description of property, but they were to keep it, and make profit of it as real estate. And further, the shares were transferable to the shareholders and their *heirs* (*z*).

10. But the more recent English cases, while, perhaps, they do not disturb the authority of the older cases above noticed, in so far as they establish the doctrine that, where lands are vested in the shareholders and not in the body corporate, the shares are to be treated as real estate, nevertheless agree in declaring and maintaining a different result where the corporation is clothed with the legal title (*a*).

11. The cases decided in the United States are very conflicting, but the following rule as laid down by Mr. Parsons, may safely be taken as properly deducible from the authorities.

"Generally, in this country, and in England, the stock of a corporation is personal property; and this is so, even

(*y*) See Wordsw. on Joint Stock Comp. (39 Law Lib.) 290.

(*z*) *Ibid.*

(*a*) *Bligh* v. *Brent*, 2 You. and Coll. 268, 294; *Weekley* v. *Weekley*, 2 You. and Coll. 281; *Bradley* v. *Holdsworth*, 2 Mee. and Wel. 422; *Duncuft* v. *Albrecht*, 12 Simons, 189; *Watson* v. *Spratley*, 28 Eng. Law and Eq. Rep. 507; *Hargreaves* v. *Parsons*, 13 M. and W. 561; *Humble* v. *Mitchell*, 2 Railw. Cas. 70; S. C. 11, Ad. and Ell. 205; *Tempest* v. *Kilner*, 3 C. B. 249; *Knight* v. *Barber*, 16 M. and W. 66; *Pickering* v. *Appleby*, 1 Comyn's R. 354; *Colt* v. *Netervill*, 2 P. Wm's. 304; *Heseltine* v. *Siggers*, 1 Exch. 856; Scribner on Dower, vol. i. p. 207.

though the whole property of the corporation be real, and the whole of its business relate to the care of real estate; if it be the surplus profit alone that is divisible among the individual members. But where lands are vested not in the corporation, but in the individual shareholders, and the corporation has only the power of management, in that case the stock or shares are real property" (*b*).

12. Dower is not demandable in a right granted to take and use water for hydraulic purposes (*c*).

(*b*) 2 Parsons on Con. 315; 1 Greenl. Cruise, 39; Redf. on Railw. 38, 39; Pierce on Railw. 127; 1 Hilliard on Real Prop. 73; 3 Kent, 340, note, 5th edition.

(*c*) *Kingman* v. *Sparrow*, 12 Barb. 201; *Buckingham* v. *Reeve*, 19, Ohio, 399; Scribner on Dower, vol. i. p. 212.

CHAPTER VIII.

THE ESTATE SUBJECT TO DOWER.

1. *Requisites to complete title of Dower.*
2. *Estate must be descendible to wife's issue.*
3. *Birth of issue not necessary.*
4. *Capacity to conceive not essential.*
5. *Husband must be entitled to immediate freehold.*
6. *Suspension of freehold during coverture.*
7. *Freehold and inheritance must both be in husband.*
8. *Intervening freehold estate.*
9. *Intervening chattel interest.*
10. *Surrender of life estate upon a contingency.*
11. *Particular estate must determine during life of husband.*
12. *Intervening contingent estate.*
13. *Determination of particular estate destroys contingent remainder.*
14. *Merger.*
15. *Contingent remainder not an estate.*
16. *Ontario Statute as to contingent remainders.*
17. *Cordal's Case.*
18. *Boothly v. Vernon.*
19. *Mr. Park's criticism of this case.*
20. *Hooker v. Hooker.*
21. *The early cases.*
22. *Contingency happening after Dower consummated.*
23. *No Dower in case of joint tenancy.*
24. *Intermediate contingent estate and intervening possibility.*

1. Having considered the nature and qualities of the property subject to dower, we will now consider the character of the estate or degree of interest in such property with which the husband must be invested in order to entitle the wife to dower.

2. The estate must be one that the issue of the wife might inherit. This doctrine relates more especially to

estates held in tail special. A case for its application is thus stated by Littleton: "If tenements be given to a man and the heirs which he shall beget of the body of his wife, although the husband die without issue, the same wife shall be endowed of the same tenements, because the issue which she, by possibility, might have had by the same husband might, have inherited the same tenements. But if the wife dieth, leaving her husband, and after, the husband takes another wife, and dieth, his second wife shall not be endowed in this case" (*a*).

The material point is, that these circumstances must concur (1) that the issue of the wife are, or would be able, to take as heir to the father, and (2) that such heirship must be in respect of the same estate as that out of which the wife claims to be endowed (*b*). For instance, "If a man be tenant in fee tail general, and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heirs of their two bodies, and they have issue, and the wife dieth, the husband taketh another wife and dieth, the wife shall not be endowed, for, during the coverture, he was seised of an estate tail special, and yet the issue which the second wife may have, by possibility may inherit" (*c*). Here, the only estate of which the husband had a seisin during the coverture of the second wife, was not inheritable by her issue, being an estate to him and the heirs of the body of himself and his first wife; and yet the issue of the second wife might, by possibility, inherit the elder estate tail, which was a tail general, and in default of issue of the first wife, would actually succeed to that estate (*d*).

(*a*) Litt. sec. 53; Bro. Dow. pl. 36; 2 Saund. Rep. 45 n. note 5; Perk. sec. 301, 302; *Spangler* v. *Stanler*, Md. ch. Decis. 36; Park on Dower 79; Scribner on Dower, vol. i, p. 215.

(*b*) Park on Dower, 79.

(*c*) Co. Litt. 31 b; Bro. Dower, pl. 18; Park on Dower, 79, 80.

(*d*) Park on Dower, 80.

The same general doctrine is thus stated by Perkins: "If tenant in general tail take a wife, and enfeoff a stranger, and take back an estate to him and his wife in special tail, and the wife dies, and he takes another wife, and hath issue and dies, the second wife shall not be endowed; yet the issue is remitted to the general tail" (*e*).

Mr. Park (*f*), referring to this doctrine, says: "The case, as put by Perkins, is liable to mislead the student. If this was intended of the issue of the second wife, who are the only issue mentioned, and which the context seems to require, there could be no remitter, because the defeasible estate tail never descended on such issue, they not being inheritable to it. The real case, however, in the books was, that the issue was by the first wife, which removes the difficulty."

3. It is not necessary to the attachment of dower that issue capable of inheriting should actually be born, but the possibility suffices. The wife must, however, be of such an age at the death of her husband, as to have had a possibility of conceiving or bearing issue, and this age the law contemplates to be nine years (*g*). On the other hand, the law does not set any bounds to the possibility of having issue at the most advanced age; and it has been decided that if a man marry a woman one hundred years old, she shall have her dower, though by possibility of nature she cannot have issue (*h*). Lord Coke's reason for this rule is as follows: "Seeing that women in ancient times have had children at that age whereunto no woman doth now attain, the law cannot judge that to be impossible which by nature

(*e*) Perk. sec. 302.

(*f*) Park on Dower, p. 80, note 3.

(*g*) Supra. cap. 2, p. 23-4; Park on Dower, p. 81.

(*h*) 2 Danv. 652; Bro. Dow. pl. 36; Co. Litt. 40 a; Roll. Abr. 657.

was possible; and in my time a woman above three score years old hath had a child, and *ideo non definitur in jure*" (*i*).

4. It is believed not to be essential to the right of dower in any case that the wife should be physically capable of bearing children. Dower is a right incident to marriage, and at this day the possibility of having issue can hardly be regarded as a pre-requisite to the inception of the estate. If, by the law of the place where the marriage is contracted, the wife is competent to enter into that contract, and the marriage be valid in other respects, the necessary effect would seem to be to clothe her with all the rights pertaining to the marital relation. And if the marriage remain undissolved during the life of the husband, it seems clear that the widow would be entitled to dower, even though it were rendered absolutely certain that by reason of physical malformation, or other cause, she was utterly incapable of bearing children (*j*).

5. The estate of the husband must confer a right to the immediate freehold. Dower is not allowed in estates in remainder or reversion expectant upon an estate of freehold, and hence, if the estate of the husband be subject to an outstanding freehold estate which remains undetermined during the coverture, no right of dower attaches, for the seisin of the freehold is in the tenant for life, and the remainder is not an estate of inheritance in possession (*k*).

(*i*) Co. Litt. 40 a; 2 Bl. Com. 131; Tud. Cas. 45.

(*j*) Supra. cap. 2, p. 23-5; *Hodgins* v. *McNeill*, 9 Gr. 307; 1 Washb. on Real Prop. 153; Scriber on Dower, vol. i., p. 217.

(*k*) *Cumming* v. *Alguire*, 12 U. C. R. 330; *Pulker* v. *Evans*, 13 U. C. R. 546; Co. Litt. 32 a; Perk. ss. 339-340; Park on Dower, 38, 49, 53, 54; 1 Roper H. and W. by Jacob, 359; 1 Greenl. Cruise, 162; 4 Kent, 38-40; *Blood* v. *Blood*, 23 Pick. 80; *Otis* v. *Parshley*, 10 N. H. 403; *Dunham* v. *Osborn*, 1 Paige, 634; *Eldredge* v. *Forrestal*, 7 Mass. 253; *Fisk* v. *Eastman*, 5 N. H. 240; *Moore* v. *Esty*, *Ibid*, 479; *Arnold* v. *Arnold*, 8 B. Mon. 202; *Apple* v. *Apple*, 1 Head (Tenn.) R. 348; *Blow* v. *Maynard*, 2 Leigh. 30; Scribner on Dower, vol. i., p. 218; *Brooks* v. *Everett*, 13 Allen (Mass.) 457; *Royster* v. *Royster*, Phill. (N. C.) L. 226; *Wilmarth* v. *Brydges*, 113 Mass. 407; *Re Leach*, 21 Hun. (N. Y.) 381.

If the husband purchases the life estate, that is, such a seisin as gives the wife dower subject to be defeated by the death of the husband prior to the tenant for life. The husband cannot alienate or encumber the estate to the prejudice of the wife's dower, nor is the same affected by the sale of the life estate upon execution against the husband (*l*). But, in order to exclude dower, the preceding estate must be a freehold interest; an estate for years, or other mere chattel interest, forms no impediment to the right to dower, since it does not prevent the husband from being seised of the immediate freehold, but rather protects and preserves that seisin, the possession of the party having the chattel interest, being regarded as the possession of the owner of the freehold (*m*). Interests of this character may postpone the enjoyment of dower, but they do not prevent the estate from attaching. Therefore, where a testator directed that if his personal estate should not be sufficient for payment of his debts and legacies, his executors should pay the same out of the rents and profits of his real estate; and when debts and legacies were paid, he devised his real estate in tail to his son, who married and died before the debts were paid and before taking possession. It was held that the estate in the executors was but a chattel interest, and that the widow of the son was entitled to dower (*n*). It is said, however, in a case of this description the endowment cannot take place until all the debts have been paid (*o*). Upon

(*l*) *House* v. *Jackson*, 50 N. Y. 161.

(*m*) Co. Litt. 32 a; Park on Dower, 53, 77, 78; 1 Roper H. and W., by Jacob, 361; 1 Roll. Abr. 670, pl. 7; Bro. Dow. pl. 89; *Bates* v. *Bates*, 1 Lutw. 729; S. C. 1 Ld. Raymond, 326: *Hitchen* v. *Hitchen*, 2 Vern. 403; 1 Greenl. Cruise, 162; 1 Wash. Real Prop. 154; 4 Kent 39; *Weir* v. *Humphreys*, 4 Ired. Eq. R. 273.

(*n*) *Hitchen* v. *Hitchen*, 2 Vern. 403; S. C. Prec. in Ch. 133; 2 Freem. 311; Cordell's Case, 8 Co. 96 a; Co. Litt. 42 a; Perk. sec. 335; 2 Crabb's Real Prop. 150; Tud. Cases, 43; *Weir* v. *Humphreys*, 4 Ired. Eq. R. 273; Scribner on Dower, vol. i., p. 218.

(*o*) *Hitchen* v. *Hitchen*, 2 Vern. 203; 1 Roper H. and W. by Jacob 373; 1 Greenl. Cruise, 157; 2 Crabb's Real Prop. 150, 151; Scribner on Dower, vol. i., p. 218.

the principle above stated, it was supposed that if the husband's seisin of the inheritance be subject to a *statute staple*, *statute merchant*, or an *elegit*, the wife's dower will attach, as those estates are but chattel interests (*p*).

6. In the case of incorporeal hereditaments, as seigniories, rents, commons, etc., the suspension of the freehold during all the time of the coverture, will prevent the attachment of dower, as in the case put with respect to the husband's curtesy in a seigniory. "If a tenant make a lease for life, of the tenancy to the seignioress, who taketh a husband, and hath issue, the wife dieth, he shall not be tenant by the curtesy; but if the lease had been made but for years, he shall be tenant by the curtesy" (*q*).

If the suspension do not take place previous to the marriage, but is the result of the marriage itself, the right of dower is not impaired. The following quotation from Perkins supports this proposition:—"If there be lord, and a woman tenant of one acre of land by fealty, and twelve pence rent, and they intermarry, and the husband die, the wife shall be endowed of the third part of the rent by way of retainer; and yet the husband was not seised thereof in deed during the marriage, for by the marriage the seigniory was in suspense, and so continued during the marriage. But notwithstanding, the husband was tenant of it during the marriage, as to bring an action, so that it was tantamount to a possession in law (*r*).

So, if the suspension be for years only, it does not prevent dower from attaching (*s*).

(*p*) 1 Roper H. and W. 373; Scribner on Dower, vol. i., p. 219.
(*q*) Co. Litt. 29 b.
(*r*) Perk. by Greening, sec. 303; Park. Dow. 55.
(*s*) Co. Litt. 29 b; Park, Dow. 77.

7. In order to render the wife dowable, the freehold and inheritance must be vested in the husband *simul et semel* "at once and together" (*t*).

They must also meet in him as one integral estate, and not as several or successive estates. But it is not necessary that they should result from one entire limitation, or that there should be a unity of title as to the freehold and inheritance. By whatever means they meet so as to become absolutely consolidated, the attachment of a title of dower is the consequence (*u*). If an estate is in terms limited to the husband for life, with remainder to his heirs or heirs of his body, it is sufficient, if in point of construction, the remainder thus limited, will operate to vest the inheritance in possession in the husband (*v*). The rule of construction, whenever it takes effect upon an immediate remainder so limited, produces a merger or consolidation of the several estates expressed by the limitations, and as a consequence the wife becomes dowable (*w*). And if the husband be seised of a life estate in lands and acquire the immediate reversion or remainder in fee expectant upon its determination, the two estates, by force of the doctrine of merger, will become consolidated, and unite in him as one entire estate of inheritance. The same principle applies where the husband is seised of the remainder or reversion, subject to a freehold estate, and that estate is surrendered to him during the coverture. In either case, the wife, if she be the survivor, is entitled to dower (*x*).

In a case determined in Maine, the consideration for a

(*t*) Perk. sec. 333; Park on Dower, 56; 1 Roper H. and W. by Jacob, 370, 371; 4 Kent, 39.

(*u*) Park on Dower, 56.

(*v*) *Ibid;* Perk. sec. 335.

(*w*) *Ibid.*

(*x*) *Post*, par. 9-10; Perk. sec. 337; Tud. Cas. 43; 1 Washb. R. P. 154, 155; *Beardslee* v. *Beardslee*, 5 Barb. 332; Scribner on Dower, vol. i. p. 220.

tract of land was paid by the husband, but the conveyance was made to a third person for the purpose of defrauding the creditors of the former. Subsequently, the grantee executed to the husband a life lease of the premises, and the latter entered and continued in possession until his death. It was held that his widow was not entitled to dower. The decision, however, was placed more especially on the ground that the husband was not invested with a legal estate in the inheritance, following in this particular the rule of the Common Law, excluding dower from the estate of a *cestui que trust*. And the Court suggested that if dower be not allowed where the trust is lawful, *a fortiori*, the wife would not be dowable where the trust is fraudulent in its character, and therefore not enforceable in a Court of Equity, so as to invest the husband with the necessary seisin (*y*). The existence in Ontario of the statute allowing dower out of equitable estates, would render the above law inapplicable here (*z*).

8. The interposition of a vested freehold estate in a third person, between the freehold and inheritance of the husband, will, during the continuance of that estate prevent dower, from attaching. It is not enough that the husband is seised of an estate of freehold in possession, and an estate of inheritance in remainder or reversion. The inheritance, as well as the freehold, must be in possession. In other words, it must be the immediate inheritance, and not an inheritance expectant upon an estate of freehold in any other person, interposed between the freehold and inheritance of the husband. Therefore, if lands be limited to A. for life, remainder to B. for life, remainder to A. in fee, the wife of A. will not be entitled to dower, unless, by the determination of the estate of B. during the coverture, A. becomes

(*y*) *Mann* v. *Edson*, 39 Maine, 25; Scribner on Dower, vol. i. p. 220.
(*z*) C. S. U. C. cap. 84, sec. 1; R. S. O. cap. 126, sec. 1; *post*, cap. 17.

seised of the inheritance in possession. The intervening estate of B. prevents the operation of the law of merger, and keeps the freehold and inheritance of A. separate and distinct. As a consequence the right of dower does not attach (*a*).

Since the passing of the statute providing that dower attaches upon estates equal to estates of inheritance in possession, it would seem that the foregoing paragraph is not law (*b*). In all cases in which the attachment of a title of dower, is prevented by the existence of a previous or intermediate estate of freehold, the obstacle will, of course, be removed by the determination of that estate (*c*).

9. An estate for years or other chattel interest intervening between the freehold and inheritance of the husband will not prevent a title of dower from attaching (*d*).

This proposition is thus stated by Perkins: "If a lease of land be made to the husband for life, the remainder to a stranger for years, the remainder to the husband in fee, and the husband die during the years, the wife may recover dower; but execution shall stay until the term be determined, for this mesne remainder for years shall be no impediment, since the freehold and the fee were sufficiently joined in the husband *simul et semel* for the wife to have dower (*e*).

(*a*) Finch's Law, b. 2, c. 3, p. 125; Bro. Dow. pl. 6; 1 Roll. Abr. Dow. pl. 9; Perk. sec. 333, 335, 338; Park on Dower, 57; Scribner on Dower, vol. 1, p. 221; Bate's Case, 1 Salk. 254; S. C. 1 Lord Raym'd, 326; 1 Roper, H. and W. by Jacob, 371; *Eldredge v. Forrestal*, 7 Mass. R. 253; *Dunham* v. *Osborn*, 1 Paige, 634; *Fisk* v. *Eastman*, 5 N. H. Rep. 240; *Moore* v. *Esty*, *ibid*, 479; *Green* v. *Putnam*, 1 Barb. S. C. 500; *Northcutt* v. *Whipp*, 12 B. Mon. 65.

(*b*) C. S. U. C. cap. 84, sec. 1; R. S. O. cap. 126, sec. 1; *post*, cap. 17.

(*c*) Co. Litt, 29 a; Park on Dower, 74; Bro. Dow. pl. 17.

(*d*) Perk. sec. 336; Co. Litt. 32 a. 296 a; Scribner on Dower, vol. i. p. 221; *Bates* v. *Bates*, 1 Lord Raym'd, 326; S. C. 1 Salk. 254; 1 Lutw. 729; *Weir* v. *Humphries*, 4 Ired. Eq. R. 273; Park on Dower, 77; 2 Crabb, Real Prop. 133, 158; 4 Kent, 39.

(*e*) Perk. sec. 336.

The rule is the same if the first estate be *per autre vie* only and limited to the husband and his assigns (*f*).

In all cases of the character above considered, dower attaches, subject only to the term, or other intervening chattel interest. The enjoyment of the estate by the dowress is postponed until such intervening interest is determined. If rent be reserved to the husband upon the intervening estate, the widow is entitled, upon endowment, to a proportionate part of such rent (*g*). If the estate be subject to a term of years, granted before coverture by way of mortgage, the widow of the mortgagor will be entitled to dower at law, with a *cessit executio* during the term (*h*), and, in equity, be entitled to redeem, if she thinks fit. If the lease be absolute, the widow will be entitled to a third of the rent immediately, and also dower of the land, with a *cessit executio* during the term (*i*). A surrender of the intervening life estate by the tenant, or any grant thereof operating virtually as a surrender, although not so in form, will be attended with this result. Thus, a lease to the reversioner or remainderman and his heirs for the life of the lessor therein, is in substance a surrender, for the reason that thereby the tenant for life parts with all his estate (*j*). But a lease for the life of the remainderman or reversioner will not operate as a surrender. In such case there is no merger of the particular estate. The reason assigned for this distinction is, that when a tenant for his own life makes a lease to another for the life of the lessee, the tenant for life retains a reversion, or what is sometimes denominated in the old books, a possibility, as possibly he may survive the lessee; and upon the happening of that

(*f*) *Trevelyan* v. *Trevelyan*, Eng. C. P. Trin. T. 1826; see note of the case in Addenda to Perkins, by Greening, p. 169; see, also, note to sec. 336.

(*g*) Park on Dower, 78; Scribner on Dower, vol. i. p. 222,

(*h*) *Chisholm* v. *Tiffany*, 11 U. C. R. 338.

(*i*) Leith and Smith's Real Prop. 142.

(*j*) 18 Ed. 3, 45; Park on Dower, 75.

event he would be entitled to enjoy the premises for the unexpired term of his own life. When such a lease is made to the owner of the inheritance, this reversionary interest of the tenant becomes an interposed estate of freehold between the lease for life and the inheritance (*k*).

10. A surrender will sometimes confer a title of dower, although it be defeasible upon the happening of a certain contingency, as where husband and wife are tenants for life and surrender to the reversioner, the wife of the latter is held dowable. And yet, if the wife of the tenant survive her husband, she may defeat the surrender. Here, there is no interposed estate, but merely a right of defeating the surrender upon the happening of a certain event (*l*).

So, also, if the tenant for life surrender to the reversioner upon condition, the wife of the reversioner will be dowable so long as no entry is made for condition broken (*m*).

11. To let in the title of dower, however, the particular estate must determine or be destroyed in the lifetime of the husband. If the wife should survive the husband, and afterwards, during her life, the particular estate should determine, she would not thereby acquire any right to be endowed, because, as will be explained hereafter, there was no seisin during the coverture of such an estate as her title could attach upon (*n*).

12. Questions of the most abstruse and perplexing character have occasionally arisen with regard to the effect upon the right of dower, of the interposition of a contingent estate

(*k*) Co. Litt. 42 a; 2 Roll. Abr. 496, pl. 7; Bro. Dower, pl. 17; Bro. Estate, pl. 67; Park on Dower, 58-75. The fact that the remainderman is a party to the lease, prevents the forfeiture which might otherwise attach upon the act of the tenant for life; Scribner on Dower, vol. i. p. 222, note 4.

(*l*) Park on Dower, 75; Scribner on Dower, vol. i. p. 223.

(*m*) Bro. Dow. pl. 74; Park on Dower, 75.

(*n*) Perk. sec. 335; Park on Dower, 76.

of freehold, between a limitation to the husband for life, and a subsequent remainder to his heirs. And to some extent, these questions have been rendered still more embarassing, by the rule of the Common Law, making contingent remainders liable to destruction by the determination of the particular estates upon which they depend before such contingent estates become vested, and the exceptions and qualifications engrafted upon this rule (*o*).

13. The general doctrine was that the determination or extinguishment of the particular estate upon which the contingent remainder rests for its support, before the event has happened which is to enable it to vest, operates to its total annihilation (*p*).

This general doctrine is thus stated by Lord Hale: "If the contingent remainder cannot take effect immediately on the first determination of the particular estate, whether it be determined by merger or surrender, or in any other way whatsoever, it will never vest afterwards, though the particular estate should come *in esse* again" (*q*). But to the general rule thus laid down the same learned Judge has annexed the following qualification: "Where an estate *in esse* and a contingent remainder over to him who had the first estate *in esse* are united together by one and the same conveyance, there the remainder *in esse* is vested until the contingent remainder comes *in esse*, and then the estates shall be opened and disjoined by the letting-in of the contingent remainder, because they were all created together by the same conveyance, and therefore the estates shall be opened and closed as appointed by the original conveyance; but otherwise it is when the remainder *in esse* comes to the

(*o*) Scribner on Dower, vol. i. p. 223.

(*p*) Fearne Cont. Rem. 316; 2 Greenl. Cruise, 269; 4 Kent, 253; Archer's Case, 1 Co. 64; Scribner on Dower, vol. 1, p. 223.

(*q*) *Purefoy* v. *Rogers*, 2 Saund. 380-387.

particular estate by any *grant* or *conveyance* made *after* the original conveyance, for there the contingent remainder will be destroyed (*r*).

14. It is another principle of the Common Law, having a direct and important connection with this subject, that whenever the present freehold and ultimate inheritance become united in the same person, and there is no intervening *vested* estate, the freehold becomes instantaneously lost or merged in the inheritance; or, as Blackstone expresses it "Whenever a greater estate and a less coincide and meet in the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged; that is, sunk or drowned in the greater" (*s*).

15. A contingent remainder, while contingent, is not recognized in law as an *estate*, in the proper sense of that term (*t*); and, therefore, in the case above supposed, an intervening remainder resting in contingency, will, by the application of the principle above stated, be absolutely defeated by such merger of the particular estate. This proposition, however, is subject to the qualification noticed in the preceding section relating to the creation of the several estates by the same instrument (*u*).

16. It may be here stated, that in Ontario, the Common Law rule permitting contingent remainders to be defeated by the determination of the precedent particular estates has been changed by Statute (*v*). The Statute above referred to enacts that, "Every contingent remainder exist-

(*r*) *Purefoy* v. *Rogers*, 2 Saund. 380-387.

(*s*) 2 Bl. Com. 177. See also *Miller* v. *Talley*, 48 Mo. 503.

(*t*) Wm's Real Prop. 235.

(*u*) Scribner on Dower, vol. i. p. 224.

(*v*) R. S. O. cap. 95, sec. 3; C. S. U. C. cap. 90, sec. 6; 40 Vic. cap. 8, sec. 39; the rule has also been changed by Statute in England, 8 and 9 Vic. cap. 106.

ing on the second day of March, 1877, or created since that day or hereafter, shall be, and every contingent remainder which existed at any time between the thirtieth day of May, 1849, and the second day of August, 1851, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold."

The principle difficulty with regard to the right of dower, in cases where contingent remainders intervene, occurs where the several estates are limited by the same instrument, or where the person having the particular estate by devise, is also heir-at-law to the testator, and takes the fee by descent *immediately* from such testator. In either of these events, if there be an intervening contingent remainder, there will be no merger of the freehold and inheritance. The law will not permit the intention of the donor or testator to be defeated by the application of the technical doctrine of merger, where the person having the freehold and fee takes them by virtue of the same instrument which creates the contingent remainder, or where the fee descends to him directly from the testator by whose bounty he holds the freehold. In these cases, therefore, the contingent remainder is not defeated by reason of the particular estate, and the fee becoming united in the same person (*w*). This being the rule, the question as to the right of dower in such cases is attended with peculiar difficulty. It is, as we have seen, a fundamental principle in the law of dower, that the husband must have the immediate freehold and inheritance, *simul et semel*. If, therefore, the intermediate contingent interest operate to pre-

(*w*) Wiscot's Case, 2 Co. 60 b; *Purefoy* v. *Rogers*, 2 Saund. 380, 387; *Plunkett* v. *Holmes*, 1 Lev. 11; Raym. 28; Archer's Case, 1 Rep. 64; *Boothby* v. *Vernon*, 9 Mod. 147; *Crump* v. *Norwood*, 7 Taunt. 362; *Doe* v. *Scudamore*, 2 Bos. and Pul. 297; Fearne Cont. Rem. 341, 503; Gilb. Uses, by Sugden, 303 note (2); 1 Roper, H. and W. by Jacob, 9, 363, 364; 2 Greenl. Cruise, 273, 274; 4 Kent. 254; Scribner on Dower, vol. i. p. 226.

vent the life estate of the husband from merging in the inheritance, and thus keeps the two estates disjoined, it is difficult to understand how, upon principle, the right of dower can attach so long as there is a continuing possibility that the contingent estate may vest. It would seem, however, to be the result of the adjudged cases, and the concurring opinion of many of the writers on the law of real property, that where a contingent estate of freehold is interposed between a limitation to the husband for life and a subsequent remainder to his heirs, the remainder is executed in possession in the tenant for life *sub modo;* or, in other words, that the estates are consolidated or united until the happening of the contingency; but with the qualification annexed to such consolidation, that if the contingency happens they shall again divide, and resume the character of several or distinct estates, so as to let in the estate limited upon that contingency (*x*). And it seems to be the prevailing opinion that upon this union of the freehold and inheritance *sub modo*, a right of dower attaches, subject to a liability to be divested upon the happening of the contingency and the consequent vesting of the contingent estate (*y*).

In Mr. Preston's learned treatise on Merger (*z*), this consolidation is in one passage called a "temporary merger." In another passage it is treated as a protection from merger (*a*). Mr. Park says: "The consolidation so occasioned would seem to be unaccompanied by merger, for the effect of a merger would be to accelerate the re-

(*x*) *Purefoy* v. *Rogers*, 2 Saund. 380, 387; Lewis Bowles' Case, 11 Co. 79 a, 80 a. Co. Litt. 28 a; Fearne Con. Rem. 36; Preston's Rule in Shelley's Case, 80; 3 Prest. Conv. 113, 489; 1 Roper H. and W. 9, 362, 365; 2 Greenl. Cruise, 272, 273; Park on Dower, 61, 62, 63, 64; Scribner on Dower, vol, i. p. 227 and note (*z*).

(*y*) Watk. Conv. by Preston, 45; Prest. Est. 535; 1 Roper H. and W. 9, 363; 2 Crabb, Real Prop. 160; Tud. Cases, 43.

(*z*) 3 Prest. Con. 113.

(*a*) 3 Prest. Conv. 489.

mainder limited to the heirs of the body, and by annihilating the particular estate of freehold by which the contingent remainder is supported, it would *ipso facto*, destroy that contingent remainder. The consolidation which the books suppose, would, therefore, appear to be an exception to the law of merger; a union of the time of two estates without an involving of the ownership of the prior estate in that of the subsequent one" (*b*).

17. The authorities bearing upon the questions just discussed are very contradictory. In Cordal's case (*c*), lands were devised to Ed. Cordal for life remainder to his first son in tail, and so to the second; remainder to the heirs of the body of Ed. Cordal. By the report it is said to have been "resolved that the estate tail was not executed (in possession) for the possibility of the mean estate that might interpose, and therefore it was always disjoined during the life of Ed. Cordal; so that of that estate his wife could not be endowed." In commenting upon this decision, Mr. Park says (*d*): "It is difficult to understand with precision what the judges intended to express by this resolution. Taken in its literal *extent*, the resolution is certainly not law at this day, it being now admitted that for some purposes the estate tail is executed, and that there is an union of the freehold and inheritance; and Cordal's case has accordingly been *denied to be law* on several occasions" (*e*).

18. In *Boothby* v. *Vernon* (*f*), Anne Boothby was tenant for her life, with a contingent remainder to the issue male of her body *living at her death*, in tail male, and she had

(*b*) Park on Dower, pp. 62, 63.

(*c*) Cordal's Case, Cro. Eliz. 316; S. C. stated 8 Co. 96.

(*d*) Park on Dower. 64, 65.

(*e*) Park on Dower, 64; 2 Saund, 386; Cas. Temp. Hardw. 13; 2 Barnard, K. B. 279; Co. Litt. 239 b note 3; Fearne Cont. Rem. 346, 4 Amer. ed; Gilb. Dev. 71.

(*f*) *Boothby* v. *Vernon*, 9 Mod. 147; S. C. 2 Eq. Ab. 727.

the reversion in fee *by descent*. The Court of Common Pleas, on a case sent there by the Court of Chancery, certified that the husband of Anne Boothby was not tenant by the curtesy. Upon a rehearing before Lords Commissioners, Raymond and Gilbert, it was argued that the husband had a right to be tenant by the curtesy, because his wife was seised of the inheritance; for, though she had an express estate for life given to her by the will, yet there was no immediate remainder which possibly could vest during her life; but the inheritance was limited upon a contingency at her death, and, therefore, she, being heir-at-law to the testator, it must descend to her until the contingency happen, so that she was seised of the inheritance subject to the contingency. The case was also argued upon another ground, but the Court appear to have decided it without reference to the circumstance that the wife had the reversion by descent, arguing only upon the intention of the testator, that she took no estate of inheritance under the will; a point which was not made at the bar. Towards the conclusion of the judgment, the Court is reported to have put the case, that "where an estate for life is limited to a woman, remainder to her first, and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs, here it is plain that she is seised of the inheritance; yet *if she hath a son*, her husband shall not be tenant by the curtesy, because the contingent estate which is to arise on her death, intervenes between her estate for life and the inheritance" (*g*).

19. Mr. Parks' criticism of this case is very severe. "The decision in *Boothby* v. *Vernon*," he says, "is peculiarly unsatisfactory. The reasoning of the judges as to the intention of the testator, quite overlooks the question; such

(*g*) Park on Dower, 64, 65. The words "which is to arise upon her death," appear to have crept in by mistake. *Ibid*, note.

intention having nothing to do with the positive rule of law which casts the reversion upon Anne Boothby, as the heir-at-law of the testator, and the reference made to the case of a limitation similar in terms to that in Cordal's case, is expressly qualified by saying, 'if she has a son;' in which event, no doubt could be entertained that the title of the husband to be tenant by the curtesy would be avoided. Indeed, this case of *Boothby* v. *Vernon* cannot be admitted as a direct authority either way, the judges having evidently treated the wife as being a bare tenant for life, with a possibility to her issue, as was observed by Lord Hardwicke in *Hooker* v. *Hooker*" (*h*).

20. In the case of *Hooker* v. *Hooker* (*i*), lands were settled to the use of William Hooker, the elder, for his life, remainder to his wife for life, remainder to William Hooker (his son and heir apparent) for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to William Hooker, the elder, in fee. William Hooker, the father, and his wife died in the lifetime of the son, who also died *without issue*, and the question was whether his widow was entitled to dower. The case was twice argued during the time of Lord Chief Justice Raymond, and on each of these arguments the Court were strongly of opinion that the widow had a title of dower (*j*). They agreed that "where the estate for life, and the remainder in fee, are in one and the same person by the same conveyance, there shall be an opening of these estates, in order that the contingent remainder may vest. But wherever the remainder in fee comes to the person who has the estate for life, and there is no vested remainder between, in such case the contingent remainder is always destroyed,

(*h*) Park on Dower, 65, 66.

(*i*) *Hooker* v. *Hooker*, Cas. Temp. Hardw. 13; 2 Barn. K. B. 200, 232 379.

(*j*) 2 Barn. K. B. 200, 232.

whether such coming of the remainder in fee is by the act of God, or by the act of the party (*k*). For this purpose the C. J. mentioned the case of *Harpool* v. *Kent*, Sir T. Jones, 76, where there were grandfather, father and son; the grandfather settled his estate to the use of himself for life, the remainder to the use of the father for life, the remainder to the use of his first and every other son in tail male, the remainder to his own right heirs. The grandfather died before the birth of the grandson, whereby the remainder in fee came to the father. The Court was of opinion in that case that the remainder was destroyed." After the appointment of Lord Hardwicke as C. J., the case was again argued. His Lordship observed that the general questions in this case were: 1st, whether the contingent remainder was destroyed by the reversion in fee falling on the estate for life; and, 2ndly, admitting that it was not, and that there might be an opening, whether this possibility would destroy the dower." He was inclined to think the remainder was destroyed. He agreed in the distinction between the several estates coming to one person by the same deed, and by distinct acts. "*Kent* v. *Harpool*," he observed "was a very strong case, and in *Purefoy* v. *Rogers*, 2 Saund. 380, the express opinion of Hale and the Judges was that the *purchasing* the remainder in fee by the tenant for life totally destroyed the contingent remainder, and that it could never be let in again though the particular estate were revived (*l*.) In the present case, indeed, there was no *descent* of the fee, because it was in abeyance during the life of William Hooker the elder, (but) *then* the estates came to be consolidated, and therefore he thought the contingent interest was destroyed in this case, likewise. But, supposing it were not so, and that there was a possibility of the estates open-

(*k*) This is too general. *Vide* Park on Dower, 67 n.

(*l*) This seems to be too general. Park on Dower. 67 n; Fearne Con. Rem., 5th ed., p. 349.

ing in this case to let in the contingent remainder, yet he thought the plaintiff had a good title to dower, inasmuch as it was stated that William Hooker, the younger, never had any issue. The single case in the books that he found against this, was that in Croke (*m*), but in *Purefoy* v. *Rogers*, 2 Saund. 386, Lord C. J. Holt, who was then counsel, said Lewis Bowles' case and others were against it, and that it was not law; and in ejectment brought in Lord Bridgman's time, that case in Croke was denied by him likewise to be law, and accordingly he (Lord Hardwicke) did not take it to be so. Page, J., said: Here is nothing but a possibility which has never happened, nor can now happen, to distinguish this case from an estate in fee; and therefore he thought the wife plainly entitled to dower. Probyn, J., said: The distinctions taken in this case may be allowed, and yet the widow be entitled to her dower; besides, it is impossible now the contingencies ever should happen." Referring to this case, Mr. Park says: "This case certainly did not require that Cordal's case should be overruled upon the point of dower, and it is observable that both Lord Hardwicke and the other Justices are reported to have laid stress upon the circumstance that the contingency has become impossible which seems alone to distinguish it from Cordal's case. The cases in which Cordal's case is mentioned to have been denied, were both, no doubt, (as in *Purefoy* v. *Rogers*), solely upon the point of consolidation, as to which, Cordal's case certainly cannot be now supported. The judgment of Lord Hardwicke, as given above (*n*), (being what appears the preferable result of the several reports,) sets the case in a somewhat different view from that in which it has hitherto appeared in the treatises. Lord Hardwicke doubted, it seems, no more than his predecessor,

(*m*) Cordal's Case, Cro. Eliz. 315.

(*n*) In the report of this case, contained in Annesley, the judgment of Lord Hardwicke is supposed to be incorrectly given. Park on Dower, 68 n. x.

Sir Robert Raymond, that the subsequent *descent* of the reversion upon a tenant for life would destroy a contingent remainder; but his doubt upon this case arose from an idea that the reversion did not come to the son by descent, inasmuch as it was in abeyance during the life of the father (*o*).

21. This notion, being now universally exploded as to conveyances to uses, a case circumstanced like *Hooker* v. *Hooker*, might, at this day, be determined on the point of the destruction of contingent remainders alone (*p*). Several cases are stated in the early text books and digests, in which a union of the freehold and inheritance is prevented, and dower consequently excluded. Thus according to Perkins: "If lands be given to two men, and to the heirs of the body of *one* of them begotten, and he who hath the fee tail takes a wife, and dies in the lifetime of him that hath the freehold, although he that hath the freehold dies, the wife shall not have any dower, because the estate tail was not executed to all purposes in her husband; and yet if a stranger had entered after the death of him who had the freehold, the issue of the donee should have had a *formedon en le descend* against him, and should have alleged the *esplees* in his father; and so to such intent the estate was executed in the donee" (*q*).

In this case, were the estate tail to vest absolutely in the person to whom the inheritance is limited, the merger of the freehold for one moiety would sever the joint tenancy, and thus defeat the intention of the donor. This the law does not permit (*r*). But the same distinction, before adverted to, is taken between the case above given and one

(*o*) Fearne on Con. Rem., 5th ed., p. 352.
(*p*) Park on Dower, 64, 71.
(*q*) Perk. sec. 334; Co. Litt. 182 a.
(*r*) Dyer, 9 a, pl. 22; Scribner on Dower, vol. i., p. 233.

where the inheritance comes to the husband by a separate conveyance or subsequent descent. In the latter case, the freehold would be immediately merged for a moiety, and the joint tenancy consequently severed. As a result of this the wife would be entitled to dower (*s*).

In the following example by Perkins the wife is entitled to be endowed: "If land be leased unto A. and B. for the life of C., the remainder unto the right heirs of A., and A. take a wife, and C. dieth, leaving A. and B., and A. dieth, leaving B., his (*i.e.* A.'s) wife shall be endowed; because the *cestui que vie* died leaving A., the husband, so as the freehold and inheritance are joined in the husband during the coverture" (*t*). Here the joint seisin of the freehold for the life of C. prevented the remainder to the heirs of A. from executing absolutely in A., and excluded the attachment of dower; but on the death of C. the joint seisin of the freehold determined, and the inheritance became executed in possession in A. (*u*).

So, if lands are given to J. and Alice, his wife, in special tail, with remainder to the right heirs of the husband, and the wife die without issue, and the husband marry again and dies, his second wife shall be endowed. Here, by the death of Alice without issue, the husband became tenant in tail after possibility of issue extinct, and that estate being no longer privileged against merger, became consolidated, and lost in the remainder in fee, so as to make him seised in fee of the freehold and inheritance in possession (*v*).

22. Upon the assumption that the wife has a title of dower upon an estate executed in the husband *sub modo*, it

(*s*) Co. Litt. 182 b, 183 a; Wiscot's Case, 2 Co. 60 b; *Merrill* v. *Rumsey*, 1 Keb. 888; Park on Dower, 59, 60; Scribner on Dower, vol. i. p. 233.

(*t*) Perk. by Greening, sec. 337.

(*u*) *Ibid*, Greening's note (i); 1 Prest. on Est. 336; Park on Dower, 76.

(*v*) Perk. sec. 358; Bro. Dow. pl. 25; 1 Roll. Abr. 677, pl. 10; 1 Roper, H. and W., 366; Park on Dower, 56, 57.

may become a question whether, if the intervening contingent remainder comes *in esse* after her title is consummated by the death of the husband, the estate arising under that remainder shall take effect subject to the title of dower, or shall defeat and overreach that title.

The better opinion seems to be, that upon the happening of the contingency and vesting of the remainder, the husband is to be regarded as having been seised of several estates *ab initio*, and consequently that the title of dower is defeated (*w*). The interposition of a mere *possibility*, if it be of a freehold nature, between the life estate and inheritance of the husband, will, so long as the possibility exists, prevent a title of dower from attaching. Its effect is not merely to defeat that title by the happening of the possibility, but absolutely prevents the attachment of a title in the wife, unless the possibility be determined during the coverture (*x*).

23. The case of a joint tenancy of the fee is a striking example of this (*y*). The existence of the possibility of survivorship, necessarily incident to a joint estate, operates to prevent the attachment of dower.

The case of a lease by a tenant for life to the reversioner, for *his* (the reversioner's) life, is governed by the same principle, as the old books considered the *mesne* reversion of the tenant for life as a mere possibility (*z*). It was for some time doubted whether if an estate was limited to A. for life, remainder to B. for the life of A., remainder to A. in fee or in tail, this interposed limitation to B. conferred

(*w*) Park on Dower, 73.

(*x*) Park on Dower, 72; 1 Washb. Real Prop. 156. This doctrine has no application to estates held upon condition. See *post*, cap. 10.

(*y*) *Post*, cap. 9.

(*z*) Park on Dower, 72.

such an interest as would prevent the consolidation of the estate for life and remainder in fee or prevent the attachment of dower. This point was decided in the case of *Duncomb* v. *Duncomb* (*a*), where, upon a writ of dower, it appeared by special verdict that William Duncomb, the husband of the demandant, was tenant for life, the remainder to J. S. and his heirs for the life of William, the remainder to the heirs male of the body of William, with the ultimate remainder in fee to George Duncomb, the tenant to the writ. William Duncomb died without issue. The question was, "whether the remainder to J. S. and his heirs for the life of William Duncomb be such an interposing estate between the estate for the life of William and the remainder to the heirs of his body, that the wife should not be endowed?" It was argued for the demandant, "that the whole estate was really in William, and the remainder to J. S. for the life of William was no more than a possibility; so that, if William had committed a forfeiture, J. S. might take advantage thereof for preservation of remainders. But in the meantime the whole estate is executed to D. as in Lewis Bowle's case (*b*), the whole estate tail was executed in the father till the birth of the first son; and though by this possibility the estate for the life of William is not merged, yet the estate tail is executed to such a purpose that the wife shall be endowed." But, the Court, upon the first argument without any hesitation, gave judgment for the tenant. The ground of this decision was that J. S. had an actual interposed estate of freehold, and not merely a possibility, as claimed in the argument (*c*).

Mr. Park says that this decision has ever since been considered as undoubted law, and has been sanctioned by the

(*a*) *Duncomb* v. *Duncomb*, 3 Lev. 437.
(*b*) Lewis Bowle's Case, 11 Co. 83.
(*c*) Fearne Con. Rem. 349; Park on Dower, 74.

decisions on the common limitation to trustees to preserve contingent remainders (*d*).

24. It seems to be one of the anomalies of the law that dower may attach where there is an intermediate contingent estate which may possibly vest, and that dower is excluded, where a mere possibility intervenes between the freehold and the inheritance.

(*d*) Park on Dower, 74; *Dormer* v. *Parkhurst*, 18 Vin. Abr. 413; 5 Bro. Parl. Ca. 453; 13 East. 489; and the certificate in *Colson* v. *Colson*, 2 Atk. 250.

CHAPTER IX.

SEISIN AS A REQUISITE OF DOWER.

1. *Husband must be seised during coverture.*
2. *Livery of Seisin.*
3. *Livery in deed and in law.*
4. *Seisin in law and mode of conveyance in Ontario.*
5. *Remainder expectant upon a freehold interest.*
6. *Dower where husband entitled to right of entry.*
7. *Conveyance under Statute of Uses.*
8. *In Ontario Uses take effect when and as they arise.*
9. *Dower out of Incorporeal Hereditaments.*
10. *Seisin by wrong.*
11. *Sole seisin requisite but not sole seisin of entirety.*
12. *Dower in cases of partition between joint tenants.*
13. *Seisin must be of an inheritance in possession.*
14. *Transitory seisin.*
15. *Proof under issue of no seisin.*
16-20. *What are evidences of seisin.*
21. *Tenant in dower not compellable to give evidence as to contents of title deeds.*
22. *Cases in the United States.*

1. In order to entitle the widow to dower at Common Law, there must have been a *seisin* either *in deed* or *in law* of lands or tenements in the husband during coverture.

A title to dower cannot arise, except in respect of the lands or tenements, of which the husband was seised; and the additional portion of the rule that the seisin shall be, during the coverture is evidently based upon sound reasoning, as it would be absurd that a title commencing with the marriage contract should relate back to all property, of which the husband had, at any period of his lifetime, been seised, and his seisin of which was previously determined.

A right or title to real property, however complete in other respects would not formerly have furnished a foundation for a claim of dower, if unaccompanied with that which is technically termed seisin (*a*).

2. Under the old feudal system, the mode of transferring a freehold was by corporeal investiture, or *livery of seisin*, and this ceremony was absolutely necessary to a perfect and complete transfer of the estate. It consisted, simply, in an open and notorious delivery of the possession to the proposed tenant of the freehold, in the presence of the *pares curiæ*, or peers of the lords' court; and this was usually effected by the lord of the manor, or some one authorized to act in his name, going upon the land with the tenant, and making a symbolic delivery of the possession to him by placing in his hand some portion of the premises, such as a turf, or a twig severed therefrom, the *pares curiæ* acting as witnesses of the transaction. This act of investiture was denominated *livery of seisin*. No deed or other writing was necessary to perfect the title of the tenant, though it was not an uncommon practice, as a means of preserving some evidence of the transfer, to record, in what were termed *brevia testata*, corresponding to some extent with deeds of modern date, the nature of the services which the tenant was to render, and the terms and conditions upon which he was to hold the land. The formality of livery of seisin being completed, the party thus placed in possession became, to all intents and purposes, *seised in deed*, as tenant of the freehold (*b*).

The rule requiring livery of seisin arose, as we have seen, out of the system of military tenures and although this system was abolished at an early period, the rule we have

(*a*) Litt. sec. 30; Perk. sec. 301; Fitzh. N. B. 147 (E.); Co. Litt. 31 a; Park on Dower, 24.

(*b*) Scribner on Dower, vol. i. p. 238; Co. Litt. 266 b. n. 217; 1 Washb. Real Prop. 32-33; *Green* v. *Liter*. 8 Cranch, 229.

mentioned, became interwoven with the law of real property and was not abolished until 1845 (*c*).

In modern English practice, livery of seisin was exactly similar to the investure of the feudal law, and in common law conveyances, was indispensible to a complete transfer of title to the purchaser. The mere saying and sealing of a deed of feoffment of lands, unless possession were formally delivered by the feoffor to the feoffee, was in no instance sufficient to transfer an estate of freehold. It did not convey the estate itself, but was regarded merely as evidence of the nature of the conveyance. Without the formality of livery of seisin, the deed passed only an estate at will (*d*).

3. Livery of seisin at Common Law consisted of two kinds: *Livery in Deed, and Livery in Law.* The feoffor might go on the premises with the feoffee, and there, taking the ring of the door of the principal mansion, or a turf, or a twig, deliver the same to the feoffee in the name of seisin; or, he might say to the feoffee, "I am content that you should enjoy this land according to the deed," or words of similar import. Either of these modes constituted livery of seisin in deed, but so strict was the law that a mere delivery of the deed on the premises was not sufficient. It was necessary that it should be delivered in the name of seisin.

Livery *in law*, was where the feoffor and feoffee went within sight of the premises, and the former said to the latter:—"I give you yonder house or land; go and enter into the same, and take possession of it accordingly," or used language to the same effect. If the feoffee entered in pursuance of this authority during the lifetime of the feoffor, the seisin was complete. Or if he could not enter without endangering his life, it was sufficient for him to venture as near as might be consistent with his safety, and

(*c*) 8 and 9 Vic. (1845).
(*d*) 1 Inst. 48 a; 4 Greenl. Cruise, 67, Par. 5.

there make claim to the land. This was also sometimes called a *constructive* seisin; and the same term has been applied to cases where a grantee, or the heir, of several parcels of land in the same county, enters into one parcel in the name of the whole, which he may do where there is no conflicting possession of the parcels not actually entered upon. Livery of seisin being thus made, the feoffee became invested with the legal title of the freehold, and was said to be seised thereof in deed (*e*).

4. *Seisin in Law*, is where title is cast upon a person by operation of law. Title to lands acquired by descent is an instance of this. Before entry the heir is said to be seized *in law*. But an actual entry upon the lands, either in person, or by some properly authorized agent, is necessary at Common Law, to invest him with seisin *in deed* (*f*).

In Ontario the conveyance of land is regulated by Statutes (*g*), which prescribe what acts or formalities are necessary to pass title to or interest in lands. A deed executed and delivered, in the manner prescribed by Statute is all that is necessary to render a transfer to the title complete, and to invest the purchaser with seisin in deed of the lands conveyed.

The rule of the Common Law making a seisin in the husband a requisite to dower did not require an actual seisin or seisin in deed, it was sufficient if the husband had a seisin in law (*h*). Therefore, if lands descended

(*e*) Co. Litt. 48 a. b.; Litt. secs. 417, 418, 419; 4 Greenl. Cruise, pp. 67, 70; Thoroughgood's Case, 9 Co. 136 a.; *Vaughan* v. *Holdes*, Cro. Jac. 80; *Parsons* v. *Perns*, 1 Mod. 91; *Dow* v. *Stock*, Gow. R. 178; *McLardy* v. *Flaherty*, 3 Kerr, N. B. Rep. 455; Scribner on Dower, vol. i. p. 239.

(*f*) Litt. sec. 448; 1 Roper H. and W. by Jacob, 352, 353; Scribner on Dower, vol. i. p. 239.

(*g*) R. S. O. cap. 98; R S. O. cap. 102.

(*h*) Co. Litt. 31 a; Litt. secs. 448, 681; Perk. secs. 304, 370; Bro. Ab. Tit. Dower, pl. 75; Sir W. Jones, 361; 2 Bl. Com. 131; 4 Kent, 37; Park on Dower, 32.

upon a man who was married, or who married at any time during the continuance of seisin, the wife shall be endowed; even though he died before entry, nor would it alter the case, that a stranger entered and abated on the death of the ancestor, for the law contemplates that there was an interval of time between the death of the ancestor, and the entry of the abator, during which the heir had a seisin in law (*i*).

5. Upon the same principle if a man is seised of a remainder, or reversion expectant upon an estate of freehold, and the estate of freehold determines by the expiration of the time comprised in its limitation, before or during the coverture, the wife will be dowable, although he dies before entry, or although after the marriage, a stranger intrudes upon his seisin (*j*).

But if upon the determination of the particular estate the tenant of that estate holds over, the husband must enter to acquire a seisin, and if he dies without entry, his wife shall not be endowed (*k*). This distinction was placed upon the ground, that where a particular tenant held over after his estate was determined, the implied seisin which would otherwise have devolved upon the remainderman, was thereby intercepted, for the particular tenant had a continuing seisin of the freehold, though under a wrongful title (*l*). But where lands were in the occupation of tenants under leases for years, it was held, that the reception of the rents after the determination of the particular estate by the person whose particular estate was determined, although under claim of ownership of the freehold, would not operate as a deforcement, for the reason that the possession of the

(*i*) Park on Dower, 31, 32; Perk. secs. 371, 372; Co. Litt. 31 a.
(*j*) Perk. sec. 372; Park on Dower, 32.
(*k*) Bro. Dow. pl. 29; Park on Dower, 32.
(*l*) Park on Dower, 32, 33.

termors for years, would preserve the seisin of all persons becoming entitled to the reversion (*m*).

However, even seisin in law is now dispensed with (*n*). If the husband were disseised before coverture, and so continued during coverture till death, in such case the widow would yet be entitled to dower, but it must be sued for and obtained within the same period that the husband's right of entry might be enforced. And so, also, if the husband was once seised during coverture, his subsequent disseisin and bar by the Statute of Limitations, would not operate against his widow (*o*).

6. The Statute provides that, "When a husband has 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 therof, but such dower shall be sued for, or obtained within the period during which such right of entry or action might be enforced."

This section does not require that the husband should *die* entitled, so that it is submitted, if the husband assigned his right of entry during his life, the widow would be entitled to dower. A common example of a right of entry is, where a person is entitled to a remainder dependant on a tenancy for life, and he becomes entitled to enter by reason of some forfeiture. In this case, although the husband is barred by the Statute of Limitations, the wife will not be barred, as her right to bring an action does not accrue until her husband's death (*p*).

(*m*) *Carhampton* v. *Carhampton*, 1 Ir. Term. Rep. 576; Park on Dower, 33; *Bushby* v. *Dixon*, 3 Barn. and Cress. 298; 10 E. C. L. R. 85; Scribner on Dower, vol. i. p. 253.

(*n*) R. S. O. Ch. 126, sec. 2.

(*o*) *McDonald* v. *McMillan*, 23 U. C. R. 302; Leith and Smith's Real Prop. 141.

(*p*) *Leach* v. *Dennis*, 24 U. C. R. 129.

But it is otherwise where the widow claims dower *out of the rights of entry*, for then the right which she seeks to enforce first accrued to her husband in his lifetime, and it is not as in dower at law, or equity, a right which first accrued to her after his death, and she would be barred by the Statute unless she brought her action within the time that her husband would have been bound to bring it (*q*).

7. On a conveyance under the Statute of Uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, the Statute providing that he who has the use shall be deemed to have the seisin. His wife, therefore, without reference to the late English Dower Act, would be dowable although no entry had been made, nor other act done by the husband to acquire a seisin *de facto* (*r*).

In modern English practice, exchanges and partitions are usually made by conveyances to uses, under which the estates are executed immediately on the delivery of the deed, and the right of dower attaches without any entry by the husband, and even in the case of a bargain and sale under a Common Law authority to executors to sell, as the vendee when ascertained by the instrument is considered as a devisee, and the seisin is consequently transferred to him from the heir without entry, the same position would seem to hold (*s*).

Under the doctrine of uses, the freehold may be made to shift from one person to another without the formality of a Common Law entry. In these cases, therefore, it would seem that if the tenant of the estate, which is defeated by force of a conditional limitation, or proviso of cesser, holds over after the event, if he has the freehold at all, it must be under a new seisin, the result of a con-

(*q*) R. S. O. cap. 126, sec. 2.
(*r*) Gilb. Uses, 96; 2 And. 161; Park on Dower, 34; 1 Greenl. Cruise, 171.
(*s*) Park on Dower, 35.

structive disseisin, of the person entitled to the benefit of the limitation or proviso. In this case, then, there would seem to be an intermediate seisin in law in the person in whose favour the shifting use operates; and if so, his wife would be dowable notwithstanding the deforcement (*t*).

8. In Ontario, it is enacted by Statute (*u*) that, "Where by any instrument, any hereditaments are limited to uses all uses thereunder, whether expressed or implied by law, and whether immediate, or future, or contingent, or executory, or to be declared, under any power therein contained, shall take effect, when, and as they arise, by force of, and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him, or elsewhere, of any seisin to uses, or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future, or contingent, or executory, uses, nor shall any such seisin to uses, or *scintilla juris*, be deemed to be suspended, or to remain, or to subsist in him, or elsewhere."

9. As to incorporeal hereditaments, the rule is, that the circumstances equivalent to an actual seisin for such hereditaments as lie in livery, are not necessary in order to confer a title of dower. Therefore, if the husband purchases a rent and dies before the day of payment, his wife shall be endowed (*v*). The rule is the same, if the rent comes to the husband by descent (*w*). Perkins puts the case thus: 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 payment the tenant of the land tenders the rent unto the

(*t*) Park on Dower, 34. But Mr. Park says that this is a point on which he does not recollect to have met with any authority.

(*u*) 29 Vic. cap. 28, sec. 18; R. S. O. C. 95, sec. 2.

(*v*) Bro. Dow. pl. 35, 71; Park on Dower, 35.

(*w*) Bro. Dow. pl. 66.

husband, and he will not receive the same, but utterly refuses the same, and dies before any receipt of the rent by him, or by any other in his name, or for him, and before anything paid to him in the name of seisin of the rent, yet the wife shall have dower of the rent (*x*). This conclusion is based upon the principle, that by the conveyance to and acceptance of the grant by the husband, he acquired a seisin in law of the rent (*y*).

It was said, *arguendo*, in 2 Siderfin, 110, that: "If a rent be granted to A., and his heirs to commence after the death of B., and the grantee dies before B., yet his wife shall be endowed (*z*).

10. A mere naked seisin without right such as the seisin of a dissiesor (*a*), an abator, an intruder, a discontinuee (*b*), or other person having the freehold and inheritance by wrong, is such a seisin as dower will attach upon, as against all persons deriving title under such tortious seisin, until it be avoided by the entry or action of the person having right, or by the operation of the law of remitter (*c*).

Under this doctrine it was held that if a tenant for years or at will make a feoffment in fee, his wife was entitled to be endowed until the feoffment is defeated, because the tenant, in making the feoffment, virtually becomes a disseisor and acquires the freehold of the land by disseisin

(*x*) Perk. sec. 373.

(*y*) 1 Roper H. and W. by Jacob, 354.

(*z*) The same law appears to hold even as to curtesy, for the husband has no means of obtaining an actual seisin of the rent, before the day of payment. Co. Litt. 29 a; Bro. Ten., per le curt. pl. 5; Perk. sec. 469; Park on Dower, 37; See also *post* ch. 16.

(*a*) 17 E. 3, 24, admitted by the issue; and see Litt. sec. 448; *Countess of Berkshire* v. *Vanlore Winch*, 77; Partington's Case, Clayt. 71.

(*b*) Bro. Discont de possession, pl. 7; Brow. Dow. pl. 50; Fitz. Dow. 98; Perk. sec. 420; Park on Dower, 37; *post* ch. 16.

(*c*) Park on Dower, 37.

(*d*). But as to a lessee for life, the rule is said to be different. The instantaneous seisin which he acquires in making a feoffment in fee, is held not to amount to a disseisin, and to be insufficient to entitle his wife to dower (*e*). The ground of this distinction is not at all clear. It would seem, that in either case the feoffee would be estopped from denying the seisin of the husband (*f*).

In the *Natura Brevium* of Fiztherbert it is stated, that the wife of a tenant for life who makes a feoffment in fee, shall have dower against the feoffee, but not as against the lessor of the husband (*g*).

The above doctrine has been modified in Ontario by statute, which provides that a feoffment shall no longer have a tortious operation (*h*). The law requires, that the seisin of the husband shall be a sole seisin, therefore, the widow of a joint tenant is not, though the widow of a tenant in common, is entitled to dower (*i*).

11. The rule requires that there shall be a sole seisin, both of the freehold and of the inheritance, and if the husband have the freehold and inheritance by successive limitations, and either of these estates be a joint estate, the title of dower will be excluded. It has been determined that if one joint tenant aliens his share, whereby the joint tenancy is severed, and the possibility of the survivorship of the other joint tenant is destroyed, it is nevertheless

(*d*) Taylor's Case, Sir W. Jones, 317; cited in *Hitchcock* v. *Harrington*, 6 John. R. 293; 1 Prest. Abstracts, 355; Tud. Cas. 44; Scribner on Dower, vol. i. p. 256.

(*e*) Bro. Dow. pl. 30; 1 Roll. 676; Jenk. Cent. 3 Ca. 1; Co. Litt. 31 b. note (3).

(*f*) Park on Dower, 44.

(*g*) Fitzh. N. B. 150; 1 Roper H. and W. by Jacob, 368, 369; *Randolph* v. *Doss*, 3 How. Mississ. 205; *Galbraith* v. *Greene*, 13 S. and R. 85.

(*h*) C. S. U. C. cap. 90, sec. 3; R. S. O. cap. 98, sec. 3.

(*i*) *Haskill* v. *Fraser*, 12 U. C. C. P. 383; *Ham* v. *Ham*, 14 U. C. R. 497; Litt. sec. 45; 1 Roll. abr. 176; Fitzh. N. B. 147 (E.); *Cowley* v. *Anderson*, Tooth. 83 (as to Curtesy).

held, that the wife of the former shall not be endowed (*j*), for it is said that the same act of the husband by which the joint estate is severed, operates to pass the fee of his moiety to the grantee (*k*). But it is not necessary that the sole seisin should be of the entirety. A sole seisin of the freehold and inheritance in any particular share, or *purparty* of lands, either as tenant in common, coparcenary, or otherwise, will, to the extent of that share, confer the right of dower (*l*); and any act which severs or determines the joint tenancy, so as to leave a sole seisin in the husband during the coverture, will remove the impediment, and render the wife dowable (*m*).

12. But in cases of partition between joint tenants, unless made by conveyances to uses, the wife would not be dowable, until the partition was consummated by entry (*n*). Actual seisin is not necessary. The seisin is sufficient if there is no disseisin (*o*).

13. The seisin must have been of an estate of inheritance in possession. Therefore, a widow would not be entitled to dower out of a life estate, nor out of an estate, which may be, and is, determined by any event such as the coming of age of a devisee (*p*).

There are cases in the old books showing that, after the death of the husband, a joint seisin may, in some instances, become a sole seisin by relation, and the wife consequently

(*j*) Fitzh. N. B. 150; Bro. Dow. pl. 30; Co. Litt. 31 b.; Park on Dower, 40; 4 Kent, 37.

(*k*) *Ibid*; 1 Roper H. and W. by Jacob, 367; Scribner on Dower, vol. i. p. 257.

(*l*) Litt. sec. 45; Co. Litt. 37 b.; 1 Roll. abr. 676; *Sutton* v. *Rolfe*, 3 Levinz. 84.

(*m*) Gilb. Uses, 404; Perk. sec. 337; Park on Dower, 40.

(*n*) Park on Dower, 34.

(*o*) *Re* Higgins, 19 Gr. 303, 318 and *seq.*

(*p*) *McLellan* v. *Meggatt*, 7 U. C. R. 559.

dowable. These are the cases of joint limitations to husband and wife; as, if lands were given to husband and wife, and the heirs of the husband, or the heirs of their two bodies, or to their heirs, and the husband dies; here the wife, if she does no act subsequent to the decease of her husband amounting to an *agreement* to take her interest in the joint estate, may waive it and claim her dower. "For," says Perkins, "she shall not be compelled to take by purchase immediately against her will, and she could not disagree to it before the death of her husband. The bringing of the writ of dower is a disagreement to take according to the purchase, and that shall relate to the time of the purchase" (*q*). And Lord Coke remarks that, "thereby, in judgment of law, the husband shall be said to be sole seised *ab initio*, and yet in truth the husband and wife were joint tenants during all the coverture; and therewith agrees the book of 11 Edward III., Dow. 63, where the case was, lord and tenant of a house held by homage, and 10s. rent. The tenant enfeoffed W., the lord granted the seignory to husband and wife in tail; W. attorned, the husband died, the seignory survived to the wife, and she brought a writ of dower, in bar, of which the lord pleaded acceptance of homage, by which it was admitted that the writ of dower did lie" (*r*). A query is made by Perkins, whether, if the grant is made unto the husband and wife *for the life of the husband*, the remainder unto the right heirs of the husband, the wife can disagree, because her estate had determined by the death of the husband, and it hath been said that there can be no disagreement to an estate after the estate determined. "But," he adds, "it seems that in this case,

(*q*) Perk. sec. 352; Park on Dower, 40.

(*r*) Butler and Baker's Case, 3 Co. 27 b; 1 And. 350; Fitzh. N. B. 194 B.; Vin. abr. Dower H. pl. 12; Bac. Abr. Joint-Tenants A.; Park on Dower, 40, 41. It seems that a widow's disclaimer by deed will be sufficient; *Townson* v. *Tickell*, 3 Barn. and Ald. 31; 5 E. C. L. R. 219; Scribner on Dower, vol. i. p. 258.

the wife may disagree by bringing a writ of dower, notwithstanding the estate were determined for otherwise by such means, the wife might be ousted of her dower in every purchase made by her husband; and yet, during the marriage, she is always by law under the government of the husband, in such manner that she cannot give away any manner of profit arising out of the lands, without the leave of her husband, and she cannot disagree to the same estate during the marriage" (*s*).

14. Any period of time, however short, is sufficient to make such a seisin as dower will attach upon, but a seisin for a transitory instant only, when the same act which gives the estate to the husband conveys it out of him again, will not entitle the wife to dower, for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act (*t*).

Thus the widow of a grantee in fee to uses, from whom the use is immediately executed into possession, in the *cestui que* use by the Statute of Uses, is not entitled to dower: As if A. grant to B. and his heirs to the use of C. and his heirs, here the widow of B. shall not have dower, for the seisin of B. was, but transitory, the same conveyance which gave him the estate, also immediately took it from him by declaring a use on which the Statute of Uses would operate (*u*). But if the land abides in the husband for a single instant of time, it is sufficient to clothe her with the right to dower (*v*). As where a vendor executed a deed of

(*s*) Perk. sec. 353; 1 Roper H. and W. by Jacob, 361; Greening's Note to sec. 352 accord; *supra*, ch. 12.

(*t*) Draper on Dower, 23; Park on Dower, 43; 2 Bl. Com. 132; 4 Kent, 38; 1 Roper H. and W. by Jacob, 374.

(*u*) *Norton* v. *Smith*, in Appeal, 7 U. C. L. J. 263; Leith and Smith's Real Prop. 143; 34 Ed. I. Dow. 179; Fitzh. N. B. 150 (K.); Co. Litt. 31 b.; Bro. Dow. pl. 30; 1 Roll. 676; Lord Cromwell's Case, 2 Co. 77; Nash. v. Preston Cro. Car. 190; *Sneyd* v. *Sneyd*, 1 Atk. 442; Park on Dower, 44.

(*v*) Cro. Eliz. 503; Co. Litt. 31 a; 2 Bl. Com. 132; 1 Roper H. and W. by Jacobs, 73; 4 Kent, 39.

conveyance to a purchaser in fee, who, in pursuance of a prior agreement, and without his wife joining immediately after such execution, reconveyed the lands to the vendor by way of mortgage, to secure the unpaid purchase money, the widow of the purchaser will be entitled to dower (*w*). But in such a case, the dower allotted will be chargeable in favour of the holder of the mortgage, with a third of the interest of the mortgage, unless the dowress will pay a third of the mortgage debt, with arrears of interest, in which case she would have her dower free (*x*), and the acquisition of the equity of redemption, by the owner of the legal estate or mortgage will not cause a merger, so as to preclude him as against the dowress, from insisting that the mortgage is on foot and unsatisfied (*y*).

Where property is conveyed to the husband under an agreement with the grantee, that the grantor is to be allowed to remain in possession for life of a specified position, the widow of the grantee, has no right to dower out of this portion during the lifetime of the grantor (*z*).

15. In actions of dower the demandant is not required to make strict proof of her husband's title under the issue of non-seisin. Where the defendant is in possession under a conveyance from the husband, or by virtue of a title derived through mesne conveyances from him, proof of this

(*w*) *Potts* v. *Meyers*, 14 U. C. R. 499; *Norton* v. *Smith*, 20 U. C. R. 213; S. C. in Appeal, 7 U. C. L. J. 263; *Henry* v. *Low*, 9 Gr. 265; *Lynch* v. *O'Hara*, 6 U. C. C. P. 259; Leith and Smith's Real Prop. 143.

(*x*) *Henry* v. *Low*, supra; *Campbell* v. *Royal C. Bank*, 19 Gr. 341.

(*y*) *Henry* v. *Low*, 9 Gr. 265. See, however, judgment of Esten, V.C., as to necessity of evidence of intention to keep alive a mortgage. See also, as to dower on merger, Bowles' Case, Tud. Lg. Ca. 37. See also *Reid* v. *Reid*, 1 C. L. T. 277, where it was held that the widow was bound to pay one-third of the interest on certain legacies and a mortgage until they fell due, after which the remainder man must pay all the interest as well as the principal.

(*z*) *Slater* v. *Slater*, 17 Gr. 45.

fact, is sufficient to establish as against the defendant the seisin of the husband (*a*).

16. Actual possession by the husband, who claims as owner, is *prima facie* evidence of a seisin in fee, as is also the receipt of rents by the husband from the person in possession (*b*).

In the case of *Wannacot* v. *Fillater* (*c*), an action of dower, it was held, that the evidence given was insufficient to establish the husband's seisin. In this case, *Lockman* v. *Ness*, *supra*, was referred to. Robinson, C.J., in his judgment, page 51, says: "The case of *Lockman* v. *Ness* in this Court was cited. It was decided in Easter term, 1837, and is not among those printed, but I have referred to my note of it. There the evidence was, that the husband had been, during coverture, in actual possession of the land, and had continued so possessed until he made a conveyance of it to another person. Whether the defendant in the dower case, claimed under that other person is not stated, but there was, at least, the fact that the husband

(*a*) *Hitchcock* v. *Harrington*, 6 John. 290; *Collins* v. *Torry*, 7 John. 278; *Hitchcock* v. *Carpenter*, 9 John. 344; *Bancroft* v. *White*, 1 Caines, 85; *Bowne* v. *Potter*, 7 Wend. 164; *Sherwood* v. *Vandenburgh*, 2 Hill, 303; *Sparrow* v. *Kingman*, 1 Comst. 242; *Davis* v. *Darrow*, 12 Wend. 65; *Finn* v. *Sleight*, 8 Barb. 401; *Kimball* v. *Kimball*, 2 Greenl. 226; *Nason* v. *Allen*, 6 Greenl. 243; *Hains* v. *Gardner*, 10 Maine, 383; *Hamblin* v. *Bank of Cumberland*, 19 Maine, 66; *Stimpson* v. *Thomaston Bank*, 28 Maine, 259; *Thorndike* v. *Spear*, 31 Me, 91; *Kidder* v. *Blaisdell*, 45 Maine, 461; *Moore* v. *Esty*, 5 N. H. 479; *Wedge* v. *Moore*, 6 Cush. 8; *English* v. *Wright*, Coxe, 437; *Montgomery* v. *Bruere*, 2 South. 865; *Hyatt* v. *Ackerson*, 2 Green (N. J.), 564; *Davis* v. *O'Ferrall*, 4 G. Greene (Iowa), 358; *Coakley* v. *Perry*, 3 Ohio St. 344; *Ward* v. *McIntosh*, 12 Ohio St. 231.

(*b*) *Lockman* v. *Ness*, 5 O. S. 505; but see *Johnson* v. *McGill*, 6 U. C. R. 194, where it was held that evidence of possession was not sufficient, although this decision was in conflict with that in *Lockman* v. *Ness*, the latter case was not cited or referred to. See also *Jackson* v. *Waltermire*, 5 Cow. 299; *Carpenter* v. *Weeks*, 2 Hill, 341, and cases cited in Scribner on Dower, vol. ii. p. 200.

(*c*) The later case of *Wannacot* v. *Fillater*, 11 U. C. R. 49, comments upon *Johnson* v. *McGill*, and follows *Lockman* v. *Ness*, supra. In *McDonald* v. *McMillan*, 23 U. C. R. 302, it was said that the difficulty in *Johnson* v. *McGill* was that nothing was proved but that the demandant's husband was at one time in possession.

was in actual possession claiming the fee, and a note was referred to, which is appended to one of the precedents in Wentworth's Pleadings, x. volume, page 161, in which it is stated to have been held by Mr. Justice Buller that evidence of actual possession by the husband, is sufficient *prima facie*, on such an issue in dower for the seisin in fee will be presumed from it. In the present case, however, there was no proof that the husband was ever in possession, apparently claiming as owner, or that he was ever in possession at all. The evidence that some man had been once in possession, under the demandant's husband, was too vague and unsatisfactory. It may be, indeed, that the defendant claims under a title derived from the husband, and if that were shown, it would remove all difficulty."

17. In an action for dower, the plea was, that the husband exchanged other lands with one F. for the lands in question, and that the demandant elected to be endowed of such other lands. To prove this exchange, an ordinary deed of bargain and sale of the other lands was produced, executed by demandant's husband, for an expressed consideration of £600, and it was shown clearly by parol evidence, that the transaction between F. and the husband was in fact an exchange, but it was held that such evidence could not avail, that the exchange must be proved in proper technical form and by deed, and that the demandant was, therefore, entitled to succeed (*d*).

18. Where it was shewn that the tenant held under a conveyance made to the husband, and under a conveyance by the husband to another party, and the tenant admitted having both these deeds in his possession, and declined to produce them on notice: it was held, that this was ample evidence of seisin (*e*). In the case of *Beatty* v.

(*d*) *Towsley* v. *Smith*. 12 U. C. R. 555.
(*e*) *Matheson* v. *Malloch*, 13 U. C. R. 354.

Beatty (*f*), the evidence of seisin, was defendants declaration to a third party, that the husband was to convey the land in question to him, and his subsequent declaration, that he had conveyed to him in fee, together with a memorial of this conveyance, executed by the defendant, and it was held that this was sufficient evidence of seisin.

19. The production of an abstract of the registries upon a lot, showing the granting by the Crown of a patent, is insufficient evidence of the patent, without the production of an exemplification (*g*).

In an action for dower in the west half of a lot, the husband's seisin being denied, and it was proved that for upwards of sixty years his father, whose title was not shewn, died in possession, leaving the husband, his eldest son, and heir-at-law. The marriage with demandant took place forty-five years before, and the husband moved on to the east half of the lot, about forty-eight years before the suit. The husband's brother, who had always lived with him, and their mother on the west half remained there; but knew that the husband claimed it until his death, eight years before the trial. It was held that the evidence was sufficient to support a verdict for demandant, for the husband's seisin by descent from his father was, in full force when he married, and if afterwards, his brother had obtained a title by possession, that could not affect demandant's right (*h*).

20. In an action of dower by the widow of M., it appeared that a patent for the land issued to one K., and a witness proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of

(*f*) 17 U. C. C. P. 484.

(*g*) *Reed etux* v. *Ranks*, 10 U. C. C. P. 202.

(*h*) *McDonald* v. *McMillan*, 23 U. C. R. 302; Park on Dower, 32 and note.

its contents given. It was proved, however, that B., 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. It was held that no estoppel arose upon this deed, and that there was no proof of seisin in M. (*i*).

21. A tenant in dower is not compellable to give evidence of the contents of the title deeds, or to disclose the title deeds under which he claims (*j*).

The demandant cannot, in general for the purpose of showing her right to dower, avail herself of recitals contained in the deed, by which the defendant holds the premises, or contained in the deed to his grantor, recognizing her right of dower, unless she is a party, or privy to the deed. But in case of loss of the *primary* evidence to establish her right, such recitals may be resorted to as secondary evidence (*k*).

22. In Maine, it is held, that the declarations of the husband as to his *equitable title*, are immaterial and inadmissible in evidence (*l*). But his declarations are admissible to show the extent of his *possession* (*m*).

In Ohio, declarations of the husband made at the time of his purchase, as to his interest in the lands, may be given in evidence, but declarations by deed, or otherwise, made

(*i*) *Minaker* v. *Haukins, Minaker* v. *Ashe*, 20 U. C. R. 20; *Haskill* v. *Fraser*, 12 U. C. C. P. 383.

(*j*) *Lynch* v. *O'Hara*, 6 U. C. C. P. 259.

(*k*) *Jewell* v. *Harrington*, 19 Wend. 471; Scribner on Dower, vol. ii. p. 204.

(*l*) *Mann* v *Edson*, 39 Maine, 25.

(*m*) *Forrest* v. *Trammell*, 1 Bailey, 77.

subsequently, are not admissible either for or against the widow (*n*).

On a proceeding for dower, the heir produced a deed from the husband, dated 13 years before his intermarriage with the demandant, and by a subscribing witness proved a delivery of the deed, a short time before the husband's death, and his declaration, that the deed had been delivered many years before. It was held, that this declaration was no part of the *res gestæ*, so far as it related to the alleged previous delivery, and therefore, no evidence of such previous delivery as against the demandant (*o*).

(*n*) *Derush* v. *Brown*, 8 Ohio, 412; Scribner on Dower, vol. ii. p. 205.

(*o*) *Pinner* v. *Pinner*, Busbee Law, 475; Scribner on Dower, vol. ii. p. 205.

CHAPTER X.

DOWER IN ESTATES IN FEE SIMPLE, FEE TAIL, ESTATES ACQUIRED BY EXCHANGE, AND DETERMINABLE ESTATES.

1. *Dower in estates in fee simple.*
2. *In estates in fee tail.*
3-4. *In estates acquired by exchange.*
5-9. *Estates determined by natural limitation.*
10. *Dower in determinable estates.*
10. *The maxim cessante statu primitivo cessat derivations.*
11. *Dower in defeasible estates.*
12-13. *In estates upon condition.*
14-16. *In base and qualified fees.*
17-20. *In estates determinable under power of appointment.*
21-22. *In estates determinable under collateral limitations.*
23-41. *In estates determinable under conditional limitations or by executory devise.*

1. An absolute and unconditional estate in fee simple is the highest interest in lands known to the law. It is almost unnecessary to add that such an estate is subject to dower.

2. A widow is also entitled to dower in estates in fee tail, whether general or special, except where the estate is so limited as to exclude her issue from the inheritance. This point has been already dwelt upon elsewhere (*a*). In Ontario, the tenant in tail may dispose of the lands entailed for an estate in fee simple or any less estate (*b*).

(*a*) *Ante*, cap. 8, p. 77.

(*b*) R. S. O. cap. 100, sec. 3. See, also, as to power to enlarge base fees, same Statute, sec. 7.

3. The term exchange, when employed in its technical sense, and with reference to the law of real property, implies a mutual grant of equal interests, the one in consideration of the other. It is not essential that the estates exchanged should be of equal *value*, but it is essential that they be of equal *interest*, as a fee simple for a fee simple; a lease for life for a lease for life, and the like (*c*).

4. The widow is not entitled to dower in the land both taken and given in exchange; she is, in such case, put to her election as to the lands out of which she shall be endowed. The evidence of exchange must be proved by the deeds of exchange. Parol statements that the husband had "traded" certain lands, are insufficient (*d*). Upon an exchange of lands, the law implies a special warranty of title; and if an exchange be made between A. and B., and B. marry, and A. is evicted of the land taken in exchange, he may recover in value against B. the land given in exchange, and the wife of B. will thereby lose her dower; for, according to the old books, the recovery in value is paramount to the title of dower by relation to the time of the exchange made, which was before the marriage (*e*). But, if a man recover by way of *recompense in value*, against the husband, by a *warranty ancestral*, the wife shall be endowed, because the recovery there is simply by force of the warranty, and not by reason of any elder title to the land; and so the land is bound only from the time of the judgment. The warranty here is only a collateral charge, and not a specific

(*c*) 2 Bl. Com. 323; Scribner on Dower, vol. i. p. 271.

(*d*) Co. Litt. 31 b; Perk. sec. 319; Fitzg. N. B. 149 (N); Butler and Baker's Case, 3 Leon, 271; Park on Dower, 261; 1 Washb. Real Prop. 158; 1 Greenl. Cruise, 163; 1 Hilliard, Real Prop. 149; *McLellan* v. *Meggatt*, 7 U. C. R. 554; *Towsley* v. *Smith*, 12 U. C. R. 555; *Stafford* v. *Trueman*, 7 U. C. C. P. 41.

(*e*) 2 Roll. Vouch. (R. b) pl. 4; Perk. sec. 309.

lien upon the land, as in the case of an exchange or partition (*f*).

5. It may be laid down as a general rule, that where the husband is seized at any time during the coverture, of such an estate, as, is in its nature subject to dower, the title of dower will not be defeated by the determination of that estate, by its regular and natural limitation. To such an estate, dower is a necessary incident; it is annexed thereto by implication of law, and forms a part thereof; the prolongation of the estate, therefore, in the dowress, is not repugnant to that limitation, but strictly consistent with it (*g*). If, therefore, the husband be seized of an estate in fee simple, and dies without heirs, his widow shall be entitled to dower against the lord claiming by escheat (*h*). The same principle applies to estates tail. In Paine's case, it was held, that, "at the common law, if lands had been given to a woman and the heirs of her body, and she had taken a husband, and had issue, and the issue died, and the wife also, without issue, whereby the inheritance of the land did revert to the donor, in that case the estate of the wife is determined, and yet the husband shall be tenant by the curtesy, for that it is *tacite* implied in the gift" (*i*).

6. The continuance of the estate of the dowress is designated by Lord Coke as "*quodammodo* a continuance of part of the estate tail" (*j*). Perkins states the point thus:

(*f*) Park on Dower, 153; Fitzg. N. B. 150 (D); Gilb. Uses, 399; Hughes' Writs, 162.

(*g*) Park on Dower, 137; Tud. Cas. 44; 1 Washb. Real. Prop. 212; *Northcutt* v. *Whipp*, 12 B. Mon. 73; *Lawrence* v. *Brown*, 5 N. Y. (1 Seld.) 394; *Fowler* v. *Griffin*, 3 Sand. S. C. 385.

(*h*) Bract. 297, pl. 2; Bro. Tenures, pl 33; Park on Dower, 158; 4 Kent, 49. The escheat by reason of crime turns upon different principles, and there the wife is not dowable. The case of the determination of a rent in fee is considered, *post*, cap. 16.

(*i*) Paine's Case, 8 Co. 34 b.

(*j*) Earl of Bedford's Case, 7 Co. 67, 68, 9 a; Litt. sec. 53; Co. Litt. 31 b, 241 a, and note 4; Perk. sec. 317; Fitzg. N. B. 149 G; Bro. on

"If a donee of land in tail general take a wife, and dies without issue, and the donor enters, the wife of the donee shall have dower; and yet the estate tail which made her title is determined" (*k*).

7. If the estate of the husband is of such a nature as to be subject to dower, and is not protected by any legal jointure, it is to be remarked, that the rule of law is so strict, that the attachment of the title of dower cannot be restrained, or prevented, by any proviso or qualification, contained in the gift of the estate. The continuation of the estate of the husband in the widow, is so far considered by the law a portion of the quantity of enjoyment designated by the terms of the limitation of the estate, that any attempt to limit or restrain the right of the wife is regarded as being repugnant to the grant. Thus, it was said by the Court in Sir Anthony Mildmay's case (*l*): "If a man makes a gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman, tenant in tail after issue, shall not be tenant by the curtesy or that tenant in tail suffer a common recovery, these conditions are repugnant, and against law, because, by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And, therefore, it is repugnant to restrain it by condition, for that would be to give a power, and to restrain the same power in one and the same deed."

8. In England, this rule has been changed by statute (*m*), which enacts, "That a widow shall not be entitled to dower

Dower, pl. 86; Park on Dower, 158, 159; 4 Kent, 49; 1 Washb. Real Prop. 212; 2 Crabb. Real Prop. 166; Smith's Appeal, 23 Pa. St. R. 9.

(*k*) Perk. sec. 317. As to rents in fee tail, see *post*.

(*l*) Sir Anthony Mildmay's Case, 6 Co. 41 a; Dyer, 343 b; the Earl of Arundel's Case, Shep. Touch. by Preston, 128, 131; Co. Litt. 224 a; Park on Dower, 82.

(*m*) 3 and 4 Wm. IV. cap. 105, sec. 6. See Appendix.

out of any land of her husband, when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." This statute does not affect our law on this subject.

9. As a consequence of the prolongation of the estate for the benefit of the dowress, it follows that all charges or derivative interests created by the tenant in tail *prior* to the inception of the title of dower, although void as against the reversioner or remainder-man, will be revived against the dowress, *quoad* the part held in dower. The following example is given by Coke: "If tenant in tail make a lease for years, reserving 20 shillings, and, after, take a wife and die without issue; now, as to him in the reversion, the lease is merely void; but, if he endow the wife of tenant in tail of the land (as she may be, though the estate tail be determined), now is the lease, as to the tenant in dower (who is in of the state of her husband), revived again, as against her, for, as to her, the estate tail continueth; for she shall be attendant for a third part of the rent services, and yet they were extinct by act in law (*n*).

10. *Cessante statu primitivo cessat derivativus*, is a maxim in the law, and upon this maxim, is founded the rule that the dower estate of the wife can only be commensurate with the primitive estate, from which it is derived. We have just seen that the determination of an estate in fee simple or fee tail, by its natural or regular limitation, does not defeat the right of dower. It has also been shown that this result is not attributable to any exception to the foregoing rule, as is sometimes supposed, but is in harmony with it. The dower estate of the widow, in such cases, exists, by implication of law, as a part of the estate embraced in the

(*n*) Co. Litt. 46 a; Earl of Bedford's Case, 7 Co. 67, 9 a; 1 Roll. Abr. 842; Park on Dower, 162.

original limitation to the husband. The quantum of enjoyment designated in the grant, is held not to be exhausted until after the death of the widow. So long as there are heirs, where the estate is limited in fee simple; or issue, where it is limited in fee tail, the *entire* estate continues to exist. So long as there is a dowress, the estate has a *partial* continuation (*o*). As regards ordinary determinable estates, the maxim above quoted, and the rule founded thereon, are of general, if not universal, application. The general doctrine is, that, if the estate of the husband be in its own nature an estate of inheritance, the fact that it has a determinable quality attached to it, will not prevent the inception of a title of dower; but, when that estate, by reason of its determinable quality, is avoided or defeated, the right of dower falls with it (*p*).

11. It has been already observed that defeasible estates, having reference now to such estates as are acquired by a tortious entry or other equivalent act of disseisin, are subject to dower (*q*). But dower, being an interest annexed to the defeasible estate, it follows that the right to dower is destroyed upon the restoration of the seisin to the rightful owner under his prior title (*r*). In these cases, the seisin of the husband is not merely determined, but it is defeated, or, as the old books still more expressively term it, *disaffirmed*. The restoration of the original seisin is not considered as merely a giving back to the owner of that which had been unjustly taken from him, with all the prejudice of an intermediate ownership, but, in intendment of law, it is considered as purging and abolishing the intermediate seisin, and all its consequences, and, for purposes of title, negativing the existence of such seisin. The person

(*o*) Park on Dower, 183-5; Scribner on Dower, vol. i. p. 276.
(*p*) Scribner on Dower, vol. i. p. 276-7.
(*q*) *Ante*, cap. 9.
(*r*) Gilb. Uses, 399.

having the right is not to be merely restored, but he is to be placed *in statu quo* (*s*). Therefore, if the owner of an estate is disseised, and the disseisor marries, and, afterwards, this disseisee enters upon or recovers against the disseisor, the title of dower in the wife of the disseisor is thereby defeated (*t*); and if the disseisor had died seised, and his heir had actually endowed the wife, and the disseisee had recovered the lands by judgment against the heirs and dowress, the estate of the dowress would be at an end (*u*).

12. Care must be exercised not to confound estates upon condition with estates created under conditional limitations. The former can only be defeated by entry for condition broken; and when this is done the old paramount title is reassumed. In the latter, upon the happening of the event or condition which is to terminate the estate, it *ipso facto* ceases, and, by the terms of the grant or devise, shifts to another person (*v*).

13. An estate held upon condition, so long as it is not avoided by entry for forfeiture, is subject to dower; but, when the estate is determined by such entry, the right of dower which depends upon it is also determined. Thus, if an estate be granted in fee or in tail upon condition to be performed by the *grantee*, and the grantor enters for breach of the condition; or, if the grant be upon condition to be performed by the *grantor*, and he duly perform the condition, and enter, the wife of the grantee is not

(*s*) Litt. sec. 358; 1 Roll. Abr. 474.

(*t*) *Countess of Berkshire* v. *Vanlore*, Winch. 77.

(*u*) Park on Dower, 141, 142; Co. Litt. 420 b; Dyer, 41 a; Tud. Cas. 44; 2 Crabb, Real Prop. 165; Scribner on Dower, vol. i. p. 277.

(*v*) Scribner on Dower, vol. i. p. 278; 4 Kent. 32, 33, note; 1 Washb. Real Prop. 212; 1 Hilliard, Real Prop. 114. As to dower in estates created by conditional limitation, or executory devise, see *infra* 23, 41.

entitled to dower (*w*). It may also be remarked that, although only a portion of the estate of the husband is defeated by force of the condition, as where the condition is annexed to the freehold only, yet, as the operation of that condition deprives the estate of that quality in respect of which the wife is dowable, and converts it into an estate in remainder or reversion, while the former seisin of the freehold is disaffirmed by the entry for breach of condition, the title of dower is equally avoided as where the whole estate is defeated. To this principle may be referred the case already put, of a surrender upon condition by the lessee for life to the reversioner, by force of which the wife of the reversioner becomes dowable, but where, if the lessee enter for condition broken, the estate of dower is defeated (*x*).

14. If the estate of the husband is in its own nature an estate of inheritance, it makes no difference that it has a determinable quality attached to it, for the wife's title of dower will attach, subject only, where the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband.

15. Therefore, a base fee carved out of an estate tail (*y*), or a qualified fee, as the Duchy of Cornwall (*z*), will confer a right of dower as against all persons claiming those estates.

16. It was for a long time the opinion of the most eminent lawyers, that, under alienations by tenant in tail not creat-

(*w*) Park on Dower, 154; 1 Roll. Abr. 474; Perk. secs. 311, 312; Butler's note, 4 Co. Litt. 241 a; 4 Kent, 49; 1 Washb. Real Prop. 208; *Beardslee* v. *Beardslee*, 5 Barb. 324; *Moore* v. *Esty*, 5 N. H. 479; Scribner on Dower, vol. i. p. 278.

(*x*) Park on Dower, 154.

(*y*) The case of fines, 3 Co. 84 b; Seymour's Case, 10 Co. 96 a; Jenk. 274, pl. 96; *Machell* v. *Clarke*, 2 Raymond, 778; *Jackson* v. *Kip*, 3 Halst. 241; *Whiting* v. *Whiting*, 4 Conn. 179.

(*z*) Jenk. 280, pl. 5; Park on Dower, 50.

ing a discontinuance, or operating as a bar, namely, by grant, bargain and sale, or other *innocent* conveyance, the alienee had a mere descendible freehold, simply determinable with the death of the tenant in tail; but the law was finally settled in *Machell* v. *Clark*, where it was determined that the alienee has a base or determinable fee, and that his estate continues until it is avoided by the entry of the issue in tail (*a*). But the dower estate of the wife of a bargainee or releasee of a tenant in tail, is defeated by the entry of the issue after the death of the tenant in tail, the effect of such entry being to determine the estate of the husband (*b*). Margery Cally's case (*c*) has been criticised as being inconsistent with this doctrine (*d*); but it would seem without just reason (*e*).

17. Among the methods invented by the early English conveyancers to so transfer real property as to intercept the title of dower, and enable the purchaser to dispose of it at will, free from that encumbrance, was the mode of conveying the estate to such uses as the purchaser should, by deed or will, executed in a particular manner, direct or appoint, and in default of appointment, to the purchaser, his heirs and assigns. This mode of limiting the estate, proceeded upon the assumption, that, the exercise of the power of appointment defeated the estate limited in default of its execution. Questions, however, speedily arose with regard to the effect of such a limitation. At one time, it was doubted whether the power did not merge in the fee; but it was finally settled that it did not. Then, it was

(*a*) *Machell* v. *Clark*, 2 Raymond, 778; 2 Salk. 619; 7 Mod. 18; 11 Mod. 19; 1 Cormyn, 119; Overruling *Took* v. *Glascock*, 1 Saund. 260. See also Park on Dower, 51, 52, 53; Scribner on Dower, vol. i. pp. 279, 280.

(*b*) Seymour's Case, 10 Co. 96 a, 98 a.

(*c*) 24 E. III. 28 b.

(*d*) Note by Serj. Williams, 1 Saund. 261 a.

(*e*) Park on Dower, 142, 143, and note; Scribner on Dower, vol. i. p. 281; *Jackson* v. *Kip*, 3 Halst. 241.

claimed that estates limited in default of the execution of such a power were *vested*, subject to a liability to be divested by an exercise of the power, and the law was eventually so settled. This point being established, it next became a question, whether, as a right of dower attached upon the estate in the fee, which became vested until the exercise of the power of appointment, a subsequent exercise of the power could drive it out, a question upon which differences of opinion existed for a considerable time (*f*). In *Cave* v. *Holford* (*g*), Mr. Justice Heath expressed an opinion that the power would enable the donee to bar the claim of dower. In *Cox* v. *Chamberlain* (*h*), Lord Alvanley spoke rather dubiously of the question. He said that, by the execution of the power, the estate in fee might be superseded, "though, perhaps, not to bar dower." Lord Eldon appears to have thought with Mr. Justice Heath, that the appointment drove out all intermediate estates, and the dowress could not sustain her claim of dower upon the new estate in the appointee of the power (*i*). Many eminent lawyers, and among them Mr. Fearne and Mr. Sugden, were of opinion that the right of dower was defeated with the estate on which it attached, by the execution of the power (*j*).

18. This question, however, is now set at rest by the case of *Ray* v. *Pung* (*k*), in which lands were conveyed to

(*f*) Sugden's note, Gilb. Uses, p. 321. See note (2), Co. Litt. 216 a; Scribner on Dower, vol. i. pp. 281, 282.

(*g*) *Cave* v. *Holford*, 3 Ves. Jr. 657.

(*h*) *Cox* v. *Chamberlain*, 4 Ves. Jr. 637.

(*i*) *Maundrell* v. *Maundrell*, 10 Ves. Jr. 263, 265, 267.

(*j*) 1 Fearne, Cont. Rem. 347, note; 2 Sugden, Powers, 34, *et seq*; Park on Dower, 186, 190; 4 Kent, 51; Scribner on Dower, vol. i. p. 282; *Wilde* v. *Fort*, 4 Taunt. 334.

(*k*) *Ray* v. *Pung*, 5 B. & Ald. 561; 7 E. C. L. R. 193; S. C. 5 Madd. 310; see also *Doe d' Argan* v. *Jones*, 10 B. and C. 459; *Tunstall* v. *Trappes*, 3 Sim. 300; per Draper, C. J., in *Lyster* v. *Kirkpatrick*, 26 U. C. R. 228; Leith and Smith's Real Prop. 153 and note (d); see also the following

such uses as C. D. should by deed appoint, and in default of, and until such appointment to the use of C. D. in fee. C. D. afterwards, in execution of the power by deed, duly made an appointment of the estate in favour of E. F. in fee. The appointment was made during the coverture of C. D., and it was held that his wife was thereby defeated of her dower in the land.

19. But if the husband die without exercise of the power, the right of dower becomes absolute (*l*).

The disposition of the estate must be referable directly to the power in order to defeat dower (*m*).

20. A devise to the husband for *life*, expressly, with remainder to such persons as he shall by deed, or will, or otherwise appoint, will not give him the absolute interest, although he may acquire it by the exercise of his power (*n*). And if he should die before making an appointment to himself under the power, his widow would not be entitled to dower (*o*).

21. Estates created by way of *collateral* limitation are subject to dower. The following is given by Jenkins, as an instance of a limitation of this character: "So of a grant of rent or land to one and his heirs till the building of St. Paul's be finished" (*p*). It is well settled, however, that dower ceases with the event which terminates the estate. In all these cases, the maxim, *cessante statu primitivo cessat*

American cases, *Thompson* v. *Vance*, 1 Met. (Ky.) Rep. 670; S. C. 7 Amer. Law Reg. 222; *Chinnubbee* v. *Nicks*, 3 Port. (Ala.) R. 362.

(*l*) The American cases upon this point are *Peay* v. *Peay*, 2 Rich. Eq. 409; *Hawley* v. *James*, 5 Paige, 318, 455.

(*m*) *Link* v. *Edmondson*, 19 Miss. 487; Scribner on Dower, vol. i. p. 283.

(*n*) 1 Sugden on Powers, 119, pl. 6; *Barford* v. *Street*, 16 Ves. Jr. 135.

(*o*) *Thompson* v. *Vance*, 1 Met. (Ky.) Rep. 670; *Collins* v. *Carislie's Heirs*, 7 B. Mon. 14; *McGaughey* v. *Henry*, 15 B. Mon. 383; Scribner on Dower, vol. i. p. 283.

(*p*) Jenk. Cent. 1 Ca. 6.

derivativus applies (*q*). "If this contingency happens," adds Jenkins to the above quotation, "dower shall cease" (*r*).

22. In some instances, the determination of an estate of inheritance is the result of a collateral limitation *implied* in law, as in the case of a gift in tail with a reservation of rent to the donor and his heirs (*s*). Here, upon the death of the donee in tail, without issue, the right of dower in the *rent* of the wife of the donor ceases, for thereby the estate from which the rent is derived is determined. And it seems that the operation of a collateral limitation, whether express or implied, will defeat dower, as well where it converts the estate of the husband into a mere life estate, as where it determines it altogether. An example of this may occur where the husband is tenant of a determinable fee derived out of an estate tail special, and during the coverture the determinable fee becomes an estate *per autre vie* by the tenant in tail becoming tenant in tail after possibility of issue extinct. Mr. Preston treats this point as doubtful (*t*), but Mr. Park maintains the proposition with much confidence, and appears to be sustained by authority (*u*).

23. Whether the wife is dowable of an estate conferred upon the husband by way of *conditional* limitation, or subject to *an executory devise, after* his estate has been divested by operation of the limitation or devise, is a vexed question, in respect of which eminent jurists and able conveyancers, both in England and the United States, have entertained conflicting opinions. We have seen that where an estate

(*q*) 3 Prest. Abst. 373; Butler's note, Co. Litt. 241 a.
(*r*) Park on Dower, 164; Scribner on Dower, vol. i. p. 284.
(*s*) See *post*, cap. 16.
(*t*) 3 Prest. Conv. 173.
(*u*) Park on Dower, 165-7; Plow. 155; Hughes on Writs, 182; Scribner on Dower, vol. i. p. 284.

expires by force of its *natural* limitation, or as it is sometimes expressed where it is *spent*, the right of dower is not disturbed (*v*). Upon this point there is no doubt nor controversy. The difficulty arises where the estate is so limited that upon the happening of a certain event it is to pass to a third person, or where upon the death of the devisee *in fee* without issue, the estate is devised over. In the first of these cases, if the event happen, the estate of the husband is thereby absolutely divested. In the other, if he die without issue, his estate is absolutely determined. In neither case does the estate expire by force of its natural limitation, but in virtue of the express limitations and conditions to which it was subject by the original grant or devise. Whether, after the estate has thus terminated, a right of dower continues to exist, is the question (*w*).

24. The case of *Sammes* v. *Payne*, decided in the 29th of Elizabeth, is the earliest reported case appearing to touch this question, and it is sometimes cited as an authority in support of the proposition that curtesy, and by analogy, dower, shall continue after the determination of an estate by the operation of a conditional limitation or executory devise. But it is very questionable whether it can properly be regarded as an authority upon this point. The facts, as stated by Leonard and Anderson (*x*), were as follows: One Jayne Payne, being seized in fee of the lands in question, conveyed the same to the use of herself for life, remainder to the use of Elizabeth Payne, her eldest daughter in tail, *upon condition* that the said Elizabeth, or the heirs of her body, should, within one year after the death of the said Jayne Payne, or within one year next after Joan, the younger daughter, of the said Jayne Payne, should attain the age of eighteen years, pay to the said

(*v*) *Ante*, pars. 1, 5, 9 of this cap.
(*w*) Scribner on Dower, vol. i. p. 283, 284.
(*x*) *Sammes* v. *Payne*, 1 Leon, 167 S. C. 1 And. 184.

Joan, or the heirs of her body, thirty pounds. And if the said Elizabeth should die without issue before the time of payment aforesaid, or if the said Elizabeth, or the heirs of her body should fail in the payment of the sum aforesaid, then to the use of the said Joan Payne in tail. The mother died, Elizabeth took husband, Thomas Sammes; had issue, and afterwards died without leaving issue before the said Joan came to the age of eighteen years. The question was, whether Thomas Sammes was entitled to be tenant by the curtesy. Against the claim to curtesy, it was argued that the estate tail of Elizabeth was defeated by the non-payment of the thirty pounds, according to the limitation of the uses, and that, therefore, no right to curtesy existed. It will be observed, that the argument was not placed upon the ground, that the estate of the wife had determined, by reason of the failure of issue, living at her death, for, as to *estates tail*, as we have seen, this is regarded as the expiration of the estate by its *regular* limitation; and, in such case, the right to curtesy or dower is confessedly preserved (*y*); but the objection urged was predicated upon the alleged breach of the condition of payment contained in the grant, upon the happening of which the estate was to shift and become vested in Joan, the younger daughter. The Court, however, determined the question in favour of the husband. Leonard reports the Judges as placing their decision upon the following ground: "As to the condition of payment of the said sum, *the same is not determined*, for she died without issue before the day of payment, *scil*, before the second daughter came of the age of eighteen years, and, as to that, there is no condition broken; and as to the point of dying without issue, the same is not a condition, but rather a limitation of the estate; and the same is no more than what the law saith, and the estate tail in Elizabeth is spent

(*y*) *Ante*, par. 5, 9.

and determined *by the dying without issue*, and doth not cease, or is cut off by any limitation."

25. According to this language, the Court denied that the condition of payment was broken, as assumed by counsel, and upon which assumption alone it was insisted that curtesy was defeated. They held, that the estate tail of Elizabeth expired by its regular limitation, upon her death, without issue living, *before* the time limited for payment. As her estate had thus terminated, and the limitation over to the younger daughter had consequently taken effect, there was nothing upon which the condition subsequently to be performed could operate. The conclusion of the Court, therefore, as above expressed, was simply that curtesy is not defeated by the determination of the estate of the wife by its natural limitation (*z*).

26. In addition to the above reasoning, however, Leonard reports Anderson, J., as stating this further proposition: "If a feoffment be made to the use of J. S. and his heirs until J. D. had done such a thing, and then unto the use of J. D. and his heirs, the thing is done, and J. S. dieth, his wife shall be endowed (*a*). But it is to be remarked that the case, as reported by Anderson himself, contains no such language (*b*), and Goldsborough, who also reports the case, makes Anderson say that, "if an estate be determined by *limitation*, this will not avoid a tenancy by the curtesy; but otherwise it is if the estate be determined by a *condition*, for this relates to the defeasance of the estate" (*c*). This mode of stating the point leaves the case of a conditional limitation untouched, and merely takes the broad ground of distinction between the estates spent, and estates defeated, for,

(*z*) Scribner on Dower, vol. i. p. 286.
(*a*) 1 Leon, 168.
(*b*) 1 And. 184.
(*c*) Goldsb. 81.

by the term "limitation," as here used, is obviously meant a simple limitation (*d*).

27. In the report of the case by Coke, no notice is taken of the condition as to payment, nor of the limitation over in case of non-payment. He reports the case as being simply a gift of lands to the elder daughter in tail general, remainder to the younger daughter in tail general. That the elder daughter married, and had issue which died. That afterwards the elder daughter died, whereby her estate tail was determined, and the lands passed to the younger daughter by the limitation over. And that by the judgment of the Court, the husband of the elder daughter was declared to be entitled to curtesy (*e*).

28. *Sammes* v. *Payne*, was followed by the case of *Flavill* v. *Ventrice* (*f*), decided in the 10th of James I., a short report of which is given as follows: "If A. seised in fee of lands, covenants to stand seised thereof, to the use of himself and his heirs, till C., his middle son, takes a wife, and after to the use of C. and his heirs; and after A. dies, by which it descends to B., the elder son of A., who has a wife, and dies, and after C. takes a wife, it *seems* the wife of B., the elder son, shall not be endowed of the said estate of her husband, *because his estate is ended by an express limitation*, and, therefore, the estate of the wife, being derived out of it this cannot continue longer than the original estate. P. 10 Ja. B. between *Flavill* and *Ventrice*, dubitatur upon a special verdict; for upon argument the Court was divided, *scil*, *Crawley* and *Vernon*, that she shall not be endowed, and *Hutton* and *Heath*, *e contra*. *Intratur* Tr. 8 Car. Rot. 1343." The Judges being equally divided, the point was not determined. The case, however, furnishes evidence that the

(*d*) Park on Dower, 169.
(*e*) Paine's Case, 8 Co. 34 a.
(*f*) *Flavill* v. *Ventrice*, 2 Danv. Abr. 655; 9 Vin. Abr. 217, F. pl. 1.

law was considered in an unsettled condition at the period when it arose. In *Heyns* v. *Villars* (*g*), decided in 1658 the above case was cited at the bar by the name of *Rochester* and *Venters*, and it was added that it was a question to that day whether the *feme* should have dower (*h*).

29. An interval of more than eighty years here occurs, in which there is no reported case touching the question. The case next in order appears to be *Sumner* v. *Partridge*, determined July 25th, 1740, which is briefly reported by Atkyns (*i*). The point considered by the Court arose upon the following case: "Devise to A. and her heirs, and if she die before her husband, he to have £20 a year for his life, remainder to go to her children. The wife died before the husband." It was held that the husband was not entitled to curtesy.

With regard to this case, it may be remarked that, upon the death of the wife, living the husband, the estate did not *descend* to the children, but passed to them as *purchasers*, by virtue of the original limitation; a feature which, with respect to its influence upon the question under discussion, will be more particularly noticed hereafter (*j*).

30. The case of *Goodenough* v. *Goodenough* is referred to by Mr. Preston, as supporting the claim of dower in estates determined by conditional limitation, or executory devise (*k*). The case is briefly noted by Dickens (*l*). The following statement of it, extracted from the Registrar's Book (*m*), is

(*g*) *Heyns* v. *Villars*, 2 Sid. 64.

(*h*) Park on Dower, 172. The case is also cited by Twisden, J., 1 Vent. 377.

(*i*) *Sumner* v. *Partridge*, 2 Atk. 47.

(*j*) *Infra*.

(*k*) 3 Prest. Abst. 372.

(*l*) Dick. Ch. R. vol. ii. 795.

(*m*) 31 Jan. 1772; Reg. Lib. A. 1771, fo. 557.

taken from Mr. Jacobs' Addenda to Roper on Husband and Wife (*n*).

R. Serle devised certain estates to his nephew, William Goodenough, and his heirs forever, subject to the limitation and condition after-mentioned, viz.: that, in case his said nephew should happen to die unmarried, and without issue of his body lawfully begotten, his will was, that the devise and devises thereinbefore made, should, in any or either of those cases, cease and be absolutely void; and in that case, he gave the estates to his nephew, Richard Jocelyn Goodenough. The testator died, leaving R. J. Goodenough his heir-at-law. William Goodenough afterwards married the plaintiff, having first, by articles previous to the marriage, agreed to settle lands of sufficient value to secure a jointure of £200 per annum to her for life, with remainder to the issue of the marriage. By his will, William Goodenough gave his personal estate to the plaintiff, and appointed her executrix, and recited that his brother Richard would have the estates left him after his (William's) death, by R. Serle, and, as he left them to his brother, without any litigation, which there was the greatest room for, he hoped he would have the generosity to pay his wife her dower regularly, and without dispute. He died without issue, leaving his brother his heir-at-law.

The bill prayed, that the plaintiff's jointure might be made good out of the lands devised by Serle, or that she might be endowed out of those lands. It submitted, that the estate of William became absolute in those lands on his marriage; or that, if the devise over was intended to take effect on his dying without issue, then that it was void, as being too remote, or that it reduced the estate of William to an estate tail; and, therefore, that the plaintiff was entitled to dower. The defendant, R. J. Goodenough,

(*n*) Roper, H. and W., by Jacob, 504, 505.

by his answer, insisted that there was no agreement on the marriage of the plaintiff for a settlement of the lands in question; and submitted that she was bound, out of the personal estate of her husband, to purchase lands of the value of £200 per annum, upon the trusts of the marriage articles, under which he would become entitled on her death. He submitted, that the executory devise in the will of R. Serle was intended to take effect on the death of William, unmarried, or without issue; and that the testator having coupled these events in the same sentence, the latter must be understood to refer to the death of William, and therefore, was not too remote.

The decree declared, that according to the true construction of the will of William Goodenough, the plaintiff was entitled to have dower, only out of the estates of which he died seised, and referred the case to a Master to take an account of the rents and profits, and to set apart and allot sufficient of the said estates, as and for the dower of the plaintiff therein (*o*).

31. But, in *Buckworth* v. *Thirkell* (*p*), decided in 1785, the subject underwent very full and elaborate discussion. The opinion was pronounced by Lord Mansfield, and the case is generally regarded as the leading one upon the questions involved. The following is a statement of the facts:—

Joseph Sutton devised certain lands to trustees in fee, in trust to receive the rents and profits, and apply them for the maintenance of Mary Barrs, granddaughter of the testator, until she should arrive at the age of twenty-one years, or be married; and from and after her attaining such age, or being married, he gave and devised the lands to the

(*o*) Scribner on Dower, vol. i. pp. 288, 289.

(*p*) *Buckworth* v. *Thirkell*, 1 Coll. Juris. 332; 3 Bos. and Pul. 652, note; Butler's Co. Litt. 241 a, note.

said Mary Barrs, her heirs and assigns forever. But, in case the said Mary Barrs should happen to die before she arrived at the age of twenty-one years, and without leaving issue of her body lawfully begotten, then, from and after the decease of the said Mary Barrs, without issue as aforesaid, he gave and devised his said estates to his grandson, Walter Barrs, and to his assigns for his natural life, remainder over. Mary Barrs married Solomon Hansard, had a child by him, which died during her lifetime, and herself died under the age of twenty-one years, without leaving any issue. On the trial of an action of replevin, a special case was reserved for the opinion of the Court upon the above facts, whether Solomon Hansard was entitled to be tenant by the curtesy. The case was twice argued at the bar by desire of the Court. The distinction made and relied upon in the arguments was between estates spent or expired, and estates defeated by way of condition. With respect to estates tail, it was argued that, "before the statute *de donis*, estates tail were conditional fees, but, on the birth of a child, the condition was considered as performed, so as to become an absolute estate to three purposes: 1st, that the donee in tail could alien; 2dly, could forfeit; 3rdly, it was descendible to the issue of a second marriage, and, of course, gave curtesy to the husband of a second marriage. The statute *de donis* took away the power of alienation, and the curtesy of the second husband, but left the right of the husband of the first marriage to be tenant by the curtesy, as it stood before the statute (viz., notwithstanding the failure of issue); that is, as being the husband of a woman whose estate on condition was become absolute on the birth of a son. This accounted for husbands being tenants by the curtesy of estates tail, but it explained the difference between estates tail and estates defeasible, on condition, such as the present, and proved how inapplicable the case of an estate tail was to

the present estate as to the right of the husband to curtesy" (*q*). Against this, it was argued that the devise operated as a conditional limitation, and not merely to create an estate upon condition; for the defeasance, it was said, had no relation to the time of creating the estate, as in the case of a condition merely, the breach of which avoids all mesne incumbrances (*r*). The judgment of the Court is reported as follows:—"Lord Mansfield. Tenancy by the curtesy existed before the statute *de donis*, and the definition of it is, that the wife must be seised of an estate of inheritance, which, by possibility, her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional, or absolute, and curtesy applies to both equally. I cannot agree with the argument, that on performance of the condition, by birth of a child. the estate became absolute; it was so by a subtlety in odium of perpetuity, and for the special purpose of alienation, but for no other. It otherwise reverted to the donor on failure of the issue, according to the original restriction. At common law, the only modification of the estates was by condition. The statute of uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities by means of the extensive operation of that statute; and, in the time of Elizabeth and James, many cases were decided with a view to prevent that effect; with this view, it was allowed to bar contingent remainders before the person who was to take came into *esse;* others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were too much loosened, and it became necessary to restrain them again; and in the time of the trouble, eminent lawyers, who were then chamber counsel, devised methods which, on their return to Westminster Hall, they

(*q*) 1 Coll. Juris. 334.
(*r*) 3 Bos. and Pul. 653, note.

put in practice, such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards.

"It is contended that this is a conditional limitation. It is not so, but a contingent limitation. All the cases cited go upon the distinction of their being conditions, and not limitations. During the life of the wife she continued seised of a fee simple, to which her issue might by possibility inherit. I am of opinion that the defendant is entitled to be tenant by the curtesy. The rest of the Court assenting, judgment for the defendant" (*s*).

32. The facts in *Buckworth* v. *Thirkell*, as reported, appear to make the limitation over a clear case of executory devise. Upon her marriage, Mary Barrs became seised of an estate in fee simple, for the devise was to her, and her *heirs* from and after attaining twenty-one, *or* upon her marriage. Upon the happening of either event she was to take the fee. But upon her death, within the age of twenty-one, and without issue *living at her death*, her estate was to determine and pass over to the grandson of the testator. Upon her marriage, therefore, she occupied substantially the position of a devisee in fee, with a limitation over in the event of his death without issue living; the only difference being that, in the reported case, in order to divest the estate, it was necessary that the death of the devisee should occur within a limited period. In point of principle, however, this would make no difference as regards the question involved. The case, therefore, is to be considered as expressly deciding that the determination of an estate by operation of an executory devise, does not defeat the right

(*s*) 3 Bos. and Pul. 652, note; Park on Dower, 175, 176, 177.

of the widow to dower, nor of the husband to be tenant by the curtesy (*t*).

33. Very few cases, in modern practice, have provoked so much discussion, or been the subject of so much animadversion, as *Buckworth* v. *Thirkell*. Lord Alvanley is reported to have remarked, that "it occasioned some noise in the profession at the time it was decided" (*u*). It is referred to, in terms of decided disapprobation, by Mr. Butler, in one of his notes to Coke on Littleton (*v*). The following observations precede that writer's review of the case, and of the grounds assigned by Lord Mansfield for the decision: "As to estates in fee simple conditional at the common law, and estates tail, under the statute *de donis*, the wife was entitled to her dower, and the husband to his curtesy, out of them, after the failure of the issues in tail. But it may be observed, that, though it is now difficult to avoid considering estates in fee simple conditional, in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversion expectant on the failure of those heirs; yet this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or, being such, if they afterwards failed, and the donee did not alien the estate, it shall be lawful for the donor and his heirs to enter. This entry, therefore, was not an entry upon the *natural expiration of a previous estate*, but for a condition broken; in which case, as in all others where entry is made for breach of a condition, the right of a wife to her dower, and the husband to his curtesy, if the general rule were

(*t*) Scribner on Dower, vol. i. p. 292.
(*u*) In *Doe* v. *Hutton*, 3 Bos. and Pul. 653.
(*v*) Butl. Co. Litt. 241 a, note (4).

adhered to, would be defeated. But, for reasons now rather to be guessed than demonstrated, this case was made an exception from the general rule. So, with respect to the right of the wife of tenant in tail to her dower, and the husband to his curtesy, after failure of the issues in tail; the statute *de donis* introduced no new estate, but only preserved estates, limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them, and as they preserved the estates, so they preserved the incidents belonging to them, and, among others, the right of the wife to her dower, and the husband to his curtesy" (*w*).

To these remarks, the same writer adds his views with regard to what he terms *limited* fees. "As to the limited fees, by which, in this place, are to be understood those which are qualified, not because the estate of the grantor is limited (such as those which are classed under the third distinction), but those which, being created by a person seised in fee simple, are, by the original grant by which they are created, only to continue to a certain event; as a grant to A. and his heirs, tenants of the manor of Dale, or to A. and his heirs, while there shall be heirs of the body of B.; or those fees which are originally devised or limited in words importing a fee simple or fee tail absolute and unconditional, but which, by subsequent words, are made determinable upon some particular event. As to fees of this description, it would seem by the case cited in the note to F. N. B. 149 G., and the cases of *Flavill* v. *Ventrice*, Roll. Abr. 676, and *Sammes* v. *Payne*, 1 Leo. 167, 1 And. 184, 8 Rep. 34, Goulds, 81, that, where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower; and the husband his curtesy, after the expiration of the period to which the fee charged with the

(*w*) 1 Butl. Co. Litt. 241 a, note.

dower or curtesy is to continue; but that, where the fee is originally devised in words importing a fee simple or fee tail absolute and unconditional, but, by subsequent words, is made determinable upon some particular event, there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases."

34. The learned annotator then proceeds to notice the case of *Buckworth* v. *Thirkell*. "By a manuscript report of this case," he remarks, "the ground upon which the Court appears to have formed their opinion on it, is an analogy they supposed it to bear to the cases of estates in fee simple conditional, and estates tail; in both of which dower and curtesy continue after failure of the issues; and in both of which, the wife being seised of a fee, to which the issue might, by possibility, inherit, entitles the husband to curtesy. Some observations have been offered above, to show that the continuation of dower and curtesy in the cases of estates in fee simple conditional, was an exception to the general rule, (dower and curtesy in all other cases of conditions, being defeated by the entry for the condition broken), and that the same reasoning may be applied to the continuation of dower and curtesy out of an estate tail, after the failure of issue. It may, therefore, seem singular that the Court on this occasion, should prefer reasoning, by way of analogy, from the only admitted *exception* to the rule, to reasoning by analogy from the general rule itself. It is the more singular, as the general case of estates on condition approached nearer to the case then under the consideration of the Court, than the particular case of estates in fee simple conditional, or estates tail, for the distinguishing feature of the devise which gave rise to the the case before the Court, (as of all devises of that description), is, that after the whole fee is first devised, it is made

defeasible by a subsequent clause. Now, neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it, but this quality forms the very essence of all other estates upon condition. With respect to the application of the maxim, that where the issue may by possibility inherit, the husband shall have his curtesy, (and so *vice versâ* of dower;) in every place in the books where that is mentioned, it is to introduce an enquiry, whether the wife being in actual seisin of an estate, was in fact seised of an estate, the *quality* of which was such, that the issue of the husband might inherit it, but never with a view to show that the *quantity* of the estate was such that it might endure so long as to be inheritable by the issue. On the contrary, when the wife's estate is evicted by title paramount, or by an entry for the breach of a condition, in both cases the issue might have inherited; but the husband would be entitled to his curtesy in neither, after the eviction or entry. Another difference between the case of an estate in fee simple made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation, or devise, cannot, by any means whatever, be discharged by the first taker or devisee, from the operation of the subsequent limitation or devise, but an estate in fee simple conditional may, immediately after the birth of a child, and an estate tail, immediately after marriage, be destroyed, and a fee simple absolute acquired, by the husband and wife joining in a fine or common recovery. The case is the same with respect to the wife's right to dower. Besides, the quality we are speaking of is not sufficient of itself to entitle the husband to curtesy, or the wife to dower; it is only one of many incidents which the estate ought to have to give that title" (*x*).

(*x*) Butl. Co. Litt. 241 a, note (4); Park on Dower, 180, 183.

35. Mr. Park also expresses marked dissent from the views of Lord Mansfield, in *Buckworth* v. *Thirkell*. "The latter passage," he observes, referring to the opinion of that Judge, "in which he is made to assign, as a reason for his decision, that it was not a conditional limitation, is not easily reconcilable with the case stated. The original limitation to Mary Barrs was expressly a limitation of the fee, and the subsequent estate being limited in derogation of that fee, and not upon the determination of a prior particular estate, was necessarily a conditional limitation. If it was not so, it is difficult to conjecture what Lord Mansfield understood by a conditional limitation. It might, perhaps, be thought that his Lordship's observations, as above stated, merely intended to take the distinction between a limitation and a condition, properly so called. But the language as stated in the report of a case in Collect. Jurid. is still more irreconcilable with any correct view of the law, in application to the facts of the case stated. It is as follows: 'Now, it is contended that this is a conditional limitation. It is no such thing. There is no condition in it. It is a contingent limitation. If it is a limitation it does not defeat the right of the husband to be tenant by the curtesy, though the estate is spent' (*y*). It is certainly inconsistent with all ideas entertained in modern practice, to consider an estate originally limited in fee, and abridged by a subsequent limitation over upon the happening of a particular event, in any such light as that implied by the observation that it was *spent* upon the happening of that event. Indeed, were not the observations of Lord Mansfield found in a case, which, as reported, was indisputably that of a conditional limitation, they would, without doubt, have been considered as establishing the general distinction, as to dower and curtesy, between estates expiring by their natural and regular limitation, and estates

(*y*) 1 Coll. Jur. 336.

abridged or defeated by some collateral term annexed to their creation. So far as the language of the judgment is to be relied on, it would seem to proceed upon the very distinction which Buckworth and Thirkell is daily cited to overturn" (*z*).

36. Some of the leading English text writers avoid expressing any opinion upon this question. Burton and Preston are among this number (*a*). Atkinson, in discussing the point, employs this language: "Where the husband's estate is defeated by title paramount, as by entry for condition broken, by reason of a defective title in the grantor, or by shifting use, the right to the dower is also defeated: but where the husband's estate is defeated by executory devise, it has been settled, rather anomalously, it has been thought, that the widow shall, nevertheless, be entitled to dower (*b*)." Mr. Jacob, the learned editor of Roper on Husband and Wife, upon an able review of the cases, and a thorough discussion of the question, inclines strongly against the right of dower where the estate is determined, either by a shifting use or an executory devise (*c*).

37. Other distinguished writers upon the Law of Real Property, however, unhesitatingly support the doctrine of *Buckworth* v. *Thirkell*. Among these may be named Roper, Jarman and Bisset. Mr. Jarman thus states the law: "It is to be observed, too, that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee simple in possession, such as curtesy, dower, etc.; the devisee having the inheritance in fee, subject, only, to a possibility" (*d*).

(*z*) Park on Dower, 177, 179; see, also, page 185.

(*a*) Burton, Real Prop. 356; 3 Prest. Abst. 373.

(*b*) 1 Atkinson Conv. 258.

(*c*) App. No. II. 2 Roper, H. and W. 502.

(*d*) 1 Jarman on Wills, 792; 1 Roper, H. and W. 38, 43, 377; Bissett, Est. for Life, 82, 87, are to the same effect. See, also, 2 Crabb. Real Prop. 167; Scribner on Dower, vol. i. p. 296.

38. The case of *Moody* v. *King* (*e*), decided since the greater part of the foregoing discussion occurred, is directly in point, and appears to fully support the judgment of Lord Mansfield upon this much mooted question. In that case, the father of W. F. devised to him and his heirs forever, certain real estate, subject to the payment of an annuity; and if the said W. F. should have no issue, the estate on his decease, was to become the property of the heir-at-law, subject to such legacies as W. F. might leave by will to any of the younger branches of the family. It was decided that under this devise, W. F. took an estate in fee, with an executory devise over, in the event (which happened) of his dying without issue, to the person who should then be the testator's heir-at-law (*f*). It then became a question whether the widow of W. F. was entitled to dower, and a bill having been filed by her for that purpose, a case was stated for the opinion of the Judges of the Common Pleas, who certified in her favor. *Buckworth* v. *Thirkell*, and *Goodenough* v. *Goodenough*, (*g*), were the authorities chiefly relied upon for the judgment of the Court. The Court were also of opinion that from the nature of the limitation, the case came within the will stated by Littleton (*h*), according to which the right of dower exists where the husband's estate is such, that the issue the wife may have by him may take by descent.

39. In the more recent case of *Barker* v. *Barker* (*i*), the question again came up for consideration. The Vice-Chancellor, by whom it was determined, went into a review of the cases of *Sumner* v. *Partridge*, *Buckworth* v. *Thirkell*, and *Moody* v. *King*, and endeavoured to reconcile

(*e*) *Moody* v. *King*, 2 Bing. 447; 9 Eng. C. L. 475.
(*f*) See *Doe dem King* v. *Frost*, 3 Barn. and Ald. 546; 5 Eng. C. L. 373.
(*g*) *Supra*, 31-4.
(*h*) Sec. 53.
(*i*) *Barker* v. *Barker*, 2 Sim. 249; 2 Cond. Eng. Ch. R. 406.

the first of these cases with the last two, upon the distinction that in the first case the issue of the wife took the estate by force of the gift, as *purchasers*, and not by descent from her, while, in the two other cases, the issue of the wife in the one case, and of the husband, in the other, would take by descent as heirs-at-law, and not as purchasers under the limitation; and upon this distinction he denied curtesy to the husband in the case before him. The case was this: Devise to A. and her heirs; but if she died leaving issue, then to such issue and their heirs. A. died leaving issue and a husband. The husband claimed curtesy. "It was said," observed the Vice-Chancellor, "that this case was decided by *Sumner* v. *Partridge*, where there was a devise to A. and her heirs, and, if she died before her husband, he was to have £20 a year for life, remainder to go to her children. A. died before the husband; but the Court held that he was not tenant by the curtesy. In opposition to that case, two cases were cited. The first was *Buckworth* v. *Thirkell*, where an estate was devised to trustees in trust for Mary Barrs, till she attained twenty-one, or married, and then to the use of her and her heirs, with a devise over in case she died under the age of twenty-one, and without leaving issue. The events were, that she married, and had a child; the child died, and then the mother died under twenty-one; and the question was whether the husband was entitled to be tenant by the curtesy, which entirely depended upon whether she had such an estate, as, by possibility, her issue might inherit. The case was twice argued, and Lord Mansfield says that, during the life of the wife, she continued seised of a fee simple to which her issue might, by possibility, inherit; and, had she attained twenty-one, her vested estate would have descended on her issue. The consequence was, that her husband was held to be entitled to be tenant by the curtesy. The second case was *Moody* v. *King*, where

there was a devise to W. Frost and his heirs, but, if he should have no issue, the estate devised was, on his decease, to become the property of the heir-at-law. Now, it is manifest that W. Frost had an estate that might have descended on his issue, and that on his dying without issue, that estate determined. But it was, nevertheless, held that his widow was dowable. But these two cases are distinguishable from *Sumner* v. *Partridge*, and from the one now under consideration. For, in *Summer* v. *Partridge*, and the case now before me, the children take by force of the gift; in the two other cases, the devise over was to other persons. It is clear, therefore, that the estate which the wife had, is determined by her dying leaving issue, by which the children take as purchasers, by force of the gift. Therefore, the wife had not such an estate as could descend to her children, they taking as purchasers. The consequence is that the husband is not entitled to be tenant by the curtesy (*j*)."

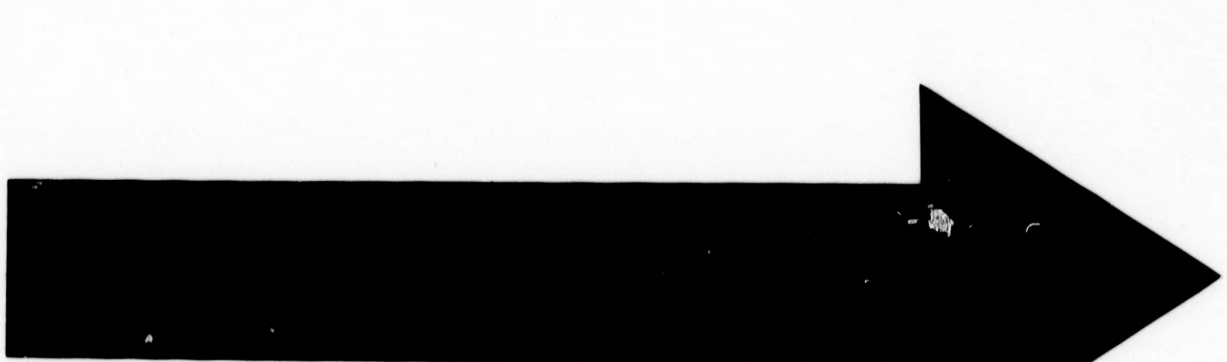
40. In a recent case, Vice-Chancellor Stuart applied the doctrine of *Moody* v. *King* to an *equitable* determinable estate. A testatrix devised to trustees certain freehold premises, in trust to receive the rents, and after paying thereout all proper outgoings, and applying therefrom any monies that they thought fit, to the maintenance of F. S. to let the residue accumulate until F. S. should attain twenty-one, and then to pay such accumulations to him; but if he should die under age, without leaving issue living at his decease, then such accumulations were to be applied for the benefit of the person to whom, and in the like manner and form, as the premises were limited in the like event; and, when F. S. should attain twenty-one, then the trustees were to stand seised of the premises, in trust for

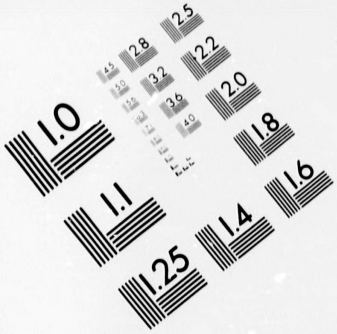
(*j*) The opinion of the Vice-Chancellor in this case is referred to by Mr. Bisset in terms of high commendation. Bisset, Est. for Life, 85; 42 Law Lib.; Scribner on Dower, vol. i. p. 298.

him in fee; but, if he should not leave any issue living at his decease, then the trustees were to stand seised of the premises in trust for A. S. in fee; and if A. S. should not leave any issue living at his decease, then the premises were devised over. F. S. attained twenty-one, and died without ever having had issue. It was held, on the construction of the will, that an equitable estate in fee in the premises vested in F. S. on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened, the limitation over in favor of A. S. took effect; but that the widow of F. S. was, nevertheless, entitled to dower under the provisions of 3 and 4 Will. IV., cap. 105. "The question in this case," said the Vice-Chancellor, "as to the widow's right to dower, must depend upon the true construction of the Act of Parliament, the 3 and 4 Will. IV. cap. 105. The estate out of which the defendant, Ann Elizabeth Spencer, claimed to be entitled to dower, was an equitable one, in respect of which, consequently, no such claim could exist at common law, and she would not be entitled to any dower, but for the late Act of Parliament, which said that where the husband should die, beneficially entitled to any land for an interest that should be an estate of inheritance in possession, then his widow should be entitled to dower (*k*). The question was whether the husband of this lady died 'beneficially entitled' to any lands, and if the interest which he had was an estate of inheritance in possession. The husband was tenant in fee simple, subject to an executory devise over, in case he died without leaving a child or issue living at the time of his death. It seemed to him, upon a strict and liberal interpretation of the language of the will, that if he died seised of anything, he must have died seised of an estate of inheritance, for he certainly did not die seised

(*k*) See Appendix.

of a life estate. The estate which he had was an estate of inheritance; but, although of inheritance, it was defeasible in this way—that, in case he left no child or issue living at his death, then the estate was to go over to the person entitled to it. This interpretation of the language of the will seemed to him quite conformable to the common law doctrine, and it was an interpretation which reconciled the right given to the widow to have her dower out of the equitable estate, so as to make it analagous to the right which she would have had if it had been a legal estate. The language of Littleton, in the 53rd section, as to a legal estate, was very clear, and the interpretation of it in *Moody* v. *King* was strict and proper. Littleton said 'that in every case where a woman taketh a husband seised of such an estate of tenements, etc., so that by possibility it may happen that if the wife have any issue by her husband, and that the same issue may, by possibility, inherit the same tenements of such estate as the husband hath, as heir to her husband of such tenements, she would have her dower, and otherwise, not.' It was quite plain that in this case the husband was so seised, that he might have had issue, who would have inherited the land in such a manner as to have had the same estate as the husband; that was, an estate of inheritance. But the question did not rest upon the interpretation of the language of Littleton, as applied to the case of a fee simple in the husband, with an executory devise over, in case he left no child living at his death; for it was determined in the case of *Moody* v. *King*, in the Court of Common Pleas—and that decision was adopted by this Court—that in a case of this kind, though there be an executory devise over, yet the wife was dowable; and, upon the same principle, it seemed impossible properly to adopt any other interpretation. It could not be necessary to hold that the estate of which the husband




1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0
11.2
12.5
14.0
16.0
18.0
20.0
22.0
25.0
28.0
32.0
36.0
40.0
45.0
50.0
56.0
63.0
71.0
80.0
90.0
100.0
112.0
125.0
140.0
160.0
180.0
200.0
224.0
250.0
280.0
320.0
360.0
400.0
450.0
500.0
560.0
630.0
710.0
800.0
900.0
1000.0
1120.0
1250.0
1400.0
1600.0
1800.0
2000.0
2240.0
2500.0
2800.0
3200.0
3600.0
4000.0
4500.0
5000.0
5600.0
6300.0
7100.0
8000.0
9000.0
10000.0
11200.0
12500.0
14000.0
16000.0
18000.0
20000.0
22400.0
25000.0
28000.0
32000.0
36000.0
40000.0
45000.0
50000.0
56000.0
63000.0
71000.0
80000.0
90000.0
100000.0
112000.0
125000.0
140000.0
160000.0
180000.0
200000.0
224000.0
250000.0
280000.0
320000.0
360000.0
400000.0
450000.0
500000.0
560000.0
630000.0
710000.0
800000.0
900000.0
1000000.0
1120000.0
1250000.0
1400000.0
1600000.0
1800000.0
2000000.0
2240000.0
2500000.0
2800000.0
3200000.0
3600000.0
4000000.0
4500000.0
5000000.0
5600000.0
6300000.0
7100000.0
8000000.0
9000000.0
10000000.0
11200000.0
12500000.0
14000000.0
16000000.0
18000000.0
20000000.0
22400000.0
25000000.0
28000000.0
32000000.0
36000000.0
40000000.0
45000000.0
50000000.0
56000000.0
63000000.0
71000000.0
80000000.0
90000000.0
100000000.0
112000000.0
125000000.0
140000000.0
160000000.0
180000000.0
200000000.0
224000000.0
250000000.0
280000000.0
320000000.0
360000000.0
400000000.0
450000000.0
500000000.0
560000000.0
630000000.0
710000000.0
800000000.0
900000000.0
1000000000.0
1120000000.0
1250000000.0
1400000000.0
1600000000.0
1800000000.0
2000000000.0
2240000000.0
2500000000.0
2800000000.0
3200000000.0
3600000000.0
4000000000.0
4500000000.0
5000000000.0
5600000000.0
6300000000.0
7100000000.0
8000000000.0
9000000000.0
10000000000.0
11200000000.0
12500000000.0
14000000000.0
16000000000.0
18000000000.0
20000000000.0
22400000000.0
25000000000.0
28000000000.0
32000000000.0
36000000000.0
40000000000.0
45000000000.0
50000000000.0
56000000000.0
63000000000.0
71000000000.0
80000000000.0
90000000000.0
100000000000.0
112000000000.0
125000000000.0
140000000000.0
160000000000.0
180000000000.0
200000000000.0
224000000000.0
250000000000.0
280000000000.0
320000000000.0
360000000000.0
400000000000.0
450000000000.0
500000000000.0
560000000000.0
630000000000.0
710000000000.0
800000000000.0
900000000000.0
1000000000000.0
1120000000000.0
1250000000000.0
1400000000000.0
1600000000000.0
1800000000000.0
2000000000000.0
2240000000000.0
2500000000000.0
2800000000000.0
3200000000000.0
3600000000000.0
4000000000000.0
4500000000000.0
5000000000000.0
5600000000000.0
6300000000000.0
7100000000000.0
8000000000000.0
9000000000000.0
10000000000000.0
11200000000000.0
12500000000000.0
14000000000000.0
16000000000000.0
18000000000000.0
20000000000000.0
22400000000000.0
25000000000000.0
28000000000000.0
32000000000000.0
36000000000000.0
40000000000000.0
45000000000000.0
50000000000000.0
56000000000000.0
63000000000000.0
71000000000000.0
80000000000000.0
90000000000000.0
100000000000000.0
112000000000000.0
125000000000000.0
140000000000000.0
160000000000000.0
180000000000000.0
200000000000000.0
224000000000000.0
250000000000000.0
280000000000000.0
320000000000000.0
360000000000000.0
400000000000000.0
450000000000000.0
500000000000000.0
560000000000000.0
630000000000000.0
710000000000000.0
800000000000000.0
900000000000000.0
1000000000000000.0
1120000000000000.0
1250000000000000.0
1400000000000000.0
1600000000000000.0
1800000000000000.0
2000000000000000.0
2240000000000000.0
2500000000000000.0
2800000000000000.0
3200000000000000.0
3600000000000000.0
4000000000000000.0
4500000000000000.0
5000000000000000.0
5600000000000000.0
6300000000000000.0
7100000000000000.0
8000000000000000.0
9000000000000000.0
10000000000000000.0
11200000000000000.0
12500000000000000.0
14000000000000000.0
16000000000000000.0
18000000000000000.0
20000000000000000.0
22400000000000000.0
25000000000000000.0
28000000000000000.0
32000000000000000.0
36000000000000000.0
40000000000000000.0
45000000000000000.0
50000000000000000.0
56000000000000000.0
63000000000000000.0
71000000000000000.0
80000000000000000.0
90000000000000000.0
100000000000000000.0
112000000000000000.0
125000000000000000.0
140000000000000000.0
160000000000000000.0
180000000000000000.0
200000000000000000.0
224000000000000000.0
250000000000000000.0
280000000000000000.0
320000000000000000.0
360000000000000000.0
400000000000000000.0
450000000000000000.0
500000000000000000.0
560000000000000000.0
630000000000000000.0
710000000000000000.0
800000000000000000.0
900000000000000000.0
1000000000000000000.0
1120000000000000000.0
1250000000000000000.0
1400000000000000000.0
1600000000000000000.0
1800000000000000000.0
2000000000000000000.0
2240000000000000000.0
2500000000000000000.0
2800000000000000000.0
3200000000000000000.0
3600000000000000000.0
4000000000000000000.0
4500000000000000000.0
5000000000000000000.0
5600000000000000000.0
6300000000000000000.0
7100000000000000000.0
8000000000000000000.0
9000000000000000000.0
10000000000000000000.0
11200000000000000000.0
12500000000000000000.0
14000000000000000000.0
16000000000000000000.0
18000000000000000000.0
20000000000000000000.0
22400000000000000000.0
25000000000000000000.0
28000000000000000000.0
32000000000000000000.0
36000000000000000000.0
40000000000000000000.0
45000000000000000000.0
50000000000000000000.0
56000000000000000000.0
63000000000000000000.0
71000000000000000000.0
80000000000000000000.0
90000000000000000000.0
100000000000000000000.0
112000000000000000000.0
125000000000000000000.0
140000000000000000000.0
160000000000000000000.0
180000000000000000000.0
200000000000000000000.0
224000000000000000000.0
250000000000000000000.0
280000000000000000000.0
320000000000000000000.0
360000000000000000000.0
400000000000000000000.0
450000000000000000000.0
500000000000000000000.0
560000000000000000000.0
630000000000000000000.0
710000000000000000000.0
800000000000000000000.0
900000000000000000000.0
1000000000000000000000.0
1120000000000000000000.0
1250000000000000000000.0
1400000000000000000000.0
1600000000000000000000.0
1800000000000000000000.0
2000000000000000000000.0
2240000000000000000000.0
2500000000000000000000.0
2800000000000000000000.0
3200000000000000000000.0
3600000000000000000000.0
4000000000000000000000.0
4500000000000000000000.0
5000000000000000000000.0
5600000000000000000000.0
6300000000000000000000.0
7100000000000000000000.0
8000000000000000000000.0
9000000000000000000000.0
10000000000000000000000.0
11200000000000000000000.0
12500000000000000000000.0
14000000000000000000000.0
16000000000000000000000.0
18000000000000000000000.0
20000000000000000000000.0
22400000000000000000000.0
25000000000000000000000.0
28000000000000000000000.0
32000000000000000000000.0
36000000000000000000000.0
40000000000000000000000.0
45000000000000000000000.0
50000000000000000000000.0
56000000000000000000000.0
63000000000000000000000.0
71000000000000000000000.0
80000000000000000000000.0
90000000000000000000000.0
100000000000000000000000.0
112000000000000000000000.0
125000000000000000000000.0
140000000000000000000000.0
160000000000000000000000.0
180000000000000000000000.0
200000000000000000000000.0
224000000000000000000000.0
250000000000000000000000.0
280000000000000000000000.0
320000000000000000000000.0
360000000000000000000000.0
400000000000000000000000.0
450000000000000000000000.0
500000000000000000000000.0
560000000000000000000000.0
630000000000000000000000.0
710000000000000000000000.0
800000000000000000000000.0
900000000000000000000000.0
1000000000000000000000000.0
1120000000000000000000000.0
1250000000000000000000000.0
1400000000000000000000000.0
1600000000000000000000000.0
1800000000000000000000000.0
2000000000000000000000000.0
2240000000000000000000000.0
2500000000000000000000000.0
2800000000000000000000000.0
3200000000000000000000000.0
3600000000000000000000000.0
4000000000000000000000000.0
4500000000000000000000000.0
5000000000000000000000000.0
5600000000000000000000000.0
6300000000000000000000000.0
7100000000000000000000000.0
8000000000000000000000000.0
9000000000000000000000000.0
10000000000000000000000000.0
11200000000000000000000000.0
12500000000000000000000000.0
14000000000000000000000000.0
16000000000000000000000000.0
18000000000000000000000000.0
20000000000000000000000000.0
22400000000000000000000000.0
25000000000000000000000000.0
28000000000000000000000000.0
32000000000000000000000000.0
36000000000000000000000000.0
40000000000000000000000000.0
45000000000000000000000000.0
50000000000000000000000000.0
56000000000000000000000000.0
63000000000000000000000000.0
71000000000000000000000000.0
80000000000000000000000000.0
90000000000000000000000000.0
100000000000000000000000000.0
112000000000000000000000000.0
125000000000000000000000000.0
140000000000000000000000000.0
160000000000000000000000000.0
180000000000000000000000000.0
200000000000000000000000000.0
224000000000000000000000000.0
250000000000000000000000000.0
280000000000000000000000000.0
320000000000000000000000000.0
360000000000000000000000000.0
400000000000000000000000000.0
450000000000000000000000000.0
500000000000000000000000000.0
560000000000000000000000000.0
630000000000000000000000000.0
710000000000000000000000000.0
800000000000000000000000000.0
900000000000000000000000000.0
1000000000000000000000000000.0
1120000000000000000000000000.0
1250000000000000000000000000.0
1400000000000000000000000000.0
1600000000000000000000000000.0
1800000000000000000000000000.0
2000000000000000000000000000.0
2240000000000000000000000000.0
2500000000000000000000000000.0
2800000000000000000000000000.0
3200000000000000000000000000.0
3600000000000000000000000000.0
4000000000000000000000000000.0
4500000000000000000000000000.0
5000000000000000000000000000.0
5600000000000000000000000000.0
6300000000000000000000000000.0
7100000000000000000000000000.0
8000000000000000000000000000.0
9000000000000000000000000000.0
10000000000000000000000000000.0
11200000000000000000000000000.0
12500000000000000000000000000.0
14000000000000000000000000000.0
16000000000000000000000000000.0
18000000000000000000000000000.0
20000000000000000000000000000.0
22400000000000000000000000000.0
25000000000000000000000000000.0
28000000000000000000000000000.0
32000000000000000000000000000.0
36000000000000000000000000000.0
40000000000000000000000000000.0
45000000000000000000000000000.0
50000000000000000000000000000.0
56000000000000000000000000000.0
63000000000000000000000000000.0
71000000000000000000000000000.0
80000000000000000000000000000.0
90000000000000000000000000000.0
100000000000000000000000000000.0
112000000000000000000000000000.0
125000000000000000000000000000.0
140000000000000000000000000000.0
160000000000000000000000000000.0
180000000000000000000000000000.0
200000000000000000000000000000.0
224000000000000000000000000000.0
250000000000000000000000000000.0
280000000000000000000000000000.0
320000000000000000000000000000.0
360000000000000000000000000000.0
400000000000000000000000000000.0
450000000000000000000000000000.0
500000000000000000000000000000.0
560000000000000000000000000000.0
630000000000000000000000000000.0
710000000000000000000000000000.0
800000000000000000000000000000.0
900000000000000000000000000000.0
1000000000000000000000000000000.0
1120000000000000000000000000000.0
1250000000000000000000000000000.0
1400000000000000000000000000000.0
1600000000000000000000000000000.0
1800000000000000000000000000000.0
2000000000000000000000000000000.0
2240000000000000000000000000000.0
2500000000000000000000000000000.0
2800000000000000000000000000000.0
3200000000000000000000000000000.0
3600000000000000000000000000000.0
4000000000000000000000000000000.0
4500000000000000000000000000000.0
5000000000000000000000000000000.0
5600000000000000000000000000000.0
6300000000000000000000000000000.0
7100000000000000000000000000000.0
8000000000000000000000000000000.0
9000000000000000000000000000000.0
10000000000000000000000000000000.0
11200000000000000000000000000000.0
12500000000000000000000000000000.0
14000000000000000000000000000000.0
16000000000000000000000000000000.0
18000000000000000000000000000000.0
20000000000000000000000000000000.0
22400000000000000000000000000000.0
25000000000000000000000000000000.0
28000000000000000000000000000000.0
32000000000000000000000000000000.0
36000000000000000000000000000000.0
40000000000000000000000000000000.0
45000000000000000000000000000000.0
50000000000000000000000000000000.0
56000000000000000000000000000000.0
63000000000000000000000000000000.0
71000000000000000000000000000000.0
80000000000000000000000000000000.0
90000000000000000000000000000000.0
100000000000000000000000000000000.0
112000000000000000000000000000000.0
125000000000000000000000000000000.0
140000000000000000000000000000000.0
160000000000000000000000000000000.0
180000000000000000000000000000000.0
200000000000000000000000000000000.0
224000000000000000000000000000000.0
250000000000000000000000000000000.0
280000000000000000000000000000000.0
320000000000000000000000000000000.0
360000000000000000000000000000000.0
400000000000000000000000000000000.0
450000000000000000000000000000000.0
500000000000000000000000000000000.0
560000000000000000000000000000000.0
630000000000000000000000000000000.0
710000000000000000000000000000000.0
800000000000000000000000000000000.0
900000000000000000000000000000000.0
1000000000000000000000000000000000.0
1120000000000000000000000000000000.0
1250000000000000000000000000000000.0
1400000000000000000000000000000000.0
1600000000000000000000000000000000.0
1800000000000000000000000000000000.0
2000000000000000000000000000000000.0
2240000000000000000000000000000000.0
2500000000000000000000000000000000.0
2800000000000000000000000000000000.0
3200000000000000000000000000000000.0
3600000000000000000000000000000000.0
4000000000000000000000000000000000.0
4500000000000000000000000000000000.0
5000000000000000000000000000000000.0
5600000000000000000000000000000000.0
6300000000000000000000000000000000.0
7100000000000000000000000000000000.0
8000000000000000000000000000000000.0
9000000000000000000000000000000000.0
10000000000000000000000000000000000.0
11200000000000000000000000000000000.0
12500000000000000000000000000000000.0
14000000000000000000000000000000000.0
16000000000000000000000000000000000.0
18000000000000000000000000000000000.0
20000000000000000000000000000000000.0
22400000000000000000000000000000000.0
25000000000000000000000000000000000.0
28000000000000000000000000000000000.0
32000000000000000000000000000000000.0
36000000000000000000000000000000000.0
40000000000000000000000000000000000.0
45000000000000000000000000000000000.0
50000000000000000000000000000000000.0
56000000000000000000000000000000000.0
63000000000000000000000000000000000.0
71000000000000000000000000000000000.0
80000000000000000000000000000000000.0
90000000000000000000000000000000000.0
100000000000000000000000000000000000.0
112000000000000000000000000000000000.0
125000000000000000000000000000000000.0
140000000000000000000000000000000000.0
160000000000000000000000000000000000.0
180000000000000000000000000000000000.0
200000000000000000000000000000000000.0
224000000000000000000000000000000000.0
250000000000000000000000000000000000.0
280000000000000000000000000000000000.0
320000000000000000000000000000000000.0
360000000000000000000000000000000000.0
400000000000000000000000000000000000.0
450000000000000000000000000000000000.0
500000000000000000000000000000000000.0
560000000000000000000000000000000000.0
630000000000000000000000000000000000.0
710000000000000000000000000000000000.0
800000000000000000000000000000000000.0
900000000000000000000000000000000000.0
1000000000000000000000000000000000000.0
1120000000000000000000000000000000000.0
1250000000000000000000000000000000000.0
1400000000000000000000000000000000000.0
1600000000000000000000000000000000000.0
1800000000000000000000000000000000000.0
2000000000000000000000000000000000000.0
2240000000000000000000000000000000000.0
2500000000000000000000000000000000000.0
2800000000000000000000000000000000000.0
3200000000000000000000000000000000000.0
3600000000000000000000000000000000000.0
4000000000000000000000000000000000000.0
4500000000000000000000000000000000000.0
5000000000000000000000000000000000000.0
5600000000000000000000000000000000000.0
6300000000000000000000000000000000000.0
7100000000000000000000000000000000000.0
8000000000000000000000000000000000000.0
9000000000000000000000000000000000000.0
10000000000000000000000000000000000000.0
11200000000000000000000000000000000000.0
12500000000000000000000000000000000000.0
14000000000000000000000000000000000000.0
16000000000000000000000000000000000000.0
18000000000000000000000000000000000000.0
20000000000000000000000000000000000000.0
22400000000000000000000000000000000000.0
25000000000000000000000000000000000000.0
28000000000000000000000000000000000000.0
32000000000000000000000000000000000000.0
36000000000000000000000000000000000000.0
40000000000000000000000000000000000000.0
45000000000000000000000000000000000000.0
50000000000000000000000000000000000000.0
56000000000000000000000000000000000000.0
63000000000000000000000000000000000000.0
71000000000000000000000000000000000000.0
80000000000000000000000000000000000000.0
90000000000000000000000000000000000000.0
100000000000000000000000000000000000000.0
112000000000000000000000000000000000000.0
125000000000000000000000000000000000000.0
140000000000000000000000000000000000000.0
160000000000000000000000000000000000000.0
180000000000000000000000000000000000000.0
200000000000000000000000000000000000000.0
224000000000000000000000000000000000000.0
250000000000000000000000000000000000000.0
280000000000000000000000000000000000000.0
320000000000000000000000000000000000000.0
360000000000000000000000000000000000000.0
400000000000000000000000000000000000000.0
450000000000000000000000000000000000000.0
500000000000000000000000000000000000000.0
560000000000000000000000000000000000000.0
630000000000000000000000000000000000000.0
710000000000000000000000000000000000000.0
800000000000000000000000000000000000000.0
900000000000000000000000000000000000000.0
1000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000.0
1250000000000000000000000000000000000000.0
1400000000000000000000000000000000000000.0
1600000000000000000000000000000000000000.0
1800000000000000000000000000000000000000.0
2000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000.0
2500000000000000000000000000000000000000.0
2800000000000000000000000000000000000000.0
3200000000000000000000000000000000000000.0
3600000000000000000000000000000000000000.0
4000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000.0
5000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000.0
6300000000000000000000000000000000000000.0
7100000000000000000000000000000000000000.0
8000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000.0
12500000000000000000000000000000000000000.0
14000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000.0
25000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000000000.0
280000000000000000000000000000000000000000000000000000000.0
320000000000000000000000000000000000000000000000000000000.0
360000000000000000000000000000000000000000000000000000000.0
400000000000000000000000000000000000000000000000000000000.0
450000000000000000000000000000000000000000000000000000000.0
500000000000000000000000000000000000000000000000000000000.0
560000000000000000000000000000000000000000000000000000000.0
630000000000000000000000000000000000000000000000000000000.0
710000000000000000000000000000000000000000000000000000000.0
800000000000000000000000000000000000000000000000000000000.0
900000000000000000000000000000000000000000000000000000000.0
1000000000000000000000000000000000000000000000000000000000.0
1120000000000000000000000000000000000000000000000000000000.0
1250000000000000000000000000000000000000000000000000000000.0
1400000000000000000000000000000000000000000000000000000000.0
1600000000000000000000000000000000000000000000000000000000.0
1800000000000000000000000000000000000000000000000000000000.0
2000000000000000000000000000000000000000000000000000000000.0
2240000000000000000000000000000000000000000000000000000000.0
2500000000000000000000000000000000000000000000000000000000.0
2800000000000000000000000000000000000000000000000000000000.0
3200000000000000000000000000000000000000000000000000000000.0
3600000000000000000000000000000000000000000000000000000000.0
4000000000000000000000000000000000000000000000000000000000.0
4500000000000000000000000000000000000000000000000000000000.0
5000000000000000000000000000000000000000000000000000000000.0
5600000000000000000000000000000000000000000000000000000000.0
6300000000000000000000000000000000000000000000000000000000.0
7100000000000000000000000000000000000000000000000000000000.0
8000000000000000000000000000000000000000000000000000000000.0
9000000000000000000000000000000000000000000000000000000000.0
10000000000000000000000000000000000000000000000000000000000.0
11200000000000000000000000000000000000000000000000000000000.0
12500000000000000000000000000000000000000000000000000000000.0
14000000000000000000000000000000000000000000000000000000000.0
16000000000000000000000000000000000000000000000000000000000.0
18000000000000000000000000000000000000000000000000000000000.0
20000000000000000000000000000000000000000000000000000000000.0
22400000000000000000000000000000000000000000000000000000000.0
25000000000000000000000000000000000000000000000000000000000.0
28000000000000000000000000000000000000000000000000000000000.0
32000000000000000000000000000000000000000000000000000000000.0
36000000000000000000000000000000000000000000000000000000000.0
40000000000000000000000000000000000000000000000000000000000.0
45000000000000000000000000000000000000000000000000000000000.0
50000000000000000000000000000000000000000000000000000000000.0
56000000000000000000000000000000000000000000000000000000000.0
63000000000000000000000000000000000000000000000000000000000.0
71000000000000000000000000000000000000000000000000000000000.0
80000000000000000000000000000000000000000000000000000000000.0
90000000000000000000000000000000000000000000000000000000000.0
100000000000000000000000000000000000000000000000000000000000.0
112000000000000000000000000000000000000000000000000000000000.0
125000000000000000000000000000000000000000000000000000000000.0
140000000000000000000000000000000000000000000000000000000000.0
160000000000000000000000000000000000000000000000000000000000.0
180000000000000000000000000000000000000000000000000000000000.0
200000000000000000000000000000000000000000000000000000000000.0
224000000000000000000000000000000000000000000000000000000000.0
250000000000000000000000000000000000000000000000000000000000.

died seised was transmissible to his heir, in order to entitle the wife to dower; because it was certain and undoubted law, that if there be a tenant in tail, with a remainder over in fee, although the tenant in tail should die wit' out leaving any issue, so that the estate in remainder in fee took effect, the wife was dowable as against the remainderman; and in principle it seemed impossible to say that an estate, of which the tenant in tail was seised at his death for an estate tail, could be, in any respect different from an estate given to a tenant in fee simple, who died seised of that estate, but because he died without leaving a child, an executory devise over took effect. The principle seemed the same in both cases, and, therefore, he felt compelled to hold, upon the true construction of the statute, that the widow of this tenant in fee simple was, notwithstanding that the executory devise over took effect, entitled to dower as against the executory devisee" (*l*). Upon appeal to the Lord Chancellor, the decree of the Vice-Chancellor was affirmed (*m*).

41. In the United States, the discussion of this subject has not resulted in an entire unanimity of opinion. Chancellor Kent maintains that "the ablest writers on property law are evidently against the authority of the case of *Buckworth* v. *Thirkell*, and against the right of the dowress, when the fee of the husband is determined by executory devise, or shifting use (*n*). Mr. Hilliard, while appearing to recognize the authority of that case, nevertheless adopts, substantially, the distinction insisted upon by Mr. Butler (*o*). But Mr. Washburn, after reviewing

(*l*) *Smith* v. *Spencer*, V. C. Stuart's Court, July, 1856, 2 Jurist, N. S. 778. A brief note of the case is also contained in 19 Law Reporter, 515.

(*m*) *Smith* v. *Spencer*, 6 De Gex M. and G. Reps. 631. Upon the appeal, however, no question appears to have been made with respect to dower. Scribner on Dower, vol. i. p. 298, 301.

(*n*) 4 Kent, 50.

(*o*) 1 Hilliard, Real Prop. 114.

the authorities, concludes that the tendency of the modern cases, both English and American, is to support the right to dower out of estates which have been determined by executory limitations (*p*). And it would seem that the adjudged cases are in harmony with this proposition (*q*).

(*p*) 1 Washb. Real Prop. 216.

(*q*) Scribner on Dower, vol. i. p. 301; *Evans* v. *Evans*, 9 Barr. 90; *Northcutt* v. *Whipp*, 12 B. Monr. 65; *Milledge* v. *Lamar*, 4 Des. 617, 637; *Adams* v. *Beekman*, 1 Paige, 631.

CHAPTER XI.

DOWER IN ESTATES IN REMAINDER AND REVERSION.

1-6. *The general doctrine.*
7. *The construction of the Ontario Statute.*
8-9. *Lands subject to prior right of dower.*
10-16. *Rule where the estate comes by descent.*
14. *Assignment of dower in rents and profits in Ontario.*
17. *Rule where the estate is acquired by devise.*
18. *Release or extinguishment of the elder right.*
19-22. *Rule where the estate is acquired by purchase.*

1. Estates in remainder or reversion, expectant upon an estate of freehold, are not subject to dower, unless the latter estate terminates during the coverture, so as to confer upon the husband the right to the immediate freehold (*a*). The law is the same in the United States (*b*).

(*a*) *Supra*, cap. 8, par. 5; Co. Litt. 32 a; Perk. ss. 339 340; Park on Dower, 49, 53, 54; 1 Roper H. and W. by Jacob, 359; 1 Greenl. Cruise, 162; 4 Kent, 38, 40; 1 Washb. Real Prop. 154.

(*b*) *Eldredge* v. *Forrestal*, 7 Mass. 253; *Shoemaker* v. *Walker*, 2 Serg. and Rawle, 554; *Blood* v. *Blood*, 23 Pick. 80; *Fisk* v. *Eastman*, 5 N. H. 240; *Moore* v. *Esty*, *Ibid*, 479; *Williams* v. *Armory*, 14 Mass. 20; *Reynolds* v. *Reynolds*, 5 Paige, 161; *Safford* v. *Safford*, 7 Paige, 259; *Dunham* v. *Osborn*, 1 Paige, 634; *Bear* v. *Snyder*, 11 Wend. 592; *Green* v. *Putnam*, 1 Barb. 500; *Durando* v. *Durando*, 23 N. Y. (9 Smith) 331; *Arnold* v. *Arnold*, 8 B. Mon. 204; *Northcutt* v. *Whipp*, 12 B. Mon. 65; *Apple* v. *Apple*, 1 Head (Tenn.) R. 348; *Beardslee* v. *Beardslee*, 5 Barb. 324; *Weir* v. *Tate*, 4 Ired. Eq. R. 264; *Cocke* v. *Phillips*, 12 Leigh, 248; *Otis* v. *Parshley*, 10 N. H. 403; *Gardner* v. *Greene*, 5 R. Is. 104; *Watkins* v. *Thornton*, 11 Ohio St. R. 367; *Brooks* v. *Everett*, 13 Allen (Mass.), 43; *Royster* v. *Royster*, Phill. (N. C.) L. 226. As to curtesy, *Robinson* v. *Codman*, 1 Sumn. 121; *Blow* v. *Maynard*, 2 Leigh, 29.

2. It has already been shown that an outstanding chattel interest is no impediment to dower (*c*).

3. While it is true, as a general rule, that the determination or surrender of the prior estate of freehold during the coverture, will enable the inchoate right of dower to attach (*d*), yet it is to be understood that such determination or surrender must take place while the husband is seised of the estate, in remainder or reversion. If he alien the inheritance during the existence of the particular estate, the right of the wife to be endowed is thereby entirely defeated (*e*). The result is the same if the particular estate be not determined during the lifetime of the husband (*f*).

4. It is a question, whether the rule of the Common Law, excluding dower from estates in remainder and reversion, expectant upon estates of freehold, has not been abrogated by the statute giving dower out of equitable estates equal to estates of inheritance in possession (*g*).

5. Mr. Crabb, in his work on real property, states that the Dower Act of 3 and 4 William IV., c. 105 (*h*), has abrogated the rule, as, by the Dower Act, seisin is not necessary to give a title to dower:

Section 2 of the English Act just referred to, is exactly

(*c*) *Ante*, cap. 8, par. 9. See the authorities there cited.

(*d*) *Vide* cap. 8, par. 10. See, also, *House* v. *Jackson*, 50 N. Y. 161.

(*e*) Park on Dower, 54; Scribner on Dower, vol. i. p. 309; *Eldredge* v. *Forrestal*, 7 Mass. 253; *Williams* v. *Armory*, 14 Mass. 20; *Otis* v. *Parshley*, 10 N. H. 403; *Shoemaker* v. *Walker*, 2 Serg. and Rawle, 554; *Dunham* v. *Osborne*, 1 Paige, 634; *Gardner* v. *Greene*, 5 R. Is. 104; Hughes on Writs, 149.

(*f*) Perk. sec. 335; Scribner on Dower, vol. i. p. 309; *Dunham* v. *Osborn*, 1 Paige, 634; *Reynolds* v. *Reynolds*, 5 Paige, 161; *Weir* v. *Tate*, 4 Ired. Eq. Rep. 264; *Apple* v. *Apple*, 1 Head. (Tenn.) R. 348. As to the law when the husband executes a mortgage upon the premises, see *Nason* v. *Allen*, 6 Greenl. 243.

(*g*) R. S. O. cap. 126, sec. 1.

(*h*) 2 Crabb, Real Prop. 136; *Ibid*, 158. See, also, page 132.

similar to the clause in our statute, giving dower out of equitable estates (*i*).

6. Mr. Scribner, in commenting upon this statement of Mr. Crabb, says (*j*): "No reported case has yet appeared supporting this construction of the statute, and it may well be doubted whether it is the true construction. It would seem that the real purpose of the Act was to dispense with technical seisin of the legal estate as a requisite of dower, or to abolish the distinction between legal and equitable estates, and place them upon the same footing. Equitable estates are made subject to dower, precisely as at common law, legal estates were subject to that interest. But it has never been understood, at least in the United States, that equitable estates in remainder and reversion are subject to dower, unless made so by express statute, and, in one reported case, it was expressly held that they are not" (*k*).

7. The construction of our provincial statute has not yet been judicially determined. It is, however, with diffidence, submitted, that the statute does not make estates in remainder and reversion subject to the title of dower. Prior to the passing of the statute, it was necessary that the husband should have been seised of an estate of inheritance in possession, and that must have been a *legal estate*. The statute then says, that if a husband dies, beneficially entitled 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*, she shall be entitled to dower therein. In both cases, however, there must be an equivalent *of an estate of*

(*i*) R. S. O. cap. 126, sec. 1.

(*j*) Scribner on Dower, vol. i. p. 311.

(*k*) *Shoemaker* v. *Walker*, 2 Serg. and Rawle, 554. See, also, *Farnum* v. *Loomis*, 2 Oregon, 29.

inheritance in possession. This cannot be where there is a preceding freehold estate.

8. *Dos de dote peti non debet*—"Dower ought not to be sought for out of dower," is an old and familiar maxim of the law (*l*), so closely related to the rule excluding dower from reversionary estates, that it is difficult to separate them. Indeed, the maxim may be regarded as the necessary and logical result of the rule itself, and as being founded upon the same principle (*m*).

9. The following case, put by Lord Coke, is explanatory of this maxim: "If there be grandfather, father, and son, and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father, who dieth either before or after entry; now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre, and dieth; the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father, which descended to him (be it in law, or actual), is defeated; and now upon the matter, the father had but a reversion expectant upon a freehold, and in that case, *dos de dote peti non debet*, although the wife of the grandfather dieth, living the father's wife" (*n*).

10. An important element in the case we have just been considering, is that the lands came by *descent*. Where lands are acquired by *purchase*, the rule is materially different, as will be explained hereafter (*o*). Upon the

(*l*) It prevailed in the time of Glanville. Glanv. Lib. 6 cap. 17; 1 Reeve's Hist. Eng. Law, 102; 1 Greenl. Cruise, 164.

(*m*) Perk. sec. 315; Bac. Ab. Dower and Jointure E.; Park on Dower, 154-6; 4 Dane's Abr. 671; *D'Arcy* v. *Blake*, 2 Sch. and Lefr. 387; Scribner on Dower, vol i. p. 311.

(*n*) Co. Litt. 31 a; Perk. sec. 315; Park on Dower, 155.

(*o*) *Infra*, par. 10, and *seq.*

death of the grandfather, the lands descended to the father, subject to the dower right of the widow of the former. In such case, upon endowment, the possession or seisin of the widow relates back, and takes effect from the instant of the decease of the grandfather: her estate being, as already shown, a continuation or prolongation of the husband's estate. It follows that, as to the lands assigned her in dower, she is seised by title paramount to that of the heir—the *father*, in the case put by Coke—and that, as to those particular lands, the intermediate seisin of the heir is defeated. The law, in such case, looks upon the intermediate seisin as having never existed, and the estate of the heir in the lands *so set apart*, is, by force of this principle, converted, as from the moment of the inception of his right, into an estate in reversion, expectant upon the life estate of the widow (*p*). Here, the rule holding reversionary estates not liable to dower applies. As the father had a reversionary interest only in the part assigned to the widow of the grandfather, and, by operation of the doctrine of relation, had no seisin of the freehold in that portion during the coverture, the dower right of *his* widow is limited to the remaining two-thirds in which he was seised of the freehold, or estate in possession, as well as of the inheritance (*q*).

11. Another material point to be observed, is, that the widow of the ancestor survives the heir. For, if the widow were to die during the lifetime of the heir, her estate would, of course, be determined, and the heir would, thereupon, become seised of the entire freehold and inheritance. But her death, *subsequent* to the decease of the heir, though in the lifetime of *his* widow, would not give dower to the latter, for the reason before stated, that the particular

(*p*) Perk. sec. 315; Park on Dower, 155, 156; Watk. on Desc. 65; 1 Washb. Real Prop. 209; Scribner on Dower, vol. i. p. 312, and the cases cited at note (4).

(*q*) See authorities cited in preceding note.

estate must terminate during the coverture, in order to render the widow dowable; so, if the heir part with his reversionary interest before the death of the ancestor's widow, the result is the same (*r*).

12. Another requisite, material to the application of the rule referred to, is that the dower of the ancestor's widow is actually assigned. If there be no assignment of dower to the ancestor's widow, the seisin, or estate in possession, which descended upon the heir, is not defeated to any extent, and consequently, his widow is entitled to dower in the entire premises. It is immaterial, however, as shown in the case put by Coke, whether the assignment be made during the lifetime of the heir, or after his decease. In either case, upon the principle already considered, the effect of the assignment, when made, is to convert the husband's estate in the portion assigned to the elder widow, into an estate in reversion *ab initio*, and as a necessary consequence, to defeat the dower claim of *his* widow in that proportion of the premises (*s*). This rule, however, is subject to a qualification that should be here noted. Where the widow of the heir has dower assigned her in the whole land, *before* the widow of the ancestor has been endowed, whether such assignment was voluntary or obtained by suit, if the widow of the ancestor is subsequently endowed, the widow of the heir, after the death of the dowress, whose right was paramount, will be entitled to be restored to her dower in the whole premises. The reason of this diversity—to use the quaint language of Coke—is, because the junior

(*r*) But a distinction is taken, and the rule is different where the widow of the heir is actually endowed before the widow of the ancestor, and survives her. See the next section, Scribner on Dower, vol. i. p. 313.

(*s*) Park on Dower, 54, 157; 1 Cruise' Dig. tit. 6, ch. 3; Hughes on Writs, 149; *Hitchins* v. *Hitchins*, 2 Vern. 405; *Reynolds* v. *Reynolds*, 5 Paige, 161; *Safford* v. *Safford*, 7 Paige, 259; *Elwood* v. *Klock*, 13 Barb. 50; *Robinson* v. *Miller*, 2 B. Mon. 284, 288; *Geer* v. *Hamblin*, 1 Green. 54, 56; 4 Kent, 65; 1 Washb. Real Prop. 210; Scrib. on Dower, vol. i. pp. 313, 314.

widow "had in it an estate for term of *her* life, and the estate for the life of the grandmother is lesser in the eye of the law as to her than her own life" (*t*).

Mr. Roper, referring to this distinction, says, that, "by the endowment, the mother became *seised* of the legal freehold for her life; and the recovery of the acre by the grandmother, did not defeat such estate *in toto*, but during her life only. The mother's estate for life, therefore, being in relation to herself, a larger interest in consideration of law, than an estate *per autre vie*, viz., during the grandmothers life, the mother retained a reversionary interest in the acre after it was recovered from her, expectant upon the grandmother's death, on the happening of which event, the mother is entitled to reclaim the acre in dower" (*u*).

13. Cases sometimes occur in which an *actual* assignment of dower is not deemed essential to the application of the the maxim under consideration. These are ordinarily cases in partition, where conflicting claims to dower in the same lands arise, and where it is scarcely practicable to suspend the proceedings, for the purpose of causing successive assignments to be made. In such cases the decree of the Court establishing the right of dower in the elder widow, and directing it to be set off, is treated in equity as equivalent to an actual assignment, and is attended with the same consequences (*v*).

14. In Ontario, provision is made by statute for the assignment of dower, in the rents and profits, in cases

(*t*) Co. Litt. 31 b; Perk. sec. 316; Watk. Descents, 76 *et seq.*; 1 Roper, H. and W. by Jacob, 383 *et seq.*; Scribner on Dower, vol. i. p. 314; In the matter of Cregier, 1 Barb. Ch. 598, 602.

(*u*) 1 Roper, H. and W. by Jacob, 383, 384.

(*v*) Scribner on Dower, vol. i. p. 314; *Dunham* v. *Osborne*, 1 Paige, 634; *Reynolds* v. *Reynolds*, 5 Paige, 161; *Safford* v. *Safford*, 7 Paige, 259; In the matter of Cregier, 1 Barb. ch. 598, 602; Litt. sec. 54; *Durando* v. *Durando*, 23 N. Y. (9 Smith) 331; 9 Amer. Law Reg. 630.

where the premises are of such a nature or in such a condition, as not to admit of an assignment by metes and bounds (*w*).

15. Whether the maxim, *dos de dote peti non debet*, is applicable when the assignment is in this form, does not appear to have ever been considered by the courts. In such case, the tenant is not deprived of the possession of any portion of the estate; his seisin of the freehold is undisturbed. The widow, in lieu of dower in the lands, has an order or decree for the payment of an annual sum of money during her life, and this sum is made a charge or lien upon the entire premises. Hence, the estate of the tenant is not, in *fact*, converted into an estate in reversion in any part of the lands. It would seem, however, that the decree for dower, and its assignment in the rents and profits, should be treated as equivalent to an assignment by metes and bounds, and the right of a second dowress be restricted accordingly. In an American case (*x*), a direction was made, that, if a sale of the premises became necessary, the dower interest of the respective claimants in the purchase money, should be estimated upon the principles applicable to an assignment of the lands (*y*).

16. If the wife of the ancestor recovered dower against the heir or his widow, by erroneous judgment, and the judgment be afterwards reversed, it seems that the mesne seisin of the heir would be revived, and his wife entitled to dower (*z*); and, although there had been no mesne seisin, yet if judgment had been reversed during the lifetime of the heir, the life estate of the ancestor's widow would thereby

(*w*) R. S. O. cap. 55, sec. 35, sub-sec. 3.

(*x*) *Dunham* v. *Osborn*, 1 Paige, 634, 636.

(*y*) In the matter of Cregier, 1 Barb. ch. 598; *Leavitt* v. *Lamprey*, 13 Pick. 382; *Fisher* v. *Grimes*, 1 S. and M. Ch. R. 107; Scribner on Dower, vol. i. p. 316.

(*z*) Co. Litt. 15 a n; 7 H. 5, 4.

be avoided, and the reversionary estate of the heir be turned into an estate in possession. In this manner, he would become *invested* in the freehold and inheritance in the entire premises, during the coverture, and the right of dower of his wife would attach accordingly (*a*).

17. The maxim, *dos de dote peti non debet*, applies as well where lands are acquired by devise, as where they come by descent. The devisee is not a *purchaser*, in the sense in which the term is here employed (*b*). But, if the widow of the devisor make no claim for dower; or if she be barred of her dower in the particular lands, by reason of devises or bequests contained in the will, in lieu thereof, which she accepts, the widow of the devisee will be dowable of the whole lands (*c*).

18. Mr. Scribner says (*d*), that, in some of the reported cases, a distinction is taken between the case of a release of the elder right of dower to the grantee of the heir or devisee, before an actual assignment, but after a judgment for dower, and the case of a release, before any judgment or decree is rendered. Thus, in *Leavitt* v. *Lamprey* (*e*), the widow having the elder right, sued for her dower, and obtained judgment against the tenant, and then released to him. Subsequently, the widow having the junior right, instituted proceedings and claimed dower out of the whole estate. But the Court, notwithstanding the release of the elder claim, restricted her to dower in two-thirds of the

(*a*) Park on Dower, 157; Scribner on Dower, vol. i. p. 317.

(*b*) *Hitchens* v. *Hitchens*, 2 Vern. 403; *Beekman* v. *Hudson*, 20 Wend. 53; *Robinson* v. *Miller*, 2 B. Mon. 284, 288; 1 Washb. Real Prop. 209; Scribner on Dower, vol. i. p. 317.

(*c*) *Hitchens* v. *Hitchens*, 2 Vern. 403; *Geer* v. *Hamblin*, 1 Greenl. 54, 56; *Robinson* v. *Miller*, 2 B. Mon. 284; 1 Cruise, 153; Reeves' Dom. Rel. 58; 4 Kent, 64 note; Scribner on Dower, vol. i. pp. 317, 318.

(*d*) Scribner on Dower, vol. i. p. 318.

(*e*) *Leavitt* v. *Lamprey*, 13 Pick. 382.

estate. In *Elwood* v. *Klock* (*f*), the release was made after action brought, but before any judgment or decree. It was held that the release neither operated as an assignment of the dower, nor as a conveyance of it to the grantee; but that the right thereby became extinguished. In accordance with this view, dower in the entire premises was allowed to the junior widow (*g*).

19. To the paragraph before quoted from Lord Coke (*h*), the following observations are added: "Here note a diversity between a descent and a purchase. For, in the case aforesaid, if the grandfather had *enfeoffed* the father, or made a gift in tail unto him, then, in the case aforesaid, the wife of the father, after the decease of the grandfather's wife, should be endowed of that part assigned to the grandmother; and the reason of this diversity is, for that the seisin that descended after the decease of the grandfather to the father, is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but, in the case of the purchase or gift, that took effect in the life of the grandfather, (before the title of dower of the grandmother was consummate,) is not defeated, but only *quoad* the grandmother, and in that case there shall be *dos de dote*" (*i*).

20. In the foregoing case, the father, or in other words, the grantee, becomes seised of the estate, by virtue of the grant, *during the lifetime of the ancestor*, the grantor. The seisin thus acquired cannot be defeated absolutely by the seisin of the ancestor's widow, which, by relation, can be carried no further back than the instant of the ancestor's death, and which, therefore, would leave the seisin of the

(*f*) *Elwood* v. *Klock*, 13 Barb. 50.
(*g*) See, also, *Atwood* v. *Atwood*, 22 Pick. 283.
(*h*) *Ante*, par. 9.
(*i*) Co. Litt. 31 a and b; and Perk. sec. 315; Park on Dower, 156.

heir, intervening between the date of the grant and the period of the ancestor's death, wholly unimpaired and undisturbed. Hence, if the grantee (the father, as the case is stated by Coke) were married, at any time before the assignment of dower, to the ancestor's widow, the seisin thus existing would be sufficient to confer upon his wife a right of dower in the whole estate, subject only to the dower interest of the ancestor's widow. If the latter were endowed during the lifetime of the grantee, such endowment would operate as an *interruption* of his seisin in the particular lands set off, during the existence of her estate. If the grantee were to die during her lifetime, and after she had been endowed, then *his* widow would be dowable of the remainder of the estate, including the *reversion* of that portion before set off. If, before the assignment of dower to the ancestor's widow, the grantee should die, and his own widow be endowed, then the subsequent assignment of dower to the elder dowress would operate to interrupt the enjoyment of the other widow in a proportionate part, during the lifetime of the former, but no longer (*j*).

21. This point appears to have been involved in an early case found in the reports (*k*). A grandfather gave lands to the father, in tail. The latter died, and his widow was endowed of the third part of the whole estate by his son. Afterwards, the grandfather died, and *his* widow brought a writ of dower against the widow of the father. The latter vouched, the son by whom she had been endowed, and the question was, as to how much she should recover against him in value; whether a third of two parts, or a third of the

(*j*) Park on Dower, 156; Scribner on Dower, vol. i. p. 319; 1 Roper, H. and W. by Jacob, 382-4; 1 Cruise' Dig. 164; Bustard's Case, 4 Co. 122 a; *Geer* v. *Hamblin*, 1 Greenl. 54; *Dunham* v. *Osborn*, 1 Paige, Ch. 634; *Durando* v. *Durando*, 23 N. Y. (9 Smith) 331; *Manning* v. *Laboree*, 33 Maine, 343; In the matter of Cregier, 1 Barb. Ch. 598.

(*k*) Paris's Case, 5 E 3 Vouch 249; 4 Co. 122 a.

whole; it was adjudged that she should recover generally to the value which she lost, "for dower tolled the estate which by law descended, but not the estate acquired and gained by purchase" (*l*).

22. But even in a case of purchase, if the grantee do not marry until *after* the assignment of dower to the grantor's widow, the maxim, *dos de dote peti non debet*, applies, and this upon the principle already stated, that the assignment converts the estate of the grantee into an estate in reversion in the lands assigned; as to these lands, he would have no seisin during the coverture (unless the grantor's widow should die in his lifetime,) of the present freehold estate (*m*).

(*l*) Park on Dower, 156, 157; Co. Litt. 31 b; Perk. sec. 316; Scribner on Dower, vol. i. p. 320.

(*m*) Scribner on Dower, vol. i. p. 320.

CHAPTER XII.

DOWER IN ESTATES IN JOINT TENANCY, CO-PARCENARY AND COMMON.

1-5. *The rule at common law as to estates in joint tenancy.*

6. *Statutory modifications in Ontario.*

7-11. *Dower in estates in co-parcenary and common.*

12-18. *Effect of sale in partition.*

1. The rule of the common law, excluding dower from estates held in joint tenancy, is thus stated by Littleton: "And it is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death" (*a*). It is difficult to trace the origin of this rule. The earliest text books, in which it is laid down, appear to be Fitzherbert's Natura Brevium, and Rolle's Abridgment (*b*). It is also found in the text of Brooke (*c*).

In the Natura Brevium, the 34 Edward I., "Dower," 179, is cited. Brooke cites and relies upon the 3rd Henry IV., p. 6; but all the treatises fail to give the particulars of these cases, or the reasoning upon which they were determined, stating simply the naked point decided. Chief Baron Gilbert has supposed the rule to be referable to feudal principles:

(*a*) Litt. sec. 45.

(*b*) Fitzh. N. B. 147 (e); *Ibid*, 150; 1 Roll. Abr. 676.

(*c*) Bro. Dow. pl. 30. This point is also decided as to curtesy, in *Cowley* v. *Anderson*, Toth. 83.

"In that case of joint tenancy," he says, "during the joint seisin, the wife's contract of dower can never attach upon the estate, because the other joint tenant comes in by the feudal contract, superior to the marriage contract; so to the wife's infeudation; for, though the marriage contract had been prior to the joint tenancy, yet it will not attach upon it, because the estate in joint tenancy is so created that it should survive. *Et cujus dare ejusdem disponere;* therefore, though the marriage were precedent, yet it cannot take place upon this infeudation" (*d*). Lord Coke's explanation of the rule is in these words: "The reason of this diversity is for that the joint tenant, which surviveth, claimeth the land by the feoffment, and by survivorship, which is above the title of dower" (*e*).

2. By analogy to the cases of estates determinable by condition, or by title paramount, it might have been supposed that the title of dower would have been held to attach, subject only to have been defeated by the survivorship, for there is no essential quality in the nature of a joint tenancy which would exclude the attachment of a title of dower *ab initio;* and the subsequent avoidance of that title, by the survivorship of the other joint tenant, would have been perfectly intelligible, upon the recognized principle, that the survivor is in of the whole, by the original feoffment or gift, and not as to any part by his companion; and that of the estate of inheritance which the husband had in him, in his lifetime, is defeated or disaffirmed by the survivorship. But, for the reasons which it is now difficult to discover, a distinction was admitted between the effects of different modes by which estates may become defeated; and, while, in most instances, a title of dower was held to attach, subject only to be determined by

(*d*) Gilb. Uses, 404.
(*e*) Co. Litt. 37 b.

the avoidance of the estate, out of which it was claimed; in others, the mere possibility of avoidance was held to interrupt the title of dower *ab initio* (*f*). But the doctrine of the common law is too well settled, to be shaken, at the present day, and indeed, is carried into the Dower Act, adopted in this Province (*g*).

3. One consequence resulting from this rule is, that if the husband sever the joint tenancy, by conveying his share to a third person, the right of dower is thereby entirely defeated (*h*). Ordinarily, any act which determines the joint tenancy during the lifetime of the husband, entitles the wife to dower; but it is held that where the joint estate is severed by the alienation of the husband, the sole seisin acquired by him in virtue of the conveyance is instantaneous only, and passes from him by the same act by which he acquired it, and therefore, that no right of dower attaches. Had a contrary doctrine prevailed, and dower been held to attach upon the joint estate, subject only to be defeated by survivorship, then, upon the determination of the joint tenancy, by the alienation of the husband, and the consequent destruction of the possibility of survivorship, the right of the wife would become fixed, liable only to be defeated by her own act, or by her decease in the lifetime of the husband (*i*).

4. The rule denying dower to joint estates, applies where either the life estate, or the estate of inheritance, is of that character. In order to confer dower, there must be a *sole* seisin both of the freehold and of the inheritance (*j*). But a

(*f*) Park on Dower, 39.

(*g*) R. S. O. cap. 126, sec. 1; *Haskill* v. *Fraser*, 12 U. C. C. P. 383; *Ham* v. *Ham*, 14 U. C. R. 497.

(*h*) Fitzh. N. B. 150; Bro. Dow. pl. 30; Co. Litt. 31 b; 1 Roper, H. and W., by Jacob, 367; Park on Dower, 39. See, also, *Cockrill* v. *Armstrong*, 31 Ark. 580.

(*i*) Scribner on Dower, vol. i. pp. 322, 323.

(*j*) Park on Dower, 39, 40.

sole seisin of the freehold and inheritance, in any particular share of the land, is sufficient to give dower in that share, even though the remainder of the estate be held by a joint seisin (*k*).

5. Except where the joint estate is terminated by the alienation of the husband, the rule is that any act which severs the joint tenancy, and clothes the husband with a sole seisin at any time during the coverture, entitles the wife to her dower (*l*). And where the joint estate is severed by the conveyance of his share by one of the joint tenants, although *his* wife cannot have dower in the portion conveyed, the principle of exclusion does not extend to the wife of the grantee. As to her, the right of dower attaches immediately upon the taking effect of the conveyance (*m*).

6. It may here be remarked, that in Ontario, all grantees, devisees, etc., except executors or trustees, shall take as tenants in common, and not as joint tenants, unless an intention clearly appears that they are to take as joint tenants (*n*).

7. Lands held in co-parcenary and common are subject to dower (*o*). In the early case of *Sutton* v. *Rolfe* (*p*), a claim for dower in lands held in common, was resisted, on the ground that the wife of a tenant in common was not dowable until after partition made; but the Court overruled the objection, and gave judgment for the demandant. The doctrine of this case is now firmly settled, and the rule is, that dower will be set off in common, unless

(*k*) Scribner on Dower, vol. i. p. 323.

(*l*) Gilb. Uses, 404; Perk. sec. 337; Park on Dower, 40.

(*m*) Litt. 44; Scribner on Dower, vol. i. p. 323.

(*n*) R. S. O. cap. 105, sec. 11.

(*o*) *Haskill* v. *Fraser*, 12 U. C. C. P. 383; *Ham* v. *Ham*, 14 U. C. R. 497; Litt. sec. 45; Co. Litt. 57 b; 1 Roll. Abr. 676; *Sutton* v. *Rolfe*, 3 Lev. 84; Park on Dower, 42. See, also, *Harvill* v. *Holloway*, 24 Ark. 19.

(*p*) *Sutton* v. *Rolfe*, 3 Lev. 84.

during the lifetime of the husband, his share has been set apart to him in severalty by partition, in which event the dower of the widow will be restricted to, and it is her right to have it assigned in, the portion so set apart (*q*). A voluntary partition, if the division be fairly made, and no fraud is practised on the wife, will have the same effect, in this particular, as a partition by virtue of legal proceedings (*r*). But in proceedings in partition, unless the wife be made a party, it is necessary, in order to limit her claim to endowment, that partition be actually made. Where she is not a party to the proceeding, she is not barred by a mere decree for partition which is not executed in her husband's lifetime (*s*).

8. In *Davis* v. *Logan* (*t*), certain parties made a partition of the estate which had descended to them from their ancestor. Lot 8, as designated in the plan of division, fell to John Logan, who was then married. He subsequently sold this lot to one Davis. Afterwards, the whole estate was conveyed to William Logan, one of the heirs, in trust, to make sales. He conveyed Lot 8, with certain other parcels, to the same Davis, who had originally purchased from John, describing in the deed the boundaries of the entire tract, but without showing the particular location or extent of a portion of the parcels thus conveyed. After the death of John, it was held that his widow was entitled to dower out of Lot 8 in the tract sold to Davis.

(*q*) Litt. sec. 44, 45; 1 Roll. Abr. 674; Perk. sec. 310; Park on Dower, 42, 153; Tud. Cas. 46; *Potter* v. *Wheeler*, 13 Mass. 504; *Wilkinson* v. *Parish*, 3 Paige, 653; *Totten* v. *Stuyvesant*, 3 Edw. Ch. 500; *Dolf* v. *Basset*, 15 John. 21; *Jackson* v. *Edwards*, 22 Wend. 498; *Mosher* v. *Mosher*, 32 Maine, 412; 1 Washb. Real Prop. 158; 1 Hilliard, Real Prop. 180; 4 Dane's Abr. 674; Scribner on Dower, vol. i. p. 327. See also, *Ross* v. *Wilson*, 58 Ga. 249.

(*r*) 1 Hilliard, Real Prop. 180; *Totten* v. *Stuyvesant*, 3 Edw. Ch. 500.

(*s*) *Wilkinson* v. *Parish*, 3 Paige, 653; Scribner on Dower, vol. p. 327.

(*t*) *Davis* v. *Logan*, 9 Dana. 185.

9. In *Rank* v. *Hanna* (*u*), the husband was seised in fee of an undivided interest in lands, which he sold, and the purchaser and his co-tenant, in the husband's lifetime, made voluntary partition, and confirmed the same by deed. It was held that the widow might have her dower assigned out of the whole undivided estate, as if no partition had been made.

10. It is held, in New Jersey, that a *parol* partition will not conclude the wife, even though made under such circumstances as will bind the husband; nor is the question affected by the fact that possession is taken in severalty under the partition, and maintained for a series of years. The widow is, notwithstanding, dowable of her husband's proportion of the whole land (*v*).

11. If, after partition made of lands held in co-parcenary, one of the co-parceners be evicted by title paramount, he may recover a proportionate share of the premises set apart to the husband, discharged of the claim of dower. In such case, the common estate is diminished by the eviction, and as the estate of the co-parcener who recovers *pro rata* has relation to the time of the death of the ancestor, it follows that, to the extent of his recovery, the right of dower is overreached and defeated (*w*).

12. In Ontario, it is provided by statute (*x*), that any parties interested in any lands in this Province, may petition for partition or sale of the same. In cases of sales, the money arising from the sale is brought into Court, and distributed to the several tenants in common, in proportion

(*u*) *Rank* v. *Hanna*, 6 Ind. 20.

(*v*) *Lloyd* v. *Conover*, 1 Dutch. 47; *Woodhull* v. *Longstreet*, 3 Harr. 405; *Lee* v. *Lindell*, 22 Misso. 202, 206; Scribner on Dower, vol. i. p. 328.

(*w*) Perk. sec. 310; Park on Dower, 153; Scribner on Dower, vol. i. p. 328.

(*x*) R. S. O. cap. 101.

to their respective interests in the property sold. A question of great nicety and importance arises upon a consideration of this statute, namely, whether a sale made in conformity thereto, operates to divest the contingent right of dower of the wife of a co-tenant, and to pass the entire estate absolutely to the purchaser; and if so, whether, for that reason, it is proper that the Court, under whose direction the sale is made, should require a portion of the husband's share of the proceeds of the sale to be invested for her benefit, in case she should survive him, and her right thus become absolute.

13. In the United States, the statutes of most, if not all the States, relating to partition, are the same as ours, and a number of cases have been decided, and a great deal of conflicting opinion expressed upon the questions now being treated of.

14. It was decided, in the cases of *Matthews* v. *Matthews* (*y*), and *Jackson* v. *Edwards* (*z*), that a sale so made does not divest the inchoate right of dower, and one ground of this decision was, that the Courts possessed no power to compel the wife to accept a provision in money in lieu of her interest in, and consequent right to, the enjoyment of the land itself. Another ground of decision was, that the statute (as is ours) is explicit in its directions where there is an estate in dower, or by the curtesy. If so, how could these provisions be applied to the case of a mere contingent or inchoate right? The practical effect, it is said, would seem to be, to convert a wife into a widow during the husband's life (*a*).

(*y*) *Matthews* v. *Matthews*, 1 Edw. Ch. R. 565.

(*z*) *Jackson* v. *Edwards*, 7 Paige, 386, 390, 391, 392. And see, also, *Wilkinson* v. *Parish*, 3 Paige 653; *Van Gelder* v. *Post*, 2 Edw. Ch. 577.

(*a*) Scribner on Dower, vol. i. p. 329.

15. The cases just quoted, were, subsequently, overruled by Chancellor Walworth, who held that the effect of a sale in partition, upon the inchoate right of dower of the wife of a tenant in common, who has been made a party to the suit, in conjunction with her husband, is, that the purchaser, under the judgment or decree, will be protected against any future claim on her part, both in equity and at law, and that the Court was authorized, and, indeed, required to ascertain the present value of the wife's contingent right of dower in the husband's share of the proceeds of the sale, and to direct it to be invested for her benefit (*b*). The case was, subsequently, carried to the Court of Errors, and was finally decided on other grounds, the members of that Court differing upon the question as to whether the inchoate right of dower was divested by the sale (*c*).

16. This question was also recently considered in Ohio. A sale had been made, on proceedings in partition, and, after the death of one of the co-tenants, his widow instituted proceedings for dower against the grantee of the purchaser at the sale. The statute regulating the partition of lands in Ohio, in force at the time the sale was made, differed materially from the New York statute, upon which *Jackson* v. *Edwards*, *supra*, was decided. The latter Act required all persons having any *contingent* interest in the premises to be made parties to the proceeding. The Ohio statute, on the other hand, simply directed that each joint tenant, coparcener, or tenant in common, and any *widow* entitled to dower in the lands, should be made defendants to the petition. The statute did not require, nor, in the case referred to, had the *wife* been made a party to the proceeding in which the sale was made. The Court, nevertheless, held,

(*b*) *Jackson* v. *Edwards*, 7 Paige, 410, 411; Scribner on Dower, vol. i. pp. 332, 333.

(*c*) *Jackson* v. *Edwards*, 22 Wend. 498.

that the inchoate right of dower was extinguished by the sale (*d*).

17. The Court observed: "Let us suppose two co-parceners, each the owner of an equal undivided half of an estate, inherited from a common ancestor. One of them has a wife; the other is unmarried. One of them petitions for partition of the common estate, which is found to be incapable of actual partition, and is ordered to be sold. It is understood to be the settled law, that the inchoate right of dower of the wife is not divested by the sale. The consequence is, inevitably, that the estate must be sold for much less than it would otherwise have brought. Yet, on the distribution of the proceeds of the sale, the husband comes in for an equal share; and the loss, consequent on the existence of the contingent encumbrance, falls alike on unmarried and married co-parcener. This is a necessary result, and it is not only inconvenient, but grossly unjust; too inconvenient and too unjust to permit us to suppose it to have entered into the intention of the legislature.

"We are of opinion, therefore, that it was the intention of the legislature, by a sale in partition, to divest the wife of her inchoate right of dower. In so holding, we do not subject this right at all to the will or caprice of the husband. The sale is the act of the law, designed to do justice to joint owners, and render estates available, and put forth only, when, from the fact that the estate is incapable of actual partition, the necessities of the case require it. The legislature has deemed it more important to the public interest, to render estates available to their owners without sacrifice of their value, by a sale in case of necessity, than to preserve in all cases whatsoever, the wife's remote and contingent interest, at the expense of parties on whom she can have no proper claim.

(*d*) *Weaver* v. *Gregg*, 6 Ohio St. R. 547; Scribner on Dower, vol. i. pp. 336, 337.

"On the whole," they add, "our view of the question is this: The right of dower in the wife subsists in virtue of the seisin of the husband; and this right is always subject to any encumbrance, infirmity, or incident, which the law attaches to that seisin, either at the time of the marriage or at the time the husband became seised. A liability to be divested by a sale in partition, is an incident which the law affixes to the seisin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in, and divests the husband of his seisin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted."

18. The arguments here used are very cogent indeed, and almost compel the mind to agree with the conclusion at which the Court arrived; but it is submitted, that in Ontario, no question can arise upon the point, as it appears to be perfectly clear, that the wife of a co-tenant must be a party to the proceedings, in order to bar her dower, and that, if a sale be ordered, her contingent right of dower in her husband's share of the proceeds of the sale must be ascertained and paid (*e*).

(*e*) R. S. O. cap. 101, sec. 49 and sub-sec. 2; 42 Vic. Ont. cap. 22, sec. 5 and sub-secs. 2 and 3; and 42 Vic. Ont. cap. 22, sec. 6.

CHAPTER XIII.

DOWER IN PARTNERSHIP LANDS.

1. A widow is not entitled to dower out of real estate purchased with partnership property, in the name of her husband, or in the joint names of him and his co-partners, for the purpose of partnership in trade (*a*).

2. The reason for this rule is, that such property is considered in equity, personal estate, and therefore, not subject to dower; and also, that the husband is a trustee for the partnership; so that it may be well to consider under what circumstances lands acquired for partnership purposes are to be regarded in equity as real or personal estate. And it may here be mentioned, that nothing but a statement of general principles can be given, as a long dissertation upon the law of partnership, to which the question under consideration properly belongs, is quite foreign to the scope of this work.

3. From the principle, that the share of a partner is nothing more than his proportion of the partnership assets, after they have been turned into money, and applied in liquidation of the partnership debts, it, necessarily follows

(*a* *Conger* v. *Platt*, 25 U. C. R. 277; *Phillips* v. *Phillips*, 1 My. and K 649; Leith and Smith's Bl. 144; *Hiscock* v. *Faycox*, 12 Bankr. Reg. 507; *Simpson* v. *Leech*, 86 Ill. 286; *Campbell* v. *Campbell*, 30 N. J. Eq. 415.

that, in equity, a share in a partnership, whether its property consists of land or not, must as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real estate, unless indeed, such conversion is inconsistent with the agreement between the parties (*b*). And, although the decisions upon this point are conflicting, the authorities which are in favor of the above conclusion, certainly preponderate over the others (*c*).

4. Mr. Lindley, in his very able work on "Partnership," says (*d*): *First*, that notwithstanding *Thornton* v. *Dixon*, *Bell* v. *Phyn*, and *Randall* v. *Randall*, the true rule, is as stated by the V. C. Kindersley, in *Darby* v. *Darby* (*e*), "that, whenever a partnership purchases real estate for the partnership purposes, and with the partnership funds, it is as between the real and personal representatives of the partners' personal estate" (*f*).

Second, That notwithstanding *Cookson* v. *Cookson*, no satisfactory distinction, with reference to the question of conversion, can be drawn between lands purchased with partnership monies, and land acquired in any other way, provided such land is, in the proper sense of the expression, an asset of the partnership (*g*).

(*b*) *Steward* v. *Blakenay*, 4 Chy. 603; 6 Eq. 179; Lindley on Partnership, 687.

(*c*) *Conger* v. *Platt*, 25 U. C. R. 277; *Wylie* v. *Wylie*, 4 Gr. 278; *Sanborn* v. *Sanborn*, 11 Gr. 359; *Ripley* v. *Waterworth*, 7 Ves. 425; *Townsend* v. *Devaynes*, 1 Mont. Part. note 2, A, App'x. See, to, 11 Sim. 498, note. *Phillips* v. *Phillips*, 1 M. and K. 649; *Broom* v. *Broom*, 3 M. and K. 443; *Morris* v. *Kearsley*, 2 Y. and C. Ex. 139; *Houghton* v. *Houghton*, 11 Sim. 491; *Darby* v. *Darby*, 3 Drew, 495; *Essex* v. *Essex*, 20 Beav. 442; *Crawspay* v. *Mawle*, 1 Swan. 495. The cases which militate against the rule under discussion are *Thornton* v. *Dixon*, 3 Bro. C. C. 199; *Bell* v. *Phyn*, 7 Ves. 453; *Randall* v. *Randall*, 7 Sim. 271; *Cookson* v. *Cookson*, 8 Sim. 529.

(*d*) Lindley on Partnership, p. 690.

(*e*) 3 Drew, 506.

(*f*) See, in addition to the cases referred to above, *Holroyd* v. *Holroyd*, 7 W. R. 426.

(*g*) See per Lord Eldon, in *Jackson* v. *Jackson*, 9 Ves. 593.

Third, That the general rule may, nevertheless, be excluded by an agreement, express or implied, to the effect that the land shall not be sold. The reason of the rule excludes its application in such a case (*h*).

5. In equity, the right of the partners to have the real estate of the partnership, treated as a fund properly applicable to the payment of the partnership debts, and to the satisfaction of any balances growing out of the partnership transactions, that may be due among themselves, is regarded as attaching upon the instant of the acquisition of the estate, and therefore as paramount to the claim of dower. The principle is, that the widow can have dower of no greater nor better estate than existed in the husband at some period during the coverture. Her right attaches, subject to all encumbrances, or equities existing at the time of the marriage, or attaching with the purchase by the husband, and is liable to be defeated by every subsisting claim which might have defeated the husband at the period of his best estate (*i*).

6. Where real estate is bought by a partnership, as partnership property, and is afterwards conveyed in payment of a partnership debt, and the firm is insolvent, no right of dower attaches (*j*).

(*h*) *Steward* v. *Blakenay*, 4 Ch. 603; 6 Eq. 479; Park on Dower, 107; Scribner on Dower, vol. i. pp. 537, 539; *Greene* v. *Greene*, 1 Hammond, 535; *Richardson* v. *Wyatt*, 2 Desauss, 471; *Winslow* v. *Chiffelle*, 1 Harper's Eq. 25; *Sumner* v. *Hampson*, 8 Ohio, 328, 364; *Dyer* v. *Clark*, 5 Met. 562; *Burnside* v. *Merrick*, 4 Met. 537, 541; *Howard* v. *Priest*, 5 Met. 582; *Hale* v. *Plummer*, 6 Ind. 121; *Matlock* v. *Matlock*, 5 Ind. 403; *Galbraith* v. *Gedge*, 16 B. Mon. 631; *Divine* v. *Mitchum*, 4 B. Mon. 488; *Loubat* v. *Nourse*, 5 Florida, 350; *Goodhburn* v. *Stevens*, 1 Md. Ch. Decis. 420. See, also, 3 Kent, 39 note; *Buchan* v. *Sumner*, 2 Barb. Ch. 165, 200, 201; *Ibid*, 336; *Delmonico* v. *Guillaume*, 2 Sandf. Ch. 366; *Averill* v. *Loucks*, 6 Barb. S. C. 19 and note, p. 28; *Buckley* v. *Buckley*, 11 Barb. S. C. 43.

(*i*) Scribner on Dower, vol. i. p. 536.

(*j*) *Duhring* v. *Duhring*, 20 Misso. 174.

7. And where, by consent of the partners, lands purchased with partnership funds, are conveyed directly to one of the partners, with an express agreement that he shall hold them in severalty in his own right, and be charged upon the partnership books with the amount paid therefor, it seems that his widow is entitled to dower (*k*).

8. The implied trust for the partnership may, however, be rebutted by evidence, that the agreement for the purchase of the lands was specific, namely, that they should be the separate property of the partner to whom they were conveyed, and that he should be a debtor to the partnership for the sum paid for the purchase. Upon an agreement of this nature, it was observed by Lord Loughborough, that the lands could never be specifically divided, as if they were part of the partnership stock; but when they come to settle, these lands are one partner's, and he is a debtor for so much money. In this case, therefore, his lordship determined that the wife was dowable of the whole (*l*).

9. It is only to the extent that its appropriation is necessary to the payment of the partnership indebtedness, and to the equalization and adjustment of the accounts of the several partners, as among themselves, that the real estate of the firm will be treated as personalty, even in a Court of Equity (*m*); and this appears to be the doctrine of the authorities. The surplus, if any, will be considered in equity, as at law, real estate, and the widow of a deceased partner will be dowable of his proportion of such surplus (*n*). But the right of the widow to be endowed in partner-

(*k*) Park on Dower, 107; Scribner on Dower, vol. i. p. 547; *Smith* v. *Smith*, 5 Ves. Jr. 189. See, also, *Willet* v. *Brown*, 65 Mo. 138.

(*l*) Park on Dower, 107; *Smith* v. *Smith*, 5 Ves. Jr. 189.

(*m*) *Ante*, 4, 5.

(*n*) *Goodburn* v. *Stevens*, 5 Gill, 1; S. C. 1 Md. Ch. Dec. 420; *Hale* v. *Plummer*, 6 Ind. 121; *Matlock* v. *Matlock*, 5 Ind. 403; *Galbraith* v. *Gedge*, 16 B. Mon. 631; *Loubat* v. *Nourse*, 5 Florida, 350; *Dyer* v. *Clark*, 5 Met.

ship lands is suspended until the purposes of the partnership are accomplished by paying all claims against it, and adjusting the accounts of the partners. For this reason, it is held that she cannot claim rents and profits from the death of her husband, but only from the period when the affairs of the partnership are settled and closed (*o*).

10. It is well settled, that the doctrine of conversion does not apply to co-owners, as distinguished from co-partners; nor to property owned by persons who, although they may be partners in profits, are only co-owners of the land which yields them (*p*).

11. Shares in companies are as a rule, personal, and not real estate. But it cannot be affirmed that shares in companies are universally personal estate, inasmuch as there are undoubtedly, exceptional cases, which render it necessary to examine the constitution of every company before the character of its shares can be determined. The point to ascertain is whether the shareholders have, individually, any interest in land as land, or, whether their interest is represented by mere money (*q*).

362; *Howard* v. *Priest*, *ibid*, 582; *Burnside* v. *Merrick*, 4 Met. 537; 1 Washb. Real Prop. pp. 158, 160; *Buchan* v. *Sumner*, 2 Barb. Ch. 165; Scribner on Dower, vol. i. pp. 547, 548.

(*o*) *Goodburn* v. *Stevens*, 1 Md. Ch. Decis. 420; S. C. 5 Gill, 1.

(*p*) *Rowley* v. *Adams*, 7 Beav. 548; *Balmain* v. *Shore*, 9 Ves. 500; *Phillips* v. *Phillips*, 1 M. and K. 649; *Steward* v. *Blakenay*, 4 Ch. 603, and 6 Eq. 479; Lindley on Partnership, p. 691.

(*q*) Lindley on Partnership, p. 693, and the cases there referred to.

CHAPTER XIV.

LANDS APPROPRIATED TO PUBLIC USES.

1. In the time of Henry III., the Great Charter of King John was so amended as to withhold from the widow the privilege of *quarantine* in the *castle* of her husband (*a*). "This," says Lord Coke, "is intended of a castle that is warlike, and maintained for the necessary defence of the realm, and not for a castle in name maintained for habitation of the owner" (*b*). The same author also remarks that, "of a castle that is maintained for the necessary defence of the realm, a woman shall not be endowed, because it ought not to be divided, *and the public shall be preferred before the private* (*c*). But, of a castle that is only maintained for the private use and habitation of the owner, a woman shall be endowed" (*d*). This appears to be the ground upon which the Courts in later times have proceeded, in holding that a woman is not dowable of lands appropriated to public uses.

2. Although there is no reported case on the subject, it seems to have been assumed in Mr. Parke's time, that by such appropriation, the right of dower was divested. "It

(*a*) First Charter of Hy. III. ch. 7.
(*b*) 2 Inst. 17.
(*c*) *Begley* v. *Gibson*, 19 U. C. R. 458.
(*d*) Co. Litt. 31 b.

should also be noticed," he says, "as the prevailing impression of the profession, that under enabling Acts, such as those of the West India and London Dock Company's, the Grand Junction Canal, and the Improvements at Temple Bar, Snow Hill and Smithfield, the wife's title of dower will be bound by the alienation of the husband, although the title is taken by way of conveyance only, and the purchase money is not invested in other lands, or paid into the bank. This is understood to have been the opinion of several gentlemen of high professional reputation, in answer to the requisition of an eminent conveyancer, who, on the behalf of the Corporation of London, had called for fines from vendors whose wives had titles of dower; and the writer believes that the subsequent practice, in the great majority of cases, has been to dispense with fines (*e*)." In the United States however, this question in different forms, has undergone judicial enquiry on several occasions, and in Canada we have one reported case upon the subject.

3. The case of *Gwynn* v. *Cincinnati*, was a petition for dower in grounds occupied by a market-house in the City of Cincinnati. The husband, during coverture, in conjunction with other owners of property in the same square, agreed to open a way or street through the square, upon which a market-house was to be erected. This agreement was carried into effect under an ordinance of the City Council. The market-house was placed upon that part of the square given by the deceased husband, a space for a street remaining open on each side of the building. It was held that the widow was not entitled to dower. "The whole space," the Court observed, "became subject to the same public regulations as the grounds originally laid out in streets, and for other public uses and purposes. The claim of dower must stand upon the same principles that it would

(*e*) Park on Dower, 246.

stand in any case to the ground thus appropriated. The counsel for the complainants insist, that it is a case to be distinguished from that of public grounds condemned for public uses; but the Court are unable to comprehend the distinction. When a town is laid out, the law requires the plan to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses, is vested in the County for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains; consequently, all private rights must be suspended or abrogated. Such has been the general understanding, not only in this State, but, so far as we are informed, in other States also. A claim for dower in the streets of a town, or in the public jail, court-house, or public offices, would be a novel one, and if sustained, could not be enjoyed without defeating the original purpose and present use of the grant. It cannot be admitted, for the same reason that it is not admitted to a castle in England. It could yield nothing to the support of the widow, by a direct participation in the possession, without such an interference with the public right to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible (*f*).

4. In the above case, there was no exercise of the right of eminent domain. The title of the public was derived solely from the dedication of the lands to public uses by the husband, and the acceptance thereof by the public authorities. But, in *Moore* v. *The City of New York* (*g*), where a similar decision was made, and where the property involved was of great value, the land had been taken by the city authorities, for the purposes of a public market, by

(*f*) *Gwynne* v. *Cincinnati*, 3 Ohio, 24; Scribner on Dower, vol. i. p. 552.

(*g*) *Moore* v. *The City of New York*, 4 Sandf. S. C. Rep. 456, 460; S. C. 4 Selden, 110; S. C. in Appeal, 4 Selden, 110; *Weaver* v. *Gregg*, 6 Ohio St. R. 547.

virtue of an Act of the Legislature. Under this Act, commissioners of estimate and assessment were duly appointed, who proceeded in the performance of their duties, and estimated the amounts due to the several owners of the land. Their report was confirmed by the proper authority. The amount awarded to the husband of the claimant for dower, as the entire value of the land belonging to him, required for the market, was paid to him. The law provided that upon the confirmation of the report, the land included in it should vest in the corporation of the city, in fee simple absolute. It was held that, by these proceedings, the contingent right of dower was divested. "The question which is here presented," the Court said, "is whether a wife has such an interest in the premises owned by her husband, while her right of dower is inchoate, as cannot be divested by this Act of the Legislature and the proceedings under it. . . The right being merely an incident to the marriage relation, it seems to us, that, while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the Legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the Legislature to modify, or even abolish it. The power of the State to take private property for public uses, results from its right of eminent domain, and that power is not restricted, except by the constitutional provision that just compensation shall be made to the owner. In this case, the husband was deemed to be the owner of the entire estate in the land, and the inchoate right of the wife was not considered by the commissioners, and we think justly so, as an interest distinct from that of her husband, as the subject of estimate as to its value, separate from his. Indeed, the value of her interest, such as it was, would seem to be scarcely capable of being estimated as a separate interest. We see no reason to doubt that the commis-

sioners were right in considering the entire estate in these lands as vested in the husband, and that he, having been paid the full value of them, the corporation, by force of the Act, became seised of the lands in fee simple absolute, discharged of any claim of dower of the wife therein" (*h*).

5. The doctrine under consideration has also been extended to the case of lands appropriated by a railroad company for the purposes of their road, under authority of law. This point arose in the case of *The Little Miami Railroad Company* v. *Jones* (*i*), decided by the Superior Court of Cincinnati, in General Term. "By the appropriation of the property in question to the use of the defendants," said Storer, J., "in the mode prescribed by the statute, a perpetual servitude at least, over the premises, was acquired by the railroad company, subject only to be divested by a forfeiture of their corporate franchise, on the judgment of a corporate Court. Until then, the unrestricted possession is not only indispensable for the purposes of the road, but is alone consistent with the paramount right of eminent domain, which had been imparted by the State through the legislature. This right, which is an attribute of sovereignty, is necessarily paramount to the claim of the private citizen, and when exerted, it compels the owner to part with his estate, for a price to be adjudged by a jury, thereby changing his estate from land into money; and, as a full price is required to be paid by the constitution of Ohio, without reference to any benefit the contemplated improvements may confer, the condemnation of the land was therefore doubtless intended, as it must necessarily do, to confer the whole title upon the corporation, who have paid the assessed value. Such would be the result where the State should directly assert her power, and appropriate, as she has done,

(*h*) Scribner on Dower, vol. i. pp. 552, 553.

(*i*) *Little Miami R. R. Co.* v. *Jones*, 5 Weekly Law Gaz. N. S. pp. 5. 7. See, also, *French* v. *Lord*, 69 Me. 537.

the lands of the citizen, for navigable canals, or any other public improvement; and we can discover no reason why the same rule should not hold, where the railway company, upon whom the power has been conferred by its charter to enter upon and take such real property as should be necessary for the construction of their road, have exerted that power, in the mode defined by law, submitted to the judgment of the Court, and receive the possession of the land thereby appropriated. On this hypothesis, the husband does not alien his estate, as in the case of a sale to a purchaser, nor is it taken to satisfy his debts, in both of which cases dower would still remain, but he is said to lose his estate, or rather to part with it *in invitum*. He could not have prevented the act of the law transferring his realty, nor yet contest the mode of its execution. An exercise of sovereign power by the body, in which for all the purposes of maintaining civil government, it necessarily rests, which existed before any title to property could be said to pass to individuals, as, in case of escheat, it becomes reinvested with his title, and may be therefore said, in some sense, to have originally imparted it, must include within the alienation it compels, the entire title. The land is conveyed, and those who represent it must, consequently be deprived of their several rights, if they are made parties to the proceeding by which it is appropriated; *a fortiori*, where there is no perfect right *in esse*, but the possibility only of a future claim."

6. The question under consideration has, to some extent, been discussed in Ontario. In the case of *Begley* v. *Gibson* (*j*), which was an action of dower, the tenant pleaded that the husband, in his lifetime, in the year 1832, granted certain land to the king; that from that time until the passing of an Act of Parliament (7 Vic., ch. 11), the Crown continued seised of the said land, for purposes connected

(*j*) *Begley* v. *Gibson*, 19 U. C. R. 458.

with the military defence of the Province, and the same was, during all the time aforesaid, duly set apart and occupied for the said purposes; that, by the Act of Parliament aforesaid, the said land was vested in the principal officers of ordinance, for the service of the said department, or for such other services as the principal officers should direct; that the land in the declaration mentioned formed part of the said land, and was part of the land on which a great part of Bytown had been built, as mentioned in the fifth clause of that statute, and, at the passing of the Act, was one of the building lots mentioned in said section, and was held under said officers by the tenant in this suit; and that, under the powers contained in the sixth section, the said officers, in 1844, conveyed the land to the said tenant, to be held by him and his heirs forever, clear of all charges and encumbrances, of whatever kind or nature, as by the said statute they were empowered to do. By the 7 Vic., cap. 11, sec. 1, the land in question was vested in the principal officers of ordinance; but it was provided that nothing in the Act should be taken to affect any right, title, or claim vested in or possessed by any person at the passing of the Act, nor to give them a better title than was then vested in the Crown; and the sixth section enacted that the said officers might convey this land, which had, for some time, been held by the tenant under them, "to be held as freehold forever, and clear of all charges and encumbrances, of whatever kind or nature." It was held, on demurrer (while fully recognizing and approving of the principle laid down by Lord Coke, that a woman is not entitled to be endowed of a castle, maintained for the necessary defence of the realm, because it ought not to be divided, and the public should be preferred before the private), that the plea showed no defence, for the demandant's right was not extinguished by the conveyance to the Crown, nor by the provisions of the statute.

This case appears to have turned altogether upon the construction of the statute above-mentioned, and cannot be said to be an authority, except in cases arising under the same or like circumstances.

7. In the case of *Harding* v. *Cardiff* (*k*), a distinction was drawn between the rights conferred on municipal corporations and railway companies respectively to expropriate private property—the former existing for the public good, the latter being commercial enterprises. The charters of the latter were, therefore, more rigidly construed than the rights of a municipal corporation. It was held that a municipal corporation has power, under secs. 373 and 456 of the Municipal Act, to enter upon and take land for the purposes permitted by the Act before making compensation to the owner, who is not entitled to insist upon payment as a condition precedent to the entry of the corporation.

8. The rule fairly deducible from these authorities would seem to exclude dower in all cases where lands are dedicated to the public for a legitimate purpose, and the public have acquired a right to the enjoyment thereof, or where they are lawfully appropriated in virtue of the right of eminent domain. The reasoning of the Courts appears to apply as well where lands are granted and used for public parks, public libraries, or other public use of a like character, as where they are devoted to the purposes of a market-place or a public highway. And it is difficult to discern any good ground for a distinction between the two classes of cases (*l*).

(*k*) *Harding* v. *Cardiff*, C. L. Times, vol. i. p. 656.

(*l*) 1 Washb. Real Prop. 221; Walker's Amer. Law, 2nd ed. 315; Scribner on Dower, vol. i. p. 553; Melizet's Appeal, 17 Pa. St. 449; *Kennerly* v. *Misso. Ins. Co.*, 11 Misso. 204; *Strong* v. *Clem*, 12 Ind. 37; *Giles* v. *Gullion*, 13 Ind. 487; *Noel* v. *Ewing*, 9 Ind. 37.

CHAPTER XV.

DOWER IN ESTATES NOT OF INHERITANCE.

1-5. *Rule at common law as to estates for life.*
6. *Dower in estate for years.*
7. *In estates at will.*
8-10. *In wrongful estates.*

1. An estate for life is not subject to dower. It is obvious that dower does not attach upon an estate which the husband holds for his *own* life, as the right of dower is but a continuation of the husband's estate (*a*); and, although the same rule for excluding dower does not exist where an estate is held *per autre vie*, yet the common law, for reasons which will be hereafter stated, makes no distinction, and rigorously applies the same rule in both classes of cases (*b*).

2. "By common speech," says Littleton, "he which holdeth for term of his own life, is called tenant for term of his life, and he which holdeth for term of another's life, is called tenant for term of another man's life" (*c*). Upon which Lord Coke has these observations: "Now it is to be understood that, if the lessee in that case dieth, living *cestui que vie* (that is, he for whose life the lease was made), he

(*a*) Park on Dower, 48, 49; 1 Greenl. Cruise, r81; Scribner on Dower, vol. 1, p. 343; *Exton* v. *St. John*, Finch, 368.

(*b*) *Ibid;* Bracton, 92 b; Plow. 556; *Bowles* v. *Poore*, 1 Bulstr. 135; *Low* v. *Burron*, 3 P. Wms. 262. See 1 Ves. Sr. 303.

(*c*) Litt. sec. 56.

that first entereth shall hold the land during that other man's life, and he that so entereth is within Littleton's words, viz.: *tenant pur autre vie*, and shall be punished for waste as tenant *pur autre vie*, and subject to the payment of the rent reserved, and is in law called an *occupant (occupans)*, because his title is by his first occupation. In like manner, it is of an estate created by law, for, if a tenant by the curtesie, or tenant in dower, grant over his or her estate, and the grantee dieth, there shall be an *occupans*" (*d*). This rule, which was limited to corporeal hereditaments, was founded upon the idea that the estate upon the death of the grantee could not go to the heir, for the reason that there were no words of inheritance; nor to the executor, because it was a freehold estate. For these reasons, it was supposed, the estate became derelict, and that the person who first entered might lawfully retain possession, and would become vested with all the rights, and subject to all the obligations and liabilities, of the grantee (*e*). Upon such an estate, so long as this doctrine was recognized, it is manifest no right of dower could attach.

3. This doctrine was, however, modified by the statute, 29 Car. II., cap. 3, sec. 12, which enacted, "that any estate *pur antre vie*, shall be devisable by will, etc.; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him, by reason of a special occupancy, as assets by descent, as in case of lands in fee simple. And in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." A statute on the same subject was also passed in the 14 of Geo. II., which, after reciting the 29 Car. II., and that

(*d*) Co. Litt. 41 b.

(*e*) 1 Greenl. Cruise, 109; Lambert on Dower, 21, 49; Scribner on Dower, vol. i. p. 344.

doubts had arisen, where no devise had been made of such estates, to whom the surplus remaining after the payment of debts, belonged, enacted as follows: "That such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said Act, or so much thereof as shall not have been so devised, shall go, be applied and distributed in the same manner as the personal estate of the testator or intestate" (*f*). A more recent Act provides that estates *pur autre vie*, if not devised, shall be chargeable in the hands of the heir as assets by descent; and if there be no special occupant, they are to go as already provided (*g*). As to wills executed after 1873, the foregoing provisions of these statutes are repealed by 36 Vic., cap. 20, R. S. O., cap. 106, which enacts, also, that a devise may be made of such an estate by a will made since 1873, though there be a special occupant. In case of intestacy, by R. S. O., cap. 105, sec. 52, an estate *pur autre vie* will descend as a fee simple, as provided by the Act.

4. The right of *special* occupancy existed where an estate was limited to the grantee *and his heirs pur autre vie;* in which case the heir, or heirs of the grantee, upon his death, would have the exclusive right, by the terms of the original grant, to enter, and occupy the lands during the residue of the term, and no right of general occupancy could arise (*h*). But, although this interest partook very much of the character of a descendible freehold estate, yet, by the common law, it furnished no foundation for the estate of dower (*i*); nor do the several Acts of Parliament

(*f*) 14 Geo. II. cap. 20.

(*g*) 1 Vic. cap. 26. See, also, as to the rights of residuary legatees, *Ripley* v. *Waterworth*, 7 Ves. Jr. 425; *Milner* v. *Lord Harewood*, 18 Ves. Jr. 259.

(*h*) *Doe* v. *Robinson*, 8 Barn. and Cress. 296; 1 Greenl. Cruise, 111.

(*i*) Plow. 556; 1 Bulstr. 135; Cro. Eliz. 805; Park on Dower, 48, 49; Bracton, 92 b; *Low* v. *Burron*, 3 P. W. 262; 1 Ves. Sr. 303.

above referred to change this common law rule in any particular. The effect of these enactments is simply to abrogate the right of general occupancy; to confer upon the grantee of an estate *pur autre vie* the right to dispose of the unexpired portion of the term by will; and to direct, in substance, that such interest of the deceased grantee shall be held and treated as personal estate (*j*).

5. An estate is sometimes created for the life of the tenant, and the life or lives of one or more third persons. It may also be made to depend upon a contingency, the happening of which will determine it before the death of the grantee. It is hardly necessary to add that in neither of these cases is the estate subject to dower (*k*).

6. The principles of the common law did not permit a right of dower to attach upon a mere chattel interest in lands, and so strict was the law in this respect, that an estate for two thousand years, no matter in what form, or by what instrument created, would not confer dower upon the widow of the lessee, although such estate might be equally valuable, in point of occupation, with the inheritance itself (*l*).

7. It follows, *a fortiori*, that estates held at the will of the lessor are not subject to dower. A copyholder, therefore, being, strictly speaking, a tenant at will, can never confer

(*j*) *Westfaling* v. *Westfaling*, 3 Atk. 460; *Williams* v. *Jekyl*, 2 Ves. Sr. 681; *Atkinson* v. *Baker*, 4 Term. R. 229; Bac Abr. tit. Est. for Life, 3; 4 Kent, 27; 1 Greenl. Cruise, 110,113; Scribner on Dower, vol. i, p. 345; Lord Windsor's Case, 3 Leon. 35; Dyer, 328 b. pl. 10; *Buller* v. *Cheverton*, 2 Roll. Abr. 151; *Salter* v. *Butler*, Moo. 664; Cro. Eliz. 901; Yelv. 9.

(*k*) Brac. lib. 4, cap. 28, sec. 1; Co. Litt. 42 a; *The People* v. *Gillis*, 24 Wend. 201; 4 Kent, 26; *Gillis* v. *Brown*, 5 Cow. 388; *Fisher* v. *Grimes*, 1 S. and M. ch. 107; *Burris* v. *Page*, 12 Misso. 358; *Alexander* v. *Cunningham*, 5 Ired. 430; *Thompson* v. *Vance*, 1 Met. (Ky.) 669.

(*l*) Park on Dower, 47; Scribner on Dower, vol. i. p. 347; *Goodwin* v. *Goodwin*, 33 Conn. 314.

on his wife a title of dower, properly so called (*m*). In England, by special custom in particular localities, a widow is entitled to what is called her *freebench* in copyhold estates; and this interest, which is limited to the estate of which her husband died seised, and which varies in extent in different portions of the country, resembles, in many respects, the estate of dower, and sometimes receives that appellation. It is however, purely the creature of local custom, and such custom, being contrary to the general rule of the common law, when alleged to exist as the foundation of a right of dower or freebench, must be strictly proved (*n*). But, if a tenant at will make a feoffment, the feoffee is estopped from denying the seisin of the feoffor in an action brought by his widow to recover her dower (*o*).

8. It is sometimes said that a right of dower does not attach upon what is termed a *wrongful estate*, that is, the estate of a disseisor, abator, intruder, or the like. This proposition is true only, in a qualified sense; for, until the wrongful estate has been avoided, by the entry or action of the person entitled to the possession, or by operation of the law of remitter, the mere naked seisin of the husband, though wrongfully acquired, will support a right of dower as against all persons deriving title under such tortious seisin (*p*). But after the wrongful estate has been determined, in either of the modes above mentioned, the right to dower therein ceases also. Therefore, if the owner of an

(*m*) 4 Co. 22 a; 22 b and notes; *Shaw* v. *Thompson*, 4 Co. 30 b; Vin. Abr. Copyholder Md. pl. 1; O. d, pl. 1; Dower, O. a, pl. 1; Com. Dig. Copyhold K. 2; Bac. Ab. Copyhold C. 2; Hob. 215, 216; Park on Dower, 48.

(*n*) *Shaw* v. *Thompson*, 4 Co. 30 b; 3 Co. 22 a, 22 b and note Park on Dower, 48; 2 Bl. Com. 129 and notes.

(*o*) Taylor's Case, cited 6 John Rep. 293; Tud. Cas. 44; 1 Washb. Real Prop. 191.

(*p*) Bro. Dow. pl. 50: Fitz. Dow. 98; Perk. 420; Park on Dower, 37, 141, 142; Bisset Est. for Life, 92, 93; 1 Hilliard, Real Prop. 147; Scribner on Dower, vol. i. p. 353; *ante*, cap. 9, par. 10; *ante*, cap. 10, p. 11.

estate be disseised, and the disseisor marry, and, afterwards, the disseisee enter upon, or recover against the disseisor, the title of dower, in the wife of the disseisor, is defeated; and if the disseisor die seised and his heir actually endow the widow, a recovery of the lands by the disseisee, against the heir and the widow, will terminate the dower interest of the latter (*q*). The difference, with regard to the defeasible character of the estate of the heir, and of that of the widow of the disseisor, is thus stated by Littleton: "Also, if a disseisor die seised, etc., and if his heir enter, etc., who endoweth the wife of the disseisor of the third part of the land, etc., in this case, as to this part which is assigned to the wife in dower, presently after the wife entereth and hath the possession of the same third part, the disseisee may lawfully enter upon the possession of the wife unto the same third part. And the reason is for that, when the wife hath her dower, *she shall be adjudged in immediately by her husband*, and not by the heir; and so, as to the freehold of the same third part, the *descent* is defeated. And so you may see that before the endowment, the disseisee could not enter into any part, etc., and, after the endowment, he may enter upon the wife, etc., but yet he cannot enter upon the other two parts, which the heir of the disseisor hath by the descent (*r*). As to the lands assigned the wife in dower, it is not necessary that the disseisee should resort to a real action, notwithstanding a descent cast, for the endowment defeats the descent *quoad* those lands, and the disseisee may, therefore, bring ejectment against the dowress (*s*). But, "if after the dying seised of the disseisor, the disseisee *abate* against whom the wife of the disseisor recover, by confession in a writ of

(*q*) *Countess of Berkshire* v. *Vanlore*, Winch. 77; *Poor* v. *Horton*, 15 Barb. 485; Park on Dower, 141, 142; Bisset Est. for Life, 92, 93; 4 Kent, 48.

(*r*) Litt. sec. 393; Co. Litt. 240 b; 241 a; Gilb. on Dower, 395.

(*s*) Co. Litt. 240 b; Park on Dower, 142 note (e).

dower in that case, though the descent be avoided, as Littleton here saith, yet the disseisee shall not enter upon the tenant in dower, because the recovery was against himself; but, if he had assigned dower to her *in pais*, some say he should enter upon her " (*t*).

9. A case, showing the operation and effect of the law of remitter upon the right of dower in wrongful estates, is given by Fitzherbert: " If a man have title *of action* to recover any lands, and, afterwards, he entereth, and *dissieseth* the tenant of the land, and dieth seised, and his heir entereth, *the heir is remitted unto the title which his ancestor had*, and the husband's wife shall lose the dower; for that estate which the husband had is determined, for that was an estate in fee by *wrong*, and the heir hath the estate in fee which his ancestor had by *right* (*u*). Mr. Scribner says:—This case presents a marked illustration of the subtlety and refinement prevading many of the rules of the ancient common law relating to real property. A technical seisin was necessary to give dower; but this requisite was satisfied by a possession acquired and maintained without lawful right. And if a man had title to lands, and a right of action to assert it, but no right of entry, and he nevertheless entered, he was treated as a disseisor; his possession was referred to the wrongful seisin, and not to his lawful title. The right of the widow to dower was in like manner limited to the wrongful estate, upon the principle before notified, that she was *in* immediately by her husband, and that her right was but a continuation of his estate; and yet the heir, upon entry made by him, by operation of the doctrine of *remitter*, was remitted to the rightful estate of his ancestor, which, as it overreached

(*t*) Co. Litt. 241 a.

(*u*) Fitzh. N. B. 149 (F); Gilb. on Dower, 393. In the case supposed, the disseisin of the rightful owner must have occurred before the marriage, as a disseisin during the coverture could not impair the right of dower.

the wrongful seisin, upon which the right of the widow rested, resulted in entirely defeating her estate, and thus, by an arbitrary rule, looking to the rigid enforcement of subtle distinctions, rather than the administration of substantial justice, the claims of the heir were made to override those of the widow, even to the extent of depriving her of the provision humanely intended for her support (*v*). The same principle is said to be applicable where a tenant in tail discontinues in fee, and afterwards marries, and during the coverture disseises the discontinuee, and dies seised. In this case, dower is denied to the widow, upon the ground that the issue is remitted to the ancient entail, and the estate which the husband had during the coverture was wrongful. "The heir," says Fitzherbert, "is in of another estate of inheritance than the husband had during the coverture" (*w*). "She shall not be endowed," observes Lord Coke, "for that the fee simple is vanished by the remitter, and her issue hath the lands by force of the entail" (*x*).

10. The principle of the common law, above-mentioned, does not apply to Ontario, as here a technical seisin is not necessary to confer the right to dower (*y*).

(*v*) See 4 Kent. 48, 49.

(*w*) Fitzh. N. B. 149 (F.); Dyer, 41 a; Park on Dower, 143, 144; 1 Greenl. Cruise, 181.

(*x*) Co. Litt. 31 b; Scribner on Dower, vol. i. pp. 355, 356.

(*y*) *Ante*, cap. 9, par. 5; R. S. O. cap. 98; R. S. O. cap. 102; R. S. O. cap. 126, secs. 1, 2.

CHAPTER XVI.

DOWER IN RENTS AND ANNUITIES.

1-9. *Dower in rents.*
8. *The rule in this Province.*
10-12. *The doctrine as to annuities.*

1. It is an established principle of the common law, that, if a man make a lease of his lands *for life*, reserving rent to himself and his heirs, and afterwards marry, and die, his widow shall neither be endowed of the reversion in the lands thus demised, nor of the rents reserved. She cannot have dower of the reversion, "because there was no seisin, in deed or in law, of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple" (*a*). The rent, in such case, passes exclusively to the heir as an incident to the reversion (*b*). It is submitted, that such would not be the case in Ontario, since the passing of the statute giving dower out of equitable estates equal to estates of inheritance in possession (*c*).

2. But if the husband, before marriage, convey lands *in tail*, reserving rent to himself and his heirs, the widow will be entitled to dower in the rent; "because," says Coke, "it is a rent in fee, and, by possibility, may continue for

(*a*) Co. Litt. 32 a; 208 a, note 1; Park on Dower, 49; Perk. sec. 348, 467.
(*b*) Scribner on Dower, vol. i. p. 357.
(*c*) R. S. O. cap. 126, sec 1.

ever" (*d*). The mere statement of this proposition, however, implies that if the donee in tail die without issue, the wife of the donor will no longer be dowable of the rent reserved, for thereby the estate tail from which it is derived is determined, and as a necessary consequence, the right to dower ceases also. Thus, it is said in Fitzherbert's Natura Brevium, that, "if a man make a gift in tail, reserving rent to himself and his heirs, and afterwards, the donor hath a wife, and the tenant in tail dieth without issue, the wife of the donor shall not be endowed of the rent, because the rent is extinct, for it was reserved upon the estate tail, which is ended" (*e*). And where the wife has actually been endowed, previously to the termination of the tenancy in tail, her dower shall, nevertheless, cease with the determination of the estate (*f*). In illustration of this principle, Jenkins states the following case: "So of a grant of rent or land, to one and his heirs, till the building of St. Paul's shall be finished; if this contingency happens, dower shall cease, as in the other case, where, after dower, the donee dies, without issue, where the rent is reserved upon the said gift in tail" (*g*). Another case, tending to elucidate this proposition, is as follows: "If A. grants a rent out of certain lands to B. and his heirs, provided that, if B. die, his heirs being within age, that, during the non-age, the terre tenant shall be quit of the rent, and B. marries, and dies, his heir within age, and the wife of B. recovers dower of the rent, execution shall be stayed until the heir comes to full age" (*h*). This case is referred to as showing that, if the rent had been made to cease, absolutely, upon the event, the dower interest would also

(*d*) Co. Litt. 32 a.

(*e*) Fitz. N. B. 149 G.; Perk. sec. 317.

(*f*) Arg. Moore, 39 pl. 126; Park on Dower, 161-163.

(*g*) Jenk. Cont. 4 Ca. 6.

(*h*) Fitzh. N. B. 149 G. note (a); Corbet's Case, 1 Co. 87 a; Perk. sec. 327; Plow. 156; Jenk. Cent. 4 pl. 6.

have been at an end (*i*). To the foregoing may be added the following, from Plowden, which, though not precisely in point, nevertheless very clearly illustrates the rule: "If a man makes a gift in tail, rendering rent, and afterwards, the *donor* takes a wife, she shall be endowed of the *rent;* but, if the donee is a woman, who dies, and her husband is tenant by the curtesy of the *land*, and afterwards the issue in tail die without issue, now the wife of the *donor* shall not have dower of the *rent;* for her title of dower was to be endowed of the rent of inheritance; and there cannot be an inheritance in the rent longer than the inheritance in the land endures; and so the one is in respect of the other; and since her title was to be endowed of the rent of inheritance, and now the rent is changed into a rent for *life* only, and so is another degree before the execution of her estate, it shall never be executed, for it would be repugnant in itself" (*j*).

3. A clear distinction exists, in principle, between the case of a gift of *lands* in tail reserving rent to the *donor* and his heirs, and the granting of a *rent* in tail, issuing out of lands, and care should be taken not to confound the two classes of cases. For in the former case, while dower may be claimed in the rent by the wife of the donor during the continuance of the tenancy; yet, as we have just seen, her right falls with the determination of the tenancy, even after assignment. But where a *rent* is granted in tail, the wife of the *grantee* may have dower therein, although the tenancy be determined by the death of her husband without issue. This point is very clearly and succintly stated by Jenkins: "A grantee of a rent in fee, or in tail, takes a wife, and dies without an heir; his

(*i*) Park on Dower, 163, 164.

(*j*) Plow. 155; Scribner on Dower, vol. i. p. 358; *ante*, cap. 10, par. 5; *ante*, cap. 10, par. 22.

wife shall be endowed" (*k*). And it makes no difference in this respect whether the rent be already *in esse*, or granted *de novo*. The rule is the same in either case (*l*). This doctrine is founded upon the old common law principle, that dower is a right, or privilege, annexed to the estate of the husband, and forming part thereof (*m*). According to that principle the right of dower is embraced in the limitation of the original estate, and the rent, therefore, is as much *in esse* for the purposes of dower after the termination of the tenancy in tail, as it was for the purposes of that estate during its existence. Nor does it affect the question, as regards the right of the widow, that there is no person entitled in law to the remaining two-thirds of the rent (*n*).

4. The foregoing discussion has rendered it, in a measure, unnecessary to add here, that where a grant is made in *fee* of rent issuing out of lands, the wife of the grantee may claim dower therein; a doctrine that is well settled. And, as in the case just considered with reference to a tenancy in tail of a rent, the death of the grantee without heirs, whereby his estate is determined, does not impair the right of the widow to her dower. She may still prosecute her claim to be endowed of the rent, and the law will enforce and protect such claim (*o*).

5. It is laid down by Perkins, that if a man seised of a rent charge in fee, purchase the inheritance of the lands

(*k*) Jenk. p. 5, Ca. 6; Co. Litt. 30 a, Lord Hale's notes.

(*l*) Park on Dower, 161; but see opinion of Lord Chancellor Talbot, contra, as to rents *de novo* in an expired estate tail, *Chaplin* v. *Chaplin*, 3 P. Wm.'s 229, and Mr. Park's comments thereon, Park on Dower, 160-162.

(*m*) Paine's Case, 8 Co. 207, 34 a; 208, 34 b.; Earl of Bedford's Case, 7 Co. 67, 68, 9 a; See, also, Co. Litt. 31 b, 241 a; Perk. sec. 317; Fitzh. N. B. 149 G; Bro. Dow. pl. 86; 4 Kent. 49.

(*n*) Park on Dower, 160-162; Scribner on Dower, vol. i. p. 359.

(*o*) Co. Litt. 32 a; Jenk. Cont. p. 5, Ca. 6. See Lord Hale's notes, Co. Litt. 30 a, with respect to curtesy; Park on Dower, 158-160; Chase's Case, 1 Bland, 227; 1 Washb. Real Prop. 167; Scribner on Dower, vol. i. p. 359.

out of which the rent issues, his wife must elect of which she shall be endowed (*p*), and this appears to be law at the present day (*q*). The author last referred to, however, extends this principle to the case of a feoffment in fee, by the husband, reserving rent, and maintains that the widow must elect to be endowed, either of the lands, or of the rent; and that, if she make choice of the former, she shall hold the part assigned her, discharged of the latter (*r*). The authority cited and relied upon for this position is Perkins, sec. 324. It has been doubted whether this authority supports the doctrine thus laid down. The section in question reads as follows, the words in brackets, however, being inserted by Mr. Greening, the accomplished English editor of Perkins: "And some persons hold opinion that in a special case, a wife shall be endowed of land, and also of a rent issuing out of the same land; and, therefore, they say, that if a man be seized of four acres of land in fee, and take a wife, and enfeoff a stranger thereof, by deed indented, rendering unto him and his heirs three shillings rent, with a clause of distress, and die; and the feoffee endows the wife of the feoffor of the third part of the land, the land which is assigned to her in dower is discharged of the rent, and the whole rent is issuing out of the residue of the land; (and she shall be endowed of this rent also), and the reason is, because the wife shall be endowed of the best possession which her husband had during the coverture; and the husband was seised of this land during the coverture, discharged of the rent; and so, etc. And this rent is a rent charge that doth not come in lieu of the land; and the husband had an estate in fee, in the rent, during the coverture."

(*p*) Park. sec. 320.

(*q*) Roper H. and W. 345.

(*r*) 1 Roper, H. and W., by Jacob, 347, 348.

6. Mr. Greening appends to this section the following observations: "The words between the brackets in this section are not in the text of any copy of the work which the editor has seen, but appear wanting to complete the sense of the section; and the position is taken to be law. With regard to the wife's right to dower in the land discharged of the rent, there can be no difference of opinion; and as the rent charge must be construed to be *granted* by the feoffee, it is a new purchase by the husband, (Co. Litt. 12 b.), of which he was seised in fee, and of which, *prima facie*, the wife is, therefore, dowable; and the consideration for the rent, or the land upon which it is charged, could not be regarded by the law; or, if it were would not vary the construction. This case is clearly different from that cited, 1 Inst. 150 a., and put by Hale in his note to Co. Litt. 12 b., where the wife was entitled to an estate for life in the whole rent by purchase. The case of dower on an exchange, it will be recollected, is an exception, not a rule. Mr. Roper (Husband and Wife, 1, 345) says, the wife shall elect between the land and the rent, and cites this section as his authority; it does not appear to support him. The point is noticed, and some reference upon it given in Fitz. Abr. tit. Dower, pl. 63" (*s*).

7. An estate for years, whether created before or after marriage; and if after marriage, whether the wife join therein or not, interposes no obstacle to a claim of dower (*t*). In every such case the wife is entitled to be endowed of the reversion in fee, and also of a proportionate part of the rent as incident to the reversion (*u*). "If the husband

(*s*) See also Perk. sec. 326 and note to that sec.; Scribner on Dower, vol. i. pp. 360-361.

(*t*) *Ante*, cap. 8, pars. 5, 9.

(*u*) Co. Litt. 29 b, 32 a, 208 a, note 1; Vin. Abr. tit. Dower, 233 pl, 7; Park on Dower, 77; 1 Greenl. Cruise, 178; *Wheatly* v. *Best*, Cro. Eliz., 564; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Herbert* v. *Wren*, 7 Cranch. 370; *Williams* v. *Cox*, 3 Edw. Ch. 178; *Weir* v. *Humphries*, 4 Ired. Eq. 364; 4 Kent,

maketh a lease for years reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of a third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the years, and herewith agreeth the common experience at this day" (*v*).

8. The rule in this Province is, that if the estate be subject to a term of years, granted before coverture by way of mortgage, the widow of the mortgagor will be entitled to dower at law, with a *cesset executio* during the term (*w*), and in equity be entitled to redeem if she thinks fit. If the lease be absolute, the widow will be entitled to a third of the rent immediately, and also dower of the land, with a *cesset executio* during the term (*x*).

9. It has been already said that at common law no right of dower attaches upon an estate *per autre vie*, even where such estate is made descendible to the heirs of the grantee as special occupants. This principle extends also to *rents* granted *per autre vie*, as where a rent is granted to A. and his heirs, during the life of B. The wife of A. has no right of dower in such rent (*y*).

10. Strictly speaking, an annuity is mere personal estate, and therefore not subject to dower (*z*). The distinction between an annuity merely, and a rent issuing out of or chargeable upon lands, is very clearly marked in the books. The one charges the person only, and although granted in

40; 1 Hilliard, Real Prop. (2nd Ed.), 134; Perk., by Greening, sec. 348, note.

(*v*) Co. Litt. 32 a, 32 b, 208 a, note 1.

(*w*) *Chisholm* v. *Tiffany*, 11 U. C. R. 338.

(*x*) Leith and Smith's Real Prop., p, 142.

(*y*) *Gawen* v. *Ramtes*, Cro. Eliz., 804; Park on Dower, 48, 49; Scribner on Dower, vol. i, p. 362.

(*z*) Co. Litt. 32 a; Perk. sec. 347; 1 Roper, H. and W., 344; Macqueen on H. and W., 170; Park on Dower, 111; 1 Washb., Real Prop., 167.

fee, is nevertheless treated as personalty. The other is a burden imposed upon, and issuing out of lands (*a*). "If I, by my deed, for me and my heirs," says Lord Coke, "grant an annuity to a man and the heirs of his body, for that this only chargeth my person, and concerneth no land, nor savoreth of the realty" (*b*). And in Doctor and Student, some of the points of difference between a rent and an annuity are thus stated: "Every rent, be it rent service, rent charge, or rent seck, is going out of land. Also of an annuity there lieth no action, but only a writ of annuity; but of a rent the same action may lie as doth of land. Also, an annuity is never taken for assets, because it is no freehold in the land, nor shall it be put in execution upon a statute merchant, statute staple, or *elegit*, as a rent may" (*c*). Fitzherbert refers to the old proceeding by writ of annuity in the following terms: "A writ of annuity lieth in case where a man granteth unto another a yearly rent for life, or for years, or in fee, out of his lands, or out of his coffers, or to receive from his person yearly at a certain day; now, the grantee may sue writ of annuity for the same, etc., if he be behind at the day of payment, etc. And if it be granted out of the land, with a clause of distress, then he may choose either to distrain for the same, and make it a rent charge, or he may bring a writ of annuity for the same. But if he bring a writ of annuity for it, if the defendant appear, and the plaintiff declare thereupon, then he cannot distrain for it after; and in like manner if he do distrain for it and avow, then he shall not sue a writ of annuity for the same rent. But if a man grant a yearly rent for life, for years, or in fee, and doth not express in the grant that it shall be taken out of any lands or tenements, nor any distress granted for non-payment thereof, then it is merely

(*a*) *Ibid*: 2, Bl. Com. 40.
(*b*) Co. Litt. 20 a.
(*c*) Doct. and Stud. dial. 1, cap. 30; see also cap. 3.

taken for an annuity; and he shall not have any other remedy for the same but a writ of annuity" (*d*).

11. Where an annuity is granted, as in the case put by Fitzherbert, so as to bind both the person and the real estate of the grantor, there is no doubt that the grantee has his election, either to bring a writ of annuity, treating his demand as a personal one only, or to distrain upon the land, as for a real interest. A grant of this character is, in substance, the creation of a rent charge, with a power of election in the grantee, or his heirs, always incident to an estate thus created, to convert it into a simple annuity. Upon such election being made, and the proper steps taken to perfect it, the estate loses its character of a real hereditament, and from thenceforth becomes mere personalty (*e*). And from this condition of the law it results that, although a widow is entitled to be endowed of a rent charge, so long as it retains that character (*f*), yet it is in the power of the husband to defeat her claim, by electing to take the rent charge as a personal annuity, and bringing a writ of annuity, which is a mere personal remedy, to enforce it as such. So, also, if the husband die before distress and avowry made, or before electing to proceed by writ of annuity, the heir, by resorting to this proceeding, may, in like manner, deprive the widow of her dower. Nor is it necessary that he should recover judgment upon his writ; it is sufficient that he proceed no further than the filing of a declaration, for thereby his election is fixed, and the rent charge will be converted into a personal annuity, and the lands be for ever discharged from the real remedy by distress (*g*). But nothing short of such election in a court of

(*d*) Fitz., N. B., 152; Scribner on Dower, vol. i, p. 363.

(*e*) Litt. sec. 219; Co. Litt. 144 b; 145 a; Perk. sec. 373; 2 Bl. Com. 40 and note.

(*f*) Perk. sec. 347.

(*g*) Perk. sec. 373; Litt. sec. 219; Co. Litt. 32 a, 144 b; 145 a; *Sprint* v. *Hicks*, 2 Bulst. 148; 2 Bl. Com. 40, note 1; Park on Dower, 111; 1 Roper, H. and W. 344, 345; 1 Greenl. Cruise, 188; 1 Hilliard on Real Prop. 251.

record, by suing out the writ of annuity, and a recovery therein, or declaring in the action, can, at common law, defeat the right of dower. If the husband die without having made an election, and, afterwards, the widow institute proceedings against the heir for dower, he cannot defeat her action by claiming to hold the rent charge as an annuity, for he cannot make his election by *claim* merely, but he must sue out his writ, and, if before declaration filed, the widow can recover judgment against him, her right to dower will be established, and made absolute (*h*).

12. In the case of *Earl of Stafford* v. *Buckley* (*i*), it was held, that a perpetual annuity granted by Charles II. out of the four and a half per cent. duties payable for exports and imports at Barbadoes, was a personal inheritance, and, although descendible, had no relation to lands or tenements, and, in no respect, partook of the nature of a rent. And in the case of *Lady Holdernesse* v. *The Marquis of Carmarthen* (*j*), before Lord Thurlow, an annuity charged upon the post office, until the sum of one hundred thousand pounds should be paid, in order to be laid out in land, was held to be a personal annuity, and that its character was not affected by reason of the purpose for which the fund was to be raised. According to the opinion of the Lord Chancellor, the peculiar character of the grant, and the circumstances attending it, prevented the Court from treating the fund as money directed to be laid out in land (*k*).

(*h*) Co. Litt. 144 b, 145 a; Fitzh. N. B. 152 a, and authorities cited in preceding note. As to the distinction taken by Lord Chancellor Talbot between a rent charge *de novo* and one already *in esse*, in which an estate of inheritance is created, see *Chaplin* v. *Chaplin*, 3 P. Wm.'s 229; Scribner on Dower, vol. i. p. 364.

(*i*) *Earl of Stafford* v. *Buckley*, 2 Ves. Sr. 170.

(*j*) *Holdernesse* v. *Carmarthan*, 1 Bro. C. C. 377.

(*k*) See, also, *Turner* v. *Turner*, Ambl. 782; *Priddy* v. *Rose*, 3 Meriv. 86, 93; *Buckeridge* v. *Ingram*, 2 Ves. Jr. 662, 665; *Aubin* v. *Daly*, 4 Barn. and Ald. 59; 6 E. C. L. R. 349. See, also, *Robinson* v. *Townshend*, 3 Gill. and John. 413; Chase's Case, 1 Bland, 227, Scribner on Dower, vol. 1. p. 365.

CHAPTER XVII.

DOWER IN TRUST AND EQUITABLE ESTATES.

1. *No dower in trust estates prior to 4 Wm. IV., cap. 1, and conveyance under Stat. of Uses.*
2. *Form of conveyance which can yet be adopted to bar dower.*
3. *To entitle widow to dower in trust estates, husband must die beneficially entitled.*
4-10. *Estate of trustee not subject to dower.*
11. *Dower where husband contracts to purchase and dies.*
12. *Widow entitled to redeem.*
13-16. *Dower in equitable estates resulting from executory contracts to purchase.*
17. *Dower out of equitable estates in Ontario.*
18-19. *The rule that the husband must be possessed of the equity at the time of his death, and the modification of the rule in Ontario.*
20-22. *The rule where the husband receives the legal title after transferring his equitable estate.*

1. Prior to the Statute 4 Wm. IV., cap. 1 (*a*), a widow was not entitled to dower out of trust estates of her husband, though they might have been equitable estates of inheritance in possession. The old form of conveyances to uses, to bar dower, was by common law conveyance to the purchaser (the husband), and his heirs to hold to such uses as he should appoint, and in default of, and till appointment to the use of him and his assigns during his life without impeachment of waste, and on the determination, during the life of the purchaser of that estate by forfeiture, or otherwise, to the use of the dower trustee,

(*a*) C. S. U. C. cap. 84; R. S. O. cap. 126, ss. 1 and 2.

and his heirs, or executors, and administrators, during the life of the purchaser in trust for him and his assigns, and after the determination of the estate limited to the trustee, to the use of the heirs and assigns of the purchaser. Under such limitations, the husband by exercise of the power, had full control, and, if he died without exercising it, dower never even *attached*, for the only estate of which the husband would be seised, *in possession*, during his life, would be the life estate; and the remainder in fee is prevented from becoming an estate of inheritance *in possession* by force of the rule in Shelly's case, and of the law of merger, in consequence of the intervening estate to the trustee (*b*). Such limitation as the above, will however, now no longer suffice, unless, indeed, the husband exercised the power, for by R. S. O., cap. 126, sec. 1, it is enacted that: "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 lands." Under such limitations as the above, the estate, it will be observed, is partly legal and partly equitable, equal to an estate of inheritance in possession (*c*). This Statute, which was passed on the 6th of March, 1834, applies to marriages made before as well as after the passing of the Act, and completely abolishes the distinction in respect of the right of dower between legal and equitable estates, except that in the case of equitable estate the husband must have died seised (*d*).

(*b*) Watkins on Conv. 9th Ed. p. 91 and notes.

(*c*) Leith and Smith's Real Prop. pp. 151-152.

(*d*) R. S. O. cap. 126, sec. 1; *McIntosh* v. *Wood*, 15 Gr. 92.

2. Another form sometimes adopted, and which can yet be adopted with effect, so far as to enable the husband to convey free of dower, is to convey to the purchaser in fee (the husband) to such uses as he should appoint, and in default of, and till appointment to him in fee. Under such limitations, dower does attach subject to be divested on the exercise of the power of appointment; for the husband till exercise of the power is seised of an estate of inheritance in possession, but on execution of the power, the appointee (a purchaser from the husband), comes in as if named in the conveyance to the husband, (in consequence of the peculiar operation of such powers and appointments), and so paramount to the right of dower of the wife. The operation and effect of these conveyances is thus:—A. conveys by common law conveyance, or by grant to B. (the husband), in fee to such uses as he (B.) shall by deed or will appoint, and in default of, and till such appointment to him (B.) in fee. B. sells to C., and conveys and appoints the estate to C. in fee, reciting the power of appointment, the whole transaction is now to be read, as though by the first conveyance, A. had conveyed to B. and his heirs to the use of C. and his heirs, which would under the Statute of Uses vest the legal estate and fee in C., and so paramount to the right of dower. Of course, if B. die without exercise of the power, then if the limitation be in the form put, the widow of B. would be entitled to her dower, which was never divested (*e*).

3. It is to be observed, that in order to entitle the widow to dower under this Act, the husband must *die beneficially entitled*, differing therein from dower out of a legal estate and right of entry. So it is obvious, that an alienation by the husband would defeat the wife's right to dower. It

(*e*) Leith's Real Prop. pp. 152-153; *Lyster* v. *Kirkpatrick*, 26 U. C. R. 228; *Giman* v. *Byrne*, 8 U. C. L. Rep. 394.

was held in the case of *Smith* v. *Smith* (*f*), that where a person had contracted to purchase certain lands, but had not paid his purchase money, or obtained his conveyance, and had created a mortgage thereon, containing a power of sale in default of payment, which power was not exercised until after the death of the mortgagor, that the widow of the mortgagor was not entitled to dower. V. C. Esten in his judgment, page 452, says:—"The bill is filed to enforce dower out of an equitable estate under the provisions of the Provincial Statute 4 Wm. IV., cap. 1. Dower attaches under the operation of this Act, upon the equitable estate of the husband at the time of his death, and not before, inasmuch as the Act provides, that the right which it confers shall be confined to estates of which the husband dies seised. It attaches of course upon the estate as it is *eo instanti*, that the husband dies and subject to everything that then affects it. The estate of the wife is derived from that of the husband, is in fact part of it, and the remainder of it descends to the heir, or devolves to the devisee. Being part of the estate of the husband, the wife's estate must partake of the nature, and be subject to all the infirmities of the estate out of which it is derived. It cannot be denied that an absolute alienation would defeat the wife's dower, because in that case the husband would not die seised. If this is so, a partial alienation must have the same effect so far as it goes. In this case therefore, the wife's dower was subject to the mortgage which had been made by the husband, and to the power of sale contained in it. Nothing can be more clear than that, if the husband had survived, his estate would have been defeated by this sale, or that the estate which has descended to the heir, has in fact been defeated by it. Upon what principle, can the wife's estate be exempted from a liability which

(*f*) *Smith* v. *Smith*, 3 Gr. 451. But see *post* par. 18, note (c), where it will be seen that the doctrine on this point is to some extent modified.

affected the whole estate in the hands of the husband, and the residue of it in the hands of the heir? At law, the dower attaches in the lifetime of the husband upon the marriage, or the acquisition of the property, as the case may be, and if the mortgage with power of sale be made afterwards, the dower overrides it. In equity, the dower not attaching until the death of the husband, the mortgage has necessarily been made when the dower attaches, and therefore, the mortgage overrides the dower. When a mortgage is made with a power of sale, the mortgagor authorizes the mortgagee to sell the estate, and therefore, when the power is exercised the estate is transferred, but as from the day on which the power was created, and therefore, the equity of redemption and the dower which has attached upon it are superseded or defeated."

4. As the common law takes no notice of the interest of the *cestui que trust*, and regards only the legal estate, it follows that the wife of the trustee may in the courts of *law* successfully prosecute her claim to be endowed of the trust property. To avoid this consequence, the practice was early introduced of resorting to the Courts of Equity to enjoin the wife of the trustee from such proceeding. At first it was doubted whether the Chancellor could interfere (*g*); but these doubts were soon dissipated, and it eventually became a well established doctrine, that in equity, the wife of the trustee is not dowable of the trust estate, and that the Courts of Equity may interpose to prevent her from asserting a claim to such dower at law (*h*).

(*g*) Gill. Uses, 11, 172; 7 Co. 73; see Hardw. 469, per Hale, C. B.; Bro. Feoff. al. Uses, pl. 10; *Nash* v. *Preston* (6 Car. 1), Cro. Car. 190; Park on Dower, ch. 6.

(*h*) Bacon's Law Tracts, 37; *Noel* v. *Jevon* (1678), 2 Freem. 43; *Bevant* v. *Pope* (1681); 2 Frem. 71; *Hinton* v. *Hinton*, 2 Ves. Sr. 634; *Casborn* v. *English*, 2 Eq. Cas. Abr. 728; Park on Dower, 101; Hill on Trustees, 269; 1 Sugd. Vand. P. 9th ed. 9. 358.

5. As the vendor of real estate after a contract of sale, is regarded in equity as a trustee for the purchaser, it follows upon the principle above stated, that where a sale is made before the marriage, although a conveyance be not executed until afterwards, the wife of the vendor is not entitled to dower (*i*).

6. The seisin must be to the husband's own use. A widow is not entitled to dower out of trust estates. In the case of *Burns* v. *Burns* (*j*), J. W. B., a widower was locatee of the Crown, and agreed with his son, J. B., to assign his interest in the land, on condition of his son's making certain payments and performing certain services for the father, which were all duly made and performed, and afterwards the patent was issued in the name of J. B., by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent the father married again. The son during all the father's life continued to occupy the premises, making valuable improvements without any claim by the father, except for his support, under the agreement made between the father and son. After the father's death the widow filed a bill for dower in the premises; but it was held, that even admitting that the grant of the land was to, and was by the government meant to be to the father, that he could be treated only as a trustee for the son, and the bill was dismissed with costs.

7. It was decided in the case of *McLean* v. *Laidlaw* (*k*), that where a nominee of lands before patent issued, con-

(*i*) *Gordon* v. *Gordon*, 10 Gr. 466; Park on Dower, 106; 1 Roper, H. and W. by Jacob, 358; *Dean* v. *Mitchell*, 4 J. J. Marsh, 451; *Oldham* v. *Gale*, 1 B. Mon. 76; *Gaines* v. *Gaines*, 9 B. Mon. 295; *Rawlings* v. *Adams*, 7 Md. 26; *Bowie* v. *Berry*, 3 Md. Ch. Decis. 359; *Cowman* v. *Hall*, 3 Gil. and J. 398; *Firestone* v. *Firestone*, 2 Ohio St. 415; *Atkins* v. *Holmes*, 2 Carter (Ind.) 197; *Kintner* v. *McRae*, ibid, 453. See also cap. 21.

(*j*) *Burns* v. *Burns*, 21, Gr. 7.

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

veyed them away, being at the time of alienation unmarried, and afterwards having obtained the patent made a new conveyance to the same party, being at the time of the second conveyance married, that his wife could not claim dower as she was estopped by the deed made before the patent issued. Another answer to her demand would have been that, after the first conveyance, her husband was only a trustee for the party to whom he had conveyed.

8. The widow of a trustee, or of a mortgagee, when the Equity of Redemption is forfeited at law, but is subsisting in equity (in which case the mortgagee is still in equity considered as trustee for the mortgagor) it has been said (*l*), before the days of equitable pleas at law, is in strictness, at law entitled to dower; for there was in the husband all that was required to entitle his widow to dower, assuming him to have been seised in fee; but as remarked in one case on the point: "If the wife of a trustee or mortgagee were to be so ill advised as to prosecute any legal claim, equity would undoubtedly saddle her with all the costs and restrain the action at law." Now the defence can be set up by equitable plea (*m*).

9. Where land was conveyed to the husband before marriage by an absolute deed in fee, it was held that a secret parol trust attending the conveyance could not be set up to deprive the wife of dower (*n*); and where a trustee purchased the trust property, and the sale was not impeached by the *cestui que trust*, it was decided that his title was good, and his wife dowable of the lands (*o*).

10. And if it be shewn to the reasonable satisfaction of a Court of Equity, that the person alleged to be a trustee

(*l*) Lewin on Trusts, 7 Ed. 224.
(*m*) Leith's Bl. 144-145.
(*n*) *Davidson* v. *Graves*, 1 Bailey's Ch. 268.
(*o*) *McNish* v. *Pope*, 8 Rich. Eq. 112.

was in point of fact the *bona fide* owner of the estate, and that the declaration of trust, which is relied on to defeat dower, was simply a contrivance resorted to for the purpose of defeating creditors or others, the court will not suffer this trust to be set up as a bar to dower against the wife of such *bona fide* owner (*p*).

11. Where the husband contracts to purchase in fee and dies, the widow will be entitled to dower as against the heir-at-law; and it makes no difference that the contract is made with the Crown, as the infallible justice of the Crown is considered equivalent to the right to compel specific performance in ordinary cases (*q*).

12. The widow is entitled to redeem, and to hold the land over beyond her endowment, until she is paid the proportion above her share as dowress. She is in the same situation as a tenant for life, and whatever principal money is paid by her, forms a lien upon the land. Such a payment is *prima facie* a subsisting charge, and does not merge for the benefit of the inheritance, unless some evidence of an intention that there should be a merger, can be adduced (*r*).

13. Equitable estates resulting from executory contracts of purchase are subject to dower (*s*).

(*p*) *Bateman* v. *Bateman*, 2 Vern. 436; Park on Dower, 108; Scribner on Dower, vol. i. p. 394.

(*q*) She is also entitled to one-third of the rents and profits for six years before the commencement of the suit. *Craig* v. *Templeton*, 8 Grant 483-485.

(*r*) *Carrick* v. *Smith*, 34 U. C. R. 394, per Wilson J.; *Palmer* v. *Danby*, 1 Eq. Cas. Ab. 219; Fisher on Mortgages, 2nd Ed. 307; *Faulkner* v. *Daniel*, 3 Hare, 199-207-216-217-218; *Burrell* v. *Earl of Egremont*, 7 Beav. 205.

(*s*) *Rowton* v. *Rowton*, 1 Hen. and M. 92; *Claiborne* v. *Henderson*, 3 Hen. and M. 322; *Wheatley* v. *Calhoun*, 12 Leigh. 264; *Blair* v. *Thompson*, 11 Gratt, 441.

14. In the case of *Bailey* v. *Duncan* (*t*), the husband died possessed of land to which he was entitled to a conveyance of the legal estate from the vendor. "If we advert as we should do," the Court observed, "to the old law as it stood at the passage of the Act, the mischief, which must have actuated the Legislature in making the change, and the remedy which the Act has provided, we apprehend, but little doubt will be entertained as to the propriety of giving such a construction to the Act as will embrace all trusts, whether expressly declared by deed, or resulting from executory contracts by construction of Courts of Equity. The interest of the *cestui que trust* is precisely the same, let the trust be created in the one way or the other; the justice of the wife's claim is as strong in one case as the other; and as she was not dowable in a trust of either sort before the enactment of the statute, the mischief to be remedied by the Act, emphatically demands that the wife should be endowed of trust estates of both sorts" (*u*).

15. Where lands are sold under a decree of court, and the purchaser enters into possession, but dies before receiving a deed, or paying the whole of the purchase money, his widow is entitled to dower in the lands, subject to the payment of the residue of the purchase money (*v*).

16. A mere pre-emption right to purchase lands is not an estate of which a widow can be endowed (*w*). "It is a right," the court said, "to purchase at a fixed price within

(*t*) *Bailey* v. *Duncan*, 4 Mon. 256, (1827).

(*u*) See also *Stevens* v. *Smith*, 4 J. J. Marsh, 64; *Dean* v. *Mitchell*, *Ibid*, 451, *Hamilton* v. *Hughes*, 6 J. J. Marsh, 581; *Lindsay* v. *Stevens*, 5 Dana, 104; *Brewer* v. *Van Arsdale*, 6 Dana. 204; *Lawson* v. *Morton*, *Ibid*. 471; *Robinson* v. *Miller*, 1 B. Mon. 88-91; *Heed* v. *Ford*, 16 B. Mon. 114; *Gully* v. *Ray*, 18 B. Mon. 107; Scribner on Dower, vol. 1, p. 405.

(*v*) *Church* v. *Church*, 3 Sandf. Ch. 434; *Sherwood* v. *Vandenburgh*, 2 Hill, 303; *Hawley* v. *James*, 5 Paige, 318-455; see also *Warner* v. *Van Alstyne*, 3 Paige, 513.

(*w*) *Davenport* v. *Farrar*, 1 Scam. 314; *Sisk* v. *Smith*, 1 Gilm. 503; *Owen* v. *Robbins*, 19 Ill. 545; *Wooley* v. *Magie*, 26 Ill. 526.

a limited time in preference to others. If he is either unable or unwilling to purchase at the price, or by the time mentioned in the law, the land can be sold to others, and the pre-emptioner turned out of possession as an intruder. These conditions annexed to his possession, clearly show that his interest is only temporary, and may never ripen into an estate of inheritance. While, therefore, the pre-emptioner remains in possession, his estate cannot be considered of a higher nature than an estate for years, and consequently the widow cannot be endowed of it."

17. Under the statute giving dower out of equitable estates (*x*), the widow may have dower in proportion to the interest which the husband has acquired in the estate, by partial payment; subject, however, to the lien of the vendor for the unpaid purchase money; and, even though the contract could not be enforced in law, by reason of default on the part of the purchaser; still, if it be capable of enforcement by a Court of Equity, the widow will be entitled to dower; and, in such cases, even be entitled to call on the personal representatives of the deceased husband to administer and pay the purchase money, and complete the contract (*y*). The case of a husband having contracted to purchase, and the widow being entitled to dower in equity, proceeds on the principle, that in equity what is agreed to be done is to be considered as done, the money considered as actually converted into land, and the vendor, from the time of the contract, a trustee for the purchaser, who is, thenceforth, deemed beneficially entitled. And by application of the same principle in a converse case, viz: that of a husband who, *before* marriage, has contracted to sell, and married before payment of the purchase money

(*x*) R. S. S. cap. 126, sec. 1.

(*y*) *Carrick* v. *Smith*, 34 U. C. R. 392, per Wilson, J.; Leith and Smith's Real Prop. 146, 147; *In re* Betton's Trusts Estate, L. R. 12 Eq. 553; *Sheppard* v. *Sheppard*, 14 Gr. 174; *Re* McMorris, 8 U. C. L. J. N. S. 284; *Craig* v. *Templeton*, 8 Gr. 483.

or conveyance, here though, as above mentioned, the widow would, at law, be entitled to dower, still, equity will restrain an action at law at the instance of the purchaser; for, by the contract, the land, in equity, is deemed as converted into money, and the vendor trustee for the purchaser (*z*). So again, a widow may, on the principle above mentioned, be entitled, in equity, to dower out of what would be personal estate at law; thus, under certain circumstances, money vested in trustees, with the express injunctions to lay out the same in the purchase of lands, in fee simple or fee tail, for the benefit of the husband and his heirs, even though never so laid out during the husband's life-time, will, nevertheless, be looked on, in equity, as actually converted into lands, and the delay of the trustees in doing what they ought to have done, shall not prejudice the widow (*a*). On the same principle a husband will, in equity, (unless precluded by the Act of 35 Vic., cap. 16; R. S. O. cap. 125, sec. 4), be entitled to curtesy out of personal estate at law; as if money be stipulated to be laid out in lands to be settled on a *feme covert*, in fee or in tail, the husband is entitled to curtesy, though no purchase be actually made in the lifetime of the wife (*b*).

18. It is to be observed, that the widow is only entitled to dower in such equitable interests as her husband shall *die* beneficially entitled to (*c*), therefore, if the husband

(*z*) *Lloyd* v. *Lloyd*, 4 Dru. and War. 370.

(*a*) Lewin on Trust, 7th ed, p. 802.

(*b*) Lewin on Trusts, *supra;* Leith and Smith's Real Prop. p. 147.

(*c*) R. S. O. cap. 126, sec. 1. This is now modified by 42 Vic. O. cap. 22, which gives the widow dower out of an equitable estate of which the husband does not die seised. This statute provides (sec. 2) that the wife shall be entitled to dower in the surplus purchase money arising from a sale under a mortgage in which the wife has joined. See also secs. 1, 3, 4, 5 and 6 of same statute; and *Martindale* v. *Clarkson*, 6 App. R. 1.

alien, the widow will not be entitled to dower therein, as against the grantee (*d*).

19. It is also held that dower does not attach to land where the husband has conveyed before he had either a legal or equitable title. Thus where A., without any title in himself conveyed land to B., for which he afterwards received a certificate of purchase from the land office, upon which a patent was subsequently issued to A., it was adjudged that the wife of the latter was not dowable of the land (*e*).

20. If, after the vendee has assigned his equitable estate, the legal title be conveyed to him by the vendor, equity regards him as holding it in trust for his assignee, and therefore no right of dower arises in behalf of his wife (*f*).

21. There appears to be a distinction between a present absolute assignment and a mere outstanding *executory* agreement by the husband, to transfer his interest upon payment of the consideration by the assignee, who has not put himself in a condition to demand its fulfilment. In the latter case the widow is entitled to dower ; but if part of the money has been received by the husband from his vendee, and has been applied by him in payment for the land, this sum must be deducted from its value, at the death of the husband, before the assignment of dower (*g*).

22. It would seem that dower is defeated as well where the husband *mortgages* his equitable interest as where he

(*d*) *Hawley* v. *James*, 5 Paige, 318, 453; *Heed* v. Ford, 16 B. Mon. 114; *Hamilton* v. *Hughes*, 6 J. J. Marsh. 581 (1831); *Lawson* v. *Morton*, 6 Dana, 471.

(*e*) *Wooley* v. *Magie*, 26 Ill. 526; Scribner on Dower, vol. i. p. 426.

(*f*) *Heed* v. *Ford*, 16 B. Mon. 114; *Gully* v. *Ray*, 18 B. Mon. 107.

(*g*) *Bowie* v. *Berry*, 3 Md. Ch. Decis. 359; Scribner on Dower, vol i. p. 427.

transfers it absolutely ; at least as against the mortgagee (*h*). But if upon a sale of the equity after the husband's death, it brought more money than was required to satisfy the mortgage debt, the widow is dowable of the surplus (*i*).

(*h*) *Welker* v. *Israel*, C. P. Knox County, Ohio, February Term, 1858; *Philly* v. *Sanders*, 11 Ohio St. R. 490; Scribner on Dower, vol. i. p. 428.

(*i*) *Miller* v. *Stump*, 3 Gill, 304; *Purdy* v. *Purdy*, 3 Md. Ch. Decis. 547; Scribner on Dower, vol. i. p. 428.

CHAPTER XVIII.

DOWER UNDER THE DOCTRINE OF EQUITABLE CONVERSION.

1. *The doctrine of equitable conversion.*
2-4. *Dower in money directed to be converted into land.*
5. *Dower in land ordered to be turned into money.*
6-8. *The right and effect of election.*

1. Nothing is better established than the principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise. Whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land (*a*). So that it will be readily seen that the doctrine of equitable conversion occupies a most important place in the consideration of the question of the right to dower in equitable estates, and

(*a*) *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497; *Wheeldale* v. *Partridge*, 5 Ves. Ir. 396; *Craig* v. *Leslie*, 3 Wheat. 563; *Peter* v. *Beverly*, 10 Peters, 532-563; 1 Jarman on Wills, cap. 19, p. 523; Taylor's Eq. p. 414; 1 Lead. Cas. in Eq. 598, *et seq.*, notes to *Fletcher* v. *Ashburner*, where the numerous English and American cases bearing upon this subject are collected and considered; Leigh and Dalzell on Equit. Conv. 59-87.

is deserving of careful consideration, so far, at least, as a correct application of the rule affects the question of the right of dower, either in money, which, by express direction, is to be employed in the purchase of land; or in land which, by like direction, is to be converted into money.

2. The rule that money, imperatively directed to be laid out in land, is, in equity, completely clothed with all the essential qualities, and impressed with all the material properties of real estate, is so well settled at this day as to admit of no question. Money ordered to be thus applied descends as real, and not as personal estate. Its effectual disposition by will, by the party entitled thereto, requires the observance of all the formalities attending a devise of land. It will pass under a general devise of all the *lands* of the person for whose benefit the conversion is directed to be made, while it will not pass as *money* by a general bequest to a legatee (*b*). In the terse, but comprehensive language of the learned English Editor of Leading Cases in Equity: "the authorities show that money agreed or directed to be laid out in land, becomes land so completely as to acquire *all* the property of land" (*c*).

3. By a singular anomaly in the English law, however, money directed to be converted into land, although held to be, and treated in equity as land for all other purposes, including the right to tenancy by the curtesy, was declared *not* to be land for the purposes of dower (*d*).

4. Since the statute (*e*) giving dower in equitable estates, there can be no reasonable doubt, in Ontario at any rate,

(*b*) See authorities cited in preceding note.

(*c*) 1 Lead. Cas. in Eq., 598; Scribner on Dower, vol. i, p. 430.

(*d*) *Crabtree* v. *Bramble*, 3 Atk. 680; *Cunningham* v. *Moody*, 1 Ves. Sr. 174; *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497; *D'Arcy* v. *Blake*, 2 Sch. and Lef. 387; Park on Dower, 136; 1 Roper, H. and W. by Jacob, 356; Leigh and Dalzell on Equit. Conv. 62; 1 Fonblanq. Eq. 420.

(*e*) 3 and 4 Wm. IV. cap. 105; R. S. O. cap. 126, sec. 1.

(our statute not containing, like the English Statute, a clause subjecting the right of dower to the unlimited control of the husband, by absolute sale in his lifetime, without her concurrence,) of the widow's right to dower in money impressed in equity with the qualities of real estate (*f*).

5. We have already seen that land ordered to be sold and turned into money, is treated in a Court of Equity as the latter species of property (*g*). The conversion is there looked upon as having actually been made. So, if a husband, *before marriage*, contract to sell, and marry before payment of the purchase money or conveyance, his widow will not be entitled to dower, for by the contract the land is deemed to be money, and the vendor a trustee for the purchaser (*h*).

6. Although land absolutely directed or agreed to be converted into money, and money directed to be converted into land, will immediately be impressed with the character of the property into which each is respectively to be converted, still this notional conversion may be put an end to, by the absolute owner electing to take the property in its actual state. And the court will not direct a conversion against his election, because when converted he might immediately reconvert it (*i*). Where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, none of them have a right to say that any part shall not be sold, and elect to take his

(*f*) *Carrick* v. *Smith*, 34 U. C. R. 392; *Craig* v. *Templeton*, 8 Gr. 483; Leith and Smith's Real Prop. 146; 1 Lead. Cas. in Eq. 599; 2 Sugd. on Vendors, 224; 1 Washb. Real Prop. 181; Scribner on Dower, vol. i. pp. 435, 437.

(*g*) *Ante*, par. 1.

(*h*) *Lloyd* v. *Lloyd*, 4 Dur. and War. 370; Lewin on Trusts, 7th ed. p. 802; Leith and Smith's Real Prop. p. 147; *Berrien* v. *Berrien*, 3 Green's Ch. R. 87; *Coster* v. *Clarke*, 3 Edw. Ch. R. 428; Scribner on Dower, vol. i. p. 438.

(*i*) Taylor's Eq. Juris. 417; *Seeley* v. *Jago*, 1 P. W. 389.

share in land; for to allow election in such a case, would be injurious to the sale of the entirety (*j*). But if money be directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole (*k*).

7. Where the parties are competent to elect, the election may be made either by express declaration, or by acts from which an election will be presumed to have been made. An express declaration to elect may be made by parol (*l*). The presumption that a person has made an election, will arise from very slight circumstances (*m*). Thus, if a person keeps land unsold, a presumption will arise that he has elected to take it as land (*n*). And where the person absolutely entitled to money directed to be laid out in land, receives the money from the trustees, he elects to take it as money (*o*).

8. An infant is held incompetent in law to make a valid election (*p*). It follows, therefore, that where money is directed to be invested in land, or land is ordered to be

(*j*) Taylor's Eq. Juris. 418; *Deeth* v. *Hale*, 2 Moll. 317; *Smith* v. *Claxton*, 4 Mod. 484, 494; *Chalmer* v. *Bradley*, 1 J. and W. 59; *Trower* v. *Knightley*, 6 Mod. 134; *Holloway* v. *Radcliffe*, 23 Beav. 163, 171.

(*k*) *Seeley* v. *Jago*, 1 P. W. 389; *Walker* v. *Denne*, 2 Ves. 182; Scribner on Dower, vol. i. p. 439.

(*l*) *Edwards* v. *Countess of Warwick*, 2 P. W. 174; *Pultney* v. *Lord Darlington*, 1 Bro. C. C. 237; *Wheeldale* v. *Partridge*, 8 Ves. 236.

(*m*) *Pultney* v. *Lord Darlington*, 1 Bro. C. C. 238; *Van* v. *Barnett*, 19 Ves. 109; *Cookson* v. *Cookson*, 12 Cl. and Fin. 121; *Dixon* v. *Gayfere*, 17 Beav. 433.

(*n*) *Ashby* v. *Palmer*, 1 Mer. 301; *Crabtree* v. *Bramble*, 2 Atk. 688; *Inwood* v. *Twyne*, 2 Ed. 148; *Davies* v. *Ashford*, 15 Sim. 44; *Kirkman* v. *Miles*, 13 Ves. 338; *Griesbach* v. *Freemantle*, 17 Beav. 314.

(*o*) Taylor Eq. Juris. 418; *Pultney* v. *Lord Darlington*, 1 Bro. C. C. 238; *Trafford* v. *Boehm*, 3 Atk. 440; *Rook* v. *Worth*, 1 Ves. 461.

(*p*) *Carr* v. *Ellison*, 2 Bro. C. C. 56; *Van* v. *Barnett*, 19 Ves. 102; *Robinson* v. *Robinson*, 19 Beav. 494; *Burr* v. *Sim*, 1 Wharton, 252. 265; 1 Lead. Cas. in Eq. 607.

converted into money, for the benefit of an infant, it is not in his power, by any act of his own, to change the character of the property in any respect. In the event that he has a wife, he can neither impair her right of dower in property regarded in equity as real estate; nor can he enable the right to attach upon land ordered to be sold. Nor does his guardian possess the power to elect for him (*q*); but a court of equity, it is said, may exercise the power of election in his behalf (*r*). A lunatic, for obvious reasons, is also incompetent to make a valid election (*s*).

(*q*) *Burr* v. *Sim*, 1 Wharton, 252, 265; 1 Lead. Cas. in Eq. 617.

(*r*) *Turner* v. *Street*, 2 Rand. 404; *Pratt* v. *Taliaferro*, 3 Leigh, 419, 428; 1 Lead. Cas. in Eq. 617.

(*s*) *Ashby* v. *Palmer*, 1 Mer. 296; *Re* Wharton, 5 D. M. and G. 33; 1 Lead. Cas. in Eq. 607; Scribner on Dower, vol. i, p. 441.

CHAPTER XIX.

DOWER IN MORTGAGED ESTATES.

1-2. *Dower in equities of redemption at common law.*

3-4. *The rule in Ontario.*

5. *Dower in equities of redemption of mortgages for years.*

6-7. *Dower in the estate of the mortgagee.*

8. *Dower as against a mortgagee before the mortgage becomes absolute.*

9-10. *Right of the widow to redeem.*

11-12. *Extent to which she must redeem.*

13. *Dower, where conveyance is made to husband, and mortgage taken back by him for whole purchase money on same day.*

14-27. *Rights of the dowress as against the husband's creditors.*

28-29. *Rule where the mortgagee acquires the equity of redemption.*

30. *Right of a widow who has redeemed to be re-imbursed.*

31. *Sale during the husband's lifetime—42 Vic. Ont., cap. 22.*

32-33. *Whether the wife must be a party to proceedings in foreclosure or sale during husband's lifetime.*

34-35. *Where the holder of the equity has redeemed, the widow must contribute.*

36 37. *Whether she must contribute where the mortgage is redeemed in husband's lifetime.*

38. *Principal or interest of the mortgage debt must be payable before contribution can be required.*

39-40. *Extent to which the widow must contribute.*

41. *Dower where there are successive mortgages.*

42-50. *When the mortgage will be treated as satisfied.*

51. *Sale of right of dower under execution or for taxes in Ontario.*

52. *As to formal decree for foreclosure where husband has executed several mortgages, in one only of which his wife has joined.*

1. Until the passage of the Dower Act (*a*), it was held in England that equities of redemption of mortgages in fee were not subject to dower. This was considered a

(*a*) 3 and 4 Wm. IV. cap. 105.

necessary result of the rule excluding dower from equitable estates (*b*), the right of redemption being regarded as a mere equitable title. To such an extent was this technical doctrine carried, that actual payment of the mortgage debt, at a period subsequent to the time when it became due, would not render the wife dowable, unless the estate were re-conveyed to the husband during his lifetime. Payment on the day named in the condition would of itself operate to re-invest the husband with the estate, but a subsequent payment would not have that effect (*c*). And, as a general rule, it was not material with respect to the right of dower in equities of redemption, whether the mortgage were executed by the husband before the marriage, or by the husband and wife after the marriage. By joining her husband in levying a fine on a mortgage in fee, the right of dower of the wife became absolutely extinguished, and she could no more redeem such a mortgage, than one made before the marriage (*d*).

2. The statute before referred to, gave the widow who was married after 1834 dower out of the equitable estates of her husband, so that now, even in England, equities of redemption of mortgages are subject to dower (*e*).

3. The English rule, excluding dower from equities of redemption, has no application in Ontario.

4. It is provided by statute (*f*), "That no bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage, or other security upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to

(*b*) See cap. 17.
(*c*) Park on Dower, 137.
(*d*) *Ibid.* 351; Scribner on Dower, vol. i. p. 443.
(*e*) 3 and 4 Wm. IV. cap. 105, sec. 2 (see Appendix).
(*f*) 42 Vic. Ont. cap. 22, sec. 1.

the rights of the mortgagee or grantee, under such instrument." And sec. 2 of the same statute provides that, "In the event of a sale of the land comprised in any such mortgage, or other instrument, under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor, who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee, or grantee, to the same extent, as she would have been entitled to dower in the land from which such surplus purchase money shall be derived, had the same not been sold." This statute is not retrospective in its operation (*g*), nor does it apply to the case of a voluntary sale by the husband (*h*).

5. Although by the common law, dower was not allowed in the equity of redemption of a mortgage in fee, yet a different rule prevailed with respect to mortgages for years. Where a mortgage was for years only, it was held there was a *legal* reversion to which the equity of redemption was knit, and that of this legal reversion the widow was dowable. And as it is a doctrine of Courts of Equity, that every person having an interest in the reversion, shall have a corresponding interest in the equity of redemption, it resulted that the widow of the mortgagor in such case was entitled to redeem (*i*). The rule was the same, whether the mortgage were executed by the husband before the marriage, or by the husband and wife jointly during the coverture. In either case the privilege of redemption was secured to her by the law (*j*).

(*g*) *Martindale* v. *Clarkson*, 6 App. R. 1.

(*h*) *Calvert* v. *Black*, 8 P. R. 255.

(*i*) Park on Dower, 140.

(*j*) Park on Dower, 350, 351; *Palmes* v. *Danby*, Prec. Ch. 137; *Banks* v. *Sutton*, 2 P. Wms. 716; *Swain* v. *Perine*, 5 John. Ch. 482, 491; *Heth* v. *Cocke*, 1 Rand. 344, 346; 4 Kent, 46; Scribner on Dower, vol. i. p. 454. As to the terms on which a widow may redeem, see *post*, pars. 9-12.

6. At common law, where the husband was a mortgagee in fee, and the condition of the mortgage had become broken, his widow was entitled to recover dower in the courts of *law*, upon proving the legal seisin of her husband under the mortgage deed. And where the estate of the mortgagee had once become absolute by breach of the condition of the mortgage, no subsequent acceptance of the mortgage money, nor re-conveyance of the lands by him, would defeat the *legal* title of his widow to dower (*k*). Hence it was the ancient practice in mortgaging estates, to unite a third person with the mortgagee, in order that by the joint seisin thus created, the right of dower of the wife of the latter might be intercepted and prevented from attaching upon the estate (*l*). But it was only in courts of law, which regarded nothing but the legal estate, that the widow of a mortgagee was held dowable of the lands mortgaged. Courts of equity proceeded on a different principle, and it was an established doctrine with them, that the equity of a mortgagor extended against persons coming in by every species of title, and consequently that the claims of the widow of a mortgagee, were subject to his right of redemption. If, therefore, the mortgage had been redeemed, a court of equity would interpose and restrain her from prosecuting her legal title, even after she had established her right and recovered judgment in a court of law (*m*).

7. In this province it is well settled, that the widow of a mortgagee is not entitled to dower where the estate of the mortgagee never becomes absolute, but is defeated by per-

(*k*) Park on Dower, 100; 4 Kent, 42; Bro. Dower, pl.11; Vin. Abr. Dower (G. 2), pl. 5; Perk. sec. 392; Co. Litt. 221 a.

(*l*) Park on Dower, 100; 4 Kent, 42; Cro. Car. 191.

(*m*) *Nash* v. *Preston*, Cro. Car. 190; Hard. 466; Arg. Cas. temp. Hardw. 400; *Noel* v. *Jevon*, Freem. 43; *Bevant* v. *Pope*, *Ibid.* 71; *Hinton* v. *Hinton*, 2 Ves. Sr. 631, per Lord Hardwicke; Park on Dower, 101; 4 Kent, 42, 43; 1 Mad. Ch. 512. Scribner on Dower, vol. i. p. 455.

formance of the condition (*n*). When a mortgage has become absolute, and the equity of redemption is extinct at the time of the claim made for dower, by lapse of time and other circumstances, still if that state of things did not exist at the death of the husband (the mortgagee), and the equity of redemption was then still subsisting, his widow will not be entitled to dower (*o*).

8. Upon the principle that a mortgagor is to be regarded as the owner of the estate mortgaged, as to all persons, so long as there is no breach of the condition of the mortgage, it was held by Chancellor Walworth, in the case of *The Bank of Ogdensburgh* v. *Arnold* (*p*), that the widow of the mortgagor is entitled to dower in the estate, even as against the mortgagee, until such time as he shall have entitled himself to a sale under the mortgage. "In this case," said the Chancellor, "Mrs. Arnold joined with her husband in the mortgage; and of course her dower interest in the premises, is pledged for the payment of his debt, so far as the same can be reached and applied for that purpose, under a decree of foreclosure made in conformity to the statute. Beyond that, the complainants have no equitable claim whatever against her dower interest in the premises, or against her personally. When she joined with her husband in this mortgage, payable at the expiration of ten years, she impliedly reserved to herself the right, in case of his death, to receive so much of the rents of the premises remaining unsold, from time to time, as belonging to her for her dower. And until the complainants have entitled themselves to a sale of the lands pledged by her, as a security for the debt of her husband, they have no lien, either at law

(*n*) *Ham* v. *Ham*, 14 U. C. R. 497.

(*o*) *Flack* v. *Longmate*, 8 Beav. 420; Leith and Smith's Real Prop. 145. See also *Tarpley* v. *Gannaway*, 2 Cold. (Tenn.) 246.

(*p*) *The Bank of Ogdensburgh* v. *Arnold*, 5 Paige 38.

or in equity, upon that portion of the rents and profits which belonged to her" (*q*).

9. It was settled in the English Courts of Equity at an early day, that as to all charges and encumbrances upon the husband's land, valid and effectual against the wife, which were in their nature redeemable, there was conferred upon her, by reason of her interest in the premises, a right of redemption (*r*). So it is now the universal doctrine, that the widow may redeem the husband's lands from an existing encumbrance, and thus entitle herself to dower even as against the mortgagee, and she is also entitled to call upon the personal estate to exonerate the realty, so as to let in her claim to dower relieved from the encumbrances (*s*).

10. The right of the widow to redeem, exists, not only where the husband was seised of the lands prior to the date of the mortgage, but also in those cases where the conveyance to the husband, and the re-conveyance by way of mortgage to the grantor to secure the unpaid purchase money, are concurrent acts. A simultaneous conveyance and reconveyance of this character are usually said to give to the husband an instantaneous seisin only, and not such an interest in the premises as will entitle his widow to dower; but this doctrine is to be understood as having reference solely to the rights of the mortgagee and those claiming under him. As to all other persons, the mortgagor is re-

(*q*) Scribner on Dower, vol. i. pp. 457, 458. See also *Bullard* v. *Bowers*, 10 N. H. 500; *Hartshorn* v. *Hubbard*, 2 N. H. 453; *Dearborn* v. *Dearborn*, 9 N. H. 117; *Flanders* v. *Lamphear*, *Ibid.* 201; *Danforth* v. *Smith*, 23 Verm. 247, 259.

(*r*) *Hitchens* v. *Hitchens*, 2 Vern. 403; *Duke of Hamilton* v. *Lord Mohun*, 1 P. Wms. 118; *Banks* v. *Sutton*, 2 P. Wms. 716; *Palmes* v. *Danby*, Prec. Ch. 137; *Squire* v. *Compton*, 9 Vin. Abr. 227; 2 Eq. Ca. Ab. 387; Park on Dower, 350, 351; 1 Mad. Ch. 552.

(*s*) *Heney* v. *Low*, 9 Gr. 265; *Sheppard* v. *Sheppard*, 14 Gr. 174; *Forrest* v. *Laycock*, 18 Gr. 611; *Carrick* v. *Smith*, 34 U. C. R. 394; *Agar* v. *Fairfax*, 2 W. and S. L. C. 481; *Re* Bettons' Trusts, L. R. 12 Eq. 553. See also *Caroon* v. *Cooper*, 63 N. C. 386; *Campbell* v. *Campbell*, 30 N. J. Eq. 415.

garded as the real owner of his lands, and his wife as being entitled to dower. And as against the mortgagee, the right of redemption exists precisely as where the mortgage is given to secure the payment of an ordinary debt (*t*). In such cases the dower allotted will be chargeable in favor of the holder of the mortgage, with a third of the interest of the mortgage unless the dowress will pay a third of the mortgage debt (*u*).

11. A mortgagee cannot be compelled to accept part only of his debt and surrender a proportionate interest in the mortgaged estate. If, therefore, a widow would entitle herself to dower as against the mortgagee, she must pay the whole of the mortgage debt, and thus redeem the entire premises (*v*).

12. It has been held that where A. being seised in fee of certain lands, executed a mortgage for 999 years to B., who took possession. A. afterwards conveyed in fee to C., and after C.'s death the premises were sold to D. at Sheriff's sale, under a judgment against C., his widow was entitled to dower with a *cesset executio* during the term. If it had been shown that D. had purchased the mortgage term, the effect would be that the term having merged, the widow could have obtained her dower at once, at law. But before she could justly claim damages, she should pay at least one third of the sum necessary for extinguishing the term, or a sum ascertained by computation upon the value of her life, and *quære* should not that amount be charged against the annual value of the estate in awarding her damages (*w*).

(*t*) Scribner on Dower, vol. i. p. 461; *Bell* v. *Mayor of New York*, 10 Paige, 49; *Wheeler* v. *Morris*, 2 Bosw. 524; *McMahon* v. *Russell*, 7 Fla. 698.

(*u*) *Heney* v. *Low*, 9 Gr. 265; and see *Campbell* v. *Royal Canadian Bank*, 19 Gr. 341.

(*v*) *Gibson* v. *Crehore*, 5 Pick. 145, 151; Scribner on Dower, vol. i. p. 464, and the cases there cited.

(*w*) *Chisholm* v. *Tiffany*, 11 U. C. R. 338; Roper, H. and W. 371; *Lindsey* v. *Lindsey*, 1 Salk. 291.

Where a wife bars her dower in a mortgage, and after her husband's death, pays it off, she is entitled to hold the lands over beyond her endowment, until she is paid the proportion above her share as dowress, and whatever principal money she pays, forms a lien upon the land (*x*). Where land is purchased by the husband, and immediately the vendor takes back a mortgage to secure the purchase money, in which the vendor's wife did not join, and the husband afterwards conveyed his equity of redemption to a person who subsequently conveyed it to the vendor, who sold to another party. The widow of the original vendee is entitled to dower, but the dower must be charged with one-third of the interest of the mortgage money, or if she chooses, she may pay off one-third of the principal with arrears of interest, in which case she shall have her dower free (*y*).

13. It has been held (*z*), that where a conveyance has been made to the husband, and on the same day a mortgage is given for the whole of the purchase money, and a subsequent re-conveyance to the person from whom the husband purchased, that the wife is entitled to dower, she not joining in either the mortgage or re-conveyance. Robinson, C.J., page 217, says: "I will add that in a court of equity the widow of the purchaser of an estate not paid for, and which he had mortgaged back to the vendor to secure the purchase money, could never make good her claim to dower in the estate, as if it had been held by her husband unencumbered, and that, when the husband had never paid anything for it, and had conveyed it back to his vendor, I apprehend, his widow would be looked upon in no other light than the widow of an intending purchaser, who had not made good

(*x*) *Carrick* v. *Smith*, 34 U. C. R. 389; *Palmes* v. *Danby*, Prec. Ch. 137; Fisher on M'tges. 2nd ed. 307.

(*y*) *Heney* v. *Low*, 9 Gr. 265.

(*z*) *Norton* v. *Smith*, 20 U. C. R. 213; In appeal, 7 U. C. L. J. 263, following *Potts* v. *Meyers*, 14 U. C. R. 499; *Lynch* v. *O'Hara*, 6 U. C. C. P. p. 259.

his purchase, and had on that account not received a conveyance. What I mean by this is, that it could hardly seem consistent with equity, to look upon her claim in any other light, though, no doubt it is true that dower is a legal claim in most cases, while in others it may be only a claim in equity, in consequence of the interest being only an equitable one. Where it is clearly a legal estate, equity I assume, must follow the law, but the disposition in this case would be, to look on Asa Norton (the husband) as never actually holding the legal beneficial interest, by reason of the mortgage he gave back immediately to secure the price." It was also held in this case, that the damages to which the widow is entitled, should be calculated upon the average value of the land through the period during which she could claim dower, *i. e.* six years; and her future allowance should be estimated upon a computation of one-third of the occupation value of the ground.

14. We will now consider the rights of the dowress when it comes into conflict with those of creditors of her husband.

15. It may, we think, be now laid down as settled law, (though the authorities are at first sight very difficult to reconcile), that where a woman joins with her husband in executing a mortgage to secure a debt of her husband's, and after his death the property is sold, and there is a surplus after paying the mortgagee, the widow is entitled, even as against creditors, to be paid her dower out of the whole value of the mortgaged property realized on the sale, to an amount not exceeding the surplus, after payment of the mortgage (*a*). Where there is no surplus after payment

(*a*) *Sheppard* v. *Sheppard*, 14 Gr. 174; *Doan* v. *Davis*, 23 Gr. 207; *Lindsay* v. *Lindsay*, 23 Gr. 210; *Re* McMorris, 8 L. J., U. C. 284; *Forrest* v. *Laycock*, 18 Gr. 611; *Re* Robertson, 24 Gr. 442; S. C. 25 Grant, 276; *Dawson* v. *Bank of Whitehaven*, 6 L. R. Ch. D. 218, observed upon and distinguished; *Jackson* v. *Innes*, 1 Bli. 126; *Jackson* v. *Parker*, Amb. 687; *Ruscombe* v. *Hare*, 6 Dow. 1; *Spyer* v. *Hyatt*, 20 Beav. 621.

of the mortgage debt, the widow would not be entitled as against creditors, to the exoneration of the mortgaged estates from the mortgage, out of the real or personal estate of the husband (*b*). Where a conveyance is made to the husband, and a mortgage in which the wife joins is given for the purchase money, or a portion of it, she is only entitled to dower out of the value of the land beyond the encumbrance upon it (*c*).

16. There are certainly a number of cases in our own courts which, if they do not actually conflict with one another, upon the question of the dowress' right, as against creditors, are indeed very difficult to distinguish, so that, if possible to lead to a clearer view of what the cases in our own courts have actually decided and wherein they have differed, if they have so differed, we shall in the following pages, take up all the cases bearing upon the subject under discussion, beginning with the earliest and ending with the last reported decision, and then attempt to reconcile them all.

17. We will first take up *Sheppard* v. *Sheppard* (*d*). In that case, it was decided that where a woman joins in a mortgage to bar her dower, for the purpose of securing a debt of her husband, and after his death the property is sold for more than is sufficient to satisfy the claims of the mortgagee, the widow will be entitled to have her dower secured out of the surplus, in preference to the simple contract creditors of her husband. The then Chancellor (Van-Koughnet) in that case, page 176, says: "In England the widow's right to dower was always regarded with great favor, even at the expense of the heir. We have here no

(*b*) *Baker* v. *Dawbarn*, 19 Gr. 113; *White* v. *Bastedo*, 15 Gr. 546.

(*c*) *Thorpe* v. *Richards*, 15 Gr. 403; *Campbell* v. *R. C. Bank*, 19 Gr. 334; *Tucker Field*, 51 Miss. 191.

(*d*) *Sheppard* v. *Sheppard*, 14 Gr. 174.

judicial or legislative policy opposed to this. On the contrary, the statutory right to dower in equitable estates may be considered as upholding if not extending it. In Mr. Park's valuable treatise on dower at page 351—1st edition—it is said: 'A dowress, like an heir or devisee, has of course, a right to have the personal estate of her husband, as far as it will go, applied in discharge of mortgage and other debts contracted by the husband, which are charges upon the land which she holds in dower, and even where the personal estate is insufficient to discharge the debt, it would seem that in some cases, if not in all, she has the privilege of having the lands which remain in the heir charged therewith, in exoneration of the land assigned to her in dower.' The authorities to which he refers, seems to me to warrant this statement of the law. Thus, it has been decided, that if a husband's lands at the time of marriage be subject to the King's debt, the lands in the heir's hands shall discharge the debt, if sufficient, or *pro tanto*, before the lands assigned to the widow in dowry shall be touched. In this country, lands are assets for the satisfaction of debts, and are subject to the like remedies for payment of the same, as personal estates. Now, the creditors here, who claim against the widow, are simply contract creditors, and can only claim to have the value of the land, or as here, in reality, only the equity of redemption applied to pay their claims, because such equity of redemption is by statute, assets for the payment of debts. Now, if the widow is entitled to have the personal estate applied to paying off the encumbrances on the land out of which she seeks dower, and in preference to the claims of other creditors, and, if lands be assets equally with personalty for the payment of debts, why may she not also ask, that such land be applied to the discharge of the encumbrances, equally with, or in the absence of personalty? It seems to me that she has this right, and that the claims of the simple con-

tract creditors must be postponed to it; and, as the residue, after paying off the encumbrances and the costs of the suit, is less than one-third of the whole value of the estate, let it be set apart as the widow's dower, and invested as such for her life, to be applied at the termination thereof, to the payment of the creditors of the intestate."

18. In *Thorpe* v. *Richards* (*e*), it was decided that the widow was only entitled to dower in the surplus money after payment of the mortgage. This case was decided by the same Judge (VanKoughnet, C.) who decided *Sheppard* v. *Sheppard*, *supra*. There is a clear distinction between the two cases. In the case of *Thorpe* v. *Richards*, the husband purchased the equity of redemption, *while married*. The legal estate was at the time of the purchase outstanding in the mortgagee. The husband owned the estate subject to the mortgage. He never owned the whole estate, legal and equitable; all he had at his death was the equity of redemption; while in *Sheppard* v. *Sheppard*, *supra*, the husband owned the entire estate, legal and equitable, and the wife joined in a mortgage of it to secure the husband's debt, and moreover, in this case the mortgage was given for the purchase money.

19. In *Thorpe* v. *Richards*, the Chancellor, page 404, says:—"In this case the testator, Thorpe (the husband), while married to the plaintiff, (the dowress), purchased the equity of redemption in certain property, and to secure an extension of time for payment of the money then overdue on the outstanding mortgage in fee, covenanted with the holder of the mortgage, to pay it off at an increased rate of interest in a period of five years. Thorpe died beneficially entitled to this equity of redemption. It would be more correct to say, that he owned at the time of

(*e*) *Thorpe* v. *Richards*, 15 Gr. 403. See also *Wing* v. *Ayer*, 53 Maine, 138.

his death the whole estate subject to this mortgage, which he had undertaken personally to pay off. In this respect the case differs from *Sheppard* v. *Sheppard*, where the husband during the marriage owned the entire estate, legal and equitable, and in which the wife had barred her dower by a release of it, contained in a deed of mortgage executed by the husband for his own purposes. I am not sure that I may not have gone too far in that case, in giving the wife the value of her dower in the entire estate, as against the creditors of the husband. But that case is not the present, for here the husband never owned the legal estate in the land, and all he had at his death was the equity of redemption, in which the wife was dowable by virtue of the Real Property Act" (*f*).

20. In *Baker* v. *Dawbarn* (*g*), and *White* v. *Bastedo* (*h*), V. C. Mowat held, that the widow was not entitled to have the mortgage debt paid in full out of the assets to the prejudice of creditors. But in both these cases there does not appear to have been any surplus (as in *Sheppard* v. *Sheppard*) from the mortgaged property after paying the encumbrances.

21. In *Campbell* v. *R. C. Bank* (*i*), the Chancellor (Spragge) held, that the widow was only entitled to dower out of the value of the land beyond the encumbrance upon it. But in this case, as in *Thorpe* v. *Richards*, *supra*, the mortgage was for purchase money. In such case, to the extent of the mortgage debt, the husband is not the owner. This case may be distinguished from *Sheppard* v. *Sheppard* as there, the mortgage was given to secure the husband's

(*f*) *Rider* v. *Nager*, 2 P. W. 328; *Bartholomew* v. *May*, 1 Atk. 487; *Galton* v. *Hancock*, 2 Atk. 430.
(*g*) *Baker* v. *Dawbarn*, 19 Gr. 113.
(*h*) *White* v. *Bastedo*, 15 Gr. 546.
(*i*) *Campbell* v. *R. C. Bank*, 19 Gr. 334.

debt. In *Campbell* v. *The R. C. Bank* the learned Chancellor cited *Jones* v. *Jones* (*j*). "Suppose she (the dowress) had redeemed, she would have gained nothing by it against the heir. What she asks, is to get from the heir something which during her husband's lifetime was alienated by him, *pro tanto* to the extent of the mortgage debt."

If the husband had sold half the lot in his lifetime (his wife joining), it may be admitted, that his widow would not be entitled to dower out of what he had alienated. A mortgage however, is given merely as security for a debt not as a partial sale. So that it is submitted, that the giving of a mortgage, cannot be said to be an alienation even *pro tanto* to the extent of the mortgage debt.

22. In *Jones* v. *Jones*, *supra*, the wife did not join in the mortgage, but her dower was barred by the husband in the mortgage deed under the English Dower Act, 3 & 4 Wm. IV., cap. 105, by which the owner of land was enabled to sell it or charge it by his own act, and thereby defeat or otherwise affect his widow's right to dower. The wife was not therefore, giving up her dower as surety for her husband's debt. He, having complete control over it, took away part of it and left her the rest. She had nothing to give up during the lifetime of her husband. The learned Chancellor, speaking of the widow's claim to dower upon the footing of the whole value of the lands, on page 343, says: "It would moreover operate most unjustly, indeed absurdly. Take the case of a piece of property worth $4,000, subject to a mortgage for $3,000. Suppose it sold by the heir or by the Court for $4,000. Of the purchase money only $3,000 would be applied to pay off the mortgage, and $1,000 would be the surplus, and would be the value of the equity of redemption. If the widow were held

(*j*) *Jones* v. *Jones*, 4 K. and J. 311.

entitled to the interest of one-third of the whole value; it would absorb the income of the whole of the surplus, leaving nothing for the heir. It is plain that, by analogy to the rule which gives the heirs two-thirds of the encumbered lands, the widow should receive one-third only of the annual value of the equity of redemption in lands which are under mortgage. To give her what is claimed in this case would nullify the rule."

23. There would be the same result exactly, if the widow had not joined in the mortgage, as she would then be entitled to be endowed upon the footing of the whole value of the land.

Suppose that husband and another were tenants in common of a piece of land. They join in a mortgage for the husband's accommodation solely. The husband dies, and the property is sold to pay the mortgage. Would the other tenant only be entitled to half of the surplus?

Suppose further that the wife joined in the same mortgage. Would she be entitled to dower only out of half the surplus? If then the other tenant is entitled to have the husband's debt paid out of the husband's assets, why should not the wife be entitled to the same privilege?

Suppose a husband and wife and one son join in a mortgage, the son being a tenant in common with the husband, the son would be clearly entitled to have as against the other sons his full half of the proceeds; then what reason is there for placing the wife upon a less favorable footing.

24. In *Doan* v. *Davis* (*k*), a suit for partition, the Chancellor held that the widow was dowable out of the whole value of the mortgaged premises, the mortgage having been given to secure the debt of the husband.

(*k*) *Doan* v. *Davis*, 23 Gr. 207.

This case was followed in *Lindsay* v. *Lindsay* (*l*). In neither of these cases were the rights of creditors involved.

In *Doan* v. *Davis*, *supra*, the Chancellor said, page 209: "The judgment of Mr. Boyd, then Master, in *Re McMorris* (*m*), contains a concise and accurate statement of the law. The widow's position in equity seems to be this, having barred her dower in a mortgagee in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband, is in one aspect in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the lands. . . . The wife simply bars her dower with a view to secure the debt due by her husband. When that debt is paid by the husband's estate, she is remitted as against the heir, and volunteers claiming under her husband to her full rights as dowress, in the whole estate mortgaged."

25. The latest reported case on the subject is *Re Robertson* (*n*), in which it was held, following *Sheppard* v. *Sheppard*, *supra*, that where a woman joins with her husband in executing a mortgage to secure money borrowed by the husband, no portion of which is received by her to her own use; and after the husband's death, the land is sold at the instance of creditors, the widow is entitled even against them, to be paid her dower out of the gross amount realized on the sale, to an amount not exceeding the surplus after payment of the mortgage.

In *Re Robertson*, *supra*, that learned and careful Judge, V. C. Proudfoot, after reviewing all the decisions on the subject referring to *Sheppard* v. *Sheppard*, says, page 447: "I think it was well decided, and that the doubt subse-

(*l*) *Lindsay* v. *Lindsay*, 23 Gr. 210.
(*m*) *Re* McMorris, 8 Can. L. J. 284.
(*n*) *Re* Robertson, 24 Grant, 442; S. C. 25 Gr. 276.

quently expressed in regard to it (by the late Chancellor VanKoughnet, who decided *Sheppard* v. *Sheppard* and *Thorpe* v. *Richards*, *supra*), was not well founded."

26. After the decision in *Re Robertson* had been given, it was held in the case of *Dawson* v. *The Bank of Whitehaven* (*o*), overruling a decision of V. C. Bacon, that the widow was not entitled to dower in the surplus proceeds of sale, after payment of the mortgage debt.

27. The case of *Re Robertson*, *supra*, again came before the learned V. C., (*p*) when he again held, that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband, and that in valuing such dower, the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee. The learned V. C., referring to *Dawson* v. *Bank of Whitehaven*, *supra*, says, page 277, "If the cases were identical in the nature of the facts and in the law, applicable to them, I would, of course, be bound to follow the decision of the Court of Chancery Appeal. It is true that I did refer to the cases of *Jackson* v. *Parker* (*q*) and *Innes* v. *Jackson* (*r*), and put a construction upon them very much similar to that of the learned V. C. (V. C. Bacon), and that construction has been determined to be erroneous, when the law to be applied was that in operation before dower in equitable estates was given. But in the case before me, under our law dower exists in equitable estates, and it was to that state of circumstances, I considered the cases of *Jackson* v. *Parker* and *Innes* v. *Jackson* applicable, and had this case been before the Chancery Appeal, I apprehend

(*o*) *Dawson* v. *The Bank of Whitehaven*, L. R. 6 Ch. D. 218.
(*p*) 25 Grant, 276.
(*q*) *Jackson* v. *Parker*, Amb. 687.
(*r*) *Innes* v. *Jackson*, 1 Bli. 104.

they would have thought my application was correct. In *Dawson* v. *Bank of Whitehaven*, the marriage took place in 1831, and therefore before there was dower in equitable estates, and the fact that the widow had no such dower was the leading feature in the decision. The Master of the Rolls, says: 'There was no dower out of an equitable estate. In all other cases there was a similar estate in equity to that which there was at law, but that rule did not apply to dower. We must recollect that, in discussing the question which we have to consider. That being so, the husband and wife's fine destroyed her dower, by changing the seisin, because the use of the fine was to the mortgagee in fee, and consequently the dower was absolutely gone at law. Where is the equity in the widow to set it up again? She voluntarily destroyed the dower at law. She voluntarily changed her husband's estate from a legal estate to an equitable estate, viz., the equity of redemption. She knew, or must be taken to have known, that one of the incidents to a legal estate, the inchoate right to dower, did not attach to an equitable estate. Consequently, by changing the character of the estate, she lost the benefit of that which was an incident to the legal estate. Why she should be entitled in equity to recover it, I do not understand, when we recollect there was no right to dower out of an equitable estate. Such a title could not be founded on contract, for there was no contract. That being so, it seems to me that, unless there is some authority to the contrary, we must hold that, as the plaintiff had extinguished her dower at law, that extinguishment operated as an extinguishment in equity also, because dower did not exist in equity at all.' The Master of the Rolls then examines the cases of *Jackson* v. *Parker* and *Innes* v. *Jackson*, and proceeds: 'I have not forgotten the two other arguments used on behalf of the plaintiff. One was that, even if the right to dower was extinguished, she would still have the ordinary right of a

surety. That argument I am not able to follow. If the right to dower is extinguished, she had no property to pledge as to which the question of suretyship could arise.' James, L.J., and Cotton, L.J., concurred in these views. James, L.J., as to the question of suretyship, says: 'With regard to the view suggested, that the case should be dealt with as one of suretyship, that is to say, that the wife is supposed to give up her property, or right to property, to enable her husband to make a mortgage, it seems to me that there is no place for that argument, unless as a matter of fact, there is property of the wife recognized in the Court of Chancery, which she parts with. When once she has joined in extinguishing her right to dower, and in converting, or enabling her husband to convert, his legal estate into an equitable one, she has done it for all purposes. The dower which was an incident of the legal estate, fell with it, and no incident could be raised in respect of the equitable estate, different from that which a Court of Equity always attached to equitable estates.' Not one word of this need be questioned, yet it would form no rule to determine the case before me. The widow here had something besides the incident to the legal estate; she had her dower in the equitable estate, an interest recognised in a Court of Equity, and therefore she had something to pledge as a security for her husband's debt. The incident to the legal estate was not an estate in deed, but a right that might ripen into an estate, it was at least a possibility coupled with an interest, and after joining in the mortgage, she had an interest of the same nature in the equity of redemption, and she can, under our statutes, convey such a right. It can be operated on under a deed of conveyance, as well as by a simple release. She is then in a position which the widow in *Dawson* v. *Bank of Whitehaven* did not occupy, and which had she occupied, the decision, according to the *ratio decidendi*, would have been otherwise." This case was sub-

sequently reheard before the full Court and the judgment of the learned V. C., affirmed (*s*).

28. Where the defendant in a proceeding for dower sets up, and relies upon a distinct claim, derived from the mortgagor or the mortgagee, his rights may generally be easily ascertained, and readily determined. But there is a class of cases more difficult of solution, arising where the rights of both mortgagor and mortgagee meet and unite in the same person. To this class, belong the cases in which the mortgagee has become the owner of the equity of redemption, and they frequently present for consideration questions of great practical importance (*t*).

29. It may safely be laid down as settled law, that where there is a foreclosure of mortgaged premises upon a mortgage valid against the wife, the result is to entirely divest her of all claim upon the lands, and in case of a sale she must look to the surplus proceeds thereof, if any remaining, after satisfying the mortgage debt. In such case also, the purchaser takes his title discharged from the mortgage encumbrances. The acquisition of the equity of redemption by the owner of the legal estate, or mortgagee, will not cause a merger, so as to preclude him as against the dowress from insisting that the mortgage is on foot and unsatisfied (*u*). In such a case, the widow would be entitled to redeem upon payment of the full amount of the mortgage debt (*v*).

(*s*) *Re* Robertson, 25 Gr. 486.

(*t*) Scribner on Dower, vol. i. p. 466.

(*u*) *Hency* v. *Low*, 9 Gr. 265. See, however, judgment of Esten, V.C., as to the necessity of some evidence of express intention in the owner of the legal estate, to keep alive the mortgage by assignment to a trustee or otherwise. See also, as to dower in mortgage, Bowle's Case, Tud. Lg. Ca. 37.

(*v*) *Van Duyne* v. *Thayre*, 14 Wend. 233; S. C. 19 Wend. 162; *Thompson* v. *Boyd*, 2 Zab. 543; 4 Kent. 45.

30. A widow who has entirely redeemed a mortgage encumbrance, or who has paid more than her proportion, may take and hold possession of the mortgaged premises, as against those whose duty it is to contribute, until she is re-imbursed (*w*).

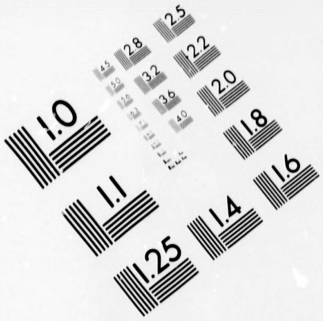
31. As we have before seen (*x*), the statute (*y*) provides, that in case of a sale of the land comprised in any mortgage under the power of sale contained therein, or under any legal process, the wife of the mortgagor shall be entitled to dower in the surplus of the purchase money, remaining after satisfaction of the claim of the mortgagee, to the same extent as she would have been entitled, had such land not been sold. Sec. 3 provides that a mortgagee or other person, holding any money, out of which a married woman shall be dowable, under the preceeding sections of this Act, may pay the same into the Court of Chancery.

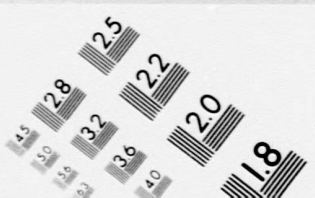
Sub-sec. 2 provides that the Court of Chancery, or any Judge thereof, may on a summary application by petition or motion, make such order for securing the right of dower of any married woman, in any money out of which she shall be dowable, as may be just.

Section 4 provides, that a widow shall not be entitled to take her interest in money under this Act, and in addition thereto, a share of the money as personal estate. So that it would appear, that the wife is entitled to have her inchoate dower interest in equities of redemption, protected by an investment of a just proportion of the surplus proceeds of a sale, where proceedings for sale have been taken, and the land been sold during the husband's lifetime. And this seems to be the better opinion in the United States,

(*w*) Scribner on Dower, vol. i. p. 476.
(*x*) *Ante*, p. 4.
(*y*) 42 Vic. Ont. cap. 22, sec. 2.




1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10
11
12
13
14
16
18
20
22
25
28
32
36
40
45
50
56
63
71
80
90
100
110
125
140
160
180
200
220
250
280
320
360
400
450
500
560
630
710
800
900
1000
1100
1250
1400
1600
1800
2000
2200
2500
2800
3200
3600
4000
4500
5000
5600
6300
7100
8000
9000
10000
11000
12500
14000
16000
18000
20000
22000
25000
28000
32000
36000
40000
45000
50000
56000
63000
71000
80000
90000
100000
110000
125000
140000
160000
180000
200000
220000
250000
280000
320000
360000
400000
450000
500000
560000
630000
710000
800000
900000
1000000
1100000
1250000
1400000
1600000
1800000
2000000
2200000
2500000
2800000
3200000
3600000
4000000
4500000
5000000
5600000
6300000
7100000
8000000
9000000
10000000
11000000
12500000
14000000
16000000
18000000
20000000
22000000
25000000
28000000
32000000
36000000
40000000
45000000
50000000
56000000
63000000
71000000
80000000
90000000
100000000
110000000
125000000
140000000
160000000
180000000
200000000
220000000
250000000
280000000
320000000
360000000
400000000
450000000
500000000
560000000
630000000
710000000
800000000
900000000
1000000000
1100000000
1250000000
1400000000
1600000000
1800000000
2000000000
2200000000
2500000000
2800000000
3200000000
3600000000
4000000000
4500000000
5000000000
5600000000
6300000000
7100000000
8000000000
9000000000
10000000000
11000000000
12500000000
14000000000
16000000000
18000000000
20000000000
22000000000
25000000000
28000000000
32000000000
36000000000
40000000000
45000000000
50000000000
56000000000
63000000000
71000000000
80000000000
90000000000
100000000000
110000000000
125000000000
140000000000
160000000000
180000000000
200000000000
220000000000
250000000000
280000000000
320000000000
360000000000
400000000000
450000000000
500000000000
560000000000
630000000000
710000000000
800000000000
900000000000
1000000000000
1100000000000
1250000000000
1400000000000
1600000000000
1800000000000
2000000000000
2200000000000
2500000000000
2800000000000
3200000000000
3600000000000
4000000000000
4500000000000
5000000000000
5600000000000
6300000000000
7100000000000
8000000000000
9000000000000
10000000000000
11000000000000
12500000000000
14000000000000
16000000000000
18000000000000
20000000000000
22000000000000
25000000000000
28000000000000
32000000000000
36000000000000
40000000000000
45000000000000
50000000000000
56000000000000
63000000000000
71000000000000
80000000000000
90000000000000
100000000000000
110000000000000
125000000000000
140000000000000
160000000000000
180000000000000
200000000000000
220000000000000
250000000000000
280000000000000
320000000000000
360000000000000
400000000000000
450000000000000
500000000000000
560000000000000
630000000000000
710000000000000
800000000000000
900000000000000
1000000000000000
1100000000000000
1250000000000000
1400000000000000
1600000000000000
1800000000000000
2000000000000000
2200000000000000
2500000000000000
2800000000000000
3200000000000000
3600000000000000
4000000000000000
4500000000000000
5000000000000000
5600000000000000
6300000000000000
7100000000000000
8000000000000000
9000000000000000
10000000000000000
11000000000000000
12500000000000000
14000000000000000
16000000000000000
18000000000000000
20000000000000000
22000000000000000
25000000000000000
28000000000000000
32000000000000000
36000000000000000
40000000000000000
45000000000000000
50000000000000000
56000000000000000
63000000000000000
71000000000000000
80000000000000000
90000000000000000
100000000000000000
110000000000000000
125000000000000000
140000000000000000
160000000000000000
180000000000000000
200000000000000000
220000000000000000
250000000000000000
280000000000000000
320000000000000000
360000000000000000
400000000000000000
450000000000000000
500000000000000000
560000000000000000
630000000000000000
710000000000000000
800000000000000000
900000000000000000
1000000000000000000
1100000000000000000
1250000000000000000
1400000000000000000
1600000000000000000
1800000000000000000
2000000000000000000
2200000000000000000
2500000000000000000
2800000000000000000
3200000000000000000
3600000000000000000
4000000000000000000
4500000000000000000
5000000000000000000
5600000000000000000
6300000000000000000
7100000000000000000
8000000000000000000
9000000000000000000
10000000000000000000
11000000000000000000
12500000000000000000
14000000000000000000
16000000000000000000
18000000000000000000
20000000000000000000
22000000000000000000
25000000000000000000
28000000000000000000
32000000000000000000
36000000000000000000
40000000000000000000
45000000000000000000
50000000000000000000
56000000000000000000
63000000000000000000
71000000000000000000
80000000000000000000
90000000000000000000
100000000000000000000
110000000000000000000
125000000000000000000
140000000000000000000
160000000000000000000
180000000000000000000
200000000000000000000
220000000000000000000
250000000000000000000
280000000000000000000
320000000000000000000
360000000000000000000
400000000000000000000
450000000000000000000
500000000000000000000
560000000000000000000
630000000000000000000
710000000000000000000
800000000000000000000
900000000000000000000
1000000000000000000000
1100000000000000000000
1250000000000000000000
1400000000000000000000
1600000000000000000000
1800000000000000000000
2000000000000000000000
2200000000000000000000
2500000000000000000000
2800000000000000000000
3200000000000000000000
3600000000000000000000
4000000000000000000000
4500000000000000000000
5000000000000000000000
5600000000000000000000
6300000000000000000000
7100000000000000000000
8000000000000000000000
9000000000000000000000
10000000000000000000000
11000000000000000000000
12500000000000000000000
14000000000000000000000
16000000000000000000000
18000000000000000000000
20000000000000000000000
22000000000000000000000
25000000000000000000000
28000000000000000000000
32000000000000000000000
36000000000000000000000
40000000000000000000000
45000000000000000000000
50000000000000000000000
56000000000000000000000
63000000000000000000000
71000000000000000000000
80000000000000000000000
90000000000000000000000
100000000000000000000000
110000000000000000000000
125000000000000000000000
140000000000000000000000
160000000000000000000000
180000000000000000000000
200000000000000000000000
220000000000000000000000
250000000000000000000000
280000000000000000000000
320000000000000000000000
360000000000000000000000
400000000000000000000000
450000000000000000000000
500000000000000000000000
560000000000000000000000
630000000000000000000000
710000000000000000000000
800000000000000000000000
900000000000000000000000
1000000000000000000000000
1100000000000000000000000
1250000000000000000000000
1400000000000000000000000
1600000000000000000000000
1800000000000000000000000
2000000000000000000000000
2200000000000000000000000
2500000000000000000000000
2800000000000000000000000
3200000000000000000000000
3600000000000000000000000
4000000000000000000000000
4500000000000000000000000
5000000000000000000000000
5600000000000000000000000
6300000000000000000000000
7100000000000000000000000
8000000000000000000000000
9000000000000000000000000
10000000000000000000000000
11000000000000000000000000
12500000000000000000000000
14000000000000000000000000
16000000000000000000000000
18000000000000000000000000
20000000000000000000000000
22000000000000000000000000
25000000000000000000000000
28000000000000000000000000
32000000000000000000000000
36000000000000000000000000
40000000000000000000000000
45000000000000000000000000
50000000000000000000000000
56000000000000000000000000
63000000000000000000000000
71000000000000000000000000
80000000000000000000000000
90000000000000000000000000
100000000000000000000000000
110000000000000000000000000
125000000000000000000000000
140000000000000000000000000
160000000000000000000000000
180000000000000000000000000
200000000000000000000000000
220000000000000000000000000
250000000000000000000000000
280000000000000000000000000
320000000000000000000000000
360000000000000000000000000
400000000000000000000000000
450000000000000000000000000
500000000000000000000000000
560000000000000000000000000
630000000000000000000000000
710000000000000000000000000
800000000000000000000000000
900000000000000000000000000
1000000000000000000000000000
1100000000000000000000000000
1250000000000000000000000000
1400000000000000000000000000
1600000000000000000000000000
1800000000000000000000000000
2000000000000000000000000000
2200000000000000000000000000
2500000000000000000000000000
2800000000000000000000000000
3200000000000000000000000000
3600000000000000000000000000
4000000000000000000000000000
4500000000000000000000000000
5000000000000000000000000000
5600000000000000000000000000
6300000000000000000000000000
7100000000000000000000000000
8000000000000000000000000000
9000000000000000000000000000
10000000000000000000000000000
11000000000000000000000000000
12500000000000000000000000000
14000000000000000000000000000
16000000000000000000000000000
18000000000000000000000000000
20000000000000000000000000000
22000000000000000000000000000
25000000000000000000000000000
28000000000000000000000000000
32000000000000000000000000000
36000000000000000000000000000
40000000000000000000000000000
45000000000000000000000000000
50000000000000000000000000000
56000000000000000000000000000
63000000000000000000000000000
71000000000000000000000000000
80000000000000000000000000000
90000000000000000000000000000
100000000000000000000000000000
110000000000000000000000000000
125000000000000000000000000000
140000000000000000000000000000
160000000000000000000000000000
180000000000000000000000000000
200000000000000000000000000000
220000000000000000000000000000
250000000000000000000000000000
280000000000000000000000000000
320000000000000000000000000000
360000000000000000000000000000
400000000000000000000000000000
450000000000000000000000000000
500000000000000000000000000000
560000000000000000000000000000
630000000000000000000000000000
710000000000000000000000000000
800000000000000000000000000000
900000000000000000000000000000
1000000000000000000000000000000
1100000000000000000000000000000
1250000000000000000000000000000
1400000000000000000000000000000
1600000000000000000000000000000
1800000000000000000000000000000
2000000000000000000000000000000
2200000000000000000000000000000
2500000000000000000000000000000
2800000000000000000000000000000
3200000000000000000000000000000
3600000000000000000000000000000
4000000000000000000000000000000
4500000000000000000000000000000
5000000000000000000000000000000
5600000000000000000000000000000
6300000000000000000000000000000
7100000000000000000000000000000
8000000000000000000000000000000
9000000000000000000000000000000
10000000000000000000000000000000
11000000000000000000000000000000
12500000000000000000000000000000
14000000000000000000000000000000
16000000000000000000000000000000
18000000000000000000000000000000
20000000000000000000000000000000
22000000000000000000000000000000
25000000000000000000000000000000
28000000000000000000000000000000
32000000000000000000000000000000
36000000000000000000000000000000
40000000000000000000000000000000
45000000000000000000000000000000
50000000000000000000000000000000
56000000000000000000000000000000
63000000000000000000000000000000
71000000000000000000000000000000
80000000000000000000000000000000
90000000000000000000000000000000
100000000000000000000000000000000
110000000000000000000000000000000
125000000000000000000000000000000
140000000000000000000000000000000
160000000000000000000000000000000
180000000000000000000000000000000
200000000000000000000000000000000
220000000000000000000000000000000
250000000000000000000000000000000
280000000000000000000000000000000
320000000000000000000000000000000
360000000000000000000000000000000
400000000000000000000000000000000
450000000000000000000000000000000
500000000000000000000000000000000
560000000000000000000000000000000
630000000000000000000000000000000
710000000000000000000000000000000
800000000000000000000000000000000
900000000000000000000000000000000
1000000000000000000000000000000000
1100000000000000000000000000000000
1250000000000000000000000000000000
1400000000000000000000000000000000
1600000000000000000000000000000000
1800000000000000000000000000000000
2000000000000000000000000000000000
2200000000000000000000000000000000
2500000000000000000000000000000000
2800000000000000000000000000000000
3200000000000000000000000000000000
3600000000000000000000000000000000
4000000000000000000000000000000000
4500000000000000000000000000000000
5000000000000000000000000000000000
5600000000000000000000000000000000
6300000000000000000000000000000000
7100000000000000000000000000000000
8000000000000000000000000000000000
9000000000000000000000000000000000
10000000000000000000000000000000000
11000000000000000000000000000000000
12500000000000000000000000000000000
14000000000000000000000000000000000
16000000000000000000000000000000000
18000000000000000000000000000000000
20000000000000000000000000000000000
22000000000000000000000000000000000
25000000000000000000000000000000000
28000000000000000000000000000000000
32000000000000000000000000000000000
36000000000000000000000000000000000
40000000000000000000000000000000000
45000000000000000000000000000000000
50000000000000000000000000000000000
56000000000000000000000000000000000
63000000000000000000000000000000000
71000000000000000000000000000000000
80000000000000000000000000000000000
90000000000000000000000000000000000
100000000000000000000000000000000000
110000000000000000000000000000000000
125000000000000000000000000000000000
140000000000000000000000000000000000
160000000000000000000000000000000000
180000000000000000000000000000000000
200000000000000000000000000000000000
220000000000000000000000000000000000
250000000000000000000000000000000000
280000000000000000000000000000000000
320000000000000000000000000000000000
360000000000000000000000000000000000
400000000000000000000000000000000000
450000000000000000000000000000000000
500000000000000000000000000000000000
560000000000000000000000000000000000
630000000000000000000000000000000000
710000000000000000000000000000000000
800000000000000000000000000000000000
900000000000000000000000000000000000
1000000000000000000000000000000000000
1100000000000000000000000000000000000
1250000000000000000000000000000000000
1400000000000000000000000000000000000
1600000000000000000000000000000000000
1800000000000000000000000000000000000
2000000000000000000000000000000000000
2200000000000000000000000000000000000
2500000000000000000000000000000000000
2800000000000000000000000000000000000
3200000000000000000000000000000000000
3600000000000000000000000000000000000
4000000000000000000000000000000000000
4500000000000000000000000000000000000
5000000000000000000000000000000000000
5600000000000000000000000000000000000
6300000000000000000000000000000000000
7100000000000000000000000000000000000
8000000000000000000000000000000000000
9000000000000000000000000000000000000
10000000000000000000000000000000000000
11000000000000000000000000000000000000
12500000000000000000000000000000000000
14000000000000000000000000000000000000
16000000000000000000000000000000000000
18000000000000000000000000000000000000
20000000000000000000000000000000000000
22000000000000000000000000000000000000
25000000000000000000000000000000000000
28000000000000000000000000000000000000
32000000000000000000000000000000000000
36000000000000000000000000000000000000
40000000000000000000000000000000000000
45000000000000000000000000000000000000
50000000000000000000000000000000000000
56000000000000000000000000000000000000
63000000000000000000000000000000000000
71000000000000000000000000000000000000
80000000000000000000000000000000000000
90000000000000000000000000000000000000
100000000000000000000000000000000000000
110000000000000000000000000000000000000
125000000000000000000000000000000000000
140000000000000000000000000000000000000
160000000000000000000000000000000000000
180000000000000000000000000000000000000
200000000000000000000000000000000000000
220000000000000000000000000000000000000
250000000000000000000000000000000000000
280000000000000000000000000000000000000
320000000000000000000000000000000000000
360000000000000000000000000000000000000
400000000000000000000000000000000000000
450000000000000000000000000000000000000
500000000000000000000000000000000000000
560000000000000000000000000000000000000
630000000000000000000000000000000000000
710000000000000000000000000000000000000
800000000000000000000000000000000000000
900000000000000000000000000000000000000
1000000000000000000000000000000000000000
1100000000000000000000000000000000000000
1250000000000000000000000000000000000000
1400000000000000000000000000000000000000
1600000000000000000000000000000000000000
1800000000000000000000000000000000000000
2000000000000000000000000000000000000000
2200000000000000000000000000000000000000
2500000000000000000000000000000000000000
2800000000000000000000000000000000000000
3200000000000000000000000000000000000000
3600000000000000000000000000000000000000
4000000000000000000000000000000000000000
4500000000000000000000000000000000000000
5000000000000000000000000000000000000000
5600000000000000000000000000000000000000
6300000000000000000000000000000000000000
7100000000000000000000000000000000000000
8000000000000000000000000000000000000000
9000000000000000000000000000000000000000
10000000000000000000000000000000000000000
11000000000000000000000000000000000000000
12500000000000000000000000000000000000000
14000000000000000000000000000000000000000
16000000000000000000000000000000000000000
18000000000000000000000000000000000000000
20000000000000000000000000000000000000000
22000000000000000000000000000000000000000
25000000000000000000000000000000000000000
28000000000000000000000000000000000000000
32000000000000000000000000000000000000000
36000000000000000000000000000000000000000
40000000000000000000000000000000000000000
45000000000000000000000000000000000000000
50000000000000000000000000000000000000000
56000000000000000000000000000000000000000
63000000000000000000000000000000000000000
71000000000000000000000000000000000000000
80000000000000000000000000000000000000000
90000000000000000000000000000000000000000
100000000000000000000000000000000000000000
110000000000000000000000000000000000000000
125000000000000000000000000000000000000000
140000000000000000000000000000000000000000
160000000000000000000000000000000000000000
180000000000000000000000000000000000000000
200000000000000000000000000000000000000000
220000000000000000000000000000000000000000
250000000000000000000000000000000000000000
280000000000000000000000000000000000000000
320000000000000000000000000000000000000000
360000000000000000000000000000000000000000
400000000000000000000000000000000000000000
450000000000000000000000000000000000000000
500000000000000000000000000000000000000000
560000000000000000000000000000000000000000
630000000000000000000000000000000000000000
710000000000000000000000000000000000000000
800000000000000000000000000000000000000000
900000000000000000000000000000000000000000
1000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000
1250000000000000000000000000000000000000000
1400000000000000000000000000000000000000000
1600000000000000000000000000000000000000000
1800000000000000000000000000000000000000000
2000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000
2500000000000000000000000000000000000000000
2800000000000000000000000000000000000000000
3200000000000000000000000000000000000000000
3600000000000000000000000000000000000000000
4000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000
5000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000
6300000000000000000000000000000000000000000
7100000000000000000000000000000000000000000
8000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000
14000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000000000000000000
50000000000000000000000000000000000000000000000000000000000000
56000000000000000000000000000000000000000000000000000000000000
63000000000000000000000000000000000000000000000000000000000000
71000000000000000000000000000000000000000000000000000000000000
80000000000000000000000000000000000000000000000000000000000000
90000000000000000000000000000000000000000000000000000000000000
100000000000000000000000000000000000000000000000000000000000000
110000000000000000000000000000000000000000000000000000000000000
125000000000000000000000000000000000000000000000000000000000000
140000000000000000000000000000000000000000000000000000000000000
160000000000000000000000000000000000000000000000000000000000000
180000000000000000000000000000000000000000000000000000000000000
200000000000000000000000000000000000000000000000000000000000000
220000000000000000000000000000000000000000000000000000000000000
250000000000000000000000000000000000000000000000000000000000000
280000000000000000000000000000000000000000000000000000000000000
320000000000000000000000000000000000000000000000000000000000000
360000000000000000000000000000000000000000000000000000000000000
400000000000000000000000000000000000000000000000000000000000000
450000000000000000000000000000000000000000000000000000000000000
500000000000000000000000000000000000000000000000000000000000000
560000000000000000000000000000000000000000000000000000000000000
630000000000000000000000000000000000000000000000000000000000000
710000000000000000000000000000000000000000000000000000000000000
800000000000000000000000000000000000000000000000000000000000000
900000000000000000000000000000000000000000000000000000000000000
1000000000000000000000000000000000000000000000000000000000000000
1100000000000000000000000000000000000000000000000000000000000000
1250000000000000000000000000000000000000000000000000000000000000
1400000000000000000000000000000000000000000000000000000000000000
1600000000000000000000000000000000000000000000000000000000000000
1800000000000000000000000000000000000000000000000000000000000000
2000000000000000000000000000000000000000000000000000000000000000
2200000000000000000000000000000000000000000000000000000000000000
2500000000000000000000000000000000000000000000000000000000000000
2800000000000000000000000000000000000000000000000000000000000000
3200000000000000000000000000000000000000000000000000000000000000
3600000000000000000000000000000000000000000000000000000000000000
4000000000000000000000000000000000000000000000000000000000000000
4500000000000000000000000000000000000000000000000000000000000000
5000000000000000000000000000000000000000000000000000000000000000
5600000000000000000000000000000000000000000000000000000000000000
6300000000000000000000000000000000000000000000000000000000000000
7100000000000000000000000000000000000000000000000000000000000000
8000000000000000000000000000000000000000000000000000000000000000
9000000000000000000000000000000000000000000000000000000000000000
10000000000000000000000000000000000000000000000000000000000000000
11000000000000000000000000000000000000000000000000000000000000000
12500000000000000000000000000000000000000000000000000000000000000
14000000000000000000000000000000000000000000000000000000000000000
16000000000000000000000000000000000000000000000000000000000000000
18000000000000000000000000000000000000000000000000000000000000000
20000000000000000000000000000000000000000000000000000000000000000
22000000000000000000000000000000000000000000000000000000000000000
25000000000000000000000000000000000000000000000000000000000000000
28000000000000000000000000000000000000000000000000000000000000000
32000000000000000000000000000000000000000000000000000000000000000
36000000000000000000000000000000000000000000000000000000000000000
40000000000000000000000000000000000000000000000000000000000000000
45000000000000000000000000000000000000000000000000000000000000000
50


2.5
2.8
2.2
3.2
2.0
3.6
1.8
4.0
4.5
5.0
5.6


1.0
4.5

and even in those States, where no statutory regulation, providing for the right to dower of the wife in the surplus purchase money, is in force (*y*).

32. The inchoate right of dower of a wife is barred by proceedings in foreclosure, in the husband's lifetime, to which she was not a party. A wife, who has joined in a mortgage to bar her dower, is not a necessary party to a bill of foreclosure during her husband's life (*a*), but she may properly be made a party since the coming into force of the 42 Vic. Ont. cap. 22 (*b*).

Prior to this statute, a husband whose wife had joined with him in a mortgage, had power to sell his equity of redemption without his wife joining in the conveyance, she being only dowable of that equity in the event of his dying seised (*c*). If, under the statute just referred to, a wife is entitled to have a portion of the surplus proceeds of a sale, which takes place in the lifetime of the husband, invested for her benefit, and there would seem to be no doubt that she has, it would appear clear that she is a necessary party to a proceeding of that character. If the law give her a right to any part of the fund, then she should have an opportunity to assert it, and to protect herself against loss. In this view, it is hard to understand that she is not a necessary party to a bill of foreclosure in her husband's lifetime, and it is submitted that she should be made a party.

33. In *Martindale* v. *Clarkson* (*d*), Mr. Justice Patterson, referring to the Statute, 42 Vic. Ont. cap. 22, says: "There

(*z*) *Denton* v. *Nanny*, 8 Barb. 618; *Vartie* v. *Underwood*, 18 Barb. 562; *Heth* v. *Cocke*, 1 Rand. 344; see also *Skinner* v. *Ainsworth*, 24 Gr. 148.

(*a*) *Davidson* v. *Bowes*, 6 P. R. 27.

(*b*) *Building and Loan Association* v. *Carswell*, 8 P. R. 73.

(*c*) *Black* v. *Fountain*, 23 Gr. 174; *In re Robertson Robertson* v. *Robertson*, 25 Grant, 276; *Curry* v. *Pringle*, 26 Gr. 67; *Calvert* v. *Black*, 8 P. R. 255; but see *Forrest* v. *Laycock*, 18 Gr. 611.

(*d*) *Martindale* v. *Clarkson*, 6 App. R. 6.

is clearly a new right given, namely, dower out of an equitable estate of which the husband does not die seised. To such dower, the Legislature applies the rule adopted by the Court of Chancery in *Robertson* v. *Robertson*, 25 Grant, 486, estimating it upon the whole value of the land, and not on the surplus over the encumbrance; but it extends the rule to cases not reached by that decision, when it recognizes the right of the wife where the sale takes place in the lifetime of the husband."

34. Where the holder of an equity of redemption has redeemed the lands from a mortgage encumbrance, the lien of which was superior to the dower interest of the widow of the mortgagor, she must contribute her ratable proportion of the amount paid, before she can be endowed of the estate (*e*).

35. The widow must also contribute, where the lands in which she claims dower are subject to a charge created by deed or will, but not if made after marriage or seisin by the husband. This rule was applied in *Clough* v. *Elliot* (*f*), where the husband of the demandant took the lands by devise, charged with a certain provision for the support of his mother; and in *Copp* v. *Horsey* (*g*), where the estate was subject to a charge of a similar character (*h*).

36. It is a question of considerable importance, whether a widow is bound to contribute before claiming dower, where a mortgage encumbrance has been redeemed by a purchaser during the lifetime of her husband. Mr. Washburn, in his valuable work on the Law of Real Property, says: "During the lifetime of the husband, the wife is not bound to contribute towards the redemption of the mortgage, and is

(*e*) Scribner on Dower, vol. i. p. 495.
(*f*) *Clough* v. *Elliot*, 3 Foster, 182.
(*g*) *Copp* v. *Hersey*, 11 Foster, 317.
(*h*) Scribner on Dower, vol. i. p. 508.

not, therefore, to be charged therewith, whoever may redeem. But upon her husband's death, she takes her interest in the estate, if at all, charged with the mortgage, and if any one interested in the estate as heir or purchaser, discharge or redeem the mortgage, he thereby acquires an equitable lien upon the estate, which he may hold against the widow, till she contributes her proportion of the charge, according to the value of her interest" (*i*).

37. Where a testator devised a portion of his lands which were subject to mortgages, to his wife in lieu of dower; and gave the residue of his lands and all his personal estate to his father, subject to the payment by his executors of *all* his just debts, funeral and other expenses, it was held, that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her, freed from the debts of the testator (*j*).

38. It has already been shown that the mortgagee cannot interfere with the endowment of the widow of the mortgagor, until he is entitled to demand a sale of the mortgaged premises; or, in other words, until the mortgage debt, or some part of it, has matured (*k*). Upon the same principle, the heir, or other person, deriving title under the husband, cannot insist upon contribution by the widow, until the principal debt, or some part of it, or the interest accruing thereon, becomes payable; and then only to the extent of her proportion of the amount which has actually become due. If, therefore, no part of the debt, principal or interest, becomes payable during the lifetime of the widow, she will escape entirely all liability for contribution (*l*).

(*i*) 1 Washb. Real Prop. 186, 188; *Eaton* v. *Simonds*, 14 Pick. 98, 107.

(*j*) *Dungey* v. *Dungey*, 24 Gr. 455.

(*k*) *Ante*, par. 8.

(*l*) *Danforth* v. *Smith*, 23 Verm. 247, 259; *Bell* v. *Mayor*, N. Y. 10 Paige, 49, 71; Scribner on Dower, vol. i. p. 511.

39. Where a widow claims dower out of mortgaged lands, she must keep down one-third of the interest of the mortgage debt, by paying, during her life, the interest of one-third part of the aggregate amount of the principal and interest of the mortgage debt (*m*).

40. Where a widow is entitled to dower in an equity of redemption, and the mortgagee does not wish to enforce payment of the principal of his debt, the rule is, that as between her and the heir or other owner of the equity of redemption, she must contribute sufficient to keep down one-third of the interest on the amount due, until the mortgages are required to be paid off, and then she must contribute towards such payment, a sum which will be equal to the then value of an annuity of the amount of one-third of the interest upon the sum unpaid at her husband's death, for the residue of her life (*n*).

41. A right of dower in an equity of redemption existing in favor of the wife, cannot be affected by any subsequent mortgage executed by the husband alone (*o*). It has been held in Ontario, that where a wife joins in a mortgage made by her husband, for the purpose of barring her dower and he subsequently mortgages the equity of redemption, to which deed she is not a party, she is entitled to dower as against the second mortgagee; and the master has power in his subsequent report, in a suit for the sale of the mortgaged premises by the first mortgagee, to report the widow's

(*m*) *Swaine* v. *Perine*, 5 John. Ch. 482, 493; accord. *Evertson* v. *Tappen*, *Ibid.* 497, 513; approved in *Gibson* v. *Crehore*, 5 Pick. 146, 152; *Cass* v. *Martin*, 6 N. H. 25, 26; *Rossiter* v. *Cossit*, 15 N. H. 38, 43; *Clough* v. *Elliott*, 3 Foster, 182, 188; *Woods* v. *Wallace*, 10 Foster, 384, 388; *Hartshorne* v. *Hartshorne*, 1 Green's Ch. 349, 359; *Heney* v. *Low*, 9 Gr. 265.

(*n*) *Bell* v. *The Mayor of New York*, 10 Paige, 49, 71; *House* v. *House*, 10 Paige, 158, 164; *Danforth* v. *Smith*, 23 Verm. 247; Scribner on Dower, vol. i. pp. 513-514.

(*o*) *Post*, cap. 21; *Titus* v. *Neilson*, 5 John. Ch. 452; *Hinchman* v. *Stiles*, 1 Stockt. 361, 454.

claim to dower against the second mortgagee, as a special circumstance (*p*).

42. Payment of the mortgage debt by the husband, or what is tantamount thereto, by some one acting in his behalf, will, of course, satisfy the mortgage, and let his widow in to her dower (*q*). Where a vendee of the husband, by his contract of purchase, is bound to apply the purchase money, or so much of it as may be necessary, to the extinguishment of an outstanding mortgage, a payment made in pursuance of such understanding is regarded as proceeding from the husband, and as a satisfaction of the mortgage in favor of his widow (*r*). So where the equity of redemption of a mortgagor was sold on execution, but before any entry was made under the purchase, the mortgage money was paid by a third person, who had formerly been a tenant under the mortgagor, and the mortgage was thereupon released to the latter, it was held, that his widow was reinstated to her dower in the entire premises (*s*).

43. Payment by the administrator of the husband will be attended with the same result (*t*).

44. In *Walker* v. *Griswold* (*u*), a grantee of land upon receiving his deed, mortgaged it to the grantor to secure a portion of the purchase money. Afterwards he mortgaged it to a third person, his wife joining, and paid off the first

(*p*) *Rowe* v. *Wert*, 7 P. R. 252. See, also, *Hyde* v. *Barton*, 8 P. R. 205.

(*q*) *Brown* v. *Lapham*, 3 Cush, 551.

(*r*) *Bolton* v. *Ballard*, 13 Mass. 227; *Carter* v. *Goodin*, 3 Ohio State, 75.

(*s*) *Parker* v. *Parker*, 17 Mass. 564; *Eaton* v. *Simonds*, 14 Pick. 98; *Wedge* v. *Moore*, 6 Cush. 8; Scribner on Dower, vol. i. pp. 525, 526.

(*t*) *Hildreth* v. *Jones*, 13 Mass. 525; *Snow* v. *Stevens*, 15 Mass. 278, 280; *Jennison* v. *Hapgood*, 14 Pick. 345; *Scott* v. *Hancock*, 13 Mass. 162; *Gibson* v. *Crehore*, 3 Pick. 475, 481; *Rossiter* v. *Cossit*, 15 N. H. 38; *Hastings* v. *Stevens*, 9 Foster, 564; *Young* v. *Tarbell*, 37 Maine, 509; *Bullard* v. *Bowers*, 10 N. H. 500, 502; *Mathewson* v. *Smith*, 1 Angell, 22; accord. *Campbell* v. *Murphy*, 2 Jones, N. C. Eq. 357.

(*u*) *Walker* v. *Griswold*, 6 Pick. 416.

mortgage. Upon his death, it was held, that his widow had a right of dower in the land, subject, however to the second mortgage (*v*).

45. In *Lanfair* v. *Lanfair* (*w*), land was conveyed by Leonard Lanfair to Samuel Lanfair, and at the same time an indenture was executed by the parties, wherein Samuel demised and granted the premises to Leonard for life, for the purpose of securing to him a maintenance in accordance with the object of the principal conveyance. The indenture was held to be a *mortgage*, and not a re-conveyance of the freehold, and the widow of Samuel was allowed dower in the premises after the decease of Leonard, as against a person claiming under the dower (*x*).

46. The holder, by assignment, of notes and a mortgage valid against the wife, surrendered them to the mortgagor, and took new notes and a new mortgage to himself, the wife not joining. It was held that she was dowable, as of an unencumbered estate (*y*). In this case, however, the first mortgage had never been recorded, and the Court said its re-delivery to the mortgagor, under these circumstances, rendered it inoperative as against the second mortgage, the latter having been duly recorded (*z*).

47. In *Gage* v. *Ward*, (*a*) the facts were as follows: Osgood conveyed to Ward, and Ward gave back a mortgage to secure the purchase money. Afterwards, Osgood became indebted to Gage in a sum less than the amount secured by his mortgage. An arrangement was entered into, by which Gage surrendered to Osgood the note of the latter;

(*v*) Scribner on Dower, vol. i. p. 527.
(*w*) *Lanfair* v. *Lanfair*, 18 Pick. 299.
(*x*) Scribner on Dower, vol. i. p. 527.
(*y*) *Hobbs* v. *Harvey*, 16 Maine (4 Shepley), 80.
(*z*) Scribner on Dower, vol. i. p. 527.
(*a*) *Gage* v. *Ward*, 25 Maine, 101.

Ward paid to Osgood in money, the difference between the amount of the note thus given up and the consideration money secured by the mortgage, and Osgood discharged the mortgage. At the same time, Ward executed to Gage a new note and mortgage for the amount of the note surrendered to Osgood; but in this mortgage Mrs. Ward did not join. It was held that she was entitled to dower in the entire estate (*b*).

48. A. and his wife mortgaged lands to B., the vendor, to secure the purchase money. During the coverture, A. conveyed to C., subject to the mortgage, having paid a part of the debt. C. subsequently paid the balance, and the mortgage was satisfied of record. The defendant purchased from a person deriving title from C. It was held, that as the mortgage had been fully satisfied, and no assignment taken, the widow of A. was entitled to dower, and could recover it at law (*c*).

49. It is also held, that the sale of the mortgaged premises, under a judgment taken at *law* on the mortgage debt, will operate as a satisfaction of the debt, and a discharge of the mortgage in favour of the claim of the dowress. In order to bar the dower interest of the wife, the proceeding in which the sale is made, must be founded directly on the mortgage. Thus, where the wife united with her husband in a mortgage, to secure the payment of certain bonds of the husband, and the obligees recovered judgment at law on the bonds, and levied upon and sold the mortgaged premises, it was adjudged, that the wife was entitled to dower, as against the purchaser from the Sheriff (*d*). This

(*b*) Scribner on Dower, vol. i. p. 528. See also, *Smith* v. *Stanley*, 37 Maine 11.

(*c*) *Runyan* v. *Stewart*, 12 Barb. 537; Scribner on Dower, vol. i. p. 528.

(*d*) *Harrison* v. *Eldridge*, 2 Halst. 392.

doctrine was carried still further in the case of *Taylor* v. *Fowler* (*e*). There the wife joined with her husband in a mortgage to secure his debt. The mortgaged premises were subsequently sold under a judgment at the suit of a stranger, and the Court ordered the purchase money, in part, to be applied on the mortgage debt. It was nevertheless held, that the widow's claim of dower was paramount to the title of the purchaser. The same principle was applied in a case where a vendor obtained a judgment at law for the unpaid purchase money of lands, instead of proceeding in equity for the enforcement of his lien, and levied upon and sold the lands under the judgment. The widow of the vendee, was allowed dower as against the purchaser, at such sale (*f*).

50. Upon the same principle, where lands were devised charged with the payment of a legacy, and the legatees, instead of proceeding in equity for an enforcement of their lien upon the lands, elected to proceed by ordinary judgment and execution against the devisee, and levied upon and sold the lands devised, in satisfaction of the judgment, it was held, that the sheriff's deed conveyed only the title existing in the devisee at the date of the judgment, and consequently that his widow was entitled to dower (*g*).

51. It has been held in Ontario, that a widow's right to dower is not affected by a sale under execution against the husband (*h*); but a sale of land for taxes under the Assessment Act, destroys her right (*i*).

(*e*) *Taylor* v. *Fowler*, 8 Ohio, 567.

(*f*) *McArthur* v. *Porter*, 1 Ohio, 99; Scribner on Dower, vol. i. p. 529.

(*g*) *Lloyd* v. *Conover*, 1 Dutch, 47; Scribner on Dower, vol. i., p. 529.

(*h*) *Walker* v. *Powers*, Mich. Term, 4 Vic.; Draper on Dower, 45; Taylor's Eq. Juris. 206.

(*i*) *Tomlinson* v. *Hill*, 5 Gr. 231.

52. Where a mortgagor has executed several mortgages, in one only of which his wife joined, the proper decree on a bill for foreclosure against the widow and devisees of the mortgagor, is one, in the usual form, against them all, with a declaration, that upon payment of the mortgage executed by the widow, she shall, if she chooses, be let into her dower (*j*).

(*j*) *Thibodo* v. *Collar*, 1 Gr. 147.

CHAPTER XX.

DOWER AS AGAINST THE VENDOR'S LIEN FOR UNPAID PURCHASE MONEY.

1. Where a vendor of lands retains the title as a security for the unpaid purchase money, the superiority of his lien over the right of dower is clear, and well established (*a*). As the lien of the vendor attaches to the estate as a trust, notwithstanding a conveyance by him of the legal title (*b*), the same principle prevails; and whenever the lien attaches, and so long as it is preserved, it is paramount to the dower of the wife of the vendee (*c*).

2. The taking of a security for the payment of the purchase money, is not, in every case, a waiver or extinguishment of the lien. Thus, the taking of a bond or note, or even bills of exchange, drawn on and accepted by a third

(*a*) *Birnie* v. *Main*, 9 Ark. 591; *Day* v. *Solomon*, 40 Ga. 32; Scribner on Dower, vol. i. p. 530. But see *Clements* v. *Bostwick*, 38 Ga. 1.

(*b*) *Smith* v. *Hubbard*, 2 Dick. 730; *Dodsley* v, *Varley*, 12 Ad. and El. 632-633.

(*c*) Taylor's Eq. Juris. 435; *Warner* v. *Van Alstyne*, 3 Paige, 513; *Ellicott* v. *Welch*, 2 Bland. 242; *McArthur* v. *Porter*, 1 Ohio, 99; *Fisher* v. *Johnston*, 5 Ind. 492; *Talbott* v. *Armstrong*, 14 Ind. 254; *Naz. Lit. Inst.* v. *Lowe*, 1 B. Mon. 257; *Willett* v. *Beatty*, 12 B. Mon. 172; *McClure* v. *Harris*, 12 B. Mon. 261; *Williams* v. *Woods*, 1 Humph. 408; *Bisland* v. *Hewett*, 11 Smedes and Marsh. 164; *Blair* v. *Thompson*, 11 Gratt. 441; *Wilson* v. *Davisson*, 2 Rob. Va. 384; see also *Meigs* v. *Dimock*, 6 Conn. 458; *Thompson* v. *Cochran*, 7 Hump. 72; Scribner on Dower, vol. i, p. 530; *Thorn* v. *Ingram*, 25 Ark. 52.

person, or by the purchaser and a third person, has been deemed no waiver of the lien, but merely a mode of payment (*d*). But where a vendor takes a mortgage upon the land, or on part of it, or on another estate, it has been held, that his lien is waived (*e*).

3. Where it is agreed, that the purchaser shall pay for the land by satisfying the demands of certain creditors of the vendor, and upon receiving a deed, he executes to them his notes and a mortgage, his wife not joining therein, the wife is dowable of the land (*f*).

4. Upon the sale of the land by an enforcement of the vendor's equitable lien, the purchaser takes it discharged of all claim of dower on the part of the wife of the vendee, and the rule is the same, whether the sale be made in the husband's lifetime, or after his death (*g*). Since the passing of the Statute 42 Vic., Ont., cap. 22, the wife if married after the passing of that statute, would be entitled to dower out of the surplus remaining after satisfaction of the vendor's lien, even though the sale took place in the life-

(*d*) *Hughes* v. *Kearney*, 1 S. and L. 136-138; *Grant* v. *Mills*, 2 V. and B. 306; *Ex parte* Peeke, 1 Mad. 349; *Ex parte* Loring, 2 Rose, 79; *Saunders* v. *Leslie*, 2 B. and B. 514; *Blackburne* v. *Gregson*, 1 Cox, 90; 1 Bro. C. C. 420; *Lynn* v. *Chaters*, 2 Keen, 520; *Teed* v. *Carruthers*, 2 Vand. C. 40; *Colborne* v *Thomas*, 4 Gr. 102; *Rutherford* v. *Rutherford*, 11 Gr. 565; *Flint* v. *Smith*, 8 Gr. 339; Taylor's Eq. Juris. 435; *Mitchell* v. *McGaffey*, 6 Chy. 361; *McDonald* v. *McDonald*, 16 Chy. 678; *Sherman* v. *Parsill*, 18 Chy. 8.

(*e*) *Bond* v. *Kent*, 2 Vern. 281; 1 S. and L. 135; *Capper* v. *Spotteswood*, Taml. 21; *De Gear* v. *Smith*, 11 Gr. 570; *Galt* v. *Bush*, 8 Gr. 360; *Driffill Assigness of Cockerline* v. *McFall*, 41 U. C. R. 313; *Anderson* v. *Trott*, 19 Gr. 619; *Rawlins v. Loundes*, 34 Ind. 639; *James* v. *Fields*, 5 Heisk. (Tenn.) 394.

(*f*) *McClure* v. *Harris*, 12 B. Mon. 261; *Blair* v. *Thompson*, 11 Gratt. 441; *Meigs* v. *Dimock*, 6 Conn. 458. For the circumstances under which a a vendor's lien will be held to attach, and what will be deemed a waiver or extinguishment of the lien, see 1 Lead. Cas. in Equity, 262-281, where the cases on this subject are collected and considered.

(*g*) *Bisland* v. *Hewett*, 11 S. and M. 164; *Williams* v. *Woods*, 1 Humph. 408; *Naz. Lit. Inst.* v. *Lowe*, 1 B. Mon. 257; *Wilson* v. *Davisson*, 2 Rob. Va. 384; *Barnes* v. *Gay*, 7 Clarke (Iowa), 26.

time of her husband (*h*). If the sale be made after his death, she may claim dower of the surplus, if any, remaining after discharging the lien, and it has been held, that she has an equitable right to have the estate of her husband, in the hands of his personal representatives, as well as that which descends to his heirs, first exhausted in due course of administration, or upon the equitable principles of marshalling assets, for the payment of the vendor's claim, before resort is had to her dower right in the land for the recovery of the unpaid purchase money (*i*).

5. Where the vendor defers his proceedings until after the death of the husband, he must make the widow of the vendee a party, otherwise she will not be concluded, and may look to the land for her dower, in proportion to the interest which her husband had therein (*j*). Since the passing of the statute (*k*), she should be made a party, although proceedings are taken in her husband's lifetime, as she is entitled to redeem (*l*). It is necessary also, in order to divest dower, that the proceedings of the vendor be expressly founded on his equitable lien, and for the enforcement thereof. If he proceed at law, and recover judgment against the purchaser, or his personal representatives, and then levy upon, and sell the lands in satisfaction of his judgment, the widow may claim dower in the lands as of an unencumbered estate (*m*).

(*h*) *Martindale* v. *Clarkson*, 6 App. R. 1; 42 Vic. Ont. cap. 22.

(*i*) *Warner* v. *Van Alsytne*, 3 Paige, 513; Accord. *Thompson* v. *Thompson*, 1 Jones (N. C.) Law, 430; *Klutts* v. *Klutts*, 5 Jones (N. C.) Eq. 80; *Caroon* v. *Cooper*, 63 N. C. 386.

(*j*) *Paine* v. *Chapman*, 7 Gr. 179; *Willett* v. *Beatty*, 12 B. Mon. 172; *McArthur* v. *Porter*, 1 Ohio, 99; Scribner on Dower, vol. i. p. 532.

(*k*) 42 Vic. Ont. cap. 22.

(*l*) *Building & Loan Association* v. *Carswell*, 8 P. R. 73.

(*m*) *McArthur* v. *Porter*, 1 Ohio, 99. But see *Flint* v. *Smith*, 8 Gr. 339, in which it was held, that the lien of a vendor for purchase money is not waived by his suing and recovering judgment for the amount, although such recovery is subsequent to another judgment registered against the purchaser.

6. It has been held, that so long as the vendor does not assert his lien, the widow of the vendee may claim dower in the entire estate (*n*). But the widow of a vendee cannot sustain a claim for dower against a vendor, nor those succeeding to his rights, where the husband never had the legal title, and the purchase money has not been paid (*o*).

7. Lands re-conveyed to the vendor in order to extinguish his lien, pass back free from any right of dower, although the wife does not join in the deed of re-conveyance (*p*).

(*n*) *Thompson* v. *Thompson*, 1 Jones (N. C.) Law, 430.

(*o*) *Barnes* v. *Gay*, 7 Clarke (Iowa), 26; Scribner on Dower, vol. i. p. 534; *Morse* v. *Thorsell*, 78 Ill. 600; *Taylor* v. *Kearn*, 68 Ill. 339.

(*p*) *Hugunin* v. *Cochrane*, 51 Ill. 302.

CHAPTER XXI.

DOWER AS AFFECTED BY ACTS OF THE HUSBAND PRIOR TO THE MARRIAGE AND DURING THE COVERTURE.

1. *Alienation before marriage defeats dower.*

2-5. *Rule where the alienation does not become fully operative until after marriage.*

6. *Alienation on the day of marriage.*

7-8. *Void and voidable conveyances.*

9-10. *Conveyances fraudulent as to the wife.*

11-12. *Contracts of sale before marriage.*

13-14. *Charges created before marriage.*

15. *Mortgages executed before marriage.*

16. *Husband's release of equity of redemption of mortgage executed before marriage.*

17-20. *Judgments recovered before marriage.*

21. *Leases for life made before marriage.*

22-24. *Dower as affected by acts of the husband during coverture—at common law dower cannot be defeated by the husband after it has once attached.*

25. *Exceptions to this general rule.*

26-27. *Instances in which the wife is concluded from avoiding the acts of the husband.*

28-30. *Wife may avoid collusive recovery against the husband.*

31. *In Ontario the concurrence of the wife is necessary to divest her dower.*

32. *Husband's release of equity of redemption of mortgage executed during the coverture.*

33. *Execution of contract of sale made prior to the marriage.*

34. *Sale of equity of redemption on execution against the husband.*

35. *Mechanics' lien.*

1. As the wife is only dowable of such estate as the husband was seised or possessed of, at some period, during the coverture, it follows that any effectual alienation by him,

prior to the marriage, places the estate beyond the reach of the wife, and prevents a right of dower from attaching in her behalf (*a*).

2. Instances may occur in which an alienation by the husband, may not take effect until after the title of dower accrued, and yet by force of the doctrine of relation, may avoid that title of dower, by making it in effect, an alienation before marriage, or before the title accrued. A case put by Sheppard, affords an example of this: "If A. bargain and sell his land to B., in fee, and then marry C., and die, and C. is endowed, *and after the deed is enrolled*, in this case the dower of the woman shall be taken away by relation, as was held in Baron Frevil's case, 22 Elizabeth Co. B." (*b*.)

3. The same principle applies to cases of exchange at common law. Until the exchange is executed by entry, the seisin remains in the original owners (*c*). But if an exchange were made before marriage, the execution of the exchange by entry after marriage, would have relation to the time of the exchange made, so as to carry the lands given in exchange, free from the title of dower in the wife (*d*).

4. So, if the husband, prior to his marriage, and without any fraudulent intent, convey his real estate in trust for such use, and such person, as he shall afterwards appoint by deed or will, and in default of, and until such appointment, to the use of himself and his heirs, and should afterwards marry, here, until a proper execution of the power, the wife would be invested with an inchoate right of dower

(*a*) Park on Dower, 24, 231. A widow is barred of dower in land conveyed by her husband before the marriage, although the deed has not been registered. *Richardson* v. *Skolfield*, 45 Maine, 389.

(*b*) Shep. Touch. 226; Gilb. Uses, 97; *Parker* v. *Bleeke*, Cro. Car. 569; Park on Dower, p. 235.

(*c*) Perk. sec. 369.

(*d*) Park on Dower, 235.

in the estate. But if the husband, during the coverture, should execute the power in due and legal form, the title of the appointee, would relate back to the date of the original conveyance, and the dower of the wife would thereby be defeated and avoided (*e*).

5. But where the husband, before his marriage, conveyed certain real estate in trust for the payment of his debts, although the trust was not expressed in the deed, but in a separate paper executed by the grantee contemporaneously with the deed, and the marriage took place before a sale by the trustee, the wife was held dowable of the lands (*f*).

6. Where a conveyance is made on the same day of the marriage, although in point of time, before it is solemnized, it is nevertheless held, that the wife's claim of dower shall take precedence of the conveyance (*g*). The same principle has been extended to a judgment recovered on the day of the marriage, there being no evidence showing which, in fact, was first, the marriage, or the entry of the judgment (*h*).

7. In considering the effect upon the right of dower, of conveyances made before the marriage, it is sometimes necessary to distinguish between alienations which are *voidable* only, and those which are *ipso facto* void; for although the alienation were voidable, yet, if it was not avoided during the coverture, there will, of course, be no right of dower. But if the alienation were wholly void, the seisin, never having been transferred to the alienee,

(*e*) *Link* v. *Edmondson*, 19 Misso. 487; Scribner on Dower, vol. i. p. 557.

(*f*) *Doe* v. *Bernard*, 7 S. and M. 319; *Hawley* v. *James*, 5 Paige, 318; Scribner on Dower, vol. i. p 557.

(*g*) *Stewart* v. *Stewart*, 3 J. J. Marsh, 48. But see *Clarke* v. *Bradlaugh*, L. R. 7 Q. B. D. 151, where the ancient rule as to the divisions of a day is somewhat infringed upon, the Court held, that they could look at the fractions of a day.

(*h*) *Ingram* v. *Morris*, 4 Haning, 111; Scribner on Dower, vol. i. p. 558.

remained in the husband, and became subject to the attachment of dower. This question has sometimes arisen in the English Courts upon the effect of different modes of alienation, by tenants in tail; since, in some cases, an alienation by a tenant in tail is absolutely void, and in other cases is voidable only; and consequently the question, whether the wife is or is not dowable of the estate tail, would depend upon the mode of alienation which was adopted. It is now clearly settled, that if a tenant in tail convey to a man and his heirs, by bargain and sale, lease and release, or covenant to stand seised to uses, a base fee passes, commensurate with the time of the estate tail, though defeasible by the issue in tail, when their right to the possession accrues (*i*). If therefore, a tenant in tail convey in either of these modes before marriage, as the estate of the bargainee, releasee, or covenantee, is good as against the tenant in tail himself, there will be no seisin in him during the coverture. It is admitted, likewise, that when the conveyance operates by transmutation of possession, the tenant in tail may limit the use by way of remainder, even though that remainder cannot take effect until after his death; as where it is previously limited to himself for life remainder to another (*j*). By our statute, the tenant in tail, by proper conveyance, may bar the issue if the conveyance be duly registered within six months after its execution (*k*). It is admitted, also, that although the conveyance does *not* operate by transmutation of possession, the use may be limited by way of remainder, if it may, by possibility, take effect in the lifetime of the tenant in tail, as a bargain and sale, a covenant to stand seised to the use of the *covenantee* for life, remainder to J. S. in fee (*l*).

(*i*) *Machell* v. *Clarke*, 2 Ld. Raym. 778; Salk. 619; 11 Mod. 19; Holt, 615; *Goodright* v. *Mead*, 3 Burr. 1703.

(*j*) *Machell* v. *Clarke*, 2 Ld. Raym. 782; *Goodright* v. *Mead*, 3 Burr. 1703.

(*k*) R. S. O. cap. 100, ss. 3, 30.

(*l*) *Machell* v. *Clarke*, 2 Ld. Raymd. 782.

But it is clearly decided (*m*), that if, on a conveyance by a tenant in tail, without transmutation of possession, the use is so limited that the remainder cannot take effect till after his death (as to himself for life, remainder to another), the remainder is void, and as a covenant by tenant in tail, to stand seised to the use of himself for life, is only good for the sake of remainders, if the remainders are void, the whole is void, and he continues seised of his old estate tail. In this case, therefore, the wife would be dowable, although married after the covenant to stand seised, and there are several cases in the old books where it has been so determined (*n*). Mr. Scribner, adds: "This point, however, has rarely occurred even in the English practice, owing to the almost universal adoption in that country, of the mode, of making settlements by lease and release to uses" (*o*).

8. There are cases, also, in which the wife is deprived of her dower, although the conveyance by the husband were wrongful and not good in law. Thus, if a man seised in tail general, *discontinues* in fee, and takes back an estate in fee simple, and afterwards takes a wife, and has issue and dies; the title of dower which attached upon the seisin of the fee, is defeated by the remitter of the issue, to the estate tail (*p*), for the seisin of the fee being cast upon the issue, immediately upon the death of the husband, the issue is consequently restored to the estate tail, and thus the seisin of the fee, with all its incidents, is defeated, or, as Lord Coke emphatically expresses it, is "vanished by the remitter," to the same extent as if the issue had recovered by formedon. So if lands are given to husband and wife

(*m*) *Machell* v. *Clarke*, 2 Ld. Raymd. 782.

(*n*) *Heigham* v. *Bedenfield*, Noy 46; *Blitheman* v. *Blitheman*, Cro. Eliz. 280; S. C. 1 And. 291; Park on Dower, 232-34 and note.

(*o*) Scribner on Dower, vol. i. p. 559.

(*p*) Fitz. N. B. 149 (F.). And see 1 Leon. 37 in *Partridge* v. *Partridge*; Co. Litt. 31 b; Gilb. Uses, 393; 1 Leon. 66; Park on Dower. 143.

in special tail, and they discontinue by fine *sur grant and render* at the common law, and retake an estate in tail general, and have issue, and the wife dies, and the husband marries a second wife and dies, in this case also the title of dower of the second wife is defeated by the remitter (*q*). But, it is said, in such a case if a stranger abate upon the death of the husband, the issue may have his election as to which estate he will claim; and if he proceed for the estate of which the wife is dowable, he shall not be remitted, and the wife shall have her dower (*r*).

9. It is said by Lord Chief Baron Gilbert, that a conveyance in trust, privately made by the husband, on the eve of marriage, for the purpose of barring dower, would be deemed fraudulent, as being designed to deprive the wife of the provision given her by the common law (*s*). For a similar reason, Mr. Justice Wilmot was of opinion, in *Drury* v. *Drury* (*t*), that an ante-nuptial jointure made without the wife's privity, would be held fraudulent and void. On the other hand, Lord Hardwicke treats it as clear, "that if a man before marriage, conveys his estate privately, without the knowledge of his wife, to trustees in trust for himself and his heirs in fee, that will prevent dower" (*u*). And in *Banks* v. *Sutton* (*v*), it was said, that if a trust were created for the express purpose of barring dower, this would be an additional reason for allowing it to have that effect (*w*). In accordance with these views, Mr. Park states it to be the

(*q*) Bro. Dow. pl. 14.

(*r*) Hughes' Writs, 152; Park on Dower, 144.

(*s*) Lex Pret. 267.

(*t*) *Drury* v. *Drury*, 3 Bro. Parl. Ca. octavo ed. p. 492; 2 Eden, 60; Wilmot's Opinions, 177; 4 Bro. C. C. 506 n.

(*u*) *Swannock* v. *Lyford*, Co. Litt. 208 a, n. 1; Ambl. 6; S. C., under the name of *Hill* v. *Adams*, 2 Atk. 208; Park on Dower, 375, 382; 1 Washb. Real Prop. 161.

(*v*) *Banks* v. *Sutton*, 2 P. Wm's. 700.

(*w*) See also *Bottomley* v. *Fairfax*, Prec. Ch. 336, and Show. Parl. Cas. 71; 1 Roper H. and W. by Jacob, 354 note.

rule, that an alienation or settlement by the husband, although made immediately before the marriage, and with the express intention of excluding the wife from her dower, would not be impeached as a fraud upon the maritial rights of the wife, as in the case of a woman making a settlement of her estates, unknown to her intended husband, on the eve of marriage (*x*). And in *ex parte Bell* (*y*), it was held, that a voluntary settlement made by the husband, though afterwards set aside as fraudulent as against creditors, prevented his wife's right of dower from arising (*z*). It has been remarked, "that the reasons for which it has been held, that a conveyance privately made by a woman during the treaty of marriage is *prima facie* fraudulent and void, do not apply with equal force to a conveyance made, under similar circumstances, by the intended husband. Since estates are now most commonly conveyed or settled, so as to prevent dower from attaching, it is not necessarily to be presumed, that the marriage was contracted by the woman in the expectation of becoming entitled to that provision, unless it appears, that representations to that effect were made to her" (*a*).

10. This reasoning can hardly apply to Ontario, where the formalities of the English practice, with regard to conveyancing prevail but to a limited extent, and where settlements for the purpose of avoiding dower are seldom attempted to be made. In the United States, although the decisions upon the subject are not entirely uniform, the weight of authority appears to be with the proposition, that a conveyance made by the husband, on the eve of marriage,

(*x*) Park on Dower, 236; Scribner on Dower, vol. i. p. 560; Atherly on Marriage, Sett. 323, 329. See also, pp. 375, 385 of Park on Dower, where the opinion of Lord Hardwicke in *Swannock* v. *Lyford* is given.

(*y*) *Ex parte* Bell, 1 Glyn. and J. 282.

(*z*) *Post.* cap. 22.

(*a*) 1 Roper, H. and W. by Jacob, 354 note.

for the purpose of defrauding his intended wife of her dower estate, will, as against the grantee or a purchaser from him, with notice, be treated as void as to her, and she may maintain her claim to endowment, precisely as if no conveyance had been made (*b*).

11. The general doctrine is, that the wife's dower is liable to be defeated by every subsisting claim or encumbrance, in law or equity, existing before the inception of her right, and which would have defeated the husband's seisin (*c*). Upon this principle, if a man make a contract for the sale of his land, and afterwards, and before conveyance made, marry, he is regarded in equity as a trustee for the purchaser, and if the conveyance be made during the coverture, in execution of the contract, the purchaser takes the estate discharged of dower (*d*). The rule is the same if the husband die without having conveyed the land, and a specific performance of the contract is enforced against his heirs (*e*).

12. It makes no difference that the sale was by parol, or that the vendor was an infant at the time of entering into the contract, provided it be confirmed by a conveyance duly executed during the coverture (*f*). In *Gaines* v. *Gaines* (*g*), it was decided, that the principle excluding dower in these cases, applies also, where a *bona fide gift* of lands is made before coverture, to a child by a former marriage,

(*b*) *Cranson* v. *Cranson*, 4 Mich. 230; *Swaine* v. *Perine*, 5 John. Ch. 482; *Petty* v. *Petty*, 4 B. Mon. 215, 217; *Littleton* v. *Littleton*, 1 Dev. and Batt. 327 And see *Rowland* v. *Rowland*, 2 Sneed, 543; contra, *Baker* v. *Chase*, 6 Hill, 482. See also, *Whithed* v. *Mallory*, 4 Cush. 138; Scribner on Dow. vol. i. p. 561.

(*c*) 4 Kent. 50.

(*d*) *Lloyd* v. *Lloyd*, 4 Dru. and War, 370; Park on Dower, 106; 1 Roper, H. and W. by Jacob, 258.

(*e*) *Ibid.*; *Adkins* v. *Holmes*, 2 Carter, 197, 199; *Kintner* v. *McRae*, *Ibid.* 453; Scribner on Dower, vol. i. p. 564.

(*f*) *Oldham* v. *Sale*, 1 B. Mon. 76.

(*g*) *Gaines* v. *Gaines*, 9 B. Mon. 295. See also, *Firestone* v. *Firestone*, 2 Ohio St. 415.

who takes possession and makes improvements, claiming the lands as his own, and receives a conveyance from the donor after the second marriage of the latter. But in the case of a sale of lands before marriage, if the vendee neglect to make payment, and the vendor during his lifetime, or his representatives, after his death, elect to rescind the contract, instead of enforcing specific performance, the beneficial interest of the vendor in the lands will revest in him in the one case, and in his heirs in the other, and his wife consequently be entitled to dower (*h*).

13. It is obvious, that as the husband may by alienating his lands at any time before marriage, altogether intercept the title of dower, and prevent it from ever arising, he may, under the same circumstances, create derivative interests or charges, which shall be good against the wife when her title to be endowed is complete by his death. Thus, his leases (*i*), his statutes or recognizances (*j*) are all binding on the wife, and she will hold the lands assigned her in dower, subject to them; and, although the husband was tenant in tail, and made a lease unauthorized by the statute, yet it will be binding upon the wife (*k*).

14. It may, however, be observed as incidental to this point, that if the husband, previous to marriage, acknowledge a statute or recognizance, and afterwards die, leaving his heir within age, and *part* of the land is assigned to the wife for her dower, it shall not be extended during the nonage of the heir; for all the land is liable *pro rata;* and as the land of the heir within age cannot be charged, so,

(*h*) *Kintner* v. *McRae*, 2 Carter (Ind.) 453; *Dean* v. *Mitchell*, 4 J. J. Marsh, 451; Scribner on Dower, vol. i. p. 567.

(*i*) Eng. Lutw. 230; Winch. 80; *Wheatley* v. *Best*, Cro. Eliz. 564; Co. Litt. 32 a; *Stoughton* v. *Leigh*, 1 Taunt. 410.

(*j*) Jenk. Cent. p. 36.

(*k*) 2 Prest. Conv. 132; Park on Dower, 162; Earl of Bedford's Case, 7 Co. 67, 9 a; Scribner on Dower, vol. i. p. 567.

neither shall the land of the dowress, for otherwise the whole burden would fall upon her. But if *all* the land should be assigned her for her dower, it would be liable to be extended during the minority of the heir (*l*). And it seems, even in the former case, that the non-age may be relieved against in equity (*m*).

15. Where the husband has mortgaged his lands at a date anterior to the marriage, his wife is dowable only of the equity of redemption. This rule is sufficiently discussed and explained in a former chapter (*n*). Where a mortgage is made to secure purchase money, and a subsequent mortgage is made to secure money lent to the mortgagor, the wife joining, she is dowable out of the whole amount realized by the sale, after deducting the amount of the mortgage given to secure unpaid purchase money (*o*).

16. It has been held in the United States, that where the husband purchased land prior to his marriage, and received a deed therefor, and at the same time gave back a mortgage to secure the payment of a portion of the purchase money, and after his marriage re-conveyed the lands to the mortgagee in satisfaction of the purchase money yet remaining unpaid, his wife who survived him, not joining in the conveyance, was entitled to be endowed of the premises (*p*), the mortgagor being regarded as the holder of the legal estate, with its incidents and the interest of the mortgagee as a lien or pledge only for his debt (*q*), and it is submitted that the same rule exists in Ontario.

(*l*) Jenk. Cent. pp. 36-37.

(*m*) *Middleton* v. *Shelly*, 1 Lev. 197-198; Park on Dower, 236-237; Scrib. on Dower, vol. i. p. 568.

(*n*) Cap. 19.

(*o*) *Re Hopkins Barnes* v. *Hopkins*, 8 P. R. p. 160.

(*p*) *Lund* v. *Woods*, 11 Met. 566; *Van Duyne* v. *Thayre*, 19 Wend. 162; *Wheeler* v. *Morris*, 2 Bosw. 524, 531; *Mills* v. *Van Voorhis*, 23 Barb. 125; S. C. 20 N. Y. (6 Smith), 412; Accord 1 Washb. on Real Prop. p. 181; Scribner on Dower, vol. i. pp. 569, 572.

(*q*) *Forrest* v. *Laycock*, 18 Gr. 611.

17. It has been held in the United States, that where a judgment lien is acquired against the husband's lands, prior to his marriage, and the land is sold subsequently thereto in satisfaction of the judgment debt, the right of dower of his wife in the land is defeated (*r*). And in one case it was decided, that the arrest of the husband on a *ca sa*, issued before the marriage, did not prevent the application of this rule (*s*). Nor is the wife permitted to avail herself of such irregularities or informalities in the proceedings connected with the sale, as do not render it void (*t*). Where lands are taken in attachment before the marriage, but there is no judgment until after the marriage, a subsequent sale under the judgment, and in virtue of the proceedings in attachment, is governed by the same rule, and the wife of the judgment debtor has no dower (*u*). But where the judgment is entered on the same day of the marriage, and no previous lien was acquired, the dower right of the wife is protected, and the judgment is made subordinate thereto (*v*).

18. And it is settled, that until a sale is actually made under the judgment, the widow may have dower assigned her, subject thereto (*w*).

19. If the widow should be compelled to pay off prior judgments to save her dower, she is entitled to stand in the

(*r*) *Robbins* v. *Robbins*, 8 Blackf. 174; *Whitehead* v. *Cummins*, 2 Carter (Ind.) 58; *Queen Ann's Co.* v. *Pratt*, 10 Md. 5; *Sanford* v. *McLean*, 3 Paige, 117; *Brown* v. *Williams*, 31 Maine, 403. See also, *McMahan* v. *Kimball*, 3 Blackf. 1; *Bisland* v. *Hewett*, 11 S. and M. 164; *Wilson* v. *Davisson*, 2 Rob. Va. 398.

(*s*) *Queen Ann's Co.* v. *Pratt*, 10 Md. 5.

(*t*) *Ibid.*

(*u*) *Brown* v. *Williams*, 31 Maine, 403.

(*v*) *Ingram* v. *Morris*, 4 Harring 111. The same principle is applied to conveyances, *Stewart* v. *Stewart*, 3 J. J. Marsh, 48. See *ante* par. 6; Scrib. on Dower, vol. i. p. 573.

(*w*) *Robbins* v. *Robbins*, 8 Blackf. 174; *Green* v. *Causey*, 10 Geo. 435.

place of the judgment creditors, with the right to collect the amount back again out of the estate which her husband had, at the time of the marriage, exclusive of her dower therein (*x*).

20. Where a sale is made after the death of the husband, and it produces more than the amount required to satisfy the judgment, the widow is entitled to dower in the surplus (*y*).

21. If the husband, before the marriage, make a lease of his lands for the life of the lessee, or of some third person, the wife will not be dowable unless the life estate terminate during the coverture (*z*). If the lease be for the husband's own life, it follows that, as it cannot end until the coverture itself ceases, no right of dower will arise in any event (*a*).

22. After a title of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge (*b*). It is a right attaching by imputation of law, which, although it may possibly never become absolute (as if the wife die in the lifetime of the husband), yet, from the moment that the facts of marriage and seisin concur, is so fixed on the land as to become a title paramount to that of any person claiming under the husband by subsequent act (*c*). The alienation of the husband, therefore, whether voluntary, as by deed or will; or involuntary, as by bankruptcy, or otherwise, will confer no title on the alienee as against the wife in respect of her

(*x*) *Sanford* v. *McLean*, 3 Paige, 117.

(*y*) *Robbins* v. *Robbins*, 8 Blackf. 174; *Sandford* v. *McLean*, 3 Paige. 117; *Whitehead* v. *Cummins*, 2 Carter (Ind.), 58; Scribner on Dower, vol. i. p. 574; *Re* Robertson.; 24 Gr. 442; S. C. 25, Gr. 276.

(*z*) See caps. 8, 11, 15.

(*a*) Cap. 15, pars. 1-5.

(*b*) *Benson* v. *Scott*, 3 Lev. 385-386.

(*c*) Co. Litt. 32 a; Fitzh. N. B. 147 (E).

dower, but she will be entitled to recover against such alienee, (except as to damages), in the same manner as she would have recovered against the heir of the husband, had the latter died seised (*d*).

23. It is a necessary consequence of this rule, that all charges or derivative interests created by the husband, subsequent to the attachment of the wife's title, are voidable, *quoad* that part of the land which is recovered in dower, as if "tenant in fee simple take a wife, and then make a lease for years, and dieth, the wife is endowed; in this case, she shall avoid the lease, but after her decease, the lease shall be in force again" (*e*). So, if the husband, after marriage, acknowledge a statute or recognizance, the wife shall, nevertheless, hold her dower discharged from its operation (*f*); and as the heir can be in no better situation than the husband, it follows that all charges made by him in the interval between the death of the husband and the assignment of dower, will be void as against the dowress, and in no degree affect her interest (*g*).

24. As the husband cannot defeat the wife's title of dower by any alienation of the land by himself alone, so neither can he bind her by any modification of the nature of the seisin, nor by any merger or extinguishment produced by his own act without her concurrence. All such acts on his part, will take effect *sub modo*, and be liable to be avoided as to the estate of the dowress (*h*). The following examples taken from the old books, though of but little practical value at this day, will serve to illustrate this

(*d*) Park on Dower, 237-238.

(*e*) Shep. Touch. 273-274; *Stoughton* v. *Leigh*, 1 Taunt. 410; Co. Litt. 46 a.

(*f*) Jenk. Cent. p. 36.

(*g*) Bro. Seisin, pl. 18; Co. Litt. 42 a; Park on Dower, 239.

(*h*) Co. Litt. 32 a.

principle. If a person having a seignory, marry, and afterwards purchase the tenancy in fee; or if the owner of a rent charge, purchase the land out of which the rent is issuing, the widow shall have her election to be endowed in the one case, either out of the seignory or the tenancy, and in the other, either of the rent or the land (*i*). The land might, indeed, be so conveyed, as not to confer a seisin on the husband on which a title of dower could attach, and, in that case, there could of course, be no election; but it is clear, that the widow might demand her dower of the seignory, rent, etc., notwithstanding its extinguishment as to other purposes. As in the case put by Perkins, "If the grantee of a rent charge in fee, take a wife, and the grantor leases the land out of which the rent is issuing, to a stranger for life, and the grantee of the rent purchases the reversion of the land, and the tenant for life attorns, and the grantee of the rent dies, leaving the tenant for life, his (the grantees) wife shall be endowed of the rent, but not of the land; because the freehold and inheritance were not joined in her husband, *simul et semel*, during the coverture (*j*). So, if the owner of a rent charge, after marriage, release the rent to the terre-tenant, the widow shall, notwithstanding, be endowed of the rent (*k*). In this case the remedy of the widow is against the terre-tenant, and not against the heir of the husband, for the heir has nothing for which the writ can be brought, and though the tenant has not the rent, yet he has the land out of which the rent issues, and the tenant of the land pays it (*l*).

25. Although, as a general rule, the husband cannot, by his individual act, defeat the dower interest of the wife

(*i*) Perk. sec. 320.

(*j*) Perk. sec. 340.

(*k*) Lord Abergavenny's case, 6 Co. 79 a; Lillingston's case, 7 Co. 128, 38 b; Perk. sec. 322.

(*l*) Jenk. Cent. 1 Ca. 6; Perk. sec. 429; Park on Dower, 239-240; Scribner on Dower, vol. i, p. 577-578.

after it has once *attached*, yet, it sometimes happens, owing to the nature of his estate, that it is exempt for a time from the incident of dower. While in this condition, it is in his power to dispose of it at pleasure, and thereby intercept the title of dower. Thus, if the husband have an estate in lands, which, by reason of any precedent or interposed estate of freehold existing in another person, is not subject to an incipient title of dower, an alienation of that estate, will prevent the wife from ever becoming dowable thereof, although the particular estate afterwards determine, or is consolidated in the lifetime of the husband (*m*). In this case, although the husband is seised during the coverture, the estate is not of such a quality during his seisin, as a title of dower will attach upon; and it was not until after his alienation that it acquired that quality (*n*). In the United States, this principle has been applied to trust estates. As where the husband, as *cestui que trust*, was entitled to a remainder in fee, expectant on the life of a third person, and the husband aliened the remainder before the determination of the life estate, it was held that his widow was not entitled to dower (*o*).

26. There are cases in which, by the rules of the common law, the wife will conclude herself from avoiding charges created by the husband, after the title of dower has attached. Thus, as she can have no damages, unless the husband *die seised*, if she pray damages upon her recovery in dower, she is regarded as having elected to be endowed of the estate of which the husband was, in fact, seised at the time of his death; and if, at the time of the charge created, he had a different estate in the land, that charge

(*m*) The same principle applies to estates held in joint tenancy; see cap. 12, pars. 1-6.

(*n*) Park on Dower, 282; *ante*, cap. 8, pars. 5, 8, and cap. 11, pars. 1-6.

(*o*) *Shoemaker* v. *Walker*, 2 S. and R. 554; Scribner on Dower, vol. i, p. 578-579.

will be sustained against her, for, of that estate, the husband did not die seised; and if she had elected to take dower of that estate, she could not have prayed damages. As when A., seised in fee, married, and granted a rent charge, and afterwards made a feoffment in fee, and took back an estate tail and died, and the wife recovered dower against the issue in tail, by reddition, and making a surmise that her husband died seised, prayed a writ of enquiry, to assess damages, which was granted to her; "in this case," remarks Lord Coke, "she holds the land charged with the rent charge, for by her prayer she accepteth herself dowable of the second estate, for of the first estate whereof she was dowable, her husband died not seised, and so she hath concluded herself; wherefore, if the rent charge be more to her detriment than the damages beneficial to her, it is good for her, in that case, to make no such prayer" (*p*).

27. So, according to the common law, if the widow accepts dower of the heir, *against common right*, she may be compelled to hold, subject to the charges of the husband (*q*), at least, as to so much of the land charged, whereof she is endowed against common right. As "if a man be seised of three manors in fee, and take a wife, and grant a rent charge issuing out of all the three manors, and die; and the wife takes one manor by assignment of the heir, for her dower, in allowance of all the three manors; now, two parts of this manor remain charged with the distress of the grantee, although the grant of the rent charge was made during the marriage; and the reason is, because as to the two parts, she has taken her dower against common right; for, according to the common right, she ought to have the third part of every manor" (*r*). This doctrine,

(*p*) Co. Litt. 33 a.
(*q*) Co. Litt. 32 b and note 2.
(*r*) Perk. sec. 330

however, as a general rule, appears to extend only to such assignments as are made without suit, for it is added, "but in the same case, if she had *recovered* her dower, and such assignment had been made to her by the sheriff, she should have holden the same discharged (*s*). But if a man be seised of three advowsons, of three several churches, and take a wife, and grant to a stranger that he shall present to the next avoidance of such one of the three churches as shall first become void, and the grantor dies, and his wife brings a writ of dower against the heir, before any church becomes void, and recovers; and the sheriff assigns to her the advowson of one church for her dower, in allowance of the other churches; which advowson assigned to her, is the first which becomes void after the grant made by the husband, and the same avoidance happens after the assignment of the dower, it seems to some, in this case, that the wife shall not have this avoidance, but the grantee shall have the same; because she is endowed against common right; for of common right, she ought to have but the third avoidance of each advowson of each church (*t*). And although the assignment be made by the sheriff, it shall not prejudice or oust the grantee of his right, because he is a stranger to the assignment; and, also, he cannot otherwise take advantage of his grant but only at this avoidance; *tamen quaere* (*u*). But, otherwise, is it in the case of a grant of a rent charge out of three manors; for when the assignment is made by the sheriff of one entire manor, in allowance of all the manors, the

(*s*) Perk. sec. 330; 1 Roper H. and W. 393.

(*t*) Perk. sec. 331.

(*u*) Notwithstanding this *quære*, the case cited by Lord Hale Butl. Co. Litt. 32 b. n. 2, and those in Com. Dig. *Pleader*, 2 Y. 19, Viner's Abr. *Dower*, X. Y. Z., and Bacon's Abr. Dower, D. 2, seem to render it clear that the wife would lose the presentation, because she is not compellable to take such assignment from the sheriff; and if she assent to it, she shall be bound by her own act, as where the assignment is made by the heir. Greening's note, Perk. sec. 332.

grantee may distrain for his whole rent in the other two manors, and in every part of them; and it shall not be made prejudical to the heir this way than the other way" (*v*).

28. A recovery by judgment against the husband in a real action, defeats the title of dower of the wife. This proposition must, however, be understood to be confined to recoveries by *actual* title, and not to extend to feigned or common recoveries. The Statute of Westminster, 2 cap. 4, recites, that by the common law, where a husband being impleaded, had given up the land demanded to his adversary, *de plano*, namely, by reddition, the justices, upon a writ of dower brought by the wife, would adjudge her her dower; but that where the land was lost by *default*, there was a difference of opinion; some justices holding that the widow was, and others that she was not entitled to dower. To remove this doubt, it was declared by that statute, that in both cases, the woman demanding her dower, should be heard; and if it were alleged against her, that her husband lost the land by judgment, so that she ought not to have any dower, and upon enquiry, it was found to be a judgment by default, then, that the tenant should further show that he had, and hath, right in the land according to the writ which he had brought against the husband; and if he proved the husband had no right, nor anyone but himself, then that the judgment should be *quod tenens recedat quietus*, and *quod uxor nihil capiet de dote*; but if he could not show that, then that the woman should have judgment *quod recuperet dotem suam* (*w*).

29. It appears also, according to the technical rule of the common law, that although the husband had no right to

(*v*) Perk. sec. 332. As to the effect upon the right of dower, of alienation by the husband by force of particular customs, see Park on Dower, 244-6.

(*w*) Park on Dower, 145, 149; 2 Inst. 349 and *seq.*; Perk. ss. 376-380.

the lands, yet if a degree were past, so that he acquired a *jus possessionis*, and the action brought against him was only a possessory action, or in other respects, was not such as the land could be recovered upon, unless by laches of pleading in the husband, the wife may falsify this recovery (*x*).

30. The rule of the common law protecting the wife from the effects of the collusive recoveries against the husband, and from the consequences of his laches in defending against unfounded or improper actions, is generally recognized and enforced in the Courts of the United States (*y*), and the common law is also in force here in this respect (*z*).

31. In Ontario, the concurrence of the wife is necessary to divest her of her dower (*a*), except in cases of equitable estates, which the husband may convey at any time before his death, discharged from the encumbrance of dower (*b*); but even in the case of equitable estates, the concurrence of the wife is necessary to divest her of her dower since the passing of the statute (*c*).

32. The husband cannot defeat the wife's dower in an equity of redemption, where she joined with him in a mortgage during the coverture, unless she is a party to the conveyance (*d*); but if the wife joins in the execution of the encumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the court made in a cause

(*x*) Park on Dower, 149, 152; Perk. ss. 381-385; Fitzh. N. B. 201-202; Greening's Note, Perk. sec. 384; Scribner on Dower, vol. i. pp. 581, 586.

(*y*) 4 Kent, 48; 1 Hilliard's Real Prop. 2nd ed. 147.

(*z*) *McDonald* v. *Boice*, 12 Gr. 48; *Lovell* v. *Gibson*, 19 Gr. 280.

(*a*) R. S. O. cap. 55, sec. 2; R. S. O. cap. 126, ss. 2-6; *Forrest* v. *Laycock*, 18 Gr. 611.

(*b*) R. S. O. cap. 126, sec. 1; Leith and Smith's Real Prop. 146.

(*c*) 42 Vic. O. cap. 22.

(*d*) *Forrest* v. *Laycock*, 18 Gr. 611; *Swaine* v. *Perine*, 5 John Ch. 482, 490; *Harrow* v. *Johnson*, 3 Met. (Ky.) R. 578.

instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser (*e*).

33. It is shown in a previous chapter, that when the husband has sold the lands before the date of his marriage, he may convey them after the marriage, in execution of the contract, free from dower (*f*).

34. Where the husband and wife join in the execution of a mortgage of the husband's lands, and the equity of redemption is afterwards levied on and sold under execution against the husband, the right of the wife to be endowed, is not thereby impaired, but may be asserted against the lands in the hands of the purchaser (*g*). Otherwise the husband, by creating an indebtedness against himself, might do indirectly, that which the law does not permit him to do directly.

35. It sometimes becomes a question, whether the lien of mechanics, acquired under the statute, for labour performed and materials furnished in erecting buildings on the land of the husband during the coverture, is superior, or subordinate to the right of dower. Although there is some diversity of opinion upon the subject, the weight of opinion is with the dowress (*h*). "Hers is the elder lien," says the Court, in *Bishop* v. *Boyle*; "the mechanic bestows his labour with a knowledge of her prior right in the real estate, and he knows the house he is building, as brick is added to brick and nail after nail is driven, becomes real estate. He can protect himself by security or not venture. She is passive and can do nothing."

(*e*) *Moore* v. *Shinners*, 1 Chy. Chamb. 59; *Simpson* v. *Simpson*, 1 Chy. Chamb. 265.

(*f*) Cap. 17, pars. 4-10.

(*g*) *Walker* v. *Powers*, Mich. Term. 4 Vic.; Draper on Dower, 45; *Harrison* v. *Eldridge*, 2 Halst. 392; *Barker* v. *Parker*, 17 Mass. 564; 4 Kent, 45; Scribner on Dower, vol. i. p. 603.

(*h*) *Pifer* v. *Ward*, 8 Blackf. 252; *Bishop* v. *Boyle*, 9 Ind. 169; *Shaeffer* v. *Weed*, 3 Gilm. 511; *Gove* v. *Cather*, 23 Ill. 634; *Van Vronker* v. *Eastman*, 7 Met. 157; *Iaege* v. *Bossieux*, 15 Gratt, 83. See also *Choteau* v. *Thompson*, 2 Ohio St. 114; Scribner on Dower, vol. i. p. 603; *Contra Nazareth Inst.* v. *Lowe*, 1 B. Mon. 257.

CHAPTER XXII.

DOWER WHERE THE WIFE HAS JOINED IN A CONVEYANCE FRAUDULENT AS TO CREDITORS.

1. It is a question upon which the cases are not entirely agreed, whether the wife, who has joined with her husband in a conveyance fraudulent as to creditors, and the creditors have afterwards avoided such conveyance, is entitled to dower.

2. In the case of the *Bank of U. C.* v. *Thomas* (*a*), Draper, C. J., says:—"There are two appeals in this cause, one on the part of the plaintiffs, the other on the part of the defendant Beatty. As to the first, the plaintiffs appeal because the decree avoids the deeds made by the defendant Thomas to the defendant Stephens, only so far as they pass the estate and interest of Thomas, whereas they insist that the deeds should have been declared wholly void. The object of their contention is simply this; that as the wife of the defendant Thomas joined in these deeds to Stephens, for

(*a*) *Bank of U. C.* v. *Thomas*, 2 Er. and App. 502; referred to in *Scott* v. *Hunter*, 14 Gr. 378, and in *Miller* v. *Wiley*, 16 U. C. C. P. 534; *Richardson* v. *Wyman*, 62 Me. 280; *Ridgway* v. *Masting*, 23 Ohio St. 294; *Lockett* v. *James*, 8 Bush. (Ky.) 28; *Lowrey* v. *Fisher*, 2 Bush. (Ky.) 70; *Dugan* v. *Massey*, 6 Bush. (Ky.) 31. See also *Robinson* v. *Bates*, 3 Met. 40; *Winship* v. *Lamberton*, unreported, but referred to in *Woodworth* v. *Paige*, 5 Ohio St. 70; *Miller* v. *Wilson*, 15 Ohio, 108, 117; *Summers* v. *Babb*, 13 Ill. 483. See also *Stribling* v. *Ross*, 16 Ill. 122; 1 Washb. Real. Prop. 202; Contra, *The Manhattan Co.* v. *Evertson*, 6 Paige, 457; *Den* v. *Johnson*, 3 Harr. 87; *Maloney* v. *Horan*, 53 Barb. N. Y.). 29.

the purpose of releasing her dower to him, and those who might thereafter acquire the estate under him, her release (though she is no party to this suit) should in effect be declared to enure to the benefit of the plaintiffs, as creditors of her husband, inasmuch as his conveyance of the lands, has, for the benefit of the plaintiffs, been adjudged fraudulent and void. We do not agree in this proposition. The effect of the decree is not wholly to avoid these deeds, for as between grantor and grantee it has not been denied that they are effectual to transfer the estate. All that has been urged against them, and all that the Court have decided is, that they were made with the intent and design to defeat and delay the plaintiffs and other creditors of Thomas, and were therefore, as against such creditors, fraudulent and void. To this decision the defendants have submitted. But the plaintiffs desire to carry it further, and under it, to obtain a right against the inchoate interest of Thomas' wife to dower in the lands conveyed, which interest, their judgment did not reach or bind, nor did their execution attach upon it. What effect may properly follow this release of dower, and to whose benefit it may enure, we are not now called upon to decide. But we have no doubt, that the plaintiffs having had originally no claim against the wife or her interest in these lands, have not acquired any by the husband's conveyances of his estate therein, and by the decree, that such conveyances have, as against creditors, been declared fraudulent and void."

3. It would seem to follow from this decision, that where a conveyance is made by the husband (his wife joining to bar dower) to a purchaser for valuable consideration, but for the purpose of defrauding creditors of the husband, and a decree is made setting aside such conveyance at the instance of the creditors, and directing a sale of the land, the purchaser will be entitled to the proceeds after payment of the creditors claims, as against both the grantor and his

wife. Suppose, for instance, the creditors' claims amounted to $1,000. That the purchaser bought for the purpose of defrauding creditors, and paid $5,000 for the land, the vendor's wife joining in the conveyance. The decree in a fraudulent conveyance suit, declares the deed void only as against the grantor's creditors, and orders a sale. Out of the proceeds the creditors are paid $1,000. Surely, the grantee is entitled to the balance against both the grantor and his wife. The grantee after conveyance, surely owns the land subject to the rights of the creditors. Why should the wife, any more than her husband, be entitled to share in the surplus? But it is otherwise, where the conveyance is without consideration (*b*).

4. In the case of *Robinson* v. *Bates*, *supra*, the wife joined her husband in a conveyance of land, relinquishing to the grantee her right of dower. A creditor of the husband, afterwards, and during the lifetime of the husband, levied an execution on the land, and recovered it in a real action against the grantee, on the ground that the conveyance was fraudulent and void as against creditors. Upon the death of the husband, proceedings were instituted by his widow for dower, and the question arose, whether she was barred by her release in the fraudulent deed. The court decided that she was not barred: "But there is another answer to this objection to the demandant's title," the Court observed, "which is entirely satisfactory and conclusive. The tenant at the time offered to prove that the conveyance to Jacobs was fraudulent and void, as to the creditors of the grantor, and that, on that ground, he had recovered judgment for the possession of the premises, against the assignees of the said Jacobs. Now, we are of opinion, that the tenant having avoided the deed to Jacobs, cannot now be allowed to set it up as a bar to the demandant's claim.

(*b*) See *post*, pars. 6, 7. See also *Miller* v. *Wiley*, 17 U. C. C. P. 371.

In *Stinson* v. *Sumner*, 9 Mass. 143, it was decided that where a wife releases her claim of dower, by joining her husband in a conveyance, and the purchaser recovers back the purchase money on account of the grantor's defect of title to the land, the release of the wife thereby becomes inoperative, and does not bar her right of dower after her husband's decease. The principle on which that decision is founded applies conclusively to the present case. The tenant has avoided the deed of the husband, and defeated the estate on which the demandant's release of dower was intended to operate. By law, therefore, and in justice, she was thereby restored to her former rights."

5. And it has been decided, that although a husband cannot, after his marriage, defeat or obstruct his creditors, by selling or exchanging his property, and taking back a conveyance to the use of his wife and family, such a conveyance as to creditors being considered fraudulent; yet, the case may be otherwise in relation to so much of the property received, as goes to compensate the just interests of the wife. If, therefore, the wife relinquish her right to dower in other land, in consideration of such conveyance to her, the value of such dower ought to be saved to her in opposition to the claims of the husband's creditors (*c*). And it has been also held, that the release of a wife's dower to a purchaser, is a good consideration for the grant of a reasonable compensation to the wife; and such a grant made *bona fide*, is valid against the husband's creditors (*d*).

6. The opinion is also expressed in a well considered case, that a release of dower in a deed executed by husband and wife without consideration, to defraud the creditors of the husband, will not estop the wife to claim dower

(*c*) *Quarles* v. *Lacy*, 4 Munf. Rep. 251; *Bullard* v. *Briggs*, 7 Pick. 533; *Forrest* v. *Laycock*, 18 Gr. 611.

(*d*) *Forrest* v. *Laycock*, 18 Gr. 611; *Singree* v. *Welch*, 32 Ohio St. 320.

against the *grantee*, or any purchaser from him with notice (*e*). "In the present case," say the Court, "the fraudulent deed has not been set aside, and the defendant Paige claims under it. So we are brought to the direct question, whether a wife who joins in a deed, made *without any consideration*, and to defraud her husband's creditors, is thereby estopped to claim dower, against a purchaser for a valuable consideration, from the fraudulent grantee. It would seem obvious that if the deed of the husband and wife was executed for a sufficient consideration, and was invalid only by reason of the intent to defraud creditors, she ought to be barred of her dower as against the grantee and his privies. For, as between her and them, there is no reason why her release, made for a sufficient consideration, should be avoided. But the case is quite different, I apprehend, where there is no consideration to uphold the deed, and it can only be upheld by the application of the doctrine, that, as between the fraudulent grantor and grantee, the title of the latter is good. For why, and in what sense, is the deed fraudulent? And why is it that the title of the grantee, who has paid no consideration is, nevertheless, good? It is fraudulent, simply because it is an attempt to place the property beyond the reach of the husband's creditors, and the title of the grantee is good, except as against the creditors, simply because no Court will aid a party to avoid his executed contract made for a fraudulent purpose. But so far as the wife is concerned, she places nothing beyond the reach of the creditors, to which they are entitled. It is the husband's estate alone, and not her dower right, that is liable for his debts, and that estate he can convey without her joining in the deed. Her execution of the deed adds nothing to its efficacy, so far as his estate is concerned—it simply releases her dower, which the creditors have no right to touch. How then can she be said to be a fraudu-

(*e*) *Woodworth* v. *Paige*, 5 Ohio St. 70, per Thurman, C.J.

lent grantor? Whom does she defraud, either by the deed, or by avoiding it so far as to claim dower? Not the creditors, for they had no right to her dower. Not the grantee, for he paid no consideration for the conveyance. Not a purchaser with notice, from the grantee, for such purchaser is in no better condition than the grantee himself. How then can it properly be said, that the deed is her executed fraudulent contract, or conveyance, against which she ought not to be relieved, when its execution does not and cannot defraud anybody? And what wisdom or justice is there in visiting women, who know so little of the law, and who are so dependant upon, and so much under the control of their husbands, with the extreme penalty of a forfeiture of their dower, upon the ground that they have attempted to defraud their husband's creditors, when in fact they have released nothing to which the creditors are entitled, done nothing of which they have a right to complain? For myself, I confess I cannot see; and although these views may not, as I am aware, accord with some adjudicated cases, I nevertheless believe they are sound, and it is probable we should so hold, were Paige a purchaser with notice." The Court, however, found that the defendant was a purchaser without notice, and therefore dismissed the bill (*f*).

7. The cases cited in support of the wife's claim to dower, where she has joined with her husband in a conveyance fraudulent as to creditors, differ from the case of *Manhattan Co.* v. *Evertson* (*g*), in at least one very essential particular. Although no consideration was paid by the grantee in that case, yet the conveyances were made upon certain trusts duly specified in writing, which were pronounced fair and honest by the Vice-Chancellor, and to the extent of

(*f*) Scribner on Dower, vol. i. pp. 615-17.
(*g*) *Manhattan Co.* v. *Evertson*, 6 Paige, 457.

which the deeds were sustained by both him and the Chancellor. As against the grantors, therefore, and—to the extent of those trusts—as against subsequent encumbrances, also, the grantee was lawfully invested with the legal title for a proper purpose. The only interest, if any, remaining in the husband, was a resulting trust, and as this was a mere equity, and under the then existing laws of New York, a wife was not dowable of an equitable estate, it followed, that she was not entitled to dower in the surplus arising from the sale of the lands. The difference between a case of this character, and one where the conveyance is for the sole and only purpose of defeating creditors, and is without any consideration whatever, is clearly and distinctly marked (*h*).

8. It appears also, that the wife is not affected by the fraudulent acts of the husband in consummating his contracts of sale, although she unite with him in conveying the lands. Thus, where the vendor of a lot of land secretly intended to sell only a part of the lot, but succeeded in making the vendee understand that he was buying the whole of it, and only a part of the lot was included in the deed of conveyance, for which the vendee paid the vendor the entire consideration intended by him to be given for the whole lot, the Court required the vendor to execute to the vendee a conveyance of the whole. The wife of the vendor had united with him in the deed, but not being privy to the fraud attempted to be practiced upon the purchaser, the Court refused to compel her to join in the new conveyance (*i*).

(*h*) Scribner on Dower, vol. i. p. 617.
(*i*) *Wiswall* v. *Hall*, 3 Paige, 313; Scribner on Dower, vol. i. p. 617.

CHAPTER XXIII.

OF THE NATURE AND QUALITIES OF DOWER DURING THE HUSBAND'S LIFETIME.

1. *Dower arises by operation of law, and not by force of any contract.*
2-4. *Inchoate dower as an incumbrance.*
5-6. *Inchoate dower as a right of property.*
7. *Inchoate right protected where sales of husband's lands made during his lifetime.*
8-9. *Inchoate right to dower assignable.*
10-11. *When inchoate dowress to be a party to proceedings for specific performance.*
12. *Inchoate dowress may be compelled to suffer, but she cannot demand partition.*

1. The right of dower arises solely by operation of law, and not by force of any contract, express, or implied, between the parties; it is the silent effect of the relation entered into by them, not as in itself, incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law (*a*).

2. A right of dower, though inchoate, is so far an encumbrance upon the lands to which it attaches, as to be within the operation of the ordinary covenant against encumbrances (*b*). It is held also, that a contingent right of

(*a*) Park on Dower, 5, 132; *Norwood* v. *Marrow*, 4 Dev. and Bat. L. 442, 450; see also the cases cited in note 3 of Scribner on Dower, vol. ii. p. 3.

(*b*) *Van Norman* v. *Beauprie*, 5 Gr. 599, per Blake C. p. 601; *Gamble* v. *Gummerson*, 9 Gr. 193; *Prescott* v. *Trueman*, 4 Mass. 627; *Shearer* v. *Ranger*, 22 Pick. 447; Rawle on Covenants 109-114; Scribner on Dower. vol. ii. p. 4, note 3, and the cases there cited.

dower is within the covenant of general warranty; and that when the right has become absolute, and is prosecuted to an eviction, actual or constructive, a breach of the covenant is worked (*c*).

3. So where a party has contracted to convey lands, with covenants of general warranty, or against encumbrances, an existing right of dower, although inchoate, will constitute a good defence to a proceeding on the part of the vendor, for a specific performance of the contract, unless the vendee has waived his right to object to the title (*d*). The rule is the same where the vendor institutes an action at law, against the purchaser, to recover damages for non-performance of the contract (*e*). So, if the vendee see proper to insist upon performance, he may go into a Court of Equity to have the dower claim settled, and compensation therefor, decreed out of the unpaid purchase money in his hands (*f*).

4. Where in a suit for specific performance, the wife of the vendor refuses to join in the conveyance, for the purpose of barring her dower, the proper mode of protecting the purchaser, is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower,

(*c*) Rawle on Covenants, 238-239, 252-253; *Leary* v. *Dunham*, 4 Geo. 593; *Tuite* v. *Miller*, 5 West. Law Jour. 413; *Johnson* v. *Nyce*, 17 Ohio 66; *Wilson* v. *Taylor*, 9 Ohio St. 595. So where dower is claimed and assigned, or the value thereof assessed, a covenant for quiet enjoyment contained in a deed of conveyance of the land, is broken; *Lewis* v. *Lewis*, 5 Rich. L. 12.

(*d*) Rawle on Covenants, 112-113; *Fuller* v. *Wright*, 18 Pick. 405; *Barnett* v. *Gaines*, 8 Ala. 347; *Parks* v. *Brooks*, 16 Ala. 529; *Springle* v. *Shields*, 17 Ala. 295; *McLemore* v. *Mabson*, 20 Ala. 137; *Greenwood* v. *Ligon*, 10 Smedes and M. 615; *Bitner* v. *Brough*, 11 Pa. St. 137.

(*e*) *Porter* v. *Noyes*, 2 Greenl. 26; *Bitner* v. *Brough*, 11 Pa. St. 137; *Jones* v. *Gardiner*, 10 John. 266; Rawle on Covenants, 112-113.

(*f*) *Van Norman* v. *Beauprie*, 5 Grant, 599; *Kendrew* v. *Shewan*, 4 Gr. 578; *Springle* v. *Shields*, 17 Ala. 295; *Thrasher* v. *Pinckard*, 23 Ala. 616; *Stevens* v. *Hunt*, 15 Barb. 17; *Hill* v. *Ressegien*, 17 Barb. 162; Scribner on Dower, vol. ii. p. 5.

in the event of the wife subsequently becoming entitled thereto, by surviving her husband, the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal so set aside, on her decease (*g*).

5. Although it was not long since most difficult to state, with precision, the nature or qualities of an inchoate dower interest, when considered as a right of property, it may now safely be said, that *it is an interest, though not an estate*, in the land (*h*).

6. In the case of *Allen* v. *The Edinburgh Life Assurance Co'y, supra*, the learned V. C., after referring to a number of English cases on the subject, says (*i*): "In all these instances, there is no distinction drawn between the nature of the right before the husband's death, and after it. In each case it is spoken of as an inchoate right. The right of action has, indeed, become perfected; but the interest in the estate is the same. And I think it is manifest, that prior to the death, she had a possibility coupled with an interest; the possibility is not terminated by the death and turned into an estate, it is still contingent or surviving till dower is assigned. After the death she has some right before she is vested with the estate, the right she had before the death is not extinguished, it is not satisfied, nor barred, nor merged, nor is it perfected till assignment; then what is this interest? I think it cannot be better described than as a continuation of her interest; and as that might have been defeated by her death before her husband, so this may be defeated by her death before assignment. It has not ceased to be a possibility coupled with an interest, and

(*g*) *Skinner* v. *Ainsworth*, 24 Gr. 148; see also *O'Connor* v. *Beatty*, 2 App. R. 497.

(*h*) *Allen* v. *Edinburgh Life Assurance Co'y*, 25 Gr. 306; *Miller* v. *Wiley*, 16 U. C. C. P. 529; *Rose* v. *Simmerman*, 3 Gr. 598; *Van Norman* v. *Beauprie*, 5 Gr. pp. 602-603; *Gamble* v. *Gummerson*, 9 Gr. 193.

(*i*) 25 Gr. p. 315.

being assignable before the husband's death, under the statute it continues to be so."

7. In Ontario, the inchoate right of dower is so far regarded as property entitled to the protection of the law, that by express enactment, the interest of the wife is secured to her where sales occur, under legal proceedings, instituted in the lifetime of the husband (*j*). And it was held in the United States, under a statute of the character just referred to, that when the present value of the wife's inchoate interest has been ascertained, and a sum reserved from the proceeds of the sale on account thereof, the amount thus set apart becomes her absolute property (*k*). So, in an early case it was decided, that inchoate dower was so far a potential right of property, that it was not divested by the revolution, which resulted in a separation of the American Colonies from Great Britain, although in consequence of that separation, the demandant became an alien, and as such was not entitled to dower in the lands subsequently acquired by her husband (*l*). "I distinguish," said Chancellor Kent, "between the capacity to acquire and the vested right. The revolution took away the one, and did not impair the other." And where the wife joined her husband in a conveyance of his lands, releasing her dower interest therein, in consideration of the conveyance to her of other lands, it was held, that although the transaction of the husband might be regarded as fraudulent as to creditors, yet to the extent of the value of the interest, surrendered by the wife, she should be protected (*m*). So, where the husband mortgaged his land, and in consideration of his wife's releasing her right of dower to the mortgagee, conveyed the equity of redemption to a stranger in

(*j*) 42 Vic. Ont. cap. 22, p. 55; *Martindale* v. *Clarkson*, 6 App. R. 1.
(*k*) *Bartlett* v. *Van Zandt*, 4 Sandf. Ch. 396; see also cap. 19, pars. 4, 31-33.
(*l*) *Kelly* v. *Harrison*, 2 John. Cas. 29.
(*m*) *Forrest* v. *Laycock*, 18 Gr. 611; *Quarles* v. *Lacy*, 4 Munf. 251.

fee, for the benefit of his wife, but by a deed containing no declaration of the trust, and purporting to be for the consideration of a sum of money, it was held, as against creditors of the husband, that the relinquishment of the right of dower was a valid consideration for the conveyance of the equity of redemption (*n*); that parol evidence was admissible to show what was the true consideration; that if the transaction was in fact so made, was honest, and the value of the right of dower equivalent to that of the equity of redemption, the conveyance was valid (*o*). Where the wife does not join in the conveyance, the right of dower is governed by the law in force at the date of the husband's alienation (*p*).

8. Until lately, it would seem to have been settled law, that there was no power to make any valid assignment of a right to dower, until the land had been actually set apart for the dowress; and consequently, that during the lifetime of her husband, and before assignment, her interest could not be sold under a *fi. fa.* at law, and was not available for the benefit of creditors (*q*); although it had been held, that dower might be transferred, in equity, before assignment (*r*). But since the passing of the Statute, 40 Vic., cap. 8, sec. 37, Ont., which is retrospective in its operation, the right of a woman to dower, as well during the lifetime of her

(*n*) *Forrest* v. *Laycock*, 18 Gr. 611; *Bullard* v. *Briggs*, 7 Pick. 533; *Garlick* v. *Strong*, 3 Paige, 440; *Harvey* v. *Alexander*, 1 Rand. 219; *Taylor* v. *Moore*, 2 Rand. 563; *Blow* v. *Maynard*, 2 Leigh, 29, 47; *Caldwell* v. *Bower*, 17 Misso. 564; *Hoot* v. *Sorrel*, 11 Ala. 386; *Williams* v. *Williams*, 3 West. Law Month. 157; *Ward* v. *Crotty*, 4 Met. (Ky.) 59; *Nims* v. *Bigelow*, 45 N. H. 343; *Lavender* v. *Blackstone*, 2 Lev. 137; *Arundel* v. *Phipps*, 10 Ves. 139; Sugden on Vendors, 11th Ed. pp. 935-936; Park on Dower, 211.

(*o*) *Black* v. *Fountain*, 23 Gr. 174; *Commercial Bank* v. *Woodruff*, 13 U. C. C. P. 621; *Bullard* v. *Briggs*, 7 Pick. 533; Scribner on Dower, vol. ii. p. 7, and the authorities cited on p. 8, note 1.

(*p*) Scribner on Dower, vol. ii. pp. 22-23.

(*q*) *McAnnany* v. *Turnbull*, 10 Gr. 298; *Allen* v. *Edinburgh Life Assurance Co'y*, 19 Gr. 248.

(*r*) *Rose* v. *Simmerman*, 3 Gr. 598.

husband as after his death, is such an interest in lands as can be assigned, and sold under a *fi. fa.* at law (*s*).

9. The statute above referred to (*t*), provided, that section 8 of the Act passed in the 24th year of Her Majesty's reign, and chaptered 41, (which had been repealed by 29 Vic., cap. 24, sec. 2), be revived and amended, by adding after the word "party," in the seventh line, the words "or over which such party has any disposing power, which he may, without the assent of any other person, exercise for his own benefit." The statute 24 Vic., cap. 41, sec. 8, provided that the 11th sec. of cap. 90, of the Consolidated Statutes, intituled: *An Act respecting the transfer of real property, and the liability of certain interests therein to execution*, be repealed, and the following substituted therefor: "Any estate, right, title, or interest in lands, which, under the fifth section of this Act, may be conveyed, or assigned, by any party, shall be liable to seizure, and sale, under execution against such party, in like manner, and on like conditions, as lands are by law liable to seizure, and sale, under execution, and the sheriff selling the same, may convey, and assign, the same to the purchaser, in the same manner, and with the same effect, as the party might himself have done." The fifth section of the C. S. U. C. cap. 90, referred to above, enacts, that a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest, or possibility be, or be not ascertained; also, a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, may be disposed of by deed, but no such disposition

(*s*) *Allen* v. *Edinburgh Life Assurance Co'y*, 25 Gr. 306, where a full statement of the law on the subject under discussion, and the conflicting decisions referred to, and distinguished, may be found; see also *Williams* v. *Reynolds*, 25 Gr. 49.

(*t*) 40 Vic. cap. 8, sec. 370.

shall, by force only of this Act, defeat or enlarge an estate tail, and any such a disposition, by a married woman, shall be made in conformity with the provisions of "*The Married Women's Real Estate Act*" (*u*).

10. An inchoate dowress, who joins with her husband in an agreement for the sale of an estate, and that the husband shall pay of a proportion of encumbrances, and convey, free of encumbrances, must be made a party defendant, to proceedings instituted by a purchaser to compel specific performance of a contract of sale (*v*).

V. C. Proudfoot, in giving judgment in this case, says (*w*) "There is no doubt that, had the husband alone entered into the agreement, he might have been required to procure a bar of his wife's dower, or to make an abatement of the the purchase money: *Van Norman* v. *Beaupie* (*x*). But that is not the case here. The husband did not contract alone to sell, but united with his wife in the contract, and I think that he has the right to say that the wife should be made a defendant; that he should not be put to the risk of having to abate the purchase money. And, besides, it is a joint agreement of husband and wife that the husband is to convey; and in such cases all the parties liable must be made parties, the General Order 62, only applying to cases of a joint and several demand" (*y*).

11. The correctness of this decision has been questioned, upon the ground that the wife was incompetent to contract, and that, even if joined as a defendant, she could not be compelled to execute the conveyance; but since it has been

(*u*) 14 and 15 Vic. cap. 7, sec. 5; C. S. U. C. cap. 90, sec. 5; R. S. O. cap. 98, sec. 5.

(*v*) *Loughead* v. *Stubbs*, 27 Gr. 387.

(*w*) Per Proudfoot, V.C., in *Loughead* v. *Stubbs*, 27 Gr. p. 390.

(*x*) *Van Norman* v. *Beauprie*, 5 Gr. 599.

(*y*) 1 Dan. C. P. 13.

held that the inchoate interest of the wife is assignable, and may be sold under execution, in short, is saleable, with what reason can it be said, that she could not bind herself by an agreement to sell, or being bound, that she could not be compelled to execute the conveyance?

12. An inchoate dowress may be compelled to suffer partition, but she cannot demand it (*z*).

(*z*) *Rody* v. *Rody*, 1 C. L. T. p. 546; R. S. O. cap. 101, sec. 4; see also *Casey* v. *Casey*, 15 Gr. 399. But see *Laidlaw* v. *Jackes*, 27 Gr. 116, in which case V. C. Proudfoot expressed an opinion the other way.

CHAPTER XXIV.

OF THE NATURE AND QUALITIES OF DOWER AFTER THE HUSBAND'S DEATH, BUT BEFORE ASSIGNMENT.

1. *Governed by the lex rei sitae.*

2-4. *May be affected by subsequent legislation.*

5-6. *The widow is not invested with a freehold estate until her dower has been assigned.*

7. *Her interest is assignable and may be sold under execution.*

8. *Proceedings to redeem may be instituted by the widow before her dower has been assigned.*

9. *Entitled to one-third of the fund produced by the sale of timber severed before assignment.*

10-17. *Rights and liabilities generally of dowress before assignment.*

18. *Infant demandant may sue for dower.*

1. Upon the consummation of the right of dower, an inquiry naturally arises in reference to the law by which it is to be ascertained and determined. The general rule is, that the *lex rei sitæ* governs. The widow has dower, not by the law of the place of the marriage, nor of the domicile, but according to the law of the place where the particular lands are situate (*a*).

2. An Act of the Provincial Legislature, if within its powers, as defined by the B. N. A. Acts, is supreme as to

(*a*) Story, Confl. of Laws, 448, 454; 1 Washb. Real Prop. 151; *Ilderton* v. *Ilderton*, 2 H. Bl. 145; *Duncan* v. *Dick*, Walker, 281; *Lamar* v. *Scott*, 2 Strobh. 562; *Harding* v. *Alden*, 9 Greenl. 140; *Barnes* v. *Cunningham*, 9 Rich. Eq. 475; Scribner on Dower, vol. ii. p. 24.

the Courts and people of the Province, and cannot be objected to as contrary to reason or justice. And it would seem that the Legislature had the power to abridge or abolish dower, while the right is inchoate, and even after it has become consummate (*b*).

3. In the U. S., the rule is different, and it is held, that after the right to dower has become consummate, whether there has been an assignment or not, it is so far a vested right, as to be beyond Legislative control. There is a difference of opinion as to the power of the Legislature, while the right is inchoate (*c*).

4. As against a purchaser from the husband, where the wife has not joined in the conveyance, her right is governed by the law in force at the time the purchaser has acquired his title (*d*).

5. The situation of a dowress, after the death of her husband, and before assignment, is very peculiar. Although the title of dower is consummate, the title of entry does not accrue until the Ministerial Act of assigning to her a third part in certainty, has been performed by some other person. In the meantime, her situation is an anomolous case in the law of England, standing upon its own peculiar circumstances, and neither borrowing nor affording any analogies. It is probably the only existing case in which a title, though complete and unopposed by any adverse right of possession, does not confer on the person in whom it is

(*b*) *Re Goodhue*, 19 Gr. 366. See also, *Toronto and Lake Huron Ry. Co.* v. *Crookshank*, 4 U. C. R. 318.

(*c*) Scribner on Dower, vol. ii. p. 25; *Strong* v. *Clem*, 12 Ind. 37; *Noel* v. *Ewing*, 9 Ind. 37; *Hendrickson* v. *Hendrickson*, 7 Ind. 13; *Galbreath* v. *Gray*, 20 Ind. 290; *Kennerly* v. *Misso. Ins. Co.* 11 Misso. 204; *Burke* v. *Barron*, 8 Clarke (Iowa), 132; *Barbour* v. *Barbour*, 46 Maine, 9; *Adams* v. *Palmer*, 51 Maine, 480; *Yancy* v. *Smith*. 2 Met. (Ky.) 408; *Lawrence* v. *Miller*, 1 Sandf. S. C. 516; S. C. 2 Comst. 245; *Johnston* v. *Vandyke*, 6 McLean, 422; *Lucas* v. *Sawyer*, 17 Iowa, 517.

(*d*) Scribner on Dower, vol. ii. pp. 22, 26; *Craven* v. *Winter*, 38 Iowa, 471.

vested, the right of reducing it into possession by entry. The situation of a dowress has no resemblance to that of a person who has become entitled to a particular estate by way of remainder, or springing use. She has no seisin in law, nor can she exercise any act of ownership before assignment. Her title to be endowed is not of an undivided third of the entirety, but of a third part in severalty, which third part is unascertained till assignment; it bears no analogy, therefore, to the case of co-parceners, or other persons becoming entitled to undivided shares. Although a title of dower is for most purposes nothing more than a right of action, and consequently transferrable in no other mode than by release to the terre-tenant by way of extinguishment, yet it differs from all other mere rights of action, in not being the result of any adverse *jus possessionis* acquired by the heir, or feoffee, and as a consequence, the mere possession of the heir, or feoffee, can never become a bar to the title of the wife (*e*).

6. The reason of the law in denying any right of entry in the wife, although her title is consummate, is obviously to be found in the injustice which would arise from permitting her to be her own judge of the particular parcels which she shall have for her dower, or, as Chief Baron Gilbert expresses it, to "carve for herself," while, on the other hand, the law in favor of the widow, would not subject her to the inconvenience of holding an undivided part in common for her dower, where the nature of the property admitted of an endowment in severalty. To avoid both these evils, it became necessary to suspend her right of entry until the certainty of the parcels, which she should hold in dower was ascertained either judicially, by the officer of the Court, or by the agreement of the dowress and the terre-tenant (*f*).

(*e*) Park on Dower, 334-335; *Hilleary* v. *Hilleary*, 26 Ind. 274.
(*f*) Park on Dower, 335-336.

7. It is now settled law, that after the husband's death, and before assignment, the widow's right to dower is such an interest in lands, as may be assigned and sold under a common law execution (*g*).

8. It has been elsewhere shown, that where lands are subject to an encumbrance, valid against the widow, she must, as against the mortgagee, or those claiming under him, redeem the lands before she can claim her dower (*h*). It follows, as a necessary result of this principle, that she may institute proceedings to redeem before her dower has been assigned (*i*).

9. If timber be cut down upon estates of which a widow is dowable, before dower is set out by metes and bounds, the dowress is entitled during her estate to the income arising from one-third of the fund produced by the sale of the severed timber (*j*).

10. A devisee may recover in ejectment against the widow without previously assigning her dower (*k*), and she cannot bring ejectment, or defend ejectment, brought against her, unless, perhaps, under A. J. Act, she can, and is bound to (*l*).

11. So if the widow tarry in the chief house of her husband after the expiration of her quarantine, proceedings in ejectment may be brought against her by the heir, or by

(*g*) *Allen* v. *Edinburgh Life Assurance Co.* 25 Gr. 306; *Miller* v. *Wiley*, 16 U. C. C. P. 529; *Rose* v. *Simmerman*, 3 Gr. 598; *Williams* v. *Reynolds*, 25 Gr. 49.

(*h*) *Ante*, cap. 19, par. 11.

(*i*) *Ibid*; 1 Hilliard R. P. 2nd ed. p. 165; Scribner on Dower, vol. ii. p. 48.

(*j*) *Farley* v. *Starling*, 18 Gr. 378; *Bishop* v. *Bishop*, 10 Law J. Chan. 302; *Dicken* v. *Hamer*, 1 Drew and Sm. 284; *Tooker* v. *Annesley*, 5 Sim. 235.

(*k*) *Evans* v. *Webb*, 1 Yeates, 424.

(*l*) *Demorset* v. *Helme*, 22 Gr. 433; *Doe* v. *Nutt*, 2 Car. and P. 430; 12 E. C. L. R. 205; *Coles* v *Coles*, 15 John. 319; *Bradshaw* v. *Callaghan*, 5 John. 80; 1 Washb. R. P. 252; 4 Kent. 62.

any person claiming title under him. Her only remedy in such case is to proceed for an assignment of her dower (*m*).

12. A widow may before assignment be compelled to make partition, although she cannot demand it (*n*), and she also may be forced to accept a gross sum in lieu of dower (*o*).

13. As the wife cannot be said to have such an interest in her husband's lands as will authorize her to make a lease, it follows that an ejectment on a joint demise by husband and wife, when the title is in the husband alone, cannot be determined (*p*).

14. An assignment of dower, though informal, if long acquiesced in by the parties interested, will not be disturbed by the Court, and will be a sufficient protection to the widow in the enjoyment of her estate (*q*).

15. The widow is entitled to be endowed immediately after her husband's death, and to damages for its detention.

16. Where a widow, by her conduct, has parted with her right to equitable dower in favour of her son, a subsequent creditor of hers is not entitled to have her dower set out and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it (*r*).

(*m*) 4 Kent. 61; *Jackson* v. *O'Donaghy*, 7 John. 247; *McCully* v. *Smith*, 2 Bailey, 103; *Collins* v. *Warren*, 29 Misso. 236; Scribner on Dower, vol. ii. p. 31.

(*n*) R. S. O. cap. 101, sec. 4; *Rody* v. *Rody*, 1 C. L. T. p. 546.

(*o*) 42 Vic. Ont. cap. 22, secs. 5 and 6.

(*p*) *Tucker* v. *Vance*, 2 A. K. Marsh, 458; Scrib. on Dower, vol. ii. p. 32.

(*q*) *Robinson* v. *Miller*, 2 B. Mon. 290; Scribner on Dower, vol. ii. p. 33.

(*r*) *Cottle* v. *McHardy*, 17 Gr. 342.

17. The widow of an intestate owner, continuing to live on the property with her children, who own the estate, and work and manage it, should not till her dower be assigned, be assessed, nor should any interest of hers be deducted from the whole assessed value, she not having the management of the estate (*s*).

18. An infant demandant may sue for dower (*t*).

(*s*) Stormont Election Petition, 7 L. J. N. S. 221.
(*t*) *Phelan* v. *Phelan*, Dra. R. 386.

CHAPTER XXV.

ASSIGNMENT OF DOWER BY THE TENANT OF THE FREEHOLD.

1-2. *Dower may be assigned without resort to legal proceedings.*
3. *No demand is necessary.*
4. *Dower may be assigned by parol.*
5. *The assignment must be made by the tenant of the freehold.*
6-8. *Not essential that he should have a valid title.*
9. *Assignment by infant.*
10. *Assignment by guardian.*
11-13. *Assignment by joint-tenant.*
14-17. *Assignment according to common right.*
18-24. *Assignment contrary to common right.*
25. *Crops.*
26. *Estoppel arising from assignment of dower.*

1. The widow is entitled to be endowed immediately after her husband's death ; and it is not necessary to a valid assignment, that legal proceedings should be instituted by either party. The person on whom the right, or duty is devolved of making the assignment, may at once proceed to set apart to the widow her proportion of the estate ; and if this be fairly done, it is as effectual and binding as if performed under a judgment or decree of the Court (*a*).

2. It is provided by statute (*b*), that "The tenant of the freehold may at any time before action commenced serve upon a dowress a notice in writing, that he is willing to

(*a*) Park on Dower, 265-266; 1 Roper, H. and W. 389; 4 Kent, 63; Scribner on Dower, vol. ii. p. 65, and cases cited there, note 2.

(*b*) R. S. O. cap. 55, sec. 3.

assign her dower in the land, (describing it), out of which she is entitled to dower, and may, thereafter, apply to one of the Superior Courts, or to a Judge thereof, for a rule or order, directing that a writ shall issue for the assignment of dower; and a writ, therefor, may thereupon issue, and the like proceedings may be had thereon, as upon a writ sued out after judgment in an action."

Section 5 provides that "The dowress and the tenant of the freehold, may by an 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 affidavits may administer, shall be registered in the Registry Office of the registration division in which the lands lie, and shall entitle the dowress 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 action, suit, or proceeding by the dowress for dower in the land mentioned therein."

3. In Ontario no demand is necessary to enable the widow to institute proceedings for her dower, still it is wise to make a demand, for unless this be done, she is according to the common law, upon the plea of *tout temps prist* by the heir, restricted in the recovery of damages to the time when her suit was commenced, and also, because the Judge has full discretion in dealing with the costs of the proceedings (*c*).

(*c*) *Grieve* v. *Woodruff*, 1 App. R. 617.

4. Dower may be assigned by parol. The widow being entitled by common right, nothing is required, but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her, without livery of seisin or writing (*d*). And this is true, not only when the dower is assigned in the manner prescribed by law, but also where a different mode of assignment is adopted by agreement; as where a rent issuing out of the lands (*e*), or an undivided third part (*f*), is allotted to the widow (*g*).

5. The assignment of dower in certainty being an act involving the interests of the persons entitled to the inheritance, it became requisite that no person should be legally competent to assign dower, who had a less estate than one of freehold. As no tenant of an inferior nature was capable of binding the rights of a freeholder in a real action, and consequently as judgment obtained on a writ of dower brought against a person having merely a chattel interest, would be voidable by the freeholder, the consistency of the law required that such person should not bind the freeholder by assigning dower without action. A person having only a chattel interest is not intrusted with the defence of the inheritance (*h*), and the freeholder might possibly have had a good bar to allege to the claim of

(*d*) *Fisher* v. *Grace*, 28 U. C. R. 312; *Leach* v. *Shaw*, 8 Gr. 494; *Fraser* v. *Gunn*, 27 Gr. 63; Co. Litt. 35 a; Park on Dower, 269; 4 Kent, 63; Scribner on Dower, vol. ii. p. 67; *Rowe* v. *Power*, 2 Bos. and Pul. N. P. 1, 34; *Conant* v. *Little*, 1 Pick. 189; *Jones* v. *Brewer*, *Ibid.* 314; *Shattuck* v. *Gragg*, 23 Pick. 88, and the cases cited at note 1; Scribner on Dower, vol. ii. p. 67. See also *Lenfers* v. *Henke*, 73 Ill. 405.

(*e*) Co. Litt. 34 b; Jenk. p. 9; Perk. 406; 9 Vin. Abr. 265, pl. 2.

(*f*) *Coots* v. *Lamberi*, Co. Litt. 32 b, note 1; Sty. 276; 1 Roll. Abr. 682; *Rowe* v. *Power*, 2 Bos. and P. N. R. 34.

(*g*) 1 Roper, H. and W. by Jacob, 392; Scribner on Dower, vol. ii. p. 67. See also *Leach* v. *Shaw*, 8 Gr. 494; *Fraser* v. *Gunn*, 27 Gr. 63.

(*h*) There is a qualification to this rule in Ontario, as our Statute provides that the action is to be commenced against the person in possession, and is to be directed to him and to all persons entitled to defend the possession of the property claimed. R. S. O. cap. 5, sec. 2.

dower. The propositions are indeed conversible, that against whomsoever a writ of dower will lie, that person is competent to make a valid assignment; or in other words, whoever is compellable by writ to assign dower, may do it without writ (*i*). It will accordingly be found, laid down in the books, that an assignment of dower by a tenant in socage, a tenant by elegit, statute staple, or statute merchant, or a lessee for years, is not good (*j*).

6. It is not necessary to the validity of the assignment that the estate of the person making it should be a lawful freehold; because assignment of dower is a legal obligation upon the tenant of the freehold, whether he obtain it by right or by wrong; and if by wrong, the widow is not obliged to wait for an assignment until the heir thinks proper to enter and defeat the tortious estate, an event which may never happen. If, therefore, an abator, disseisor, or intruder, make the assignment, as the lawful tenant ought to have done, it will be good, and binding upon such tenant (*k*).

7. But if the tortious freehold of the person making the assignment be obtained by collusion with the widow, in order to enable him to assign the dower, then, although the assignment will not be absolutely void, yet it will be voidable by the entry of the heir (*l*). The same consequences follow, if under like circumstances, the assignment of dower be fairly made of an equal third part to the widow by the sheriff, after she has obtained a judgment for her

(*i*) Park on Dower, 265; 1 Roper, H. and W. 389; Co. Litt. 34 b, 35 a.

(*j*) Perk. 404; Co. Litt. 35 a; 6 Rep. 57 b; Scrib. on Dower, vol. ii. p. 69.

(*k*) Perk. 394; Co. Litt. 35 a, 357 b; 2 Co. 66 b; 6 Co. 58 a; 1 Roper. H. and W. 389-390; Park on Dower, 266; Scribner on Dower, vol. ii. p. 70.

(*l*) Co. Litt. 35 a; 357 b; Plow. 51, 54; Perk. 394, 395; Jenk. Cent. 4 Ca. 98; Park on Dower, 269.

dower (*m*). The heir, in such case, may treat the widow as a disseisor, she having made herself a party to the disseisin (*n*).

8. The law, however, only countenances the acts of persons acquiring estates by wrong, from necessity; and in the present instance for the benefit of the widow, whose endowment might otherwise be totally prevented. At the same time that it guards against this inconvenience, it protects the right of the lawful heir; and lest he might be injured by the transaction, it supports only such assignment of dower by parties having a tortious possession, as the heir, if he had been in possession, would have been bound to make. Dower is assignable, as will be hereafter shown (*o*), either according to common right, or specially, and against common right. An assignment of dower according to common right, if made by a person possessed of the freehold by right or by wrong, is, as we have seen, binding both upon the wife and upon all persons having interests in the lands assigned (*p*); an assignment against common right is binding upon neither further than they agree thereto (*q*); and therefore such assignment, if made by a person having only a particular or defeasible interest in the inheritance, though valid during the continuance of that interest, if accepted by the wife (*r*), is not binding upon his successors, or other persons having title. So that if a disseisor, abator, or intruder, assign to the widow a rent out of the lands for her dower, instead of assigning a third part of them according to the common law, the disseisee, or he who has the right

(*m*) Co. Litt. 35 a; 1 Roper, H. and W. 390.

(*n*) Park on Dower, 269; Scribner on Dower, vol. ii. p. 71.

(*o*) *Post* pars. 14-24.

(*p*) Perk. 404; Park on Dower, 267, note.

(*q*) *Post*, pars. 18-24.

(*r*) *Rowe* v. *Power*, 2 Bos. and Pul. N. R. 33.

to the lands, will not be bound by such assignment (*s*). The assignment, however, stands good until avoided (*t*).

9. If the heir be an infant, he is, notwithstanding his minority, competent to assign dower; because he may be compelled to make the assignment by suit, in which he would not be permitted to take advantage of his infancy, so as to prevent an immediate assignment, since the widow's title to her dower is urgent, it being necessary for her immediate support (*u*).

10. At common law a guardian, in socage was not authorized to assign dower, though the rule was otherwise as to a guardian in chivalry (*v*). In the United States, however, it has been several times decided that a guardian is competent to assign dower (*w*).

11. If two persons be joint tenants of an estate, under a devise or conveyance from a man whose widow is entitled to dower out of it, and one joint tenant assign a third part to her for dower, the assignment will be good and obligatory upon his companion; because he, being tenant of the freehold *per mie et per tout*, is competent and compellable to make the assignment according to the rule of the common law (*x*).

(*s*) Park on Dower, 267; 1 Roper, H. and W. 391; Perk. 397-398; Jenk. Cent. 1 Ca. 17; 6 Rep. 57 b; Co. Litt. 35 a.

(*t*) Perk. 404; Park on Dower, 268-269; Scribner on Dower, vol. ii. pp. 71-72.

(*u*) 1 Roll. Abr. 137, 681; *Gore* v. *Perdue*, Cas. Eliz. 309; 1 Roper, H. and W. 389; Park on Dower, 268; *Young* v. *Tarbell*, 37 Maine, 509; *McCormick* v. *Taylor*, 2 Carter (Ind.) 336; *Robinson* v. *Miller*, 1 B. Mon. 88; S. C. 2 B. Mon. 284; *Jones* v. *Brewer*, 1 Pick. 314, 317; *Den* v. *Miller*, 1 South. 321; Scribner on Dower, vol. ii. p. 72. See also *Phelan* v. *Phelan*, Dra. Rep. 386.

(*v*) Park on Dower, 266; Co. Litt. 35 a, 38 b; Perk. 403.

(*w*) *Jones* v. *Brewer*, 1 Pick. 314; *Young* v. *Tarbell*, 37 Maine, 509; *Curtis* v *Hobart*, 41 Maine, 230; *Boyers* v. *Newbanks*, 2 Carter, (Ind.) 388; *Robinson* v. *Miller*, 1 B. Mon. 88; S. C. 2 B. Mon. 284; Scribner on Dower, vol. ii. p. 73.

(*x*) Park on Dower, 267; Co. Litt. 34 a, 35 b; 1 Roper, H. and W. 391; Scribner on Dower, vol. ii. p. 73.

12. But, if a joint tenant assign to the widow a rent out of the estate for dower, or otherwise endow her against common right, then his companion will not be bound by the assignment, for the same reasons which have been before mentioned, (*y*) relative to similar assignments by persons seised of tortious freeholds (*z*).

13. So, a husband seised of lands jointly with, or in right of his wife, may assign dower to a woman entitled to it, out of the estate, and his widow will not be permitted to defeat the assignment after his death (*a*); but it is presumed, upon the reasons before given, that the assignment must be such as the law authorizes to be made; namely, of a third of the lands, or the husband's widow may avoid it (*b*).

14. The assignment of dower required by the common law, is of one-third part of the lands and tenements of which the widow is dowable, to be set out by metes and bounds where it is practicable, and to be held by her for life. The endowment, therefore, must be of parcel of the lands and tenements themselves. Such is the widow's common law right, and the heir or tenant ought so to make the assignment (*c*). When this rule of law has been complied with, the dower is said to have been set out *according to common right* (*d*).

15. When the property does not admit of an assignment of dower in severalty, either from the nature of the hus-

(*y*) *Ante*, par. 10.

(*z*) Perk. 397; 2 Co. 67 a; Co. Litt. 34 b, 35 a; Scribner on Dower, vol. ii. p. 73.

(*a*) 1 Roll. Abr. 681; Perk. 399.

(*b*) Park on Dower, 267-268; Hargr. Co. Litt. 35 a, note (2); 1 Roper, H. and W. 391; Scribner on Dower, vol. ii. p. 73.

(*c*) *Fisher* v. *Grace*, 28 U. C. R. 312; Litt. 36; Co. Litt. 34 b; Perk. 411, 414; *Pierce* v. *Willams*, 2 Penning, 521.

(*d*) Park on Dower, 251; Scribner on Dower, vol. ii. p. 74; 1 Washb. Real Prop. 2nd ed. p. 223, pl. 4, 5.

band's interest in it, or from the quality of the thing itself, the assignment by metes and bounds, will of necessity be dispensed with. Thus, if the husband be seised in common or co-parcenary, and die before partition, the widow cannot have her dower assigned by metes and bounds, but shall have the third part of the share of her husband to hold in common with the heir, and the other tenants (*e*). So, if the property be indivisable in its nature, the widow must be content with a special endowment. Thus, if the husband die seised of a mill, or other manufactory, she may be endowed of one-third of the clear yearly rents of the premises, or according to the common law rule, of the third toll dish, or of a third of the profits, or the entire mill, for every third month (*f*). So, if the property be a ferry, one-third of the profits, or the use of the ferry for a third part of the time, in alternate periods, should be set apart to the widow (*g*). So, of many hereditaments, which are not divisible, dower must be assigned specially, of a third part of the profits (*h*).

16. It is said that at common law, the heir is not compellable to assign to his mother for her dower, the capital messuage which was his father's, or any part thereof, although she be dowable of the same. But he may assign to her other lands and tenements of which she is dowable, in allowance of the capital messuage. But if there are no other lands or tenements of which she is dowable, and the heir assign unto her a chamber in the capital messuage, in the name of dower, and in allowance of the same messuage, and she agree thereto, it is a good assignment. "But it

(*e*) Litt. 44; Co. Litt. 32 b; 2 Ld. Raym. 785; Fitzh. N. B. 149; Perk. 412; cap. 12, par. 7.

(*f*) R. S. O. cap. 55, sec. 35, sub-sec. 3. See also, Co. Litt. 32 a; Perk 342; Gilb. Dow. 397; N. Bendl. 120 And. See 2 Keb, 8, 41; Perk. 415, where it is added "And she shall grind there toll free."

(*g*) *Stevens* v. *Stevens*, 3 Dana, 371.

(*h*) Park on Dower, 252; 1 Roper, H. and W. 396. See cap. 7, par. 4; Scribner on Dower, vol. ii. p. 74.

seems," says Perkins, "that she is not compellable to take it, because the messuage is, as it were, an entire thing; and it shall be but trouble and vexation to a woman to have a chamber within the house of another man; and if she will not agree to the same, then the heir may assign to her a rent issuing out of the same messuage, in the name of her dower" (*i*).

17. The assignment of dower must be for the widow's life, whether the assignment be of common right, or of a compensation in lieu of dower. It is also essential that the assignment be absolute, unconditional, and without any exception or reservation in dimunition of its value (*j*). The reason mentioned in the books for this requisite is, that the widow's third part is a continuation of her husband's estate and interest; and that the heir or terre-tenant is but a minister of the law to assign and mark out such her share, and because, when her share is set out, she comes in by her husband, and her title has relation to his death (*k*).

18. An important distinction prevails between an assignment of dower made by the sheriff, in pursuance of a judgment at law, and a voluntary assignment made by the heir or grantee. In the former case, the rules of law, as to the mode in which dower shall be assigned, according to the particular nature and circumstances of the property, are to be strictly pursued (*l*); for, although the wife should consent to take her dower in some other manner than that due of common right, yet the sheriff cannot bind the heir or

(*i*) Perk. 406; Park on Dower, 254; Scribner on Dower, vol. ii. p. 75.

(*j*) Co. Litt. 34 b; Hob. 153; *Wentworth* v. *Wentworth*, Cro. Eliz. 452; Noy, 55; 1 And. 288.

(*k*) 9 Vin. Abr. 257, pl. 7, 8, 9; 1 Bright, H. and W. 379; Scribner on Dower, vol. ii. p. 75. See also, *Bullock* v. *Finch*, 1 Roll. Abr. 682, pl. 45; *Colthirst* v. *Bejushin*, Plow. Com. 21; Laws of Baron and Feme, p. 105; Co. Litt. 34 b; Park on Dower, 264-265.

(*l*) *Booth* v. *Lambert*, Styles, 276; Perk. 414; 12 Ed. IV. 2. But see 18 Hen. VI. 27 contra.

tenant (*m*), whose assent to an assignment against common right is as necessary as that of the wife; but on a voluntary assignment by the heir or terre-tenant, the parties may, by mutual agreement, waive a strict assignment according to the rules of law, and make such arrangement for the mode of enjoying dower as they think fit (*n*).

19. It follows, from what is above stated, that if a widow be dowable of several manors, lands, tenements, commons, etc., she may accept an assignment for life of any one or more of them, in lieu of her dower in all the rest; and such assignment, confirmed by entry, will bind her, although it may be of less value than the third part of each (*o*). She may accept an undivided third part in common, in lieu of a third part in severalty (*p*). And it is not necessary that the third part of the thing of which she is dowable, should be assigned, for if the fourth part, the fifth part, or the moiety be set off to her in the name of dower, for all the freehold which her husband had, and she agree thereto, it is a valid assignment (*q*).

20. If a widow recover judgment for her dower out of certain lands, and before execution she accept from the tenant an assignment of a rent out of them, in lieu of dower, this assignment will be good answer by the tenant,

(*m*) Perk. 332.

(*n*) Park on Dower, 262; Scribner on Dower, vol. ii. p. 76.

(*o*) 1 Roll. Abr. 683; Perk. 405; 2 New Rep. 33; 1 Roper, H. and W. 399.

(*p*) *Coots* v. *Lambert*, (1651), Styles, 276; Co. Litt. 32 b. n. (1); 4 Kent, 64; and see also *Rowe* v. *Power*, 2 Bos. and P. N. R. 1; and Perk. 413, who makes a *quære* on this point.

(*q*) Perk. 405; Park on Dower, 263. But it is said that *all* the land of the husband cannot be assigned in the name of dower. Perk. 408; *Stiner* v. *Cawthorne*, 4 Dev. and B. Law, 501; Scribner on Dower, vol. ii., p. 77; Moor. 679, pl. 928; 3 Leon. 272; 1 Roper, H. and W. 400; Moor. 59, pl. 167; Dyer, 91 a, in margin; *Bickley* v. *Bickley*, And. 287. And see Jenk. Cent. 1 Ca. 17; 1 Roll. Abr. 683; Brow. Dow. pl. 61; Perk. 410; Park. on Dower, 263.

to a *scire facias* brought by her to obtain execution upon the judgment, because the assignment is a compliance with and satisfaction of the judgment (*r*). But the reverse would have been the case, if the rent had been assigned out of lands in which the widow was not entitled to endowment, and therefore not the subject of the suit, nor mentioned in the record, for then the assignment would not agree with the directions of the judgment, which only respected the lands of which the widow was dowable. This assignment, therefore, could not be a satisfaction of the judgment, and consequently no impediment to the widow obtaining execution under her *scire facias* (*s*).

21. Upon the same principle, if the parties agree that dower shall be assigned by a Court which does not possess jurisdiction in the particular case, and the assignment is made accordingly, and is accepted by the widow, it will be binding (*t*).

22. It is settled, also, that an irregular or void assignment of dower may become obligatory, if the parties subsequently adopt and ratify the proceedings, or acquiesce therein for a long period of time; and the doctrine applies even where the court in which the proceedings were had, has exceeded its jurisdiction or authority in making the assignment (*u*).

(*r*) 1 Roper, H. and W. 400. And see *Hanger* v. *Fry*, Cro. Eliz. 310.

(*s*) Perk. 407-10; Park on Dower, 264; 1 Roper, H. and W. 401-3; Co. Litt. 34 b; Vernon's Case, 4 Rep. 1; *Conant* v. *Little*, 1 Pick. 189; Co. Litt. 34 b, and 288; Scribner on Dower, vol. ii. pp. 78, 79, 80. For the circumstances under which the doctrine of estoppel is applied to the widow, see *post*, cap. 31.

(*t*) *Pinkham* v. *Gear*, 3 N. H. 163. See also, *Meserve* v. *Meserve*, 19 N. H. 240; *Beers* v. *Strong*, Kerby (Conn.) 19; *Draper* v. *Baker*, 12 Cush. 288; Scribner on Dower, vol. ii. p. 81.

(*u*) *Fowler* v. *Griffin*, 3 Sandf. S. C. 385; *Fitzhugh* v. *Foote*, 3 Call. 13; *Robinson* v. *Miller*, 1 B. Mon. 88; S. C. 2 B. Mon. 284; *Mitchel* v. *Miller*, 6 Dana, 79; *Johnson* v. *Neil*, 4 Ala. 166; *Austin* v. *Austin*, 50 Maine, 74; Scribner on Dower, vol. ii. pp. 81-82.

23. It is said that, if a widow having a title of dower, marry a second husband, and the issue of the first husband assign the third part of the lands to his mother by the agreement of the husband, for her dower, in allowance of all the freehold which his father was seised of, she may, after the death of the second husband, refuse it, and be endowed anew, according to the value of the whole land which was in the possession of the husband during the coverture (*v*). But it would have been otherwise, if she had been endowed by the sheriff upon writ of dower brought by her and her husband (*w*).

24. An assignment against common right, though made by the heir, is not binding upon persons having charges or other interests in the land, although created subsequently to the attachment of the title of dower. And if a tenant in tail, assign an *undivided* third part of the lands in dower, it is good only during the continuance of his interest (*x*).

25. If lands which have been sown with corn and grain be assigned to the widow for dower, by the heir, she will be entitled to the crops (*y*).

26. If the owner of real estate, assign dower therein to a widow, he will not be permitted to deny that the land was subject to the right of dower, and this whether the assignment be in writing or by parol (*z*). So a parol assignment

(*v*) Perk. 422; 2 Inst. 309; Jenk. Cent. 2 Ca. 56.

(*w*) *Ibid.* See also, Scribner on Dower, vol. ii. pp. 82.

(*x*) Park on Dower, 267; *Rowe* v. *Power*, 2 Bos. and P. N. R. 11. But it has been said, that if a tenant in tail assign a *rent* out of the land in lieu of dower, this shall bind his issue, unless it amount to more than a third part. Per two Judges in *Bickley* v. *Bickley*, 1 And. 288; Scribner on Dower, vol. ii. p. 82.

(*y*) Dyer, 316, pl. 2; Perk. 521; 2 Inst. 81; 1 Bright, H. and W. 386, pl. 90; *post*, cap. 29; Scribner on Dower, vol. ii. p. 82.

(*z*) *Shattuck* v. *Gragg*, 23 Pick. 88.

by a residuary devisee, is conclusive of the right of dower as against him and his privies (*a*). And it has been held, that the acceptance of dower by the widow, estops her from denying the title of her husband to the lands of which she was endowed (*b*).

(*a*) *Meserve* v. *Meserve*, 19 N. H. 240.
(*b*) *Perry* v. *Calhoun*, 8 Hump. 551; Scribner on Dower, vol. ii. p. 82.

CHAPTER XXVI.

ASSIGNMENT BY METES AND BOUNDS AS AGAINST THE HEIR, DEVISEE OR ALIENEE OF THE HUSBAND.

1. *Introductory.*
2-6. *Mode of assignment in Ontario.*
7-12. *Duty of the sheriff or commissioners in making the assignment.*
13-15. *Assignment in separate tracts.*
16. *In estates held in common.*
17-18. *In mines.*
19. *Improvements since husband's death or alienation.*
20-22. *Mode of ascertaining the widow's proportion.*
23. *Date of the alienation.*
24-25. *Increase in value from extrinsic causes.*
26. *Allowance in lieu of dower conclusive.*
27. *Deterioration in the hands of the alienee.*
29. *Remedy for waste in Ontario.*
30-31. *Exoneration of the estate conveyed where the husband dies seised of other lands.*

1. It has been shown in a previous chapter (*a*), that in all cases in which the quality and condition of the property, and the nature of the husband's estate therein will admit of it, the rule of law requires that the dower of the widow shall be assigned to her by metes and bounds (*b*). It is proposed now to consider the proper application of this rule to cases where the widow has recovered judgment for her dower against the heir, or devisee of her husband, or against a purchaser from either.

(*a*) Cap. 25, par. 14.

(*b*) Perkins, 414; Co. Litt. 34 b; Park on Dower, 251; 4 Kent. 63; *Pierce* v. *Williams*, 2 Penning, 709.

2. In Ontario, the manner in which the assignment shall be made, is provided by statute (*c*). It is not necessary to give notice of the execution of a commission to lay off dower, to the heir or tenant who is a party to the suit (*d*). And where the admeasurers met at the house of the heir, and requested him to show the premises, and he refused to have anything to do with the business, this was held a sufficient notice, if any was required, and a waiver of all further notice (*e*).

3. Where, after receiving a demand, the tenant gave a written notice to demandant, that he was willing to assign her dower. In pursuance of this notice the tenant and the demandant's second husband met on the ground, and the tenant then offered what he considered a third, and put up pickets to make the boundary. The husband, however, refused this, and would not say what particular portion the demandant wanted, or would take. The parties then separated, and the action was brought. It was held, that the offer proved was sufficient (*f*). Robinson, C. J., said:—"It appears to me, that what the Legislature meant by the provisions referred to (13 and 14 Vic., cap. 58, sec. 5) was that the demandant in dower should not have her costs from the tenant, except where the tenant had denied the right to dower, or at least had declined, or omitted upon written demand made to acknowledge it. If the tenant admits the right, but will not, or cannot come to an amicable arrangement with the demandant in regard to the part which is to be taken, it is always in the power of the demandant to have the dower admeasured by the Sheriff,

(*c*) R. S. O. cap. 55.

(*d*) In the matter of Watkins, 9 John. 245; *Ridgway* v. *Newbold*, 1 Harring. 385; *Beaty* v. *Hearst*, 1 McMullan, 51. Our law is the same as that in force in the States in which these cases were decided.

(*e*) In the matter of Watkins, *supra*.

(*f*) *Bishoprick* v. *Pearce*, 12 U. C. R. 306. See also *Humphries* v. *Burton*, 16 U. C. R. 511.

but the costs of proceeding with that view should not be at the charge of the tenant, and would not have been at common law on a record like the present. The Legislature, I think, intended that the tenant should not have costs to pay if he throws no impediment in the way of the demandants recovering judgment for her dower, and by his conduct shows that there is no necessity for an action in order to establish her right."

4. Where, after demand, the tenant served a written notice naming a day and hour to meet the demandant on the land, and assign her dower and attended accordingly, but the demandant having mistaken the day appointed did not attend, and the tenant in consequence refused to do anything more; it was held that the demandant was entitled to succeed on the question of the offer to assign (*g*).

5. In *Ryckman* v. *Ryckman* (*h*), 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. It was held that the issue, as to whether or not the tenant had refused to assign dower, must be found for the tenant.

6. Section 30 and the following four sections of the Statute (*i*) provide for the appointment of commissioners to admeasure the dower, and section 35 and the following sections set out their duties.

7. The sheriff is a mere ministerial officer, and can only assign dower according to the mode prescribed by law and

(*g*) *Cook* v. *Phillips*, 23 U. C. R. 69.
(*h*) *Ryckman* v. *Ryckman*, 15 U. C. R. 266.
(*i*) R. S. O. cap. 55.

the tenor of the writ addressed to him by the court (*j*). If, therefore, the subject out of which dower is to be assigned be divisible, and he do not return that he has delivered seisin of a third part of it by metes and bounds, the assignment cannot be supported (*k*). Thus where two lots fronted on a river, and were, therefore, irregular in shape, and the sheriff assigned the east third of one and the west third of the other, making no survey and giving no further description, the assignment was held insufficient (*l*). The same general doctrine applies where, by Statute, the duty of making the assignment is withdrawn from the sheriff, and devolved upon commissioners appointed by the court (*m*).

8. If the sheriff discharge his duty vexatiously and maliciously, he will be punished by the Court, and the assignment set aside (*n*).

It has been held that when the subject of the assignment is a dwelling house, the *whole* of particular rooms may be set off for dower (*o*).

9. In Ontario, the portion assigned to the widow must be not less than one-third (*p*).

10. It is not competent to assign to the widow a portion of the land in fee, equal to her dower in the whole, for this would be in effect to make her a co-heir (*q*). Nor can the

(*j*) 1 Roll. Abr. 683, pl. 35.

(*k*) *Fisher* v. *Grace*, 28 U. C. R. 312; 1 Roper, H. and W. 394; 1 Washb. R. P. 2nd ed. 234; *Pierce* v. *Williams*, 2 Penning, 709.

(*l*) *Fisher* v. *Grace*, 28 U. C. R. 312.

(*m*) Scribner on Dower, vol. ii. p. 545, and note (6).

(*n*) Abingdon's Case cited, Palm. 265; Longvill's Case, 1 Keb. 743; Park on Dower, 272.

(*o*) Palm. 264; *Doe dem Riddell* v. *Gwinnell*, 1 Q. B. 682; 1 Gale. and D. 180; 1 Bright, H. and W. 372, pl. 40; Perk. 342; *White* v. *Story*, 2 Hill, 543; *Parks* v. *Hardey*, 4 Bradf. 15; *Patch* v. *Keeler*, 27 Verm. 252.

(*p*) R. S. O. cap. 55, sec. 35, sub-sec. 1.

(*q*) *Wilhelm* v. *Wilhelm*, 4 Md. Ch. Dec. 330.

privilege be given the widow of cutting firewood and feeding stock upon land not set off for dower (*r*).

11. It is not competent to show by parol what lands were included in an assignment of dower. Thus, where the return of commissioners set forth an assignment of "50 acres of the south-westerly side of said lots," which "said lots" were numbered three and four, parol evidence was held inadmissible to show that the easterly half of lot three was meant to be assigned, and this notwithstanding that the widow had built upon that part of the premises, and had resided there for forty years (*s*). It has been held also, that the return of the sheriff, that dower had been set off by three disinterested freeholders, is conclusive, and cannot be contradicted by the parties. If not true, the officer is liable to an action for a false return (*t*).

12. An assignment to the widow, and putting her in possession, is sufficient, though she have a husband (*u*).

13. By the common law, if the widow be entitled to dower out of several tracts or parcels of land, the sheriff must assign to her one third part of each, by metes and bounds (*v*). But if the writ command him to deliver possession of a third part of all lands and tenements, etc., and there are lands in meadow, pasture, and corn, he would act in obedience to the writ by assigning dower *in toto* out

(*r*) *Jones* v. *Jones*, Busbee's Law Rep. 177.

(*s*) *Young* v. *Gregory*, 46 Maine, 475.

(*t*) *Eastabrook* v. *Hapgood*, 10 Mass. 313. As to sufficiency of Sheriff's or Commissioner's return, see *Howard* v. *Cavendish*, Cro. Jac. 621, pl. 12; Palm. 264; 1 Roper, H. and W. 394; *Den* v. *Abingdon*, Dougl. 476; *Fenny* v. *Durrant*, 1 Barn. and Ald. 40; *Patch* v. *Keeler*, 27 Verm. 252; *Adams* v. *Barron*, 13 Ala. 205; *Stevens* v. *Stevens*, 3 Dana, 371; Scribner on Dower, vol. ii. pp. 549-50.

(*u*) *Adams* v. *Barron*, 13 Ala. 205.

(*v*) Litt. 36; *Schnebly* v. *Schnebly*, 26 Ill. 116; *French* v. *Pratt*, 27 Maine, 381; *French* v. *Peters*, 33 Maine, 396; And cases cited, Scribner on Dower, vol. ii. p. 550.

of any of these descriptions of lands, and his return to the Court of having done so, would be good (*w*).

14. It is said (*x*), that if the widow be dowable of three manors, the sheriff may assign one manor to her in lieu of dower out of all; but this is denied by the Court in an anonymous case in Moore (*y*), because the widow is entitled by common right to dower of a third of each manor. Mr. Roper considers that the difference probably may be thus reconciled (*z*). "If the widow recovers dower out of three manors, and the writ to the sheriff direct him to assign it out of the three, then his assignment of one manor for dower out of all, will not be good (*a*); but that if the direction in the writ be general, to assign dower of all lands and tenements comprised in it, and the parties agree that one manor shall be assigned for dower in respect of all the three (*b*), such assignment will be good" (*c*).

15. But Mr. Jacob, observes (*d*):—"Perhaps the authorities in favour of this mode of assigning dower would now prevail, if the manor assigned were equal in value to one-third of the whole. It does not seem to be necessary in all cases, that the widow should have a third of each part of the husband's estates. Thus, if the husband be possessed of several different mines, it is not necessary that the sheriff should divide each of them; but he may assign such a number of them as may amount to one-third in value of the whole" (*e*).

(*w*) Moore, 19. pl. 66; 1 Roper, H. and W. 393; Park on Dower, 255.
(*x*) Moore, 19.
(*y*) Pge. 12, pl. 47.
(*z*) 1 Roper, H. and W. 393.
(*a*) *Ante*, cap. 25, pars. 18-24.
(*b*) *Ante*, cap. 25, pars. 18-24.
(*c*) 1 Roll. Abr. 683, pl. 30; Moore, 19, pl. 66; Scribner on Dower, vol. ii. p. 551.
(*d*) 1 Roper, H. and W. 393, note.
(*e*) 1 Taunt. 411; 9 Vin. Abr. 257, pl. 13, 14; *Ibid.* 260; pl. 3; *Post*, pars. 17-18; *Clarendon* v. *Hornsby*, 1 P. Wms. 446.

16. As has already been stated, if the husband be tenant in common, and die before partition, the dower of his widow must be assigned to her to hold in common also, and not in severalty (*f*). But if partition be made before the husband's death, so as to invest him with a sole seisin in his share of the lands, the widow's dower is thereby rendered capable of being assigned in severalty; and in such case, the assignment of it ought to be made by metes and bounds (*g*). So the widow of a tenant in common whose interest was conveyed in his lifetime, without release of dower, to his co-tenant, may have her dower set out by metes and bounds (*h*).

17. Of open mines and minerals, the following distinctions have been laid down in a late English case (*i*), in regard to the manner of assigning dower. If the open mines be within lands which belonged to the husband, the sheriff must estimate the annual value of them, as part of the value of the lands of which the widow is dowable; but he need not assign to her any of the mines, or any parts of them; he may include a third of their annual value in the quantity of the lands set out by him by metes and bounds for dower in which are none of the mines or minerals. But if he choose, as he is at liberty to do, to include any of the mines or minerals in the assignment, then if the lands in which they are, form no part of the lands assigned for dower, he ought to describe the mines specifically; if, how-

(*f*) Fitz. N. B. 149 (1); 1 Brownl. 127; Litt. 44; 2 Raym. 785; Perk. 412; Park on Dower, 251; *Rank* v. *Hanna*, 6 Ind. 20; *Lloyd* v. *Conover*, 1 Dutch. 47; *Woodhull* v. *Longstreet*, 3 Harr. 405.

(*g*) Perk. 412; 1 Roper, H. and W. 396; *Potter* v. *Wheeler*, 13 Mass. 504; *Wilkinson* v. *Parish*, 3 Paige, 653; *Totten* v. *Stuyvesant*, 3 Edw. Ch. 500; *Dolf* v. *Basset*, 15 John. 21; *Jackson* v. *Edwards*, 22, Wend. 498; *Mosher* v. *Mosher*, 32 Maine. 412; *Ridgeway* v. *Newbold*, 1 Harring, 385; Scribner on Dower, vol. ii. p. 553.

(*h*) *Blossom* v. *Blossom*, 9 Allen, 254.

(*i*) *Stoughton* v. *Leigh*, 1 Taunt. 402. See also cap. 7, par. 5.

ever, the mines assigned be included in the lands set out in dower, it is optional in him to particularize them, since they are parts of the lands assigned. But the sheriff is not compellable to adopt either of these methods. He may divide the enjoyment and perception of the profits of the mines between the parties, viz., by directing the separate alternate enjoyment of the whole for short periods, proportioned to the share each party had in the subject, or by giving to the widow an adequate part of the profits (*j*).

18. With respect to open mines or minerals of the husband lying in the lands of other persons, and in which his widow is entitled to dower, it is to be observed, that if the assignment for dower of such mines could be made by metes and bounds, in the manner lands are required to be divided, that method ought to be adopted; but since that cannot be accomplished without preventing the parties from having the proper enjoyment and perception of the profits, the sheriff is permitted to assign dower in a special manner. It is not, therefore, necessary that the sheriff should divide each of the mines; but he may assign such a number of them as he thinks proper, so as to give each person a due share of the whole, as before mentioned (*k*).

19. In Ontario, it is provided by Statute (*l*), that it shall be the duty of the commissioners to ascertain and determine what permanent improvements have been made upon

(*j*) 1 Roper, H. and W. 397.

(*k*) *Stoughton* v. *Leigh*, 1 Taunt. 402; 1 Roper, H. and W. 397; Park on Dower, 253; *Hoby* v. *Hoby*, 1 Vern. 218; *Dicken* v. *Hamer*, 1 Drew. and Sm. 284; Scribner on Dower, vol. ii. pp. 553-554. See observations of Mr. Park on the case of *Stoughton* v. *Leigh*, Park on Dower, 258-61. The rule laid down in *Stoughton* v. *Leigh* was adopted by the Courts in New York, *Coates* v. *Cheever*, 1 Cow. 460. See also, *Billings* v. *Taylor*, 10 Pick. 460; *Moore* v. *Rollins*, 45 Maine, 493. It is held in New Jersey that dower may be assigned in clay banks. *Rockwell* v. *Morgan*, 2 Beasl. Ch. 384, 389.

(*l*) R. S. O. cap. 55, sub-sec. 2 of sec. 35.

the lands, out of which dower is claimed since the death of the plaintiff's husband, or since the time her husband alienated them to a purchaser for value, and if it can be done, they shall award the dower out of such part 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 plaintiff 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 permanent improvements.

20. The widow is entitled to have assigned to her such part of the land, the beneficial enjoyment of which by her, in the condition in which it was at the time of such assignment, will be to her equal in value to the beneficial enjoyment, by her, of one-third of the land, had it remained up to that time in the same condition, as it was at the time of her husband's death, or at the time of its alienation by him (*m*).

21. A purchaser under execution, occupies the same position in regard to improvements made by him, as if the premises had been conveyed by deed directly from the husband (*n*).

22. But if the husband make a conveyance upon condition, and the grantee afterwards improve the lands, and the estate of the latter is then defeated by entry of the

(*m*) Per Armour, J., in *Robinet* v. *Pickering*, 44 U. C. R. 337. It was also held in this case that the clearing of lands for farming purposes is a permanent improvement, and that the report of the Commissioners will not be disturbed unless upon the clearest evidence of its injustice. See also, *Doe Riddell* v. *Gwinnell*, 1 Q. B. 682, in which it was decided that the widow was entitled to a third part of the lands, according to their value at the time of her husband's death.

(*n*) *Ayer* v. *Spring*, 9 Mass. 8; *Summers* v. *Babb*, 13 Ill. 483; *McClanahan* v. *Porter*, 10 Misso. 746; Scribner on Dower, vol. ii. p. 579.

husband for a breach of the condition, the husband thereby becomes seised of his former estate (*o*), and his widow will be entitled to dower of the improvements as well as of the lands. The grantee in such case has no reasonable ground of complaint, since it was his own folly and imprudence to make improvements upon lands which he held by so uncertain a tenure (*p*). And the same rule holds with respect to improvements by one who has disseised the husband (*q*).

23. Where the husband conveys by absolute deed, the date of its execution and delivery fixes the period of the alienation. If he mortgages the land, and afterwards release the equity of redemption, the time of the release is to be regarded as the time of alienation (*r*). If he gave a title bond conditioned for a conveyance on payment of the purchase money, and deliver possession, and afterwards the purchase money is paid, and a title obtained by the purchaser, the date of the bond must be considered the period at which the interest of the husband was determined (*s*). In a case where the husband, by contract, sold a parcel of land, and agreed to deliver possession and execute title on a certain day upon payment of the purchase money, but died before the time fixed, and his widow continued to occupy a portion of the premises for several years, and until her dower was assigned; it was held, that the purchaser was entitled to be relieved from the payment of a sum equal to one-third the value of the land at the

(*o*) *Ante* cap. 10, pars. 13, 14.

(*p*) 1 Roper, H. and W. 350.

(*q*) Perk, 328; 1 Roper, H. and W. by Jacobs, 350; Scribner on Dower, vol. ii. p. 580.

(*r*) *Hale* v. *James*, 6 John. Ch. 258. The widow is dowable of improvements made by the husband as mortgagor. *Ibid.*; *Purrington* v. *Pierce*, 38 Maine, 447; 4 Kent, 66.

(*s*) *Wilson* v. *Oatman*, 2 Blackf. 223. In this case the title was obtained after the husband's death.

time of the contract, until the death of the dowress, on his securing its ultimate payment without interest, by a lien on the land (*t*).

24. Under the doctrine of the English Courts, which entitles the widow to dower according to the value of the lands, at the death of her husband, or at the time of the assignment, it follows that she not only receives the benefit of all improvements made, but also of the increased value, if any, arising from other causes. And Mr. Scribner says: "In the latter particular, the law in most of the American States corresponds with that of England" (*u*).

25. In the case of *Thompson* v. *Morrow* (*v*), it was held that the widow is entitled to the benefit of the increased value arising from extrinsic causes. In the case referred to, the premises in which dower was claimed, were situate in the City of Pittsburgh, and had been improved by the purchaser, and had also greatly increased in value by the growth of the city and other causes distinct from any buildings or improvements made by him. The opinion was delivered by Tilghman, C.J., who said: "So far as concerns improvements made by the alienee, it is agreed, that the tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labour or money of the alienee, it would be hard indeed upon the widow, if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate, which may arise either from public misfortune, or the negligence, or even the voluntary act of the alienee (*w*); for, although he destroy the buildings erected by the hus-

(*t*) *Springle* v. *Shields*, 17 Ala. 295; Scribner on Dower, vol. ii. p. 580.
(*u*) Scribner on Dower, vol. ii. p. 587.
(*v*) *Thompson* v. *Morrow*, 5 Serg. and R. 289.
(*w*) *Post*, pars. 27, 28.

band, the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband" (*x*).

In Ontario, it has been held, following *Robinet* v. *Lewis* (*y*), and the American decisions, that the widow is entitled to the benefit of the increased value arising from extrinsic causes. In *Norton* v. *Smith*, it was held, that the damages of the widow from the time of demand made, "should be calculated upon the average value of the land through that period, irrespective of improvements put on by the tenant standing in the place of the alienee of her husband;" and that, "with respect to the future allowance to the widow in lieu of dower, it should be estimated upon a computation of one-third of the occupation value of the ground, irrespective of the improvements upon it, which have all been made since the alienation of the land by the husband, making an allowance (if it can be done on any satisfactory data), for any probable variation in the value of the land from causes independent of improvements."

26. Where a widow has petitioned to recover dower, and by reason of the indivisibility of the property, an allowance has been made to her in lieu of dower, the sum so fixed becomes conclusive, and cannot be changed by a Court of Equity, although the property may subsequently become greatly enhanced or depreciated in value (*z*).

27. Upon the subject of deterioration in the hands of the alienee, Perkins says (*a*): "If a man be seised of land

(*x*) See also *Powell* v. *Mon. and Brimf. Man. Co.*, 3 Mason, 347. See also Scribner on Dower, pp. 588-589, and the cases there cited.

(*y*) *Robinet* v. *Lewis*, Dra. Rep. 260; *Norton* v. *Smith*, 25 U. C. R. 213; S. C. in Appeal, 7 U. C. L. J., O. S. 263; followed in *Robinet* v. *Pickering*, 44 U. C. R. 337; *Buck* v. *McCallum*, 13 U. C. C. P. 163.

(*z*) *Donoghue* v. *The City of Chicago*, U. C. L. J. 1874, p. 290.

(*a*) Perk. sec. 329.

in fee upon which there is a building, so that by reason thereof the land is worth four pence more by the year, and he takes a wife, and enfeoffs a stranger, who takes down the building, and the feoffor dies, his wife shall have dower according to the value of the land, as it was at the time of the death of her husband; and hath not any remedy for the taking away of the building before the death of her husband, although the building was upon the same land, and in the possession of her husband during the coverture; for a wife has not right to have possession of her dower before the death of her husband; *tamen quaere* of this case." In a note to this section, Mr. Greening observes (*b*): "An authority upon this point has been sought in vain; and Bacon's Abridgement Dower, B. 5, appears to be the only book in which it is at all noticed; but the law seems to be as stated in the text; for it is clear that if the buildings had been pulled down by the husband, the wife could have claimed nothing in respect of them; and this privilege, it is apprehended, must be transfered with the estate. And there is no right without a remedy; but, as stated, the wife has no means of recovering the value of the buildings against the feoffee, therefore she has no right. The right to dower, too, as implied in the text, is inchoate only during the husband's life, and not consummate till his death, when (in the case put) the buildings were not in existence."

28. Upon the authority of Perkins, Mr. Jacob lays it down as the rule (*c*), that "if the husband, during the coverture, aliens the land, and the alienee impairs the value, as by taking down buildings, it seems that the wife is only entitled to be endowed according to the value at the time

(*b*) Perk. 15 ed. 329, note.
(*c*) 1 Roper, H. and W. by Jacob, 350; Park on Dower, 257.

of her husband's death." But he adds (*d*): "If the alienee impairs the value *after* the husband's death, it may be presumed that the widow would be entitled to have her dower assigned according to the value at that time. For she would otherwise have no compensation for the diminution, as she does not in this case recover damages in dower (*e*).

29. In Ontario, it would seem that the widow has no remedy for waste committed by the alienee during the lifetime of the husband; but that if such waste is committed after the husband's death, she may obtain an injunction to restrain it (*f*).

30. In the early case of *Grigby* v. *Cox* (*g*), part of the plaintiff's bill appears to have been framed upon the idea, that a purchaser of part of an estate, which is subject to dower, has an equity to have the dower turned upon the part remaining unsold, in discharge of the part purchased. In that case, the estate had been settled, on the marriage of the defendant and his wife, subject to the dower of the mother, to the separate use of the wife, who appointed part to the plaintiff. He filed a bill to have the effect of this bargain, and also praying that he might be decreed to receive the rents and profits of this part of the estate free from the deduction of the mother's dower. It does not appear from the report that the mother was a party to the bill. The observations of Lord Hardwicke on this part of the prayer of the bill are scarcely intelligible, and probably depend upon specialties of the case, which the report does not develope (*h*).

(*d*) 1 Roper H. and W. 350, note.
(*e*) Co. Litt. 324; Park on Dower, 258.
(*f*) *Farley* v. *Starling*, 18 Gr. 378.
(*g*) *Grigby* v. *Cox*, 1 Ves. Sr. 517.
(*h*) Park on Dower, 281; Scribner on Dower, vol. ii. p. 597.

31. In a case (*i*) in New York, where the husband sold several lots of land, in which his wife had a contingent right of dower, to various individuals, and conveyed such lots with warranty, and afterwards died seised and possessed of a large real and personal estate, which he devised to the complainant, in trust, for his daughter; and the trustee, after the death of the testator, offered to assign to the widow her dower out of the estate of which the husband died seised, as well for that estate, as for the lands sold and conveyed by her husband with warranty, which offer she refused, and commenced ejectment suits against the several purchasers, for the purpose of recovering her dower in each lot separately; it was held by Walworth, Chancellor, that the widow was in equity, bound to accept an assignment of the whole dower out of the estate of which her husband died seised, and which was ultimately liable to sustain the whole charge of her dower right in the lands conveyed with warranty (*j*).

(*i*) *Wood* v. *Keyes*, 6 Paige, 478.

(*j*) See also *Lawson* v. *Morton*, 6 Dana, 471; Scribner on Dower, vol. ii. p. 598.

CHAPTER XXVII.

ADMEASUREMENT OF DOWER WHERE THERE HAS BEEN AN EXCESSIVE ASSIGNMENT.

1-3. *Excessive assignment by the heir.*

4-10. *Excessive assignment by the sheriff or commissioners.*

11-12. *Compensation to the widow for improvements where dower is admeasured on account of an excessive assignment.*

1. It may happen that the heir, in making the assignment, has set off to the widow more than a third part of the subject, in which she was entitled to dower. If he were of full age, and under no disability at the time, a court of law will extend to him no relief (*a*).

2. But if the heir were under age when he assigned dower, the common law protects him against the consequences of an excessive assignment, and supplies him with the writ of admeasurement of dower (*b*).

3. An infant heir, who has assigned too large a portion of lands for dower, cannot defeat the assignment by entry upon attaining twenty-one, because the widow being en-

(*a*) Gilb. Dow. 380; *Stoughton* v. *Leigh*, 1 Taunt. 404, 412; Scribner on Dower, vol. ii. p. 703.

(*b*) *Ibid.* 408; *Young* v. *Tarbell*, 37 Maine, 509; *McCormick* v. *Taylor*, 2 Carter (Ind.) 336. See *post*, par. 6.

titled to dower, the assignment is good in part, and can only be defeated *quoad* the excess, which is uncertain previous to the admeasurement (*c*).

4. If the sheriff assign dower contrary to common right, when it might have been assigned regularly, it seems that this is error in the execution, and may be taken advantage of by the tenant as such (*d*). And if the assignment be of lands not comprised in the judgment, they may be recovered back in an ejectment; for whatever is included in the sheriff's return, and not authorized by the judgment, to that extent the execution is void (*e*).

5. It is said by Doddridge, J., in the case of *Howard* v. *Mansfield* (*f*), that if the sheriff commit error by assigning a larger part than he ought, a writ of admeasurement lies, but not error, inasmuch as the judgment and award of execution are good. It is, however, very doubtful, whether the writ of admeasurement could be resorted to in this instance; and Mr. Park expresses the opinion that no precedent for it is to be found (*g*). But according to the practice at common law, if the sheriff assign more than a third part of the lands for dower, the heir or tenant may bring a *scire facias* for an assignment *de novo* (*h*).

6. We have seen (*i*), that if an infant heir assign to the widow, more than her just proportion of the lands, he may

(*c*) Gilb. Dow. 388; 1 Roper, H. and W. 408; *McCormick* v. *Taylor*, 2 Carter (Ind.) 336; Scribner on Dower, vol. ii. p. 705.

(*d*) Styles, 276 in *Booth* v. *Lambert*; Park on Dower, 27. As to error in the return, see *Howard* v. *Mansfield*, Palm. 264.

(*e*) 2 Ld. Raym. 1293, 1295; 1 Roper, H. and W. 406; Scribner on Dower, vol. ii. p. 705.

(*f*) *Howard* v. *Mansfield*, Palm. 266.

(*g*) Park on Dower, 271.

(*h*) Gilb. Dow. 389; Palm. 266; Bro. Dow. fo. 255 b, pl. 83; Bro. Extent pl. 13; Fitzh. N. B. 148, note (b); 1 Roper, H. and W. 406, 409; Park on Dower, 271; Scribner on Dower, vol. ii. p. 706.

(*i*) *Ante*, par. 3.

have relief upon the writ of admeasurement of dower. But Mr. Roper states (*j*), that if the assignment had been made under the judgment of a court of law, a writ of admeasurement would not lie for the heir at his age of twenty-one, since it is presumed, from his being an infant when the assignment was made, the Court took care of his interest. It seems, however, that the heir may bring a *scire facias*, as in other cases, or he would be without remedy (*k*).

7. It seems, also, that a Court of Equity will entertain a bill for relief against a partial assignment of dower by the sheriff, and that that Court may direct a new writ of seisin to the sheriff, and even order him to divide the lands into three parts, and to choose by lots (*l*). In this case the assignment was charged to have been fraudulently made; and besides the excess of value, it appeared that the father of the dowress was the only person that, on behalf of the infant children, defended the writ of dower, and appeared to see the same set out, which was relied on as looking like collusion (*m*).

8. In Ontario, the practice in setting aside the report of commissioners is regulated by the statute (*n*), which provides that either party may, after the expiration of ten days, from the filing of the sheriff's return to the writ of assignment, apply for a rule, calling upon the opposite party to show cause why the commissioners report should not be set aside, and the Court may order the report to be varied or

(*j*) 1 Roper, H. and W. 409. See the comments of Mr. Jacobs, *Ib.* note.

(*k*) Gilb. Dow. 389; 1 Roper, H. and W. 409; Scribner on Dower, vol. ii. p. 706.

(*l*) *Hoby* v. *Hoby*, 1 Vern. 218; 2 Ch. Ca. 160.

(*m*) See also *Sneyd* v. *Sneyd*, 1 Atk. 442; Park on Dower, 272; 1 Roper, H. and W. 406.

(*n*) R. S. O. cap. 55, sec. 37.

amended, or may annul and set it aside, and appoint new commissioners, or direct the sheriff to do so.

9. But circumstances may occur long after the original proceedings have terminated, which render it just and proper that an assignment *de novo* should be ordered in behalf of the tenant, and in such cases a Court of Equity will afford relief. An example of this is furnished by the case of *Singleton* v. *Singleton* (*o*). There, some years after dower had been set out to the widow, a recovery was had against the heirs, by the holder of a paramount title, which deprived them of a large portion of the tract of which the widow had been endowed. This loss fell entirely on the part reserved to the heirs; and there was, moreover, a decree against the estate for several thousand dollars, for deterioration of soil, and the rents and profits. Upon this state of facts, the Court regarded it as a clear principle of equity, that the widow was not entitled to retain as her dower one-third of the entire tract, after a fourth or a third of it had been lost. "It would be just as reasonable," they said, "to suppose that she would be entitled to retain one-third of the whole, after the remaining two-thirds had been lost by an adverse claim. The heirs, as between them and the widow, are as much entitled to two-thirds of the land of which the ancestor died seised, as the widow is to one-third." And they added: "As the heirs were made liable for rents upon the lost land during the whole time it was held by, or for them, that is, from the close of the year 1815, when the widow's dower was assigned, the case is, in effect, as if they had not had the use of the lost land at all; and as to them, it may be considered as lost before the assignment of dower; while the widow has enjoyed the issues and profits of one-third of the whole tract during the entire period. To remedy this inequality, there should

(*o*) *Singleton* v. *Singleton*, 5 Dana, 87.

have been a re-assignment or re-admeasurement of dower, giving to the dowress one-third of the tract, exclusive of the lost land. And the dowress and her successive husbands, who have enjoyed the dower land in her right, should be held accountable to the heirs, as trustees, for the reasonable annual value during the respective periods of their enjoyment of the excess of the dower, as originally assigned, beyond the proper quantity ascertained upon the re-admeasurement." It was further held, that the account for rents upon the excess should not be charged with interest, but should be credited with the value at the time of the assessment of such improvements as had been made by, or for the widow, during the period to which the accounts respectively applied (*p*).

10. It has been suggested, also, that equitable relief may be had in a proper case, where the assignment was of the rents and profits. "It seems," remarked the Court, in *Gove* v. *Cather* (*q*), "that after a decree allowing the widow a yearly sum in lieu of dower, the allowance may be changed upon filing a bill, if the income of the property be materially enhanced, or lessened" (*r*).

11. If the lands assigned by the infant heir exceed one-third of the whole, and they become more valuable than the remainder by improvements made by the widow, it is said, that a writ of admeasurement will not lie, on account of such improvements (*s*), as that would be unjust, since she may have been induced to make them under a presumption that the assignment was proper. But there seems to be no objection to the admeasurement of the

(*p*) Scribner on Dower, vol. ii. pp. 708-709.
(*q*) *Gove* v. *Cather*, 23 Ill. 634.
(*r*) Scribner on Dower, vol. ii. p. 709.
(*s*) Fitzh. N. B. 149 (c).

lands assigned, and to the heir taking the overplus, upon allowing for the value of the improvements of the excess of the lands assigned. Thus, if the assignment were of four acres, when the number should have been three, the heir might take back the fourth upon the admeasurement, and make compensation to the widow for the value of its improvements.

12. It is also said to be doubtful, whether, if an open mine of coals or lead were in the share assigned by the infant heir, so as to render the widow's third of greater value than the remaining two-thirds, a writ of admeasurement would lie (*t*). Upon this point, Mr. Roper remarks (*u*): "It is presumed, however, attending to what has been observed on the assignment of mines and minerals in a preceding page (*v*), and the necessity of estimating the yearly value of them as part of the value of the whole estate, that if no estimate of the mine in question had been made, there could be no objection to the heir's title to the writ of admeasurement, to rectify the mistake, and to reduce the widow's assignment" (*w*).

(*t*) Fitzh. N. B. 149 (c).
(*u*) 1 Roper, H. and W. 410.
(*v*) *Ibid.* 396.
(*w*) Scribner on Dower, vol. ii. p. 710.

CHAPTER XXVIII.

EVICTION OF THE WIDOW FROM THE ESTATE ASSIGNED HER AS DOWER.

1-3. *Eviction from dower assigned according to common right.*

4-5. *Eviction where the assignment was contrary to common right.*

6. *Proceeding for new assignment.*

1. Every assignment of dower according to common right, by the heir, or by the sheriff, on a recovery against the heir, implies a warranty; but this warranty is special, viz.: that the tenant in dower, being impleaded by one who has title paramount, shall vouch, and recover in value, not according to that which she hath lost, but a third part of the two remaining parts of the lands whereof she is dowable (*a*). And if it is but a particular estate which is recovered against the dowress, and which determines in her lifetime, she may re-enter into her original dower, and then it seems the heir may enter into the second dower, but she shall not have both (*b*).

2. The old books are at variance, whether this implied warranty arises only in respect of the privity between the

(*a*) Bro. Dow. pl. 79; Co. Litt. 384 b; Fitzh. N. B. 149 (M); 4 Co. 122 a; Perk. 418-20; 9 Vin. Abr. 264; 1 Roll. Abr. 684, pl. 25; Gilb. Dow. 424; *French* v. *Pratt*, 27 Me. 381; *French* v. *Peters*, 33 Me. 396; *Jones* v. *Brewer*, 1 Pick. 314. But see 9 Co. 17 b, where it is said that she shall be newly endowed of other lands which the heir has, generally; Park on Dower, 275.

(*b*) Bro. Dow. pl. 79.

dowress and the heir, or extends also to an assignment by the alienee of the husband, or of the heir. In one case, it is said, that a widow endowed by the vendee of the husband, may vouch the vendee, because of her endowment and the reversion in him (*c*). But Mr. Parke is of opinion that the current of authority is against this view (*d*). In Bedingfield's case (*e*), it is said: "There is a greater privity when a wife is endowed of the immediate estate which her husband's heir has by descent, than when she is endowed by a stranger, or of another estate; for if the wife be endowed of the immediate estate, descended to her husband's heir, if she be after impleaded, she shall vouch the heir, and shall be newly endowed of other lands which the heir has; but if the wife be endowed by the husband's or heir's alienee, if she be impleaded, she shall not vouch the alienee to be newly endowed; and that is the reason that when a woman brings a writ of dower against the alienee of the husband, etc., and he vouches the heir, the demandant may witness that the heir has lands descended to him in the same county (for the original doth not extend to another county), and pray that she may be endowed of his estate, and that is for the benefit of her voucher to be newly endowed. Vide in 4 E. III. 36 b and 6 E. III., 11 a, b. The tenant in a writ of dower, vouched the heir of the husband, and the demandant testified that he by descent, etc., in the same county; and judgment was given against the heir if he had, and if not against the tenant (*f*). In 6 E. III. 20 b, the wife of a stranger brought a writ of dower, and the tenant vouched the heir, etc. (*g*), the demandant shall not recover against the heir, because there wants privity.

(*c*) 2 Roll. Abr. 743.
(*d*) Park on Dower, 275.
(*e*) Bedingfield's Case, 9 Co. 17 b.
(*f*) 2 Roll. Abr. 751; Dy. 202, pl. 71; Winch. 81, 88; Hutt. 71-72.
(*g*) *Quære*, what heir? Park on Dower, 276, note.

In 18 E. III. 36 b, in dower, the tenant vouched, and the vouchee vouched the heir of the husband of the demandant; the demandant testified that the heir had assets by descent in the same county; the demandant shall not recover against the heir, but against the tenant only, for there is not immediate privity betwixt the demandant and the heir, for the demandant shall recover against the heir, only when the tenant in demesne vouches him. Vide Regist. Judic. 15; 16 E. III. Dow. 56; 3 El. Dy. 202" (*h*). It seems, however, that if a woman is endowed by a disseisor, she shall have the warranty (*i*).

3. The rule of the common law, that a widow, who has been evicted of her dower, may be evicted anew of the remaining lands of her husband, is generally recognized in the United States (*j*).

4. If the widow accept an assignment by the tenant, contrary to common right, she takes the estate set apart to her, subject to the charges and encumbrances existing thereon (*k*); and if she be evicted therefrom, she is not entitled to be endowed anew of other lands of the husband (*l*). "The law," observes Mr. Roper (*m*), "carries back the title of the widow to the husband's first seisin, in instances only, where dower is accepted and assigned, according to its own form and rule; but when a different

(*h*) See 4 Kent, 69.

(*i*) Fitzh. N. B. 149, note; Park on Dower, 277; Scribner on Dower, vol. ii. pp. 711-12.

(*j*) *Scott* v. *Hancock*, 13 Mass. 162, 168; *Holloman* v. *Holloman*, 5 Smedes and Marsh, 559; *Mantz* v. *Buchanan*, 1 Md. Ch. Dec. 202; *French* v. *Pratt*, 27 Me. 381; *French* v. *Peters*, 33 Me. 396; *St. Clair* v. *Williams*, 7 Ohio, pt. 2, 110; Scribner on Dower, vol. ii. pp. 713-14.

(*k*) *Ante*, cap. 21, par. 27; *Post*, cap. 29, par. 6; Park on Dower, 242.

(*l*) Co. Litt. 173 a, 32 b; 1 Roper, H. and W. 412; 1 Washb. R. P. 2nd ed. 224, 240; *Jones* v. *Brewer*, 1 Pick. 314; *French* v. *Pratt*, 27 Me. 381; *French* v. *Peters*, 33 Me. 396.

(*m*) 1 Roper, H. and W. 412.

form and rule are adopted by the consent of the widow, she claims in the nature of a purchaser, so that her estate commences from the assignment, and without relation to any antecedent period; for which reason she takes it with all the encumbrances affecting it in the possession of her husband, and it was her own folly to accept of such an assignment."

5. An exception to this rule occurs when the endowment is not made by the heir *in pais*, but dower is assigned by the sheriff, upon a judgment obtained by the widow in a writ of dower, in the making of which assignment, he has not followed the directions of the common law, in delivering to her seisin of one-third part of each kind of her husband's property, to which her right of dower attached. In this case, her acceptance and acquiescence under the assignment, will not debar her of any of the privileges which she would have been entitled to, if her dower had been assigned in the form and manner which the common law requires. The assignment having been made under the authority of a Court, it is to be considered as a legal and proper one, while it remains uncorrected; and it therefore entitles the widow to the same advantages as if the assignment had been made of common right (*n*).

6. By the ancient common law, when the widow was sued by one having a superior title to the lands assigned her as dower, she was at liberty to vouch the tenant and recover against him in value in the same action (*o*). It seems, however, in modern practice that where the widow is evicted of the third part set off to her upon a writ of seisin by the sheriff, she may resort to a *scire facias* for a

(*n*) 1 Roll. Abr. 684, pl. 50; Perk. 330; Park on Dower, 242; 1 Roper, H. and W. 393, 413-14; Scribner on Dower, vol. ii. p. 714. See also, American cases cited in preceding note.

(*o*) *Ante*, par. 1.

new assignment in the remaining lands (*p*). It is said, in a case in Maine, that the proper method of proceeding is by action, in the same manner as if no assignment had been made (*q*).

(*p*) Stearn's Real Act, p. 321; 1 Washb. Real Prop. 2nd ed. 241.

(*q*) *French* v. *Pratt*, 27, Maine, 381, 396-7; Scribner on Dower, vol. ii. p. 719.

CHAPTER XXIX.

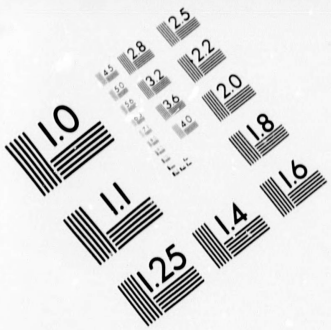
OF THE NATURE AND QUALITIES OF DOWER AFTER ASSIGNMENT.

1. *The assignment of dower vests the widow with the immediate freehold.*
2-3. *Her estate takes effect by relation from the death of her husband.*
4. *Charges and encumbrances created by the husband alone, defeated by the assignment.*
5. *Charges and encumbrances created prior to the marriage, paramount to dower.*
6. *If the widow accept an assignment contrary to common right, she takes subject to encumbrances.*
7. *Where the lands assigned are subject to a lease for years, the widow is entitled to the rent.*
8-10. *Whether a dowress can enter upon a lease for years for condition broken.*
11. *Widow cannot maintain assumpsit for previous use and occupation.*
12. *Hereditaments lying in appendancy.*
13-15. *Emblements.*
16. *Leases for years executed by the widow.*
17-25. *Duties or services to which the widow is liable.*
26. *Effect of the death of the widow.*
27-29. *Effect of an assignment in discharging other lands from the claim of dower.*
30-40. *Waste at common law.*
41-43. *Waste in Ontario.*

1. As soon as dower has been assigned to the widow by the sheriff, or by the owner of the land, and she has executed it by entry, she becomes seised of the immediate freehold (*a*), either of the particular lands set out in dower, if assigned by metes and bounds, or of an undivided

(*a*) Co. Litt. 31 a. And of some things which are entire, and cannot be divided, although she shall be endowed of the profits only, yet she shall have the freehold of the third part; as of a mill. Gilb. Dow. 371, 397.





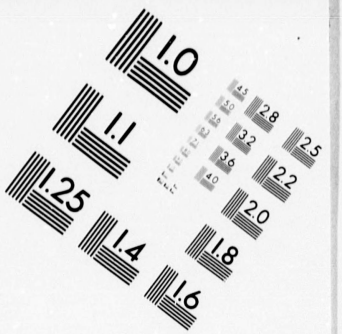
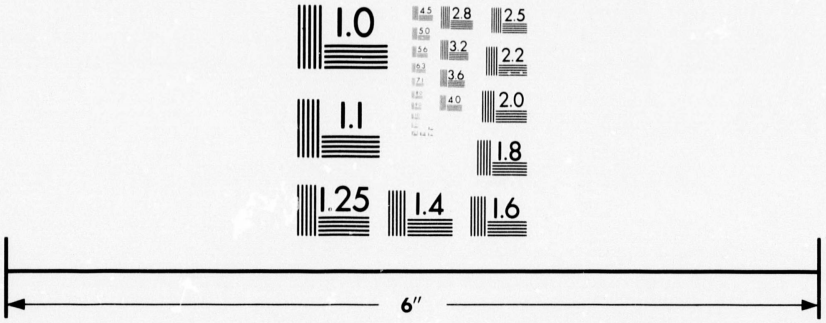
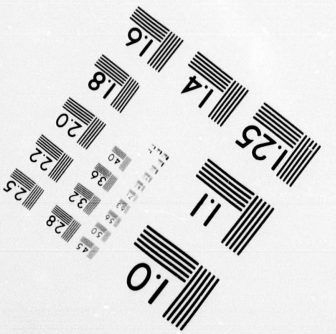
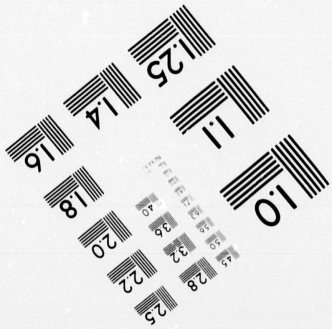


IMAGE EVALUATION TEST TARGET (MT-3)

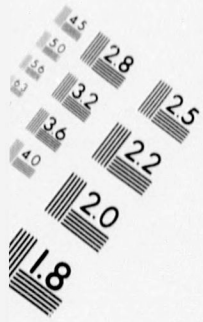






Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503


45
50
28
32
25
36
22
40
20
18

third part of the entirety, if assigned in common. All the incidents of a freehold tenure consequently attach upon her tenancy, and for all purposes of title in which the concurrence of the freeholder is requisite, or the existence of a particular estate of freehold is material to the deduction, her tenancy, to the extent of the lands assigned, must be taken into consideration accordingly. And if an action is brought in which the entirety is sought to be recovered, she must be joined as well as the person who has the freehold in the remaining lands, or undivided parts. As the owner of a vested particular estate, she is also capable of a release in enlargement of her estate, from any person competent in point of title and privity to make that release; and she is, of course, competent to alien her own interest to a stranger by any of the modes of conveyance available for transferring an estate of freehold (*b*).

2. Although in point of tenure, a dowress holds of the heir, yet, in point of title, she is *in* of the lands assigned to her, by her husband, and not by the person making the assignment (*c*). Although her right of entry is *suspended* until assignment made, her estate does not take its effect out of the ownership of the party assigning, but it is considered as a continuation of the estate of the husband; and although the heir entered, and had an actual seisin between the death of the husband and the assignment of dower, yet that intervening seisin does not disturb the continuity of the wife's title, for, as soon as her dower is assigned, the law supposes her in, by relation, from the death of her hus-

(*b*) Park on Dower, 339-40; 1 Roper, H. and W. 416; 2 Roll. Abr. 401; Co. Litt. 273 a; *Windham* v. *Portland*, 4 Mass. 384, 388; *Jones* v. *Brewer*, 1 Pick. 314; *Conant* v. *Lillie*, 1 Pick. 189; *Stevens* v. *Stevens*, 3 Dana, 371; *Fowler* v. *Griffin*, 3 Sandf. S. C. 385; *Lawrence* v. *Brown*, 1 Seld. 394; *Boyers* v. *Newbanks*, 2 Carter (Ind.) 388; *Matlock* v. *Lee*, 9 Ind. 298; *Childs* v. *Smith*, 1 Md. Ch. Dec. 483; *Norwood* v. *Marrow*, 4 Dev. and Bat. 442; Scribner on Dower, vol. ii. p. 720-21.

(*c*) 36 Hen. VI. Dow. 30; Co, Litt. 241 a; Gilb. Uses, 356; 395.

band, and does away all mesne seisin, or as Coke expresses it, "the law adjudgeth no mesne seisin between the husband and the wife (*d*). And by reason of this relation to the estate of her husband, it is (as Mr. Watkins remarks), that a remainder limited on an estate in dower, (as where the heir endows his mother, and at the same time limits a remainder over to another), is void; for, as the particular estate and the remainders limited thereon, must form together but *one* estate (*e*), the remainder limited on an estate in dower cannot be good; as the estate in dower arises from, and has relation to that of the husband, and reference to his death; and the remainder proceeds from the heir and arises from the grant made by him; so that such heterogenous portions can never form *one* estate (*f*). Another consequence of the wife's being *in* by her husband, and not by the heir, is, that an assignment of dower by the heir, is no consideration for anything moving from the wife; and therefore if the heir assign dower unto his mother in exchange for another acre of land, it is said to be a void exchange (*g*).

3. Where an actual assignment of one-third of the land in dower is made, the effect of such assignment is, that the estate in the one-third is turned into a reversion, and in consequence of the rule that the doweress was *in* from her baron, and not by him who endowed her, the assignment has the effect of divesting by relation, all mesne seisin in the one-third, which attaches between the death

(*d*) Co. Litt. 241 a; 1 Greenl. Cruise, 195; 4 Kent. 62, 69; *Conant* v. *Little*, 1 Pick. 189; *Stevens* v. *Stevens*, 3 Dana, 371; *Fowler* v. *Griffin*, 3 Sandf. S. C. 385; *Lawrence* v. *Brown*, 1 Seld. 394; *Powell* v. *Monson*, 3 Mason, 368; *Childs* v. *Smith*, 1 Md. Ch. Dec. 483; *Norwood* v. *Marrow*, 4 Dev. and B. 442, 448; cap. 10, pars. 5, 6; cap. 11, par. 10.

(*e*) See cap. 8, par. 12, *et seq.*

(*f*) Park on Dower, 340-1; Watkins' Descents, 66, note; Finch's Law, 13; Washb. R. P. 2nd ed. 252-3, pl. 4.

(*g*) Perk. 272; Park on Dower, pp. 340-42.

of the baron and the time of the assignment (*h*). Hence the one-third in dower would devolve to the person who, at the death of the dowress, should be the heir of the baron, without regard to mesne seisins, while the other remaining two-thirds would descend to the heirs of the person, who successively acquired a seisin, governed by the rules of descent as to estates in possession (*i*).

4. It results from the principles above set forth, that when dower has been assigned in conformity to the rules of the common law, the title of the widow will have such a relation to her husband's first and original seisin of the estate and the period of the marriage, so as to defeat not only all charges and encumbrances, which he alone made during the coverture, after acquiring the estate (*j*), but also all debts which he contracted during the coverture, in respect of which such property might be affected (*k*). So, also, the widow holds the lands discharged from leases made by her husband during the coverture (*l*), and she is not bound by his release of a rent (*m*).

5. But if the encumbrances were created by the husband before the marriage, by securities which did not prevent the right of dower from attaching to the estate, her endowment would not suspend the rights of the creditors against the third part of the lands, assigned to her in dower, because her title having relation only to the time when the marriage was solemnized, is preceded by the securities of the encumbrancers, who are, therefore, entitled to priority;

(*h*) Bro. Desc. pl. 19; Bro. Dow. pl. 87.

(*i*) Park on Dower, p. 343.

(*j*) Fulwood's case, 4 Rep. 64 b; Jenk. 36, pl. 69; Co. Litt. 33 a; cap. 21

(*k*) Co. Litt. 31 a; Fitzh. N. B. 150 (Q.); Gilb. Dow. 407-411; 1 Roper, H. and W. 411; Park on Dower, 351-52, 362.

(*l*) Noy. 65; 1 Taunt. 410; cap. 21, par. 23.

(*m*) Co. Litt. 32 a; 6 Co. 79 a; 1 Roper, H. and W. by Jacob, 411, note; Scribner on Dower, vol. ii. p. 724.

consequently the lands assigned to her for her dower, will be liable for the amount of their demands (*n*). Reference has been made in a former part of this work, to the rule of the English law entitling the widow, as against her husband's general estate, to have her dower exonerated from such encumbrances (*o*). But it is an established principle, that if the debts were not of the husband's contracting, as when the estate descended to him before the marriage, charged or encumbered, the widow must take her dower *cum onere*; for his own personal property is not liable to answer for the debts of other persons, and consequently not, in the present instance, to exonerate the dowable estate from encumbrances so made upon it (*p*).

6. It has been already shown, that where the widow accepts an assignment contrary to common right (*q*), she claims in the nature of a purchaser, and her estate commences from the assignment, and without relation to any antecedent period; and, therefore, that she takes it with all the encumbrances affecting it in the possession of her husband (*r*).

7. The wife, when endowed of lands upon which there is any existing lease for years, becomes the reversioner, and is entitled to the rent, or, as the case may be, a proportion of it (*s*). If she is endowed only of a portion of the lands comprised in the lease, there will be an apportionment in law of the rent, and she may distrain for her part (*t*).

(*n*) 1 Roper, H. and W. 414; cap. 21.

(*o*) *Ante*, cap. 17, par. 12.

(*p*) 1 Roper, H. and W. 415; Scribner on Dower, vol. ii. pp. 724-5.

(*q*) *Ante*, cap. 21, par. 27; cap. 25, par. 18-24; cap. 28, par. 4-5.

(*r*) 9 Vin. Abr. 266, pl. 3; Co. Litt. 32 b, 173 a; 1 Bright, H. and W. 388, pl. 97; Scribner on Dower, vol. ii. p. 725.

(*s*) 1 Roll. Abr. 678; Winch. 81; Cro. Eliz. 564; Anon. Owen, 32 cap. 8, par. 9; cap. 16, par. 7.

(*t*) Bro. Avowry, pl. 139; Park on Dower, 346; *Boyd* v. *Hunter*, 44 Ala. 705.

8. It has been doubted whether a dowress can enter upon a lease for years, for condition broken (*u*). Previously to the Statute of 32 Henry VIII., cap. 34, advantage of a clause of re-entry for the breach of a condition contained in a lease, could only be taken by the lessor, his heirs, executors, or administrators; the lessor being a party and privy to the contract, and the other persons legally representing him being privies in right. If, then, this privity had been destroyed, as by an assignment of the reversion, the assignee could not enter for a breach of the condition; the reason of which distinction the reader will find in Littleton (*v*). Mr. Roper considers (*w*) that as the above Statute only alters the common law in favour of assignees or grantees, leaving the common law to operate upon estates created by act of law (*x*), if the husband, previously to his marriage, had granted a term of years of the dowable estate, with a clause of re-entry in the lease, if the lessee committed waste, and after the husband's death and the endowment of his widow, the lessee had broken the condition, the widow could not enter to determine the lease, because her estate being the creature of law, there was no privity between her, or the lessor, or his lessee (*y*).

9. But upon this point, Mr. Jacobs remarks (*z*): "The expression grantee or assignee, in the Statute of 32 Henry VIII., cap. 34, has received a liberal construction (*a*), and there is great reason to contend that it comprises a tenant in dower, as she derives her title from the lessor. Lord Coke, in saying (*b*), that the Statute does not extend to

(*u*) Park on Dower, 346-7.
(*v*) Litt. 347.
(*w*) 1 Roper H. and W. 425.
(*x*) Co. Litt. 215 b.
(*y*) Scribner on Dower, vol. ii. p. 226.
(*z*) 1 Roper, H. and W. 425, note.
(*a*) *Isherwood* v. *Oldknow*, 3 M. and S. 382.
(*b*) Co. Litt. 215 b.

those who come in merely by act of law, instances only the case of the lord claiming for escheat or mortmain, or in respect of villeinage; and he gives the reason (*c*), why the lord in those cases, cannot have the benefit of the statute, viz.: that he comes in by title paramount, and is in merely in the post, and not by any limitation or act of the party. It seems, therefore, that this passage was not meant to apply to persons claiming under the lessor" (*d*).

10. It is clear, that if no clause of re-entry be inserted in such a lease, and it is declared that upon waste committed by the lessee, the lease shall terminate and be void, then the widow may enter, because the lease is not merely voidable upon entry, as in the case first supposed, but it is *ipso facto* void without any entry (*e*).

11. While it is established, as we have seen, that upon assignment of her dower and entry thereunder, the seisin of the widow relates back to the death of her husband, it is equally well settled, that she cannot maintain an action for use and occupation against the tenant, who has enjoyed the lands assigned to her since her husband's death, although no damages were allowed to her in the proceeding in which she recovered her dower (*f*).

12. It has been held, that if a *feme* is endowed of a third part of a manor to which franchises are appendant, she shall not have the third part of the franchises, for these are not divisable; otherwise, if she has the whole manor in dower

(*c*) 3 Co. 62 b.

(*d*) See 4 Co. 50 b; Scribner on Dower, vol. ii. p. 726.

(*e*) 1 Roper, H. and W. 425; 1 Bright, H. and W. 393, pl. 10; Park on Dower, 347; *Gamock* v. *Cliffs*, 1 Leon, 60-61; Scribner on Dower, vol ii. p. 726.

(*f*) *Thompson* v. *Stacy*, 10 Yerg. 493; *Sutton* v. *Burrows*, 2 Murph. 79; *Andrews* v. *Andrews*, 2 Green. 141; 1 Washb. R. P. 2nd ed. 252, pl. 3; Scribner on Dower, vol. ii. p. 727.

(*g*). If a woman is endowed of a manor *eo nomine*, to which common is appendant, she shall have common appendant to her third part; but it is said, that if she is endowed of two acres of land, parcel of the manor, in allowance of all the manor, she shall not have common appendant unto these two acres; for during the time they are in possession of the woman they are not parcel of the manor, and the common is appendant unto the manor. (*h*).

13. If the husband sow the ground and die, and the heir assign the land sown to the wife for her dower, she shall have the crop growing thereon, and not the executor of her husband (*i*). This is an instance of the peculiar favour shown to the tenant in dower above any other tenant for life, who are never put into possession of lands which are sown (*j*). It was owing to this reason, that at the common law, a tenant in dower, could not devise corn which she had sown, nor did it go to her executors, but became the property of the person in reversion; but now by the Statute of Merton 20, Henry III. cap. 2, the representatives of a dowress, like those of any other tenant for life, will be entitled to emblements, and she may devise the emblements. And if tenant in dower sows the land, and takes baron, who makes his executor, and dies, before severance of the corn, the *femé* shall have the crop, and not the executor of the baron. Otherwise, if the baron sows the land and dies before severance; there the executor shall have the emblements; and the reason is said to be, that he who did the labour and costs of the emblements, shall have them (*k*).

(*g*) Bro. Dower, pl. 102, But see Cro. Jac. 620-621.

(*h*) Perk. 344; Park on Dower, 349; Scribner on Dower, vol. ii. p. 727. See cap. 7, par. 4.

(*i*) 2 Inst. 81; *Fisher* v. *Forbes*, 9 Vin. 373. pl. 82; 2 Eq. Abr. 392; Dyer, 316 a, pl. 2; *Parker* v. *Parker*, 17 Pick. 236; *Ralston* v. *Ralston*, 3 G. Greene (Iowa), 533; *Kain* v. *Fisher*, 2 Seld. 597-598. See also *Talbot* v. *Hill*, 68 Ill. 106; *Farnsworth* v. *Cole*, 42 Wis. 483.

(*j*) Park on Dower, 354-5.

(*k*) Perk. 522; Co. Litt. 55 b; Bro. Emblements, pl. 26; 1 Roper, H. and W. 427; 1 Bright, H. and W. 394; Park on Dower, 355.

14. "If two tenants in common, be of land in fee, and one of them taketh a wife and dieth, and his wife is endowed, and she and the other tenant in common, sow the land and afterwards she maketh her executors and dieth, the corn not being severed, her executors shall have the corn in common with him, who held in common with the tenant in dower" (*l*).

15. But the right to growing crops, does not attach in favour of the widow, until after her dower has been assigned (*m*). If, before assignment, she receives the fruits and grass growing on her husband's lands at the time of his decease, she is liable to the heir for their full value, and cannot retain one-third on account of her right of dower in the estate (*n*).

16. If a dowress lease the lands which she has in dower, for years, and die, her executor shall have the rent which was in arrear at her death, and not the heir, for he is a stranger to the lease, and by her death it is terminated (*o*).

17. The duties or services to which the widow is liable in respect of her dower, are founded upon her title to the estate. Her interest as we have seen (*p*) is a continuation of her husband's seisin; she is consequently liable as standing in his place, to one-third of all the duties and services to which the estate was subject in his possession, and for which one-third, she is answerable to the person entitled to the reversion of the property (*q*).

(*l*) Perk. sec 523; Park on Dower, 356.

(*m*) *Budd* v. *Hiler*, 3 Dutch. 43.

(*n*) *Kain* v. *Fisher*, 2 Seld. 597; Scribner on Dower, vol. ii. p. 728.

(*o*) Bro. Rents, pl. 16; Bro. Leases, pl. 19; Park on Dower, 356. *Stockwell* v. *Sargent*, 37 Verm. 16.

(*p*) *Ante*, par. 2.

(*q*) 9 Rep. 135 b; Perk. 424, 425, 427; 1 Roper, H. and W. 427; Scribner on Dower, vol. ii. p. 730.

18. If she be endowed of lands, of which the husband was tenant in common, she must stock the land proportionally with the other tenants in common (*r*); and it is apprehended she must contribute towards the repairs (*s*). But whether the reversioner can maintain a bill in equity, to compel a dowress who has had lands specifically assigned to her, to repair, is probably doubtful (*t*). In *Wood* v. *Gaynon* (*u*), a bill to compel a tenant for life to repair, or to have a receiver appointed with directions to repair, was dismissed, as being without precedent. But it seems that in taking accounts, a tenant for life, though without impeachment of waste, may be charged with sums for the repairs of houses on the estate (*v*).

19. An instance of the attendancy of the widow upon the reversion, is the case, where a rent reserved upon an estate tail, granted to the husband has expired, by reason of his death, without leaving issue (*w*); there, the widow being dowable of the estate tail, notwithstanding its determination, the law decided that, in respect of one-third of the estate assigned to her for her dower, she should be attendant upon, and pay to the donor one-third of the rent originally reserved (*x*). So, if the husband die without heirs, and the land escheat, the widow holds her dower of the lord, rendering to him a third of the rents and services (*y*). In other cases, the dowress, in point of tenure, holds

(*r*) Gilb. Dow. 397.

(*s*) Of the writ *De reparatione facienda* between tenants in common, etc., see Fitzh. N. B. 295. And see 1 Vern. by Raithby, 219, note.

(*t*) Park on Dower, 356.

(*u*) *Wood* v. *Gaynon*, Ambl. 395.

(*v*) *Parteriche* v. *Powlet*, 2 Atk. 383; Scribner on Dower, vol. ii. p. 731.

(*w*) *Ante*, cap. 16, par. 3.

(*x*) Co. Litt. 241; Perk. 431; 9 Vin. Abr. 268, pl. 5, 6; 1 Roper, H. and W. 428.

(*y*) 9 Vin. Abr. 268, pl. 7, 9.

of the heir (*z*). And according to the principles of the common law she must contribute to rent services (*a*). Thus, if the heir "hold over by rent, she is attendant upon him by the rate and proportion of the rent which the land assigned unto her should bear" (*b*).

20. It seems too, that a woman who is endowed of the third part of the profits of an office, shall contribute a third part of the charge of the office, as in the case of a bailwick (*c*). It has been said, that if there be grandfather, father, and son, and the grandfather dies, and the father enters, and assigns dower to the grandmother, who afterwards surrenders to him, paying ten pounds per annum, and the father dieth, and the wife is endowed of the land, she shall pay to the grandmother, so much of the rent as belongs to her proportion in dower (*d*).

21. Upon the principles applicable to these cases, if the estate be subject to encumbrances, paramount to the right of dower, and they are of such a nature as not to entitle the widow to have them satisfied from her husband's general estate, she will be obliged to keep down one-third of the interest, as has been before shown (*e*). The liability of the widow to contribution for part of the duties reserved out of the dowable estate is, as before observed, founded in justice; on the principle, that the owner of two-thirds of the estate should not be obliged to pay over the whole of such reservation, but that the proprietor of the other third should contribute *pro rata*. It is also equal justice, that if the heir, or his grantee, become

(*z*) Fitzh. N. B. 7 (F.); Co. Litt. 241 a, 31 a, note (2); Park on Dower, 344-5.
(*a*) Park on Dower, 345, 356.
(*b*) Perk. 424; Co. Litt. 31 a, note (2), 241 a.
(*c*) Perk. 342.
(*d*) Hughes, Writs, 173; Park on Dower, 356-7.
(*e*) *Ante*, cap. 19.

discharged of the render or duty, it should operate in favor of the widow. Accordingly, if the husband's estate, upon its creation, were subject to a rent, and the reversioner, or donor of the estate, or the person to whom it is payable, release the whole, or part of it to the heir, the widow will also hold her dower discharged from it, a third of which she was previously liable to pay to the heir (*f*).

22. It is a rule of general, if not of universal application, that it is incumbent upon a tenant for life to pay all taxes assessed upon the lands, subject to the tenancy during his life (*g*). And there is nothing peculiar to a tenancy in dower, which distinguishes it with respect to charges of this character, from other estates of freehold for life (*h*).

23. In Ontario, it is provided, that where an assignment of dower by metes and bounds cannot be made a yearly sum of money, being as near as may be, one-third of the clear yearly rents of the premises, shall be assessed after deducting any *rates or assessments* payable thereon, and making allowances for permanent improvements (*i*).

24. It has been held, that the annual water rate in the city of New York, for the use of the Croton water, is subject to the same division. But a charge for Croton water, separately and specifically made for a particular use, which use is exclusively confined to the apartment of one of the parties, should be borne in whole by such party (*j*).

(*f*) Co. Litt. 241 a; Perk. 430; Bro. Tenures, 252 b, pl. 33, 82; 1 Roper, H. and W. 428-9; Scribner on Dower, vol. ii. p. 732.

(*g*) Washb. R. P. 2nd ed. p. 96, pl. 28; *Varney* v. *Stevens*, 22 Me. 331, 334; *Stetson* v. *Day*, 51 Me. 434; *Cairns* v. *Chabert*, 3 Edw. Ch. 312; *McMillan* v. *Robbins*, 5 Ohio, 28.

(*h*) *Whyte* v. *Nashville*, 2 Swan (Tenn.), 364; *Graham* v. *Dunigan*, 2 Bosw. S. C. 516; Scribner on Dower, vol. ii. p. 732. But see *ante*, cap. 24, par. 17.

(*i*) R. S. O. cap. 55, sub-sec. 3 of sec. 35.

(*j*) *Graham* v. *Dunigan*, 2 Bosw. S. C. 516; Scribner on Dower, vol. ii. p. 733.

25. The principle above considered, applies to all incidental charges upon the dower lands, which accrue during the continuance of the widow's estate. It is held, therefore, that she is bound to re-imburse the proper corporate authorities, for monies expended by them in constructing a foot pavement, in front of premises which have been assigned to her for her dower, the requisite notice having been first given her to construct the pavement herself (*k*). And this is a charge which must be borne wholly by the dowress, although the party having the reversion, may receive the benefit of the improvement after her death. "When the charge is upon the entire estate of which the husband died seised," said the Court, in the case last cited, "the dowress is, of course, only bound for one-third part of it, because she takes only a third part of the estate; but where, as in the case under consideration, the charge falls exclusively upon a part of the estate which has been assigned in dower, she is separately and exclusively liable for its discharge (*l*).

26. As the widow has but a life estate in the realty allotted to her, it follows, that upon her death, the heir, or party owning the inheritance, is entitled to the immediate possession (*m*). So, the lease of a widow's dower by her guardian becomes inoperative by her decease. If an heir in possession, under such lease, refuse, on demand, to let the other heirs into joint occupancy, they may maintain ejectment and recover to the extent of their right, including rents and profits. And if her administrator receive and hold the rent, the heirs may collect it of him (*n*). Ordinarily, also, the the incidents to her estate in dower, cease with her estate

(*k*) *Whyte* v. *Nashville*, 2 Swan (Tenn.), 364.
(*l*) Scribner on Dower, vol. ii. pp. 733-34.
(*m*) *Holmes* v. *McGee*, 12 Smedes and Marsh, 411; *Whyte* v. *Panther*, 1 Knapp, 226.
(*n*) *Stockwell* v. *Sargent*, 37 Verm. 16. See *ante*, par. 16.

in the land. As where a right of way was set out, as appurtenant to dower lands, across the lands of the husband, it ceased with the determination of her estate (*o*). But where a certain part of a house was set out as dower, with certain easements in other parts of it, as appurtenant, and the parts not set out to the widow were sold, and described as being all the estate not assigned to her, it was held, that at her death, these easements continued appurtenant to the dower portion in the hands of the heirs (*p*).

27. The consequence of a valid assignment of dower is, that the title of dower, which, on the death of the husband, attached upon all the lands of which he was seised, during the coverture, is discharged as to all the remaining lands, (except so far as there may be a lien upon them by reason of the warranty) (*q*), if the assignment was made in allowance of all the lands; or, as to the remaining parts of the particular lands, which the assignment, if partial only, was made in allowance of. The heir, or grantee, may therefore make a good title to the remaining lands, or parts of lands, without the concurrence of the dowress; for if she were to bring a writ of dower against the owner of these lands, the assignment might be pleaded in bar to the action (*r*).

28. But, if there be several grantees of land, of which a woman is dowable, and one of them, by agreement with her, assign a portion of his land to her, in allowance of all the freehold which belonged to her husband, it has been doubted whether, this assignment shall discharge the other grantees from the claims of the dowress. It is supposed by Perkins, that it shall; "but some," he adds (*s*), "have said

(*o*) *Hoffman* v. *Savage*, 15 Mass. 130.

(*p*) *Symmes* v. *Drew*, 21 Pick. 278; 1 Washb. R. P. 2nd ed. p. 254, pl. 5; Scribner on Dower, vol. ii. p. 734.

(*q*) *Ante*, cap. 28.

(*r*) Park on Dower, 213, 277; Scribner on Dower, vol. ii. p. 699.

(*s*) Perk. 402.

the contrary (*t*), for they say, that they cannot plead this matter against the woman, in several writs of dower brought by her, against them; *tamen quære*. And the feoffee who made the assignment, cannot come into court and plead this matter in actions brought against the other feoffees, because he is a stranger to those actions, and there is not any means to bring him into court." But, "if a man seised of two acres of land in fee, take a wife, and enfeoff a stranger of one of the acres, with warranty, and die, and both the acres are in one county, and the heir endows his mother of parcel of his acre in allowance of all her dower in both acres, it is a good assignment; for if the feoffee had been impleaded by the woman in a writ of dower, he might have vouched the heir, and the demandant should have recovered against the heir conditionally (*u*). And if the heir lease for life to a stranger, parcel of the land, which he hath by descent from his father, and assign to his mother parcel of the land which remains in his possession in allowance of all her dower, as well for the land leased, as for the land which remains in his possession, the assignment is good; and yet, if the woman implead the lessee by a writ of dower, and he vouches his lessor, the wife shall not have judgment to recover against the heir, because he is not bound to the warranty by the lien of his father, who was husband to the woman. *Quære*, if in such a case, the lessee vouch the heir generally, and the heir enter generally into the warranty, then it seems, judgment shall be given for the demandant against the vouchee conditionally" (*v*).

(*t*) In Co. Litt. 35 a, it is laid down as clear, that the other feoffees can take no benefit of the assignment. And Sir M. Hale, in his note upon that passage, states it to have been so adjudged in Throgmorton's Case, M. 8 Jac. C. B. Greening's note, Perk. 402.

(*u*) Perk. 400; Moore, 25, 26; Co. Litt. 35 a.

(*v*) Perk. 401. But see note by Greening, Perk. 401. See also Scribner on Dower, vol. ii. p. 700, note (2).

29. We have seen (*w*), that in consequence of the implied warranty, if the particular lands which are assigned to the widow in dower, are recovered against her by lawful title, her title of dower in the remaining lands revives, and she is entitled to be newly endowed of one-third of those lands, although sold by the heir during the interval (*x*). It would therefore seem, that where a person selling lands, relies upon an assignment of dower of other lands as discharging the lands sold from a title of dower, and the lands assigned are held under a different title from those sold, the purchaser ought to be satisfied of the goodness of the title to the lands assigned, as well as to those sold (*y*).

30. By the ancient common law, the only persons punishable for waste, were guardians in chivalry, tenant in dower, and tenant by the curtesy. The liability did not extend to lessee for life, or for years. The reason of this distinction was, that in the tenancies first named, the estate was created by act of law, which properly furnished a remedy for the violation of the rights of the owner of the inheritance; but lessee for life, or for years, came in by the demise of the owner of the fee, who might have provided against the committing of waste. It was considered that the law was not bound to supply the omission of the lessor in this respect (*z*). But by the Statutes of Marlbridge (*a*) and Gloucester (*b*), it was provided, that the writ of waste should not only lie against tenants by the law of England, (or curtesy), and those in dower, but also against any farmer or other, that held in any manner for life, or years (*c*).

(*w*) *Ante*, cap. 28.
(*x*) Perk. 418-20.
(*y*) Park on Dower, 280; Scribner on Dower, vol. ii. p. 702.
(*z*) 2 Inst. 299; 5 Co. 13; 2 Bl. Com. 283; 4 Kent, 78; 1 Washb. R. P. 2nd ed. 108.
(*a*) 35 Hen. III. C. 23; 2 Inst. 144-145.
(*b*) 6 Ed. I. C. 5; 2 Inst. 299.
(*c*) 2 Bl. Com. 283; Scribner on Dower, vol. ii. p. 743.

31. The ancient remedies for waste, were by writ of *estrepement*, and the action of waste (*d*). These are now regarded as obsolete (*e*); and the modern practice is to resort to a bill in equity, to enjoin the commission of waste when the injury would be irreparable, or by a special action on the case, in the nature of waste, to recover damages (*f*).

32. The punishment for waste, was by the common law and the Statute of Marlbridge, only single damages (*g*). But the Statute of Gloucester enacts, that the tenant shall lose and forfeit the place, wherein the waste was committed, and also treble damages to him that hath the inheritance (*h*). The expression of the statute is, "he shall forfeit the *thing* which he has wasted." It has been determined, that under these words, the *place* is also included (*i*). Blackstone in commenting upon this provision, says (*j*): "If waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited (*k*); because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood, (or perhaps in one room of a house, if that can be conveniently separated from the rest), that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner" (*l*). Under the present law, the

(*d*) Co. Litt. 53 b; 2 Inst. 299-300, 145; Fitzh. N. B. 55 C.; Park Dow. 359.

(*e*) The action of waste was abolished in England by the 3rd and 4th Wm. IV. cap. 27, sec. 36.

(*f*) Park on Dower, 360; 4 Kent, 77-78; 1 Bright, H. and W. 147, 150; Scribner on Dower, vol. ii. p. 743.

(*g*) 2 Inst. 146.

(*h*) 2 Inst. 303.

(*i*) 2 Inst. 303.

(*j*) 2 Bl. Com. 283.

(*k*) Co. Litt. 54 a.

(*l*) 2 Inst. 304; Scribner on Dower, vol. ii. p. 744.

place would not be forfeited. The compensation would be by giving damages.

33. In general terms, waste may be defined to be, a spoiling, or destroying of the estate, with respect to buildings, wood, or soil, to the lasting injury of the inheritance. But no damage resulting from the act of God, as lightning, or tempest; or from public enemies, as an invading army; or from the reversioner himself, is waste. There are two kinds of waste, *voluntary* and *permissive*. Voluntary waste is that which results from actual commission, as felling timber, defacing buildings, opening mines, and changing the course of husbandry. Permissive waste is that which results from omission, as suffering buildings or other improvements to go to decay (*m*).

34. It seems that a dowress is punishable, not only for voluntary, but also for permissive waste, although the English books do not furnish any express authority to that effect (*n*). But the Statute of Anne (*o*), which exempts all persons from actions for accidental fire, except in the case of special agreements between landlord and tenant, is supposed to extend to tenants in dower (*p*). But it does not apply where the fire is the result of carelessness on the part of the tenant (*q*). It is laid down with respect to permissive waste, that there is no remedy after the death of the tenant (*r*).

(*m*) 2 Bl. Com. 281; 4 Kent, 76; 1 Washb. R. P. 2nd 107, *et seq.*; Scribner on Dower, vol. ii. p. 744.

(*n*) Park on Dower, 357; 1 Bright, H. and W. 150, pl. 22; Hargr. Co. Litt. 57 a, note (1).

(*o*) 6 Anne, Ch. 31. The provisions of this Act were extended by 14 Geo. III. cap. 78.

(*p*) Park on Dower, 357; 1 Bright, H. and W. 150, pl. 25. See Hargr. Co. Litt. 57 a, note (1).

(*q*) *Filliter* v. *Phippard*, 17 Law J. N. S. Q. B. 89; 12 Jur. 202; 11 Q. B. 347. See *Viscount Canterbury* v. *Att'y-Gen.* 1 Ph. 306.

(*r*) *Turner* v. *Buck*, 22 Vin. Abr. 523, pl. 9; *Castlemain* v. *Craven*, *Ibid.* pl. 11; *Lansdowne* v. *Lansdowne*, 1 Jac. and Walk. 522; 1 Bright, H. and W. 149, pl. 21; Scribner on Dower, vol. ii. p. 744.

35. If the tenant in dower cut down timber trees, they are the property of the heir, or reversioner, and he may take them (*s*); but if a house fall down *per vim venti*, in the time of tenant in dower, she has a special property in the timber to re-build the like house for her habitation; and if she fell a tree for the purpose of repairs, she has a special property in it for that purpose; but she cannot give or sell the tree so felled (*t*). So, if she dig unopened mines, it will be waste; but she may work mines, or coal pits, which were opened in her husband's lifetime (*u*).

36. If the dowress enter into a second marriage, and her husband commit waste and die, she is not punishable for this (*v*). But she shall answer for waste done by a stranger, for he in the reversion cannot have any remedy, but against the tenant, and the tenant has remedy over against the wrong-doer, and shall recover all in damages against him, and by this means the loss shall light upon the wrong-doer (*w*).

37. At common law, if the heir granted over the reversion, his assignee had no remedy for waste done by the tenant in dower, but this was remedied by the Statute of Gloucester (*x*). And in respect of the privity between the heir and the tenant in dower, the heir shall bring his action of waste against her, notwithstanding she grants over her estate, and as well for waste committed by her as by her grantee; and he shall recover the place wasted against the assignee in that action, and damages against

(*s*) 4 Co. 62 b; Park on Dower, 357.

(*t*) 11 Co. 82; Cro. Eliz. 784; 5 Co. 13 b. See 2 P. Wm.'s 242.

(*u*) Gilb. Dow. 391; 1 Taunt. 411. See cap, 7, par. 6.

(*v*) 15 Hen. III.; Fitzh. Waste, 133, But *contra*, said to be held in *Atkins* v. *Glover*, MS. note by Serjeant Hill, in 22 Vin. Abr. 446, Linc. Inn Library; Park on Dower, 358, note.

(*w*) 2 Inst. 303.

(*x*) 2 Inst. 301; 11 Co. 83 b; Co. Litt. 316 a, 53 b; 3 Co. 23 b.

the tenant in dower, who shall take her remedy over (*y*). But as tenant in dower can hold of none but the heir and his heirs by descent, the assignee of the heir shall not have his action of waste against the tenant in dower, who has granted over her estate, but against her assignee, for by the grant of the reversion, the privity is destroyed (*z*). But if the feoffee of the husband endow the wife, and she assign over her estate, waste lies for him against her; for (says the book), the plaintiff shall not suppose in his writ, that she held in dower of him *ex assignatione*, but only that she held in dower of his heritage (*a*).

38. If tenant in dower lease for her life, to him in reversion within age, who never takes the profits, but at full age disagrees to the lease, he may have an action of waste, for waste committed in the meantime (*b*).

39. It was formerly doubted in England, whether the assets of one who had committed waste were liable after his death, on the ground that waste was a tort, the remedy for which died with the person. But by 3 and 4 Wm. IV., cap. 42, sec. 2 (*c*), an action of trespass, or trespass on the case, may be brought against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, provided that the injury has been committed within six calendar months before such person's death, and the action be brought within six calendar months after the executors

(*y*) Fitzh. N. B. 55 (E); 12 Hen. IV. 14; 30 Edw. III. 16 b; 38 Ed. III. 23; 2 Inst. 301; 3 Co. 23 b; 9 Co. 142 a; Anon. Brownl. 239; Bro. Waste, pl. 76.

(*z*) Co. Litt. 54 a, 316 a; 2 Inst. 301; 3 Co. 23 b; Fitzh. N. B. 56 (E. F.).

(*a*) Fitzh. N. B. 56 (E), n. (c). See also Fitzh. N. B. 55 (E), n. (a), and Dyer, 206 b; Park on Dower, 359-60; Scribner on Dower, vol. ii. p. 746.

(*b*) 30 Ed. III. 16; Fitzh. N. B. 55 (E), n. (a); Park on Dower, 360.

(*c*) R. S. O. cap. 107, sec. 9.

or administrators have undertaken the administration of the estate (*d*).

40. Where property is gained by a wrongful act, the party injured, may waive the tort, and have recourse to the action of assumpsit (*e*), which survives against the executors; an action will therefore lie against the executors of a tenant for life, for the produce of waste committed; and as the demand is recoverable out of assets, it seems, as Mr. Jacobs observes (*f*), that a bill in equity will lie for the same purpose (*g*).

41. The doctrine in Ontario and the United States is is somewhat varied from the English law, and is more enlarged, and better accommodated to the circumstances of a new and growing country. It has been held in this province, that it is not waste in a tenant for life to cut down timber on wild land, for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry, taking into view the location and situation of the whole farm (*h*). In the case last cited, Galt, J., said: "When we bear in mind the natural state of lands in this province, and that they are almost invariably useless for agricultural purposes until they have been cleared, and cultivated, it appears to me, that it would be highly inexpedient and unjust if we were to hold, that a tenant, by the curtesy, could not bring the lands under cultivation, by clearing and cultivating them; inexpedient, because it is for the interest

(*d*) 1 Bright, H. and W. 148, pl. 18.

(*e*) *Hambly* v. *Trott*, Cowp. 371. See *Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. and S. 191.

(*f*) 1 Roper, H. and W. by Jacob, 421.

(*g*) *Bishop of Winchester* v. *Knight*, 1 P. Wm.'s 406. See *Garth* v. *Cotton*, 3 Atk. 751; 1 Ves. Sr. 524, 546; 1 Dick. 183; Scribner on Dower, vol. ii. p. 746.

(*h*) *Drake* v. *Wigle*, 24 U. C. C. P. 405; *Campbell* v. *Shields*, 44 U. C. R. 449.

of the public that the lands should be cultivated, and unjust because it would leave the tenant, or at all events, the land, subject to taxes, and so far from a tenant by the curtesy, deriving any benefit from the lands of his deceased wife, he would be subjected to a loss " (*i*).

42. In this Province it is provided by statute that dower shall not be recoverable out of wild land. But that this provision shall not restrict or diminish the right to have woodland assigned to the dowress, under the 35th section of "*The Dower Procedure Act*," from which it shall be lawful for her to take fire-wood, necessary for her own use, and timber for fencing the other portions of land assigned to her, of the same lot, part or parcel (*j*).

43. It would seem that this provision, excluding dower in wild land, is practically of no effect, as she can clear the land and fit it for cultivation, and thus render it liable to dower (*k*).

(*i*) See also on this subject the following American cases:—*Hastings* v. *Crunckleton*, 3 Yeates, 261; *Crockett* v. *Crockett*, 2 Ohio St. 180; *Allen* v. *McCoy*, 8 Ohio, 464; *Ward* v. *Sheppard*, 2 Hayw. 283; *McCullough* v. *Irvine*, 13 Pa. St. (1 Harris), 438; *Jackson* v. *Brownson*, 7 John. N. Y. 227; *Clemence* v. *Steere*, 1 R. I.'s 272; *Keeler* v. *Eastman*, 11 Verm. 293; Scribner on Dower, vol. ii. pp. 750-56.

(*j*) R. S. O. cap. 126, sec. 3.

(*k*) See the cases cited *ante*, par. 41.

CHAPTER XXX.

PAYMENT OF A GROSS SUM IN LIEU OF DOWER.

1. *Widow may be required to accept an equivalent portion of the purchase money in lieu of dower.*
2. *Widow's right in the purchase money of land sold under mortgage.*
3. *The claim to dower may be sold in cases of administration or partition.*
4. *Inchoate right may be sold and gross sum paid.*

1. In Ontario, where the widow is dowable of the surplus proceeds of sales under mortgage, and where actions for partition, and for the sale of the real estate of deceased person, are frequent, it often happens that a widow may be required to accept an equivalent portion of the purchase money, in satisfaction of her dower. Sometimes a gross sum is accepted by her, in lieu of her dower in the rents and profits, in cases where no sale has been made.

2. It is provided by statute (*a*), that in the event of a sale of the land comprised in any mortgage, or other instrument, intended to have the effect of a mortgage, or other security, upon real estate, under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor, who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain, after

(*a*) 42 Vic, cap. 22, sec. 2.

satisfaction of the claim of the mortgagee or grantee to the same extent as she would have been entitled to dower in the land, from which such surplus purchase money shall be derived, had the same not been sold.

Section 3, provides for payment into the Court of Chancery, of the money out of which a married woman shall be dowable, under the preceding section.

Sub-section 2, of section 3, provides that the Court of Chancery may make an order, for securing the right of dower of any married woman, in any money out of which she shall be dowable, as may be just.

3. It is also provided by statute (*b*), that in case of a suit for partition or administration, or any suit in which a partition or sale of land is ordered, and in which the estate of any tenant in dower is established, and if the person entitled to such estate, has been made a party to the proceedings, the Court, or Judge, shall 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 is ordered, all the estate and interest of every such tenant shall pass thereby; and no conveyance or release to the purchaser shall be required from such tenant, and the purchaser shall hold the premises freed and discharged from all claims by virtue of the estate or interest of any such tenant; and the Court or Judge shall (*c*) direct the payment of such sum in gross out of the purchase money to the person entitled to such dower, as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate, or may direct the payment to the person entitled to dower, of an annual sum,

(*b*) R. S. O. cap. 101, sec. 49; 42 Vic. cap. 22, sec. 5, and sub-secs. 2 and 3.

(*c*) The word *may* is used in 42 Vic. cap. 22, sec. 5, sub-sec. 2, and *shall* is used in R. S. O. cap. 101, sec. 49.

or of the income or interest to be derived from the purchase money or any part thereof as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as may be necessary.

4. It is also provided (*d*), that where any married woman is a party to such proceedings as petitioner, if her claim is an inchoate right of dower, then, in case of sale, the court shall determine the value of such right according to the principles applicable to deferred annuities and survivorships, and shall order the amount of such value to be paid; or shall order the payment to such married woman of an annual sum, or of such income or interest as is provided in section five of this act, and such payment shall be a bar to any right or claim of dower.

(*d*) R. S. O. cap. 101, sec. 49, sub-sec. 2; 42 Vic. cap. 22, sec. 6.

CHAPTER XXXI.

THE DOCTRINE OF ESTOPPEL AS AFFECTING THE RIGHT OF DOWER.

1-3. *The rule at common law.*
4-8. *The rule in the United States.*
9-14. *By the acceptance of a collateral satisfaction.*
15-20. *By the acceptance of an estate inconsistent with the claim of dower.*
21-23. *When widow estopped by her covenants.*
24. *When widow estopped by the covenants of her ancestor.*
25. *Effect of covenants by a second husband.*
26. *When widow not estopped by release.*
27-35. *What acts of the widow will operate as an estoppel.*

1. According to the principles of the common law, if a tenant at will, or for years, make a feoffment in fee, his widow will be entitled to dower as against the feoffee and his heirs (*a*); "for," says Mr. Roper, "the feoffee, by accepting the conveyance, *admits* that the husband was seised in fee, and entitled to pass it; and the feoffee and such claimants are *estopped* from showing that the husband had a less estate" (*b*). But, it is a controverted question whether this doctrine is applicable where a tenant for *life* makes a feoffment in fee. Mr. Preston maintains that there is no dower in such a case (*c*); and in this he is supported by

(*a*) 3 Hen. IV. 6 a; 16 Hen. IV. 13; 1 Inst. 31 b, and Hale's note, *Ibid.*; *Mosely* v. *Taylor*, Sir Wm. Jones, 317; 1 Prest. Abstr. 355; Prest. Est. 555; Park on Dower, 44; 1 Roper, H. and W. 368.

(*b*) 1 Roper, H. and W. 368. See *Henley* v. *Webb*, 5 Madd. 407.

(*c*) 1 Prest. Abstr. 355; Prest. Est. 555.

the text of Brooke (*d*). On the other hand, it is laid down in Fitzherbert's *Natura Brevium* (*e*), that the wife of a tenant for life, who makes a feoffment in fee, shall have dower as against the feoffee, and Mr. Park, and Mr. Roper, concur in this statement of the law (*f*).

2. But where the acceptance of the conveyance does not necessarily admit a fee in the husband, the tenant is not estopped from showing the true nature of the husband's estate. Rolle, in his Abridgment (*g*), states, upon the authority of the Year Book (*h*), that if husband, tenant for life, grant a lease *pur autre vie*, and die, his wife shall not have dower. And the reason is, that the lessee, by accepting the lease, merely admits that the husband had a power of demising for the life of some other person than himself. The lessee, therefore, not being estopped to show the husband's interest in bar to the widow's claim, such claim must be disappointed for want of the seisin of the husband of an estate of inheritance (*i*).

3. The doctrine of estoppel in the instances above referred to, applies only as against the feoffee and those claiming under him. As against the person lawfully entitled to the lands, upon the expiration of the husband's estate, the widow cannot claim dower, since they are not prevented from showing what interest he had in the premises. Her title to dower can continue no longer than the estate of the feoffee is permitted to endure (*j*).

(*d*) Bro. Ab. Tit. Dow. fol. 235 b, pl. 30.

(*e*) Fitzh. N. B. 150, margin.

(*f*) Park on Dower, 44; 1 Roper, H. and W. 368. To the same effect, 1 Bright, H. and W. 345, pl. 31; Scribner on Dower, vol. ii. p. 217.

(*g*) 1 Roll. Ab. tit. Dower, p. 676, pl. 45.

(*h*) 3 Hen. IV. 6.

(*i*) 1 Roper, H. and W. 369.

(*j*) 1 Roper, H. and W. 368; Fitzh. N. B. 150, margin; Scribner on Dower, vol. ii. p. 218. See cap. 9, par. 10.

4. In the United States, a number of cases have arisen involving the question whether, in proceedings for dower, parties claiming under the husband of the demandant, are estopped from denying his sesin. And the decisions upon this point are so conflicting, that it is quite impossible to reconcile them. Mr. Scribner, however, courageously makes the attempt to do so, with the following result (*k*): "It is scarcely possible to harmonize the various decisions upon this subject, or to extract from them any satisfactory rule of general application. But the opinion may be ventured, that in New York, until the case of *Bowne* v. *Potter* (*l*), the Courts, in the application of the doctrine of estoppel in favour of the dowress, had been guilty of no departure from principle; nor, as it would appear, had the will administered by them, worked any substantial injustice. In all the earlier cases in that State, involving this question, the party in possession had derived his title from or under the husband; enjoyed the property in virtue of that title, and pretended to no other or better right. Under these circumstances there would seem to be gross injustice in permitting any defect of title, or unasserted outstanding right to be interposed in the way of a claim to dower; and notwithstanding the doubts suggested by some of the later decisions, the rule forbidding this to be done, is supported by the clear weight of authority. But the case of *Bowne* v. *Potter*, presented an entirely different question. In that case, the tenant had been compelled to purchase in a superior title, in order to protect his possession; and in holding that he could not avail himself of the title so acquired as a defence to a claim of dower by the widow of the first grantor, the Court went far beyond the previous cases, and contrary to decisions made elsewhere (*m*). The strictures of Bronson,

(*k*) Scribner on Dower, vol. ii. p. 234. See also, *Ibid.* pp. 218-234.

(*l*) *Bowne* v. *Potter*, 17 Wend. 164.

(*m*) *Dashiel* v. *Collier*, 4 J. J. Marsh, 601; *Hugley* v. *Gregg*, 4 Dana, 68; *Smith* v. *Ingalls*, 13 Maine, 284, 287.

J., upon this ruling, seem to be just. "There is," he said, "no principle upon which the estoppel can be carried another step, and applied to a case where the husband's grantee has been obliged to purchase in a good outstanding title for the purpose of protecting his possession (*n*)." There is also much force in the reasoning of Chief Justice Marshall, that the vendee has a right to fortify his title by the purchase of any other which may protect him in the quiet enjoyment of the premises. The case stands alone in the extreme doctrine there held, the nearest approach to it, being the North Carolina decision of *Norwood* v. *Marrow*, in which, however, the outstanding title was obtained pending the suit and after plea (*o*).

5. It seems just, also, upon like reasoning, that a party in possession under an honest claim of title, should be permitted to quiet his possession and title by the acquisition of an adverse claim, without subjecting himself to the operation of the doctrine of estoppel in respect thereto. This is placed in a strong and clear light by the case of *Coakley* v. *Perry* (*p*). And it has been well said, that, "one may fortify an existing title without putting it in jeopardy, if the rights of others are not thereby prejudiced; and by so doing he cannot originate rights in others (*q*)."

6. Although, as has been remarked, a party in the enjoyment of an estate under the husband's title, ought not to be permitted to avail himself of defects therein, as against his widow, there are, nevertheless, frequent cases in which the husband has made a conveyance without having any

(*n*) *Sparrow* v. *Kingman*, 1 Comst. 242.

(*o*) *Norwood* v. *Marrow*, 4 Dev. and Bat. L. 442; *Manning* v. *Laboree*, 33 Maine, 343; Scribner on Dower, vol. ii. pp. 234-5.

(*p*) *Coakley* v. *Perry*, 3 Ohio St. 344.

(*q*) *Thompson* v. *Thompson*, 19 Maine, 235; *Fox* v. *Widgery*, 4 Greenl. 214; Scribner on Dower, vol. ii. p. 235.

real or substantial interest in the premises, and where the title conveyed was really not that of the husband, but that of some third person for whom he was acting. Cases of estates held in trust are examples of this. The trustee is invested with no beneficial interest; the title is lodged in him for a particular purpose; and if he convey in execution of the trust, he is regarded as the mere instrument employed to pass the right and title of another. The grantee does not enter into the enjoyment of the estate as property derived from the husband, but as that of the parties for whom the husband was acting. And this principle applies not only where an express trust is created, but where by operation of law, the holder of the legal title is treated as sustaining the relation of a trustee. A vendor of lands holds the title in trust for his vendee, and if he marry before a conveyance is executed, his widow has no dower in the estate. So where an equitable interest has been transferred, and the assignor is afterwards clothed with the legal estate to enable him to complete his contract, the same rule applies. Nor, it would seem, does the fact that the trustee superadds his personal covenants, make any difference in the result (*r*). Where the grantee takes an estate conveyed in execution of a trust, he can not, consistently with principle or the dictates of justice, be precluded from showing the real facts of the case. He is not in possession under the husband, in the sense in which that expression is used above, and therefore ought not to be subjected to the operation of the doctrine of estoppel (*s*).

7. So the husband may have a beneficial interest in lands, and yet, confessedly not be seized of such an estate as will enable a right of dower to attach; and it is in this class of cases that the greatest difficulty arises in determining the

(*r*) *Gully* v. *Ray*, 18 B. Mon. 107.
(*s*) Scribner on Dower, vol. ii. p. 236.

rights of the widow. "A man," observes the Court in *Foster* v. *Dwinel* (*t*), "may have only the estate and right of a mortgagee, which will not give dower, and yet he may properly give a deed of the premises (*u*). There are many other cases where the title in the husband, may give him a seisin and a right to convey his interest, and yet not in law give the wife a right of dower (*v*). It would seem to be a great stretch of the doctrine of estoppel to say, that by *accepting* a deed from the husband, which in no way alludes to the matter of dower, or to the existence of a wife of the grantor, the tenant is not only estopped from denying an actual seisin of the husband, sufficient to enable him to give the deed, but is also estopped, from denying that the seisin was such as to give a third person an independent right in the estate, although in truth no such seisin ever existed; thus creating an estate by a rule of law, where none ever before existed." There is certainly force in these suggestions; and when the instrument which confers upon the husband his right in the lands, does not assume to pass to him a dowable estate; as where it is a mortgage or a lease for years, or a conveyance in express terms of a remainder expectant upon an estate for life; and where the conveyance executed by him is a proper one to pass that interest, and does not necessarily assume to convey a greater one, it would seem, upon principle, that the grantee should not be estopped to show the true nature of the husband's seisin. The difference between a case of this kind, and one where the conveyance to the husband assumes and was understood to vest him with the fee, and where he has made a like conveyance, is entirely manifest (*w*).

(*t*) *Foster* v. *Dwinel*, 49 Maine, 44.

(*u*) *Hutchins* v. *Carlton*, 19 N. H. 487; 15 N. H. 55.

(*v*) See as to transitory seisin, cap. 10, par. 14.

(*w*) Scribner on Dower, vol. ii. p. 236-7.

8. Where, however, even in a case of the character above stated, the husband has asserted a claim to the fee, and has expressly assumed to convey it, whether with or without covenants of warranty; and the grantee relying solely on the title so acquired, enters and enjoys the estate without being disturbed, by an adverse claimant, it would seem no more than reasonable that the widow should be allowed her dower. It is true, that in the English case of *Gaunt* v. *Wainman* (*x*), a contrary doctrine was held, upon the ground that as between the widow and tenant there can be no estoppel, for want of mutuality. "Suppose," said Tindal, C. J., "he (the tenant) had bought the premises as a leasehold; would the demandant be estopped to say that they were freehold?" It may be remarked, however, that while the widow might not be concluded by any such action on the part of her husband, yet as her right is derived from him, and her estate is a continuance of his, there would seem to be an inconsistency in denying to her any advantage or benefit resulting to her husband in respect to the estate (*y*). It is also worthy of consideration, that in the event of a breach of covenants of warranty by the assertion of a paramount title, the husband, or his estate, must respond in damages; and the distributive share of the widow in the personalty be proportionately diminished. As she must, in this indirect manner bear a portion of the responsibility attaching to the covenants, it is but just that she should share in the advantages resulting therefrom (*z*).

(*x*) *Gaunt* v. *Wainman*, 3 Bing. N. C. 69; 32 Eng. C. L. 42; *Gardner* v. *Greene*, 5 R. I. 104; Rawle, Covenants for Title, 2nd ed. 459, *et seq.*

(*y*) "It seems that a *feme* who claims dower shall have advantage of an estoppel by deed between her baron and the tenant." Park on Dower, 297. Roll. Abr Estoppel (L.) pl. 1, cites 3 Hen. IV. 6 *dubitatur:* "Privies in blood, as the heir; privies in estate, as the feoffee, lessee, etc; *privies in law*, as the lords by escheat, tenant by the curtesie, *tenant in dower*, the incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound and take advantage of estoppels." Co. Litt. 352 a. See further upon the subject discussed in the text, 2 Smith's L. C. 6th Amer. ed. 712-13, 717, 771-6.

(*z*) Scribner on Dower, vol. ii. p. 237.

9. In the courts of law, the general rule is, that a right of dower cannot be barred by a collateral satisfaction; or by the assignment to the widow of lands in which she is not dowable; or of a rent issuing out of them. Nor does it make any difference that she consent to the assignment so made. The acceptance by her of a compensation in lieu of dower to which she is entitled of common right, must, in order to constitute a legal bar, either be of some part of the lands of which she is dowable, or of a rent issuing out of them, and for such an interest as may endure for her life (*a*).

10. But in equity, a different rule prevails, and the acceptance of a freehold interest in other lands, or of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, will constitute a good bar to a claim of dower (*b*).

11. Where a widow accepts a bond, securing to her as part of a family arrangement a maintenance, it has been held, that it amounted to a satisfaction of her claim to dower (*c*).

12. In *Germain* v. *Shuert*, Draper, C. J., says, page 318: "The demandant's former husband must have been dead several years before the date of the bond. There was ample

(*a*) *Ante*, cap. 25; Co. Litt. 36 b; Moor, 31; Cro. Eliz. 128, 274; Vernon's Case, 4 Rep. 4; Dyer, 220 a; 1 Roper, H. and W. 400, 461, 565; *Conant* v. *Little*, 1 Pick. 189; *Jones* v. *Brewer*, *Ibid.* 314; *Jones* v. *Powell*, 6 John. Ch. 194, 200; *Warfield* v. *Castleman*, 5 Mon. 517; *Bullock* v. *Griffin*, 2 Strobh. Eq. 60; *Ellicott* v. *Mosier*, 11 Barb. 574; *Keeler* v. *Tatnell*, 3 Zab. 62. As to jointures and devises in lieu of dower, see *posts*, caps. 33 and 34.

(*b*) Hargrave's Note, Co. Litt. 36 b; 1 Roper, H. and W. 405; *Mundy* v. *Mundy*, 2 Ves. Jr. 122; *Jones* v. *Powell*, 6 John. Ch. 194, 200; *Hunter* v. *Jones*, 6 Rand. 541; *Warfield* v. *Castleman*, 5 Mon. 517; *Shotwell* v. *Sedam*, 3 Ohio, 5; Simpson's Appeal, 8 Barr. 199; *Reed* v. *Morrison*, 12 S. and R. 18; *Bullock* v. *Griffin*, 1 Strobh. Eq. 60; *Darnall* v. *Hill*, 12 Gill and J. 588; *Lively* v. *Pachal*, 35 Ga. 218.

(*c*) *Germain* v. *Shuert*, 7 U. C. C. P. 316; *Sarsfield* v. *Sarsfield*, 22 U. C. R. 59.

time for all parties to understand their relative positions and particular interests, and looking at the recitals in the bond, as a whole, there is nothing unfair or unreasonable in the arrangement. It is not shown how long after the date of the bond the parties continued to act upon the agreement recited. This action, which is the first positive indication of disagreement, is of recent date, so that it may be presumed all parties acted under the arrangement for a considerable period. That in pursuance of the agreement, the tenant undertook, and fulfilled certain liabilities, seems conceded, and I do not see why this acceptance of the defendant's bond for the benefit of the demandant, evidenced by her own hand and seal, may not be treated as an act *in pais*, deliberately performed by her, and founded on a sufficient consideration to satisfy her claim. In the argument, no authorities were referred to on behalf of the demandant, to show that she might not accept a satisfaction for her dower, though "an assignment of other land, whereof she is not dowable, or of a rent issuing out of the same, is no bar of her dower" (*d*). I think the bond to which she was a party, furnished evidence to go to the jury. That the recitals in it were evidence, although not by way of estoppel, against her of an agreement, and that they might find on this evidence, that she had accepted the bond as a satisfaction of her claim to dower, and treating their verdict as a finding on that point. I think it should not be set aside."

13. Where the wife made advances to, and for the use of the husband, during the coverture, from monies held by her as administratrix of her first husband's estate, and in consideration of these advances the husband conveyed a small tract of land, not exceeding in value the amount of the advances made, in trust for the wife, and the trustee

(*d*) Co. Litt. 346.

afterwards conveyed the premises to her in execution of the trust, this was held to constitute no equitable bar to her claim of dower (*e*).

14. A creditor levied his execution on land of his debtor, and after the right to redeem had expired, sold the land with warranty for a sum exceeding the amount of his debt, and paid the balance to the widow and children of the debtor after his decease. It did not appear that the money paid was in lieu, or satisfaction of dower; nor was there any agreement not to claim dower. It was held, that these facts furnished no bar in equity to the claim of the widow (*f*).

15. It is a principle in the law of dower, that when the widow consents to an act inconsistent with her right to actual endowment, she is bound by her consent, and barred of her legal title. If, therefore, she agree to accept an interest in the dowable estate, which is inconsistent with her title to dower in that estate, this acceptance will bar her of her legal right (*g*).

16. Thus, if she accept from the heir a lease for *life* of the whole of her husband's freehold estates, since she cannot claim dower out of them without partially defeating such lease, she will be barred of her dower (*h*). But it would seem that if her husband had died seised of one

(*e*) *Swaine* v. *Perine*, 5 John. Ch. 482, 490; *Mitchell* v. *Mitchell*, 8 Ala. 414; Scribner on Dower, vol. ii. pp. 242-3.

(*f*) *O'Brien* v. *Elliot*, 15 Maine, 125; Scribner on Dower, vol. ii. p. 243. See also *Mitchell* v. *Word*, 60 Ga. 525.

(*g*) 1 Roper, H. and W. 562; Scribner on Dower, vol. ii. p. 244. Where the wife of a debtor joins with him in the execution of a fraudulent conveyance of his real property to a third person, who re-conveys to her, and the conveyances are set aside at the suit of a creditor, she is not entitled to have dower reserved to her by the judgment. *Meyer* v. *Mohr*, 19 Abb. Pr. R. 299.

(*h*) Perk. 350; Park on Dower, 214 note.

hundred acres, and the lease included fifty acres only, she might claim dower out of the remainder, provided she did not accept the demise in lieu of dower in the whole (*i*).

17. Mr. Park says (*j*): "So where the widow accepts a chattel interest in the lands of which she is dowable, her right to be endowed is held to be *suspended* during the continuance of the chattel interest. As where, after the death of the husband, the widow accepts a lease for years of the husband's land from the heir during this lease, her dower is suspended" (*k*). In response to a *quære* found in Perkins upon this point (*l*), Mr. Greening observes (*m*): "According to the case in Fitzherbert, N. B., 149 E., and note, and Jenk. Cent. 73 pl. 38, the dower is suspended during the continuance of the lease; but as this is on the ground of inconsistency only, it is apprehended that at most it could be so held only where the husband died possessed of no other lands, and that generally the widow would recover her dower without reference to the term created by the lease. But the term, in the part assigned to her for dower, would of course merge in her estate for life; and the rent upon the lease, if any were reserved, be apportioned" (*n*).

18. According to Perkins (*o*), "If a man seised in fee of Whiteacre lease it to a *feme sole* for forty years and the lessor intermarrieth with the lessee, and the husband suffer the

(*i*) 1 Roper, H. and W. 562; Scribner on Dower, vol. ii. p. 244. See next section.

(*j*) Park on Dower, 214.

(*k*) Jenk. Cent. 2 ca. 38; Fitzh. N. B. 149 (E.); Gilb. Dow. 391. Mr. Roper's statement of the law on this subject is as follows: "So, if the lease accepted were not for life, but for a term of years only, still it will exclude her from dower during the term, if it include the whole of the dowable estate." 1 Roper, H. and W. 562.

(*l*) Perk. 350.

(*m*) Greening's note, Perk. 350; and see Vin. Ab. Dow. x pl. 20.

(*n*) Scribner on Dower, vol. ii. p. 244-5.

(*o*) Perk. 351.

term to continue as it was leased, without any alienation or other thing done therewith, and die within the term, it is said that in this case the wife may have her dower presently, notwithstanding the term doth continue; because at the time of the lease she was not entitled to dower; and notwithstanding the term doth continue, it shall not oust her of her dower until the term be determined; because if it (viz. her taking her dower), should be prejudicial to any person, it would be to the prejudice of the wife herself." In the case here put by Perkins, had the term been granted to a stranger, the widow would, as we have seen (*p*), been entitled to dower of the reversion with a *cessat executio* during the term. But her right is not affected by the term happening to be in herself; consequently, when the dower is assigned, and she becomes seised of an estate for life in a third part of the premises, the term for years in that part, meeting with the estate for life, merges in it. The widow, therefore, will hold that share in dower for her life, and the remaining two-thirds under the lease during the continuance of the term (*q*).

19. As the husband cannot prejudice his wife in respect to her freehold (*r*), a waiver of dower by a second husband will not bind the wife after his death. So if the heir, during the coverture with the second husband, make a lease for years to the wife of the land of which she is dowable, although the husband enter under the lease, she may, after his death, waive the lease and claim her dower (*s*). Neither

(*p*) *Ante*, cap. 16, pars. 7, 8.

(*q*) Scribner on Dower, vol. ii. p. 245; 1 Roper, H. and W. 563; Park on Dower, 215; Fitzh. N. B. 149 (E) n. But see Owen, 154, arg. in *Goodridge* v. *Warburton*, where it is said, that if a *feme sole* lessee marry the lessor, and the lessor die within the term, and the wife enter, this shall not conclude her dower after the lease is expired; and cites 11 Hen. IV. The fact of entry by the wife, is, however, not noticed in the case as put by Perkins; Park on Dower, 215, note.

(*r*) See *Squire* v. *Harder*, 1 Paige, 494.

can he prejudice her by accepting less than a third part for her dower, for, after his death, she may waive the portion which he accepted, and have her full third part (*t*).

20. Where the widow signed the following instrument not under seal: "I do hereby attorn to C. S. for (describing the land), and I agree to become her tenant therefor, at the yearly rental of £15 a year, with taxes, payable quarterly from this date, one-third of which I am to retain as my dower, and the remaining two-thirds to be paid to C. S. during her life. And in case a higher rent can be obtained for said premises, I agree to quit on receiving three months notice previous to the end of any quarter." It was held that this was not a bar to the right of dower or could be treated as a satisfaction of it (*u*). Burns, J., in giving judgment said: "Then as to demandant's right to judgment for the dower, there can be no question of that. There was no proof that the demandant had received anything in lieu of her right of dower, that is, in lieu of her life interest. If the tenant, Catharine Sarsfield, had leased the place to any third party during the life of the demandant, and it had been agreed between them, that the demandant should receive the third part of such rent in lieu of dower, and if such rent had been in a formal binding manner assured to her, then such a compromise might have been set up in bar of her dower. And so if the interest of Catharine had been such as enabled her to lease the premises to the demandant for life, and she had done so at a certain rent, and it had been in a binding manner agreed between them, that the demandant should retain in her hands one-third of such rent in consideration of her continuing right of dower, that

(*s*) Jenk. Cent. 2 ca. 38; 1 Roper, H. and W. 562.

(*t*) 4 Hen. V. 32 E. 1; Fitz. Dow. 121; Jenk. Cent. 2 ca. 56; Park on Dower, 216; Scribner on Dower, vol. ii. p. 245.

(*u*) *Sarsfield* v. *Sarsfield*, 22 U. C. R. 59. See also, *Goodman* v. *Moore*, 22 Ark. 191.

would have been an agreement the same in substance and effect as the other, and I have no doubt might have been set up as a satisfaction in bar of her claim for dower; but this was no arrangement of that kind in fact, and is not so pleaded, and if the plea can be held to amount to that, then it is clear that the plea taken in that sense was not proved. The agreement shown was not signed by the tenant, Catharine. No interest therefore could pass under it to the demandant, and if she had put her name and seal to it, and if it had been by indenture between the two, still by the language of it, it did not assure any certain term, but the demandant would have held only at the will of the tenant, Catharine, who could have turned her out at any time on a three months notice. While the demandant enjoyed the property on the terms mentioned in that paper, her claim for damages for detention of dower, would be satisfied by her retaining one-third of the rent, and so far her right to damages would be affected; but it is impossible to treat this arrangement as any satisfaction of the right of dower, so as to prevent the widow recovering her dower after the relation of landlord and tenant had been put an end to. The parties then stood as they would have done if no such transaction had ever taken place between them. It can not be maintained that by the paper put in evidence a lease for life had been granted by Catharine Sarsfield to demandant, subject to be put an end to by a three months notice, for so far from there being any instrument under seal assuring a life interest, as there must have been according to our statute, (Con. Stat. U. C., cap. 90, sec. 4), there is nothing whatever in writing from Catharine Sarsfield, assuring an interest either for the life of herself or of the demandant. Judgment of record should be entered for the demandant for her dower, but without damages."

21. In the Year Book 31, Edward I. (*v*), (A.D. 1303), this

(*v*) Year Books, 30 and 31, Edw. I. by Horwood, 458.

case is reported: "A woman brought her writ of dower against a tenant, who vouched to warranty one John, son and heir of the husband, whose body, and a part of whose lands were in ward to the said woman; and a portion of the lands were in the ward of one Richard de Midd, and a portion in ward to the Earl of Leicester. The guardians came into Court, and all yielded dower of their portions, except Richard de Midd; and he warranted, and said that he had nothing except by lease from the same woman, who was guardian in socage of these tenements, and who had leased to him the tenements for the term of ten years; and he prayed judgment, if in opposition to her own deed she could have an action during the term; and he showed a writing creating the term, etc.; and the woman was driven to answer and she admitted. Hengham adjudged, etc., that she do recover her seisin, saving to Richard his term. And she had a writ of seisin after the completion of the term (*w*).

22. And it seems to be well settled, that if the widow execute a conveyance of her husband's lands with covenants of warranty, she is estopped from afterwards asserting dower against parties claiming under such conveyance (*x*).

23. But where there are no covenants for title, the general rule is, that the doctrine of estoppel does not apply. In a case involving this point, the widow, as administratrix, with her co-administrator, had conveyed lands in execution

(*w*) Scribner on Dower, vol. ii. p. 246.

(*x*) Scribner on Dower, vol. ii. p. 246; *Magee* v. *Mellon*, 23 Misso. 585; *Woodruff* v. *Cook*, 2 Edw. Ch. 259; *Dundas* v. *Hitchcock*, 12 How. U. S. 256. As to covenants made by the wife during coverture, see Hill's *Lessee* v. *West*, 8 Ohio, 226; *Massie* v. *Sebastian*, 4 Bibb. 436; *Fowler* v. *Shearer*, 7 Mass. 21; *Colcord* v. *Swan*, *Ibid.* 291; *Nash* v. *Spofford*, 10 Met. 192, holding that the wife is thereby estopped from setting up any after-acquired right; and *Jackson* v. *Vanderheyden*, 17 John. 167; *Dominick* v. *Michael*, 4 Sandf. S. C. 424; *Carpenter* v. *Schermerhorn*, 2 Barb. Ch. 314; *Martin* v. *Dwelly*, 6 Wend. 9, *contra*. See also *Wight* v. *Shaw*, 5 Cush. 65; *Wadleigh* v. *Glines*, 6 N. H. 18; *Dev* v. *Demarest*, 1 Zab. 541; *Nelson* v. *Harwood*, 3 Call, 342; Rawle, Cov. for Tit. 2nd. ed. 429-30, 573-5; 2 Smith's L. C. 6th Amer. ed. 716.

of the contract of her deceased husband, in pursuance of a decree ordering the conveyance to be made. The deed recited the seisin of the husband, the contract, the petition and decree, and conveyed the land, "and also all the estate, right, title, interest, etc., of the said James Smith (the decedant), in his lifetime, and of them, the said Mary and Dale (the widow and her co-administrator), since his decease in law or equity" (*y*), and was sealed by the grantors, and signed without the addition of their official character. It was held that the dower of the widow did not pass (*z*). Gibson, C.J., said: "Had the dower been specifically described in it as a distinct estate, and separate subject of the grant, an intention to convey it would have been too clearly disclosed to be resisted; but the administrators were directed by the decree to deal, not with their own property, but with the legal title of the vendor; and though a conveyance explicitly including an interest of their own, would have passed it, yet the words in a conveyance like the present, are to be restrained, where they will bear it, to the business of the occasion, and no intendment is to be carried beyond it. The administrators met the defendant to execute a contract, not of their own, but of their intestate; and before their particular interests are to be involved in their conveyance, it must appear by special description that they were intended to be involved. No one can believe that the plaintiff meant to throw in her dower; and it would require strong terms to bear out an intention so opposite to her interest. By no construction but a strained one, could the clause in question, be made to embrace any but joint interests of the administrators; and as it does not appear that they had any, it seems to

(*y*) In *Thomas* v. *Harris*, 43, Pa. St. (7 Wright), 231, the Court was again called upon to give a construction to this conveyance, and it was there held that these words operated as a relinquishment of the dower of the widow.

(*z*) *Shurtz* v. *Thomas*, 8 Barr. 359.

have been inserted under a vague impression that the case was within the statutes which turn a devise of a power to sell, into a devise of the legal title" (*a*).

24. A widow might formerly also be precluded from claiming dower by the covenants of her ancestor. Thus, where the husband of the demandant acquired title from her father, the conveyance containing covenants of warranty binding the grantor and his heirs, it was held, that she was not entitled to dower against the alienee of her husband (*b*). Where a nominee of lands before patent issued conveyed them away, being unmarried, and afterwards, having obtained the patent, made a new conveyance to the same party, being then married; it was held, that his wife could not claim dower, as she was estopped by the deed made before the patent issued (*c*).

25. In *Potter* v. *Potter* (*d*), a widow entitled to dower in the estate of her deceased husband, contracted a second marriage. The real estate of the first husband was sold by his administrator for the payment of his debts. The purchaser conveyed the lands to the second husband, who afterwards sold and conveyed the same to the defendant, the wife not joining in the deed. It was held, that by the covenants of the husband, he and his wife were estopped from claiming dower in the estate during the existence of their intermarriage (*e*).

26. A stranger to a release made by the wife, can derive no advantage from it; nor, as against him, is she estopped

(*a*) Scribner on Dower, vol. ii. pp. 247-8.

(*b*) Park on Dower, 297; Roll. Abr. Estoppel (L), pl. 11; Scribner on Dower, vol. ii. p. 249; *Torrey* v. *Minor*, 1 S. and M. Ch. 489. See also *Russ* v. *Perry*, 49 N. H. 547.

(*c*) *McLean* v. *Laidlaw*, 2 U. C. R. 223.

(*d*) *Potter* v. *Potter*, 1 R. J. 43.

(*e*) Scribner on Dower, vol. ii. pp. 249-50.

from asserting dower (*f*). But it has been held, that if a married woman join with her second husband in a conveyance of real estate, and relinquish her dower therein, she is estopped to claim dower under her former husband in the lands so conveyed (*g*). And where the acknowledgment of a deed by a married woman was pronounced void by reason of its having been taken in one county by a Justice of the Peace of another county, but she afterwards joined as executor in a suit to recover the purchase money for the lands conveyed by such deed, it was held, that she thereby affirmed the deed, and would be barred by the recovery from claiming dower (*h*).

27. It is a point upon which the authorities are generally agreed, that if the dowress is guilty of fraudulent practices in inducing the purchaser to take the estate, under a belief that she waives her right to dower, she will be estopped from afterwards setting up her claim (*i*).

28. Where a wife for ten years concealed from the public her relation to her husband, and allowed him to live with another woman, as his wife, under an assumed name, the real wife living in the neighbourhood, and receiving from them, her own support, it was held, that she was precluded from claiming dower out of land purchased during this period, in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser, who

(*f*) *Littlefield* v. *Crocker*, 30 Maine, 192; *Harriman* v. *Gray*, 49 Me. 537; *Pixley* v. *Bennett*, 11 Mass. 298; *Robinson* v. *Bates*, 3 Met. 40; *Woodworth* v. *Paige*, 5 Ohio St. 70; *Blain* v. *Harrison*, 11 Ill. 384; *Summers* v. *Babb*, 13 Ill. 483. See also *French* v. *Lord*, 69 Me. 537; *Weaver* v. *Sturtevant*, 12 R. I. 537.

(*g*) *Usher* v. *Richardson*, 29 Maine, 415. But see *Guidet* v. *Brown*, 3 Abb. (N. Y.) N. C. 295.

(*h*) *Share* v. *Anderson*, 7 S. and R. 42; Scribner on Dower, vol. ii. p. 250.

(*i*) *Hoig* v. *Gordon*, 17 Gr. 599; *Deshler* v. *Berry*, 4 Dall. 300; *Dougrey* v. *Topping*, 4 Paige, 94; Scribner on Dower, vol. ii. pp. 251-2.

bought in good faith, and without any notice of the real relationship of the parties (*j*).

29. In another case, a widow was present at a sale of her husband's lands by his administrator, and consented that the sale might be made free from her claim of dower. The purchaser, relying upon this promise, bid off the property at a much larger sum than he would have otherwise paid. A bill for dower afterwards brought by the widow was dismissed (*k*). The Court, in disposing of the case, said:—"It is a well established principle in equity, that if a person, having a right to an estate, permit, or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right (*l*); and the rule prevails even against *feme coverts*, and persons under age (*m*). It is contended on the part of the complainants, that the acts and declarations of Mrs. Smiley, at the time of the sale of the lots in question, ought not to bar her of the aid of a Court of Equity, because she was at that time ignorant of her rights, nor can they be considered as a fraud upon the purchaser, as he had notice of her title. It is unnecessary to consider whether a person, having legal title to lands, who encourages the sale by another, shall be permitted to show his ignorance of that title, to the prejudice of a *bona fide* purchaser for valuable consideration, as we are clearly of the opinion that the evidence does not prove Mrs. Smiley's ignorance of her rights at the time of the sale by the administrator. * * * If she had not, in fact, relinquished her right of dower, her standing by, permitting the property to be sold free of dower, without

(*j*) *Hoig* v. *Gordon*, 17 Gr. 599.

(*k*) *Smiley* v. *Wright*, 2 Ohio, 506.

(*l*) *Daniel* v. *Davison*, 16 Ves. Jr. 253; *Evans* v. *Bicknell*, 6 Ves. Jr. 174; *Livingstone* v. *Byrne*, 11 John. 564; *Storrs* v. *Barker*, 6 John. Ch. 166; 9 Mod. 35.

(*m*) *Cory* v. *Girtchin*, 2 Mad. 40.

asserting her claim, was calculated to deceive and defraud the purchaser (*n*), and did induce him to pay a much larger sum for the property than he would otherwise have given. He believed she had relinquished her dower, and acted upon this belief. To permit her to assert her title to dower, against a *bona fide* purchaser for a valuable consideration, who was induced by her to purchase, because she has never executed any formal act of assignment, or release of her dower, would be to aid her in the commission of a fraud" (*o*).

30. Where the widow knowingly permits the purchaser to part with his money for real estate, under the assurance that the land is free from her claim of dower, and accepts and enjoys the use of the purchase money, such acts on her part constitute an *estoppel in pais* (*p*).

31. Where the widow has done nothing to mislead the purchaser, and the circumstances are such that she is not required by good faith to disclose her claim, her mere silence in regard to it does not affect her right. Thus, her failure to give notice of her claim when the land in which she has dower is advertised for sale, is no bar to her recovery (*q*). It has been held that in order to constitute an *estoppel in pais*, not only must the widow, by her words or conduct, have caused the purchaser to believe, that he would acquire a title discharged from dower, but he must also have acted upon that belief in making his purchase and paying the purchase money (*r*). Where an intending purchaser of devised lands, who was in doubt whether a provision made

(*n*) *Heth* v. *Cocke*, 1 Rand. 344.

(*o*) Scribner on Dower, vol. ii. pp. 252-3. See also *Ellis* v. *Diddy*, 1 Carter (Ind.), 561; s. c. 1 Smith (Ind.), 354. See also *Gatling* v. *Rodman*, 6 Ind.) 289; *Stoney* v. *Bank of Charleston*, 1 Rich. Eq. 275; *Darnall* v. *Hill*, 12 Gill. and J. 388,

(*p*) *Wood* v. *Seely*, 32 N. Y. (5 Tiffany) 105; Scribner on Dower, vol. ii. p. 254.

(*q*) *Smith* v. *Paysenger*, 2 Mills (Con. Court), 59. See also *Owen* v. *Slatter*, 26 Ala. 547.

(*r*) *Lawrence* v. *Brown*, 1 Seld. 394, 401. See also *Hill* v. *Hill*, 5 Ark. 68; *Edmondson* v. *Montague*, 14 Ala. 370; *Martin* v. *Martin*, 22 Ala. 86.

by the testator for his widow was in lieu of dower, asked the widow whether she had or claimed dower, it was held that, even if her answer was in the negative, it afforded no ground for the purchaser afterwards applying to the court to restrain an action for dower brought by the widow, on her being advised that, under the terms of the will, she was not put to her election (*s*).

32. Where a testator by his will, had directed his executors to allot fifty acres of land to his widow in lieu of her dower; under a power in the will, the executors advertised the residue of the land for sale, but understanding that the widow intended to claim her dower, they agreed with her to give her a house and one year's provisions, and to build her a house, upon condition of her abiding by the will. After the widow had acceded to these terms, the land was exposed to sale, subject to the life estate of the widow in fifty acres only. The executors failing to comply with their agreement, it was held, that the widow was entitled to recover her dower against a purchaser with notice of her rights (*t*).

33. A widow entitled to a moiety of a tract of land as devisee under her husband's will, and who has procured partition to be made, is not estopped by the partition from prosecuting her action of dower against the parties holding the other moiety (*u*). So, where, at the time of the partition of an estate among co-devisees, one of them had an inchoate right of dower in premises set off by the partition to another; and subsequently to the partition, the inchoate right of dower became perfect by the death of her husband, she will not in equity be held estopped to claim her dower against her co-partitioners (*v*). But in such case, equity will, while sustaining the claim to dower, decree and enforce

(*s*) *Fairweather* v. *Archibald*, 17 Gr. 255.
(*t*) *Wilson* v. *White*, 2 Dev. Eq. 29; Scribner on Dower, vol. ii. p. 256.
(*u*) *Kennedy* v. *Nedrow*, 1 Dall. 415.
(*v*) *Walker* v. *Hall*, 15 Ohio St. 355.

a contribution by all the parties to the partition, to make good to the co-devisees, in whose share the dower is assigned, their equal share in the common estate remaining after the assignment of dower (*w*).

34. Where dower has been assigned by the Court of Chancery, and afterwards the estate of the husband, including the part assigned for dower, is sold for the payment of debts under an order of the surrogate, such order, so far as relates to the life estate of the widow, is void; and the receipt by her, as assignee of the creditors, of the entire proceeds of the sale, cannot be regarded as an affirmance by her, of the sale of her life estate, nor as a surrender thereof to the purchaser (*x*). The money in such case is not received by the widow, "as an equivalent for, or in satisfaction of her estate in dower, but expressly in her character of creditor of the estate of her husband." But where land of which a husband died seised, is decreed by a Court of Equity to be sold freed from dower, for the payment of debts, and the widow is a party to such proceeding, she is barred from claiming dower, so long as the decree remains unreversed (*y*).

35. It is no answer to a proceeding for dower, that the widow has disposed of her husband's whole personal estate, exceeding in amount the value of her dower interest (*z*); nor that she has wasted it, or converted it, to her own use (*a*). Nor will the fact, that the defendant is a creditor, make any difference as to the right of the widow to recover (*b*).

(*w*) *Walker* v. *Hall*, 15 Ohio St. 355; Scrib. on Dower, vol. ii. p. 256.
(*x*) *Lawrence* v. *Brown*, 1 Seld. 394.
(*y*) *Gardiner* v. *Miles*, 5 Gill, 94.
(*z*) *Caruthers* v. *Wilson*, 1 S. and M. 527.
(*a*) *Kennedy* v. *McAliley*, 9 Rich. L. 395.
(*b*) 1 Brev. Dig. tit. 101; 2 *Ibid.*, p. 350; Scribner on Dower, vol. ii. p. 257.

CHAPTER XXXII.

RELEASE OF DOWER.

1. *Dower not releasable by parol.*
2. *Husband cannot alienate her dower without her concurrence.*
3-4. *Release by fine and recovery in England.*
5. *Release by an instrument separate from the conveyance by the husband.*
6-11. *The early statutes as to the release of dower.*
12. *When it is necessary to call the wife to prove the execution of a release by her.*
13-17. *The late statutes—The husband and wife must join in the execution of the deed.*
18-19. *Whether the wife may release by attorney.*
20. *The release must be under seal.*
21-23. *The deed must contain words of release or grant.*
24-29. *Release by infant feme covert.*
30-44. *Release where the wife is insane, or living apart under such circumstances as disentitle her to alimony.*
45. *Wife may recall her assent before delivery of the deed.*
46-47. *In what cases release not absolute.*
48-52. *Release to stranger no bar.*
53. *Release to husband.*
54. *If the deed be avoided dower restored.*
55-56. *Release after the husband's death.*
57. *Release may be made before or after assignment.*

1. As dower is an interest in lands, a valid release of that interest can only be made, under the Statute of Frauds, by an instrument in writing. No mere parol relinquishment, however formal, will operate to divest the right (*a*).

2. It is an important quality in titles of dower, and indeed, the circumstance which makes them matter of such

(*a*) *White* v. *White*, 1 Harrison, 202 ; Scribner on Dower, vol. ii. p. 266. See also *Davis* v. *McDonald*, 42 Ga. 205.

anxious consideration, in modern conveyancing, that after they have once attached, they cannot be suspended, or extinguished by any act of the husband alone, in the nature of alienation or charge. The law in its anxiety for the preservation of this favorite provision, put it absolutely out of the power of the husband, to deprive his wife of it without her concurrence, solemnly manifested by matter of record (*b*).

3. It was for a long time doubted by eminent English lawyers, whether, before the death of the husband, there were any means by which the wife's inchoate title of dower could be voluntarily extinguished (*c*). It was thought that as she had no right of action until the death of her husband, she had nothing to part with until then, and could not be bound, even by fine (*d*). But eventually it became established, that the title of dower, though inchoate until the death of the husband, yet being an interest attached on the lands from the instant of the concurrence of marriage and seisin, might be extinguished by those modes, by which a married woman may relinquish any other legal interest in real estate (*e*).

4. Fines and recoveries have been abolished in England by the 3 and 4 Wm. IV, cap. 74, and a statute deed is substituted in their stead. And the late Dower Act of 3 and 4 Wm. IV, cap. 105, has, as to marriages contracted since January 1st, 1834, placed the right of dower entirely within the control of the husband (*f*),

5. Dower may also be barred by the wife joining in a conveyance with her husband, in which a release of dower

(*b*) Park on Dower, 191.
(*c*) See Butl. Co. Litt. 330 b, note 1; Park on Dower, 191, note.
(*d*) See Lampet's Case, 10 Co. 49.
(*e*) Park on Dower, 192.
(*f*) See Appendix.

is contained, (*g*), or by executing a release by an instrument separate from the conveyance by her husband, but in such case an examination and certificate are necessary, as before the late statute (*h*).

6. C. S. U. C., cap. 84, s. 6, enacted, that if the wife executes a release of her dower without her husband joining, to make such deed effectual, it must be acknowledged before the Chief Justice, or one of the Judges of the Queen's Bench, or before the Quarter Sessions, and a certificate of such examination was required to be endorsed on the deed. It is not necessary that the certificate should state that the wife has been privately examined. It is sufficient if it states that the wife being duly examined, etc., did appear, etc., (*i*).

7. A woman under a second coverture cannot release her right to dower in the land of her first husband without her second husband's concurrence (*j*).

8. Where a certificate, on a deed, executed in 1816, to which the wife of the grantor was not a party, stated that "On the 30th May, 1829, personally came before me, A. F., Judge of the Midland District Court, Mary, wife of the within named Robert McNally," and being examined, etc., consented to be barred of her dower. The grantor was described in the deed as of the Town of Kingston, County of Frontenac. It was objected that the wife did not appear to have been resident in the county when the certificate was given, but it was held, that the presumption was that she resided with her husband, and that his residence con-

(*g*) *Miller* v. *Wiley*, 17 U. C. C. P. 368; C. S. U. C. cap. 84, sec. 5.

(*h*) *Hill et ux* v. *Greenwood*, 23 U. C. R, 404; *Heward* v. *Scott*, 2 Chy. Chrs. 274; *Bogart* v. *Patterson*, 14 Gr. 624.

(*i*) *Buck* v. *McCallum*, 13 U. C. C. P. 163.

(*j*) *Howard* v. *Wilson*, 9 U. C. R. 450 (1852); 10 U. C. R. 186, affirmed in *McGill* v. *Squier*, 13 U. C. R. 550.

tinued the same, and that the 2 Vic., cap. 6, sec. 4, clearly removed any objection on the ground, that she was not a party to the deed (*k*).

9. To a plaint in dower, the defendant pleaded that the husband of demandant, by an Indenture to which she was a party, conveyed the land in question to A. B., and that demandant had appeared before one of the Judges of the Queen's Bench who had examined her, and that she consented to and did bar her dower in the land, and that the Judge certified on the back of the Indenture, that the demandant had been duly examined and had consented, &c. The demandant replied that she did not give and acknowledge her consent, to be barred of her dower in manner and form as alleged by the defendant, and it was held on these pleadings, that it could not be said that the demandant had given her consent before a Judge, to be barred of her dower according to law. That as the demandant had traversed the fact alleged in the plea, viz: her alleged consent to be barred of her dower, and the defendant having taken issue with that fact and stated it affirmatively, the burden of its proof was thrown upon him (*l*).

10. It is also provided by statute (*m*), that: "Where a husband has before the second day of March, 1877, duly conveyed land of which he was owner, any deed or conveyance executed before the said day by his wife for the purpose of barring her dower to which deed or conveyance her husband is not a party, is, and shall be taken and adjudged, to be valid and effectual to have barred her dower in the lands in which such deed or conveyance professed to bar dower, notwith-

(*k*) *McNally* v. *Church*, 27 U. C. R. 103.

(*l*) *Huffman* v. *Askin*, 2 U. C. C. P. 423; *Edmunds* v. *Groves*, 2 M. & W. 642; *Fearn* v. *Felica*, 7 M. and Gr. 517, 518; *Smith* v. *Martin*, 7 M. and W. 308.

(*m*) R. S. O. cap. 126, sec. 11.

standing the absence or want of a certificate, touching her consent to be barred of her dower, and notwithstanding any irregularity, informality or defect in the certificate, (if any), and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any Act, on or before the said day in force, respecting the barring of dower."

11. The R. S. O., cap. 55, sec. 2, provides that "no action of dower shall be hereafter maintained, in case the dowress 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.

12. Where in an action for dower it is necessary for the defendant, to prove the execution by the demandant of a deed in which she releases her dower in the land in dispute, if he cannot clearly prove its execution without her, he must call the demandant (*n*).

13. In Ontario it is provided by statute (*o*), that a married woman may bar her dower in any lands or hereditaments, by joining with her husband in a deed or conveyance thereof, in which a release of dower is contained.

14. Another statute provides (*p*), for conveyance by a married woman of the age of twenty-one years, of her interest in real estates, and enacts, that she may also by deed, bar her dower and any right or inchoate right of dower, but no such conveyance shall be valid or effectual, unless the

(*n*) *Clark* v. *Stevenson*, 24 U. C. R. 200.
(*o*) R. S. O. cap. 126, sec. 5.
(*p*) R. S. O. cap. 127, sec. 3.

husband is a party to, and executes the deed by which the same is effected."

15. It will be observed, that cap. 126 is silent as to the woman being of age. In Messrs. Leith & Smith's work on Real Property it is said (*q*): "It would seem that in those cases to which cap. 126 is applicable, cap. 127 will not vary its effect as to age, and this conclusion is entirely independent of any argument to be drawn from section 12 of cap. 127, which section indeed may form no argument (*r*)."

16. It is further enacted by statute (*s*), that a married woman may also bar her dower 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; but no such deed or conveyance shall be effectual to bar her dower, unless made in conformity with the Married Woman's Real Estate Act, R. S. O., cap. 127.

17. In their very valuable work, to which reference has before been made, Messrs. Leith & Smith say (*t*): "There is a difficulty as to the construction of this section, arising out of the fact that, to conform with cap. 127, the husband must be a party, as that Act, section 3, expressly requires it, and indeed there is nothing else to which there can be conformity. Unless so much of section 5 as requires conformity is to be rejected, it would appear that the only mode of proceeding would be under section 4, of cap. 127, and to procure a Judge's order dispensing with the necessity of the husband being a party. It would seem, however, that section 4 was intended only to apply to cases therein

(*q*) Leith and Smith's R. P. p. 156.

(*r*) *Furness* v. *Mitchell*, 3 App. R. 510. But see *Boustead* v. *Whitmore*, 22 Gr. 222.

(*s*) R. S. O. cap. 126, sec. 6.

(*t*) Leith and Smith's R. P. p. 157, note B.

specified and others *ejusdem generis*, and not to such a case as, mere temporary, though lengthy absence of the husband. The words, 'any other cause,' are to be construed with reference to the context, and the maxim *noscitur a sociis* applies. The Legislature seems to have erred in referring to cap. 127 at all, the language of section 5 of that statute is the same as the Consolidated Statute, cap. 84, sec. 5, and all that the latter statute requires, was examination of the wife by the proper official as to her consent to be barred. When the Consolidated Statute was in force, there was, till 36 Vic., cap. 18, no such provision as above, in relation to a Judge's order. Probably so much of section 5 as requires conformity is to be rejected, for it can hardly be that the Legislature is to be understood as saying, that a woman might bar by deed to which her husband is not a party, but that the deed should not operate unless he were a party, or a Judge dispensed with his being a party."

18. It has been held, in the United States, that a married woman cannot execute a valid power of attorney to convey lands, even in connection with her husband (*u*). In Ontario, it has been held, that a woman may execute a valid power of attorney to compound for, and compromise, her claim to dower, and to execute a release of such dower (*v*).

19. It is not necessary that the wife should sign in person, the deed releasing her dower. It is settled that a deed is well executed, if the name of the grantor be put to it by his direction, and in his presence, by the hand of another

(*u*) *Lewis* v. *Coxe*, 5 Harring, 401; *Sumner* v. *Conant*, 10 Verm. 9; *Earle* v. *Earle*, 1 Spence, 347; Scribner on Dower, vol. ii. p. 278.

(*v*) *Williams* v. *Comrs. of Coburgh*, 23 U. C. R. 330. *Quære*. whether in Ontario may not release dower by attorney, even before her husband's death.

person (*w*); and a deed executed by the wife in this manner, is sufficient to pass her dower (*x*). So it is as competent for her to have her name placed to the deed by her husband, by her direction, if it be done in her presence, as by any other person (*y*).

20. It is also essential to the validity of a release of dower, that it be under seal (*z*).

21. The wife, to bar her dower, must not only join with her husband in the execution of a deed of his estate, but the conveyance must contain words constituting a release or grant of her right. The usual mode, by which a wife is joined, is by introducing a clause in the close of the deed, expressly relinquishing all claim to dower in the premises sold.

22. It has been several times decided, that the mere signing and sealing of the deed by the wife, is ineffectual to divest her right (*a*). Nor will the insertion of her name in the introductory clause, describing the parties, or in the concluding part of the deed, unaccompanied by a statement as to the purpose for which she joins in the execution, or any reference to her contingent interest, make any difference (*b*). So, if it be expressed that she joins, "in token of her assent

(*w*) Shep. Touch. 57; *Ball* v. *Dunsterville*, 4 T. R. 313; *King* v. *Longnor*, 1 Nev. and Man. 576; *Gardner* v. *Gardner*, 5 Cush. 483; *Wood* v. *Goodridge*, 6 Cush. 117; *Buras* v. *Lynde*, 6 Allen, 309, 310; *Irvin* v. *Thompson*, 4 Ibb. 295; 2 Washb. R. P. 2nd ed. 601, pl. 15; Scribner on Dower, vol. ii. p. 279. *Contra*, *Wallace* v. *McCollough*, 1 Rich. Eq. 426.

(*x*) *Frost* v. *Deering*, 21 Maine (8 Shepl.), 156.

(*y*) *Ibid.*

(*z*) Scribner on Dower, vol. ii. p. 279.

(*a*) *Catlin* v. *Ware*, 9 Mass. 218; *Lufkin* v. *Curtis*, 13 Mass. 223; *Powell* v. *Monson, etc., Man. Co.*, 3 Mason, 347; *Hall* v. *Savage*, 4 Mason, 273; *Cox* v. *Wells*, 7 Blackf. 410; *Davis* v. *Bartholomew*, 3 Ind. 485; *McFarland* v. *Febiger*, 7 Ohio, 194; *Lothrop* v. *Foster*, 51 Maine, 367.

(*b*) *Lufkin* v. *Curtis*, 13 Mass. 223; *McFarland* v. *Febiger*, 7 Ohio, 194; *Carter* v. *Goodin*, 3 Ohio St. 75, 78; *Agricultural Bank* v. *Rice*, 4 How. U. S. R. 225.

thereto" (*c*); or "in token of her free assent" (*d*); or that she agrees "in the above conveyance" (*e*); or words of similar import be employed, the right of dower is not barred. And if the deed do not contain words proper to pass or extinguish the interest of the wife, the omission cannot be aided by the certificate of acknowledgment (*f*). So, if the wife sign and seal a deed in blank, and it is afterwards filled up differently from what was intended at the time she signed it, she is not estopped from showing the fraud and claiming her dower, even against an innocent grantee (*g*).

23. But a release of dower need not be in technical form; nor are words of inheritance essential to its validity (*h*). It is sufficient if a wife join in a deed with her husband, "in token of her relinquishment of dower (*i*);" or, "in token that she relinquishes her right to dower in the premises (*j*);" or if she declare in the deed that she thereby "relinquishes her right of dower in the above premises (*k*)." It has been held that where the husband by deed aliens the land, and the wife though not named as a formal party, releases her dower, and both execute it, it is a sufficient bar of dower (*l*). In all these cases there is an express reference to, and relinquishment of the right of dower (*m*). So, if the wife unite with her husband in the granting part of a deed, without any reference in terms, to her dower, she will be

(*c*) *Leavitt* v. *Lamprey*, 13 Pick. 382.

(*d*) *Stevens* v. *Owen*, 25 Maine (12 Shepl.), 94.

(*e*) *Hall* v. *Savage*, 4 Mason, 273.

(*f*) *Davis* v. *Bartholomew*, 3 Ind. 485.

(*g*) *Conover* v. *Porter*, 14 Ohio St. 450; *Drury* v. *Foster*, 2 Wallace, U. S. R. 24.

(*h*) *Gray* v. *McCune*, 23 Pa. St. (11 Harris) 447.

(*i*) *Stearns* v. *Swift*, 8 Pick. 532.

(*j*) *Frost* v. *Deering*, 21 Maine, 156; *Usher* v. *Richardson*, 29 Maine, 415.

(*k*) *Davis* v. *Bartholomew*, 3 Ind. 485.

(*l*) *Bonter* v. *Northcote*, 20 U. C. C. P. 76. See also *Dent* v. *Clayton*, 10 Jur. N. S. 671; 33 L. J. Chan. 503; 12 W. R. 903; 10 L. J. N. S. 865.

(*m*) See also *Dundae* v. *Hitchcock*, 12 How. U. S. R. 256.

barred; nor will it make any difference in such case, that she is the owner in fee of an undivided share in the premises conveyed (*n*).

24. The deed of an infant is not absolutely void, unless it appears on its face to be prejudicial to the infant when it is void *ab initio* (*o*), but voidable by him either before or after he comes of age (*p*). No act of disaffirmance is necessary on the part of a wife who has, while under age, executed a release of dower before bringing her suit, if it is prejudicial to her (*q*). Nor is she required to refund to the purchaser, any part of the money paid by him for the premises in which dower is claimed (*r*).

25. Delay of the infant in bringing her action to set aside the deed, may, if the release is not prejudicial to the infant, be treated as a ratification (*s*). The bringing of an action to regain possession contrary to her deed is a sufficient act of avoidance (*t*).

26. A voidable deed is valid until some act is done to avoid it; and it lies upon those who claim in opposition to

(*n*) *Learned* v. *Cutler*, 18 Pick. 9; *Smith* v. *Handy*, 16 Ohio, 191; Scribner on Dower, vol. ii. p. 282.

(*o*) *Harvey* v. *Ashley*, 3 Atk. 610; *Keene* v. *Boycott*, 2 H. Bl. 511; Simpson on Infants, p. 8.

(*p*) *Doe d. Jackson* v. *Woodruffe*, 7 U. C. R. 332; *Mills* v. *Davis*, 9 U. C. C. P. 510; *Featherston* v. *McDonnell*, 15 U. C. C. P. 162; *Gilchrist* v. *Ramsay*, 27 U. C. R. 500; *Miller* v. *Ostrander*, 12 Gr. 349; *Doran* v. *Reid*, 13 U. C. C. P. 393; *Zouch* v. *Parsons*, 3 Burr. 1794.

(*q*) *Priest* v. *Cummings*, 20 Wend. 338; *Hughes* v. *Watson*, 10 Ohio, 127, 134; *Sanford* v. *McLean*, 3 Paige, 117; *Thomas* v. *Gammel*, 6 Leigh, 9. But see *Holmes* v. *Blogg*, 8 Taunt. 38, holding that the infant must disaffirm within a reasonable time after coming of age. This case, however, only applies where the contract may or may not be for the benefit of the infant, not where it is on its face prejudicial to him.

(*r*) *Shaw* v. *Boyd*, 5 S. and R. 309; *Markham* v. *Merrett*, 7 How. (Miss.) 437. See also Scribner on Dower, vol. ii. p. 283, note 3 and p. 284, note 1, where the cases bearing upon the point under discussion decided in the United States are collected.

(*s*) *Featherston* v *McDonnell*, 15 U. C. C. P. 164; *Miller* v. *Ostrander*, 12 Gr. 349.

(*t*) *Doe Jackson* v. *Woodruffe*, 7 U. C. R. 332; *Gilchrist* v. *Ramsay*, 27 U. C. R. 500.

the deed, to show that such act has been done (*u*). An infant, on coming of age, may ratify securities given by him during his minority, without receiving any further consideration, but he must, on the occasion, have full knowledge and complete information respecting the transaction (*v*).

27. A deed by an infant, to secure the repayment of money advanced for necessaries, is voidable (*w*). Where the plaintiff had advanced money to an infant, partly in order to pay for necessaries, and he had by deed assigned to the plaintiff, his reversionary interest as a security, in an action against the infant on his attaining twenty-one, for an account of monies advanced to him, and expended on necessaries, and for repayment, and also claiming that the same might be declared to be a charge on his reversionary interest; it was held, that though the plaintiff was entitled to an account, and an order for repayment, the deed was not binding on the infant, and the security could not be enforced (*x*).

28. In *McCoppin* v. *McGuire* (*y*), Richards, C. J., said, "It is not necessary to decide that the deed of the infant, unless legally avoided, would operate by way of estoppel, to pass the title to the land conveyed by the deed, as soon as the fee vested in him, on attaining his majority. The case already referred to, *Featherston* v. *McDonnell*, 15 U. C. C. P., 156, goes far to sustain that view."

29. It is submitted, (and a careful perusal of the case of *Featherston* v. *McDonnell* supports this view), that the rule

(*u*) *Allen* v. *Allen*, 2 Dru. and W. 307; 1 C. and L. 427 (Irish); *McCoppin* v. *McGuire*, 34 U. C. R. 157.

(*v*) *Kay* v. *Smith*, 21 Beav. 522.

(*w*) *Martin* v. *Gale*, L. R. 4 Ch. D. 428; 46 L. J. Ch. 84; 36 L. T. 357; 25 W. R. 406.

(*x*) *Ibid.*

(*y*) *McCoppin* v. *McGuire*, 34 U. C. R. 157.

suggested by Richards, C.J., in the above case, is only applicable where the release is not void *ab initio*, but merely voidable, and the infant has not within a reasonable time after attaining his majority, taken steps to avoid it.

30. The husband may, in certain cases, convey his land, freed from dower, without his wife's joining in the conveyance or without her concurrence.

31. The statute (*z*) provides for the conveyance by a husband, whose wife is a lunatic, of his land, freed from her dower.

32. Section 9 provides that the last preceding section shall apply to any case in which an agreement for sale has been made, and a conveyance has been executed by the husband, and any part of the purchase money has been retained by the purchaser on account of dower, and to any case in which an indemnity has been given against the dower of the wife.

33. Section 10 provides for the conveyance by the husband, of his land, freed from dower, where his wife has been living apart from him for two years, under such circumstances as disentitle her to alimony. This section is amended by statute (*a*), which provides that in case the wife has not been living apart from her husband, under such circumstances as disentitle her to dower, the judge shall state in the order, the value of the dower, and order the same to remain a charge upon the property, or be secured to the wife.

34. The ninth section of R. S. O., cap. 126, is extended by statute (*b*), which enacts, that that section shall apply

(*z*) R. S. O. cap. 126, sec. 8. See Appendix.
(*a*) 41 Vic. O. cap. 8. See Appendix.
(*b*) 43 Vic. cap. 14, sec. 4. See Appendix.

where any person owns or has the right to sell, as trustee or otherwise, land which is subject to dower, whether such dower is inchoate or complete, and whether the person applying is or is not the husband of the lunatic, and the tenth section of the same Act shall apply to any case in which an agreement for sale had been made, a conveyance executed by the husband, before the passing of this Act, and part of the purchase money retained by the purchaser, on account of dower, or an indemnity given against such dower.

35. The statute, 44 Vic. (*c*), provides for the making of an application to mortgage lands free from dower where the wife is disentitled by misconduct.

36. By section 2 of this Act, the eighth and ninth sections of R. S. O., cap. 126, are extended to the case of the wife, though a lunatic, not being confined in an asylum.

37. Section 3 provides that section 2 of this Act, and section 8 of R. S. O., cap. 126, shall apply to mortgages as well as sales.

38. Section 4 provides that the judge may make subsequent orders for sale or mortgage, being satisfied of the continued insanity of the wife.

39. Section 5 provides that the Act, and section 10 of the R. S. O., cap. 126, shall apply to any case, where any person owns or has the right to sell or mortgage, (whether as trustee or otherwise), land which is subject to the dower of a lunatic, whether such dower is inchoate or complete, and whether the person applying is or is not the husband of the lunatic.

40. Section 6 provides that sections 6, 7, 8 and 10 of "The Married Woman's Real Estate Act" shall apply to any order made under this Act.

(*c*) Cap. 14, sec, 1. See Appendix.

41. Before an order will be made under this statute, allowing a husband to convey his land free from the dower of his wife, it must be shown, beyond all question, that the wife is disentitled to alimony (*d*).

42. The affidavit of service of notice of an application to convey free from dower, must identify the person served as the wife of the applicant; and where upon such an application, the husband stated that he did not know where his wife was, and another affidavit stated that she lived at St. Catharines for some time with one M. as Mrs. M., notice of the application was directed to be given twice a week for three weeks in a newspaper at St. Catharines (*e*).

43. Notice of the application to convey free from dower must be given, unless it can be shown that unreasonable difficulties are thrown in the way of effecting service on the wife, or that she has left her husband's roof, and expresses a determination never to return to reside with him (*f*).

44. Where upon an application under the statute to dispense with the execution of a conveyance by the wife of the grantor, alleging that she had been living apart from her husband (the petitioner), for two years, in consequence of her adulterous conduct, the respondent denied the adultery, and other misconduct charged. The petitioner produced in evidence the decree in a suit for alimony, in which he had set up her adultery as a defence. The decree dismissed the bill, and did not state the ground of dismissal. It was held, that such decree was not sufficient, and the application was refused (*g*).

(*d*) *Re* Eagles, 7 P. R. 241.
(*e*) *In re* McGuin, 7 P. R. 310.
(*f*) *Re* Campbell 25 Gr. 187.
(*g*) *In re* Campbell, 25 Gr. 480.

45. At common law, if a contract of sale were entered into by the owner of an estate, of which the wife was dowable, and a fine was to be levied to extinguish the title to dower, and the husband died before the essential ceremonies were completed, the wife might intervene, and prevent their completion, and thus protect her dower, even though she had joined in acknowledging the fine (*h*). Upon the same principle, it has been held, that a married woman, who has executed and acknowledged a deed in due form, may revoke her assent at any time before the deed has been delivered (*i*). But where a conveyance, which had been signed, sealed, and acknowledged by husband and wife, was sent by the former, in the presence of the latter, to be recorded, no objection being made on her part, this was held to be such a delivery as would bind the wife (*j*). So where a deed regularly executed and acknowledged by husband and wife, is delivered by the husband, without the knowledge of the wife, and is accepted by the grantee, acting in good faith, and without notice of her dissent, she is bound by such delivery (*k*).

46. The release is not necessarily an absolute bar of dower. If it be executed for a particular purpose, as to raise a term of years, or to create a charge upon the estate, its operation will be restricted to that purpose; and dower will be barred to the extent only, and as against the owner of, the particular interest so created (*l*).

(*h*) *Hody* v. *Lunn*, 1 Roll. Ab. 375, pl. 20; Park on Dower, 201; 1 Roper, H. and W. 540.

(*i*) Leland's Appeal, 13 Pa. St. (1 Harris) 84-85.

(*j*) *McNeely* v. *Rucker*, 6 Blackf. 391.

(*k*) *Baldwin* v. *Snowden*, 11 Ohio St. 203; Scribner on Dower, vol. ii. p. 286.

(*l*) Park on Dower, 196, 207; 1 Roper, H. and W. 537; Chase's Case, 1 Bland's Ch. 206, 228.

47. If the wife join her husband in a mortgage of his estate, she is still dowable of the mortgaged premises, subject to the lien and rights of the mortgagee (*m*). If she join in a lease, and no rent be reserved, she is entitled to dower subject to the term (*n*); if rent be reserved, she is dowable of the rent as well as of the reversion (*o*). So if a widow, as administratrix, convey her husband's estate in pursuance of an order of Court, her right of dower will not pass by the deed (*p*). Nor will her deed as guardian, conveying the interest of her ward, and limited by fair construction to that interest, transfer her right of dower (*q*). A release of "all my dower * * * in to, out of all that certain * * * lot," to two or more tenants in common, is a release of her dower in the whole lot, and there is no accrual in favour of the other tenants in common (*r*). It has been held, that a release of dower in one moiety of a farm will not operate in law as a release of it in the other moiety; nor does a release of it to one tenant in common for his share, operate as a release of it to another tenant in common who has a different share (*s*). But if a woman join her second husband in a conveyance of real estate for the purpose of relinquishing her dower therein, she is estopped to claim dower in the same estate, under her former husband (*t*). It is no bar however to an action for dower by a woman and her second husband out of the lands of her first husband, that her second husband has conveyed his right to the lands in question (*u*).

(*m*) *Ante* cap. 19.
(*n*) *Ante* cap. 16, par. 7.
(*o*) *Ante* cap. 29, par. 7; *Hall* v. *Hall*, 2 McCord's Ch. 280; Chase's Case, 1 Bland's Ch. 206, 231.
(*p*) Scribner on Dower, vol. ii. p. 287, note (5).
(*q*) *Jones* v. *Hollopeter*, 10 S. and R. 326.
(*r*) *McDearmid* v. *McDearmid*, 15 L. J. N. S. 112.
(*s*) *White* v. *White*, 1 Harrison, 202. See also *French* v. *Lord*, 69 Me. 537.
(*t*) *Usher* v. *Richardson*, 29 Maine, 415; Scrib. on Dower, vol. ii. p. 288.
(*u*) *Lawson* v. *Montgomery*, 10 U. C. R. 528.

48. It is no defence to an action of dower that the widow has released her right to a stranger (*v*).

49. Where after recovery in ejectment against the husband by the purchaser at sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him in a conveyance in fee of the land, by way of bargain and sale to a third party, thereby releasing to the latter for the consideration of five shillings her dower, and all right and title thereto, and all manner of actions, etc., of dower. No money consideration passed the grantee executing a mortgage back for the whole of the purchase money mentioned in the deed to him, and the husband remaining in possession until dispossessed by the sheriff under process in the ejectment suit. The defendant's, the tenants of the land, claimed under the purchaser at sheriff's sale, it was held that the demandant was entitled to dower. Wilson, J., pge. 371, says: "It is to be implied that the release of dower referred to by the statute must, to be binding on the wife, be contained in a deed made for the principal purpose of the husband conveying his interest to a purchaser, and in which the wife joins merely for the purpose of releasing her dower, by way of extinguishment in the land, and that it does not refer to the case of the release being made to a stranger, when the husband had no estate in the land, and the sale of dower or right to dower, was solely dependant upon that estate, and was not itself intended to be the subject of the conveyance. In such a case, if the deed of the husband be inoperative or void, the *release* as incident to it must fall with it, for there will be nothing upon which it can attach. Here the husband had not the estate he

(*v*) Co. Litt. 266 a; Litt. 495; Anon. Cro. Jac. 151; *Miller* v. *Wiley*, 17 U. C. C. P. 368; *French* v. *Crosby*, 61 Me. 520; *Mallory* v. *Horan*, 12 Abb. (N. Y.) Pr. N. S. 289; *Weaver* v. *Sturtevant*, 12 R. I. 537; *French* v. *Crosby*, 61 Me. 502.

professed to grant, nothing in fact passed by it, the bargainee acquired an estate as against the bargainor, and we assume against his wife also by estoppel; but these tenants are no parties to the deed, they claim adversely to it, and not by it, they therefore cannot conclude the demandant by this deed from saying, she did not release her dower to a purchaser. If the husband could be considered in the light of disseisor when he conveyed to his son, the release of dower contained in a deed passing an estate founded upon disseisin, would have been an effectual release, because the conveyance would have passed an actual estate at law, and would have enured to the benefit of the actual owner of the land whenever he determined the disseisin by the recovery of his rightful estate" (*w*).

50. So where lands have been mortgaged to secure the payment of a debt, the wife having joined in the mortgage, and subsequently the lands were sold under a judgment against the husband, at the suit of a stranger to the mortgage, it was determined, that as against the purchaser at such sale, the wife was not divested of her dower (*x*). The result will be the same if the mortgagee proceed at law, and sell the mortgaged premises under ordinary judgment and execution, instead of foreclosing his mortgage. The purchaser under such a judgment cannot be said to be in privity with the mortgagee, and therefore is not protected against dower (*y*). Upon the same principle, if husband and wife execute a deed of trust, and the lands are afterwards sold in satisfaction of a mechanic's lien, subsisting at the date of the deed, the purchaser takes the premises subject to dower (*z*). But where the husband alone mort-

(*w*) *Miller* v. *Wiley*, 17 U. C. C. P. 368. See also *Kiztmiller* v. *Rensselaer*, 10 Ohio St. 63.

(*x*) *Taylor* v. *Fowler*, 18 Ohio, 567.

(*y*) *Harrison* v. *Eldridge*, 2 Halst. 392.

(*z*) *Gove* v. *Cather*, 23 Ill. 634. See cap. 21, par. 35.

gaged his estate, and afterwards joined with his wife in a conveyance to a third person, it was held, that a purchaser under proceedings in foreclosure founded on the mortgage, the grantee of the husband and wife having been made a party to the proceedings, acquired all the title of the mortgagor and the grantee, and held the property discharged of dower (*a*). And where a widow executed, with the proper formalities, an instrument in writing, addressed in general terms, "To all to whom these presents shall come," containing, in substance, a release of dower, and delivered it to a person in possession of lands under a conveyance from her husband, and it appeared from the circumstances that the writing was intended as a release of dower in the lands so held, the party receiving it will not be regarded as a stranger in the transaction, but may avail himself of the release against a claim for dower subsequently set up by the widow (*b*).

51. If the party to whom the wife makes a valid release of dower, afterwards acquire title to the lands, the release operates to bar the dower as to him, by way of estoppel (*c*). And, if, after a mortgage by the husband alone, the wife join with him in a conveyance to a third person, and the grantee re-convey to the husband, the wife is dowable of the equity of redemption only. In such case, all the right which she has, is derived from the re-conveyance, and as that vests in the husband nothing but the equity, her dower is limited accordingly (*d*). But a release of dower to a person who has parted with his title by deed of quit

(*a*) *Carter* v. *Walker*, 2 Ohio St. 339. See, however, *Littlefield* v. *Crocker*, 30 Maine, 192.

(*b*) *Gray* v. *McCune*, 23 Pa. St. 447; Scribner on Dower, vol. ii. p. 290.

(*c*) *Harriman* v. *Gray*, 49 Maine, 537.

(*d*) *Hoogland* v. *Watt*, 2 Sandf. Ch. 148.

claim merely, without covenants of warranty, does not inure in favor of his grantee (*e*).

52. It has been held in Ontario, that where a woman joins with her husband in a conveyance by deed, of his land to a purchaser, and after his death, brings an action for dower against tenants thereof, it is not necessary for the tenants to establish privity of estate (*f*). Wilson, J., p. 533, says: "It is never of any consequence to the dowress who the tenant of the freehold is, or by what title he holds. She may sue a disseisor, the actual tenant of the freehold, just as she would the person who was the true tenant of the freehold, if he were in the possession, and a recovery against such disseisor, or even a voluntary assignment of dower made by him, is as valid and conclusive against the true owner as if it had been made by the true owner in person. In this action, the dowress having treated these tenants, as tenants of the freehold, and as bound by law, and competent to assign to her her dower, privity of estate is thus established (*g*), and privity which makes them the proper representatives of the freehold, must be sufficient privity to entitle them to plead any just or true plea to this demand. If it had appeared that the demandant had not released her dower by deed, or had not joined in the deed with her husband, or that there was not a release of dower contained in the deed, or that she had not released to a purchaser, the plea perhaps, would not have been good; but when it is in the very words of the statute, we think it must be sufficient, although the purchaser is not named, and although that purchaser is not shown to have taken a freehold estate. It was not objected to the plea, that the purchaser was not shown to have been a purchaser of the freehold; and if it

(*e*) *Harriman* v. *Gray*, 49 Maine, 537; Scribner on Dower, vol. ii. p. 290.
(*f*) *Miller* v. *Wiley*, 16 U. C. C. P. 529, and the cases there referred to.
(*g*) Co. on Litt. 265 b, 266 a.

had, we are not prepared to say it would have been entitled to prevail; we rather think it would not; for the statute is in the negative form, that 'no action shall be brought in case the claimant joined in a deed to convey the land or release dower therein to a purchaser,' and as it expressly makes the conveyance or release to a purchaser sufficient, we could not have gone counter to the very words of the statute."

53. A wife cannot relinquish her dower in her husband's real estate, by executing a release to him (*h*). Even an agreement made during coverture, between a husband, his wife, and a trustee of the latter, that in consideration of her enjoying separately, and absolutely controlling her separate property, she would relinquish her dower in his lands, is invalid, and cannot be enforced against her in an action for her dower (*i*). A deed of separation between husband and wife, by which the estate is conveyed to trustees, in trust for the wife for life, with remainder to the children of the marriage on her death; is not avoided by the subsequent reconciliation of the parties, if the deed has been acted upon after the reconciliation ceased, or where the right of third parties intervenes (*j*).

54. A wife who joins with her husband in a conveyance of his lands, is not a party thereto, except for the purpose of relinquishing her dower. She is not to be regarded as alienating a real subsisting estate, but as releasing a future contingent right. Her renunciation of dower is to attend

(*h*) *Ogden* v. *McArthur*, 36 U. C. R. 246; *Davisson* v. *Sage*, 20 Gr. 115; Scribner on Dower, vol. ii. p. 290.

(*i*) *Townsend* v. *Townsend*, 2 Sandf. S. C. 711. See *Martin* v. *Martin*, 22 Ala. 86; *Walsh* v. *Kelly*, 34 Pa. St. 84; Scribner on Dower, vol. ii. p. 290.

(*j*) *McArthur* v. *Webb*, 21 U. C. C. P. 358; *Randle* v. *Gould*, 8 El. and B. 456.

the conveyance of her husband; to endure while that endures, and no longer (*k*). Hence, if the conveyance of the husband be inoperative, or if it be set aside, or avoided, the right of dower remains unimpaired (*l*).

55. After the death of the husband, the right of dower may be extinguished by release to the terre-tenant (*m*). But there is a distinction between the release by the widow of her right of dower, and the release of her action of dower; for if she release her right of dower, it will be a bar, whether it be made to the tenant of the freehold, or to the person in reversion. But if the release be of "all actions of dower," or of "all actions real," and such release, instead of being made to the tenant of the freehold, is granted to the person in reversion, it will not bar the right to endowment. The reasons upon which this distinction is founded, will appear in a supposed case, stated by way of example on each form of release (*n*).

56. If a widow entitled to dower out of lands limited to B. for life, with remainder to C. in fee, release all her right to C., and afterwards implead B. for dower, he may take advantage of the release to C.; and so would C. after B's. death, be allowed the benefit of a similar release to B.; because the right to dower arises out of both the estate for life and that in reversion; and when the *jus habendi*, which is the principal, is released, it follows that the action, which

(*k*) *Clowes* v. *Dickenson*, 5 John. Ch. 235, 246; *Douglass* v. *McCoy*, 5 Ohio, 522-527; *Blain* v. *Harrison*, 11 Ill. 384; *Rickard* v. *Talbird*, Rice Eq. R. 158; *Eisher* v. *Grimes*, 1 Smedes and Marsh Ch. 107; *Davison* v. *Waite*, 2 Munf. 527.

(*l*) *Rickard* v. *Talbird*, Rice Eq. R. 158; *Robinson* v. *Bates*, 3 Met. 40; *Stinson* v. *Sumner*, 9 Mass. 143; *Blain* v. *Harrison*, 11 Ill. 384; *Summers* v. *Babb*, 13 Ill. 483; *Woodworth* v. *Paige*, 5 Ohio, St. 70; *Miller* v. *Wiley*, 17 U. C. C. P. 368; Scribner on Dower, vol. ii, p. 295.

(*m*) Park on Dower, 212; 1 Roper H. and W. 563; Shep. Touch. 328; Altham's case, 8 Co. 151.

(*n*) Scribner on Dower, vol. ii, p. 296.

is but the instrument to recover it, is also gone (*o*). But if the release to C. were not of the right, but of the action, it would not extinguish the dower; for the widow would have no right of action against C., but against B. only; and an action of dower being a real action, can only be released like other real actions, to the tenant of the freehold (*p*). Therefore, as the widow could not sue C. for dower, he not being tenant of the freehold, if B., who was such tenant, were to plead to the writ the release to C., her replication that C. had nothing in the freehold at the time of the release, would be sufficient to avoid the plea; it being an established rule, that in order to give validity to a release of actions real, the releasee must be tenant of the freehold, either in deed or in law (*q*). It is necessary in a plea of such a release, to aver that the person to whom it was made was *tenens liberi tenementi* (*r*).

57. We have already seen that dower may be barred by conveyance before or after it has been assigned (*s*).

(*o*) Co. Litt. 265 a, 267 b; 1 Rep. 112 b; 8 Rep. 151 b.
(*p*) Litt. 495.
(*q*) Altham's Case, 8 Co. 150-151 b.
(*r*) Anon. Cro. Jac. 151; Park on Dower, 213; 1 Roper, H. and W. 563-5; Scribner on Dower, vol. ii. p. 296.
(*s*) *Ante* cap. 23, par. 8; cap. 24, par. 7.

CHAPTER XXXIII.

JOINTURE AND ANTE-NUPTIAL SETTLEMENT AS A BAR OF DOWER.

1. *The origin of jointure.*
2. *Requisites of a legal jointure.*
3-4. *It must consist of an estate or interest in land.*
5-8. *It must take effect immediately on the death of the husband.*
9-12. *The estate limited must not be for a less term than the life of the wife.*
13. *It must be limited to the wife herself, and not to another.*
14. *But it may be limited to the husband and wife jointly in fee.*
15. *It must be made in satisfaction of dower, but need not so appear in the deed.*
16. *To be a complete bar, it must be made before the marriage.*
17. *Not necessary that the estate be immediately derived from the husband.*
18. *The statute does not prescribe any rule as to the amount of a jointure.*
19-22. *Assent of the wife to the jointure.*
23-47. *Equitable jointure.*
48-52. *Jointures upon infants.*
53-60. *Remedy where the widow has been evicted.*
61. *Conveyance of the jointure.*
62. *Jointure not forfeited by elopement or adultery.*
63. *Interest not allowed on arrears of jointure.*
64. *An agreement to make a jointure equal to a jointure.*

1. One method of barring Dower is by jointure as regulated by the Statute, 27 Hen. VIII., cap. 10, or by ante-nuptial settlement in lieu of dower. A jointure, which strictly speaking, means a joint estate limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke :

"A competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least (*a*)." Before the Statute of Uses the greater part of the land of England was conveyed to uses, and the *cestui que use* then stood in much the same position as a *cestui que trust* after the statute, and had but an equitable beneficial interest. Now, though the husband had the use of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being seised thereof: wherefore it became usual on marriage to settle by express deed, some special estate to the use of the husband and his wife for their lives, in joint tenancy or jointure, which settlement would be a provision for the wife, in case she survived her husband. At length the Statute of Uses ordained that such as had the use of lands, should, to all intents and purposes, be reputed and taken to be, absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled, at the same time, to any special lands that might be settled in jointure, had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall forever be precluded from her dower (*b*).

2. In giving a construction to the Statute, courts of law, having reference to the widow's title to dower, in lieu of which jointures were substituted, have required the jointure, as to time of commencement, certainty, interest, etc., to be as beneficial to the widow as her dower. If this object be effected, it is immaterial in what manner the estate is limited to the wife; for, although the statute expressly

(*a*) Co. Litt. 36 b. 37 a; 1 Roper, H. and W. 462; 1 Washb. R. P. 2nd ed. 261, pl. 5; Vernon's Case, 4 Co. 1 a.

(*b*) 27 Hen. VIII. cap. 10; 1 Cruise, tit. 7 Ch. 1; 2 Bl. Com. 137-8.

mentions these five forms of limitations only,—1st, limitations to the husband and wife, and to the heirs of the husband; 2nd, to the husband and wife, and to the heirs of their two bodies; 3rd, to the husband and wife, and to the heirs of the body of one of them; 4th, to the husband and wife for their lives; 5th, to the husband and wife, for the life of the wife; yet these particulars are only expressed as examples, and not in exclusion of other cases which may fall within the meaning and intention of the Act (*c*). These observations will be illustrated from the consideration of what have, and what have not been determined to be valid jointures at law (*d*).

3. Under the Statute of Henry VIII., a provision for a jointure must consist either of an estate in land, or of some interest collateral to, and issuing out of land; as a rent already subsisting, or a rent created *de novo*, for the purpose (*e*). Thus, an *annuity* settled upon a wife, does not bar dower at law (*f*); nor can a legal jointure be composed partly of a freehold and partly of an annuity not secured on real estate (*g*).

4. In equity, as we shall presently see (*h*), the strict rules of law, in this particular, are materially modified (*i*).

5. The jointure must take effect immediately upon the death of the husband, according to this rule, if an estate for life be limited to A. after the husband's death, and then in jointure to the wife for life; or if the limitation be to A.

(*c*) 1 Bright, H. and W. 435, pl. 4; Vernon's Case, 4 Co. 2 a.
(*d*) Scribner on Dower, vol. ii. p. 371-2.
(*e*) 3 Prest. Abstr. 376. See *Gelzer* v. *Gelzer*, 1 Bail. Eq. 387.
(*f*) *Hastings* v. *Dickinson*, 7 Mass. 153; *Gibson* v. *Gibson*, 15 Mass. 106.
(*g*) *Vance* v. *Vance*, 21 Maine, 364.
(*h*) *Post*, pars. 23-47.
(*i*) Scribner on Dower, vol. ii. p. 372.

for a term of years after the decease of the husband, with remainder to the widow for life, in satisfaction of her dower, by way of jointure; or if the remainder for life, limited to the wife for her jointure, be expectant upon an estate tail in her husband, these will not be good jointures within the meaning of the statute, which did not intend to place widows in a worse situation, in respect of these provisions, than they would have been in regard to their dower; and the death of A., or the expiration of the term, or the husband's death without issue, will not cure the original defects (*j*).

6. The mere *possibility* of the jointure taking effect upon the husband's death, is insufficient; it must be so limited as to ensure that result. If, therefore, the limitation were to A. for life, remainder to B. for life, with remainder to such woman as B. might marry, this would not be a good jointure upon the wife of B., because it is subject to the contingency of A. dying before B., which event not happening, the widow of B. would be unprovided for from the death of her husband, so long as A. lived (*k*).

7. It is obvious that if jointures of the character above stated had been established under the statute, widows might have been deprived of their dower, without deriving any benefit from the provision substituted in its place, which would have been contrary to the intention of the statute. But a *mesne* estate intervening between the estate for life of the husband, and the remainder to the widow for her life as a jointure, will not prejudice the settlement, if

(*j*) 1 Roper, H. and W. 464; Co. Litt. 36 b; Vernon's Case, 4 Co. 2 a; Hob. 151; *Wood* v. *Shurly* Cro. Jac. 489; Hut. 51; Winch. 33; Gilb. Uses, 148; *McCartee* v. *Teller*, 2 Paige, 511; *Hastings* v. *Dickinson*, 7 Mass. 153; *Gibson* v. *Gibson*, 15 Mass. 106; *Vance* v. *Vance*, 8 Shepl. 364; *Gelzer* v. *Gelzer*, 1 Bail. Eq. 387; *Crain* v. *Cavana*, 36 Barb. 410; Scribner on Dower, vol. ii. p. 374.

(*k*) 1 Sid. 3, 4; Winch. 33; *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500, 513; Scribner on Dower, vol. ii. p. 374.

such *mesne* estate be concurrent with the husband's, and cannot exceed it, and in that event, the interest limited to the widow will be a good jointure, within the intent and meaning of the statute. Thus, if the limitation were to the husband for life, remainder to the use of trustees during the husband's life, to preserve contingent uses, with remainder to the wife for life in jointure, such a provision would be a valid jointure (*l*).

8. The rule under consideration is to be understood as applying to the *mode* in which the jointure is to be limited. It seems that a jointure will not be rendered void by an uncertainty as to its taking effect in possession, arising from the title to the property settled, being defective (*m*).

9. The estate limited must not be for a less term than the life of the wife, accordingly, an estate settled upon the wife *per autre vie*, or during the lives of three or more persons (*n*), is not a good jointure within the statute; because she may survive all of them, in which event she would be unprovided for; so that this is a case not within the contemplation of the Act (*o*).

10. Mr. Roper states it as the rule fairly deducible from Vernon's case (*p*), that if the continuance of the widow's estate be made to depend upon herself, viz.: her remaining single, or her performance or non-performance of certain conditions, such a qualified or conditional freehold will be a good legal jointure, and bar her of her dower, whether

(*l*) 1 Roper, H. and W. 465; 1 Bright, H. and W. 436-7; Scribner on Dower, vol. ii. p. 374.

(*m*) *Corbet* v. *Corbet*, 1 Sim. and Stu. 612; 5 Russ. 254; Jacob's note, 1 Roper, H. and W. 464; Scribner on Dower, vol. ii. p. 374.

(*n*) Vernon's Case, 4 Co. 2 b; Co. Litt. 36 b.

(*o*) Scribner on Dower, vol. ii. p 374-5.

(*p*) Vernon's Case, *supra*.

she determine her estate or not; for the jointure, in its creation, being a freehold, and which might continue for her life, is within the letter, and the intention of the statute; and the circumstance of its being made defeasible at the election of the widow, does not take the case out of the Act (*q*).

11. In commenting upon the case, cited by Mr. Roper, in support of this position, Mr. Jacobs says (*r*): "It is doubtful whether it was intended to be decided, that an estate thus qualified would universally constitute a good legal jointure. The case related to a jointure made after marriage, and the chief reason given for the decision was, that the widow had accepted it, and that if the condition had been unreasonable, she might have waived it; and it does not seem to have been thought that a jointure subject to a condition would be good unless accepted (*s*). This reasoning does not apply to ante-nuptial jointures, which are not waivable, and do not derive their effect from the acceptance of the widow. The ninth section of the Statute, which applies to jointures made after marriage (*t*), may admit of a larger construction than the sixth, with reference to the nature of the estate to be limited to the wife; it speaks of lands assured to the wife, 'for the term of her life, *or otherwise*, in jointure.' One of the reasons for the decision in Vernon's case was, that the jointure in question came within these words" (*u*).

(*q*) 1 Roper, H. and W. 467; Scribner on Dower, vol. ii. p. 375.

(*r*) *Ibid.* 469, note.

(*s*) See Cro. Eliz. 452; Gilb. Uses, 148.

(*t*) See *post*, par. 16.

(*u*) Dyer, 317 b; 4 Co. 3 a; 4 Kent, 55-56. See also *McCartee* v. *Teller*, 2 Paige, 511, 560; Clancy's Rights of Women, 209; *Caruthers* v. *Caruthers* 4 Bro. C. C. 500; 1 Washb. R. P. 2nd ed. p. 262, pl. 6. But see *McCartee* v. *Teller*, 8 Wend. 267, in error.

12. If the estate settled in jointure be of a nature less than freehold, as of a term for years, then, although the term from its length must necessarily exceed the life of the widow, it will not be a legal jointure within the provisions of the statute, because it is but a chattel interest and less in the eye of the law than a freehold for the wife's life (*v*).

13. The estate must be limited to the wife herself, and not to another in trust for her. The Statute of Henry VIII., as we have noticed, had in contemplation such jointures only, as were limited to the wife's use; so that where the use instead of being limited to the wife, is limited to a stranger in trust for her, the jointure is not a legal jointure, either within the letter or spirit of the Act. And although the jointure be expressed to be in satisfaction of dower, and the widow accept it, yet neither of these circumstances will give it validity at law (*w*). A trust estate, however, is good as an equitable jointure (*x*).

14. If the estate be limited to the husband and wife in fee simple, it will be a good jointure, although the limitation be not one of those mentioned in the statute; because such a provision is within the intention; for, if she be the survivor, then, she will have a larger interest than if the estate had been merely limited to her for life after her husband's death; and if she die before him, there is no occasion for the provision (*y*).

(*v*) Co. Litt. 36 b; *Gelzer* v. *Gelzer*, 1 Bail. Eq. 387; Scribner on Dower, vol. ii. p. 376.

(*w*) Co. Litt. 36 b; *Hervey* v. *Hervey*, 1 Atk. 561; 1 Roper, H. and W. 474.

(*x*) *Post*, par. 23, *et seq.*; Scribner on Dower, vol. ii. p. 376.

(*y*) Denis's Case, Dyer, 248 a; Vernon's case, 4 Co. 3 b; 1 Roper, H. and W. 466; 3 Prest. Abstr. 376; Winch. 33; Scribner on Dower, vol. ii. p. 377.

15. It must be made, though it need not in the deed be expressed to be, in satisfaction of her whole dower, and not of any particular part of it. The word jointure in construction of law *ex vi termini* means a provision in bar of dower (*z*).

16. The Statute of Henry VIII., contains a proviso reserving to the widow, a right of election between the jointure and her dower, when the provision is made after the marriage (*a*). Still, if made after the marriage, it will be a jointure within the statute, if it conform thereto (*b*), but it is voidable by the widow after her husband's death, at her election (*c*). If she enter upon and enjoy the settled estate, this will not be a confirmation of the jointure and a bar of dower, unless the estate was taken by her while *sui juris* substantially in lieu of dower (*d*). And if she, by a writ of dower, waive her jointure, she will, at law, be confined to her dower, and not be permitted to claim both dower and jointure (*e*).

17. The letter of the Statute of Henry VIII., is confined to jointures made by the husband; but, as already stated, its provisions have been liberally construed; and a jointure settled upon the wife by the father of the husband, or

(*z*) *Gilkison* v. *Elliott*, 27 U. C. R. 95; *Visod* v. *Louden*, 2 Kelynge's Chy. Cas. 17, 2 Bl. Com. 131, note; *Creagh* v. *Creagh*, 8 Ir. Eq. Rep. 70; *In re* Dwyers, 13 Ir. Chy. Rep. 438; *Killen* v. *Campbell*, 10 Ir. Eq. Rep. 465; Sugden's Prop. Stats. 244, ed. of 1862. But see *Charles* v. *Andrews*. 9 Mod. 152.

(*a*) 27 Hen. VIII. Ch. 10; Co. Litt. 36 b. See also Leith and Smith's R. P. pp. 148-149.

(*b*) Vernon's Case, 4 Co. 4 a.

(*c*) Co. Litt. 36 b.

(*d*) *Gilkison* v. *Elliott*, 27 U. C. R. 95.

(*e*) *Sharp* v. *Purslow*, cited 4 Co. 4 b, and 5 a; *Gosling* v. *Warburton*, Cro. Eliz. 128; *Tracy* v. *Ivies*, 1 Leon. 311; *McCartee* v. *Teller*, 2 Paige, 556; 8 Wend. 267; *Hastings* v. *Dickinson*, 7 Mass. 153; 1 Roper, H. and W. 469; Scribner on Dower, vol. ii. p. 380.

through the medium of trustees, is considered within the meaning of the Act (*f*).

18. According to a literal construction of the Act, the right to dower is barred, however inadequate the settlement may be. Hence Lord Northington says: "The estate which is to bar dower, is of no defined value by the statute, and if it be made up of the qualities and accidents specified, it is a legal bar, and every court of law is bound to accept it as such" (*g*). Lord Coke, though he described a jointure as a competent livelihood (*h*), etc., does not mention adequacy of amount in his enumération of the points to be observed in making a perfect jointure within the statute, and does not allude to any criterion by which its competency is to be ascertained. It seems to be clear, that if the settlement be made before marriage with the consent of the wife, or if, being made during the coverture, it is afterwards accepted by her, it cannot be objected to on the ground of inadequacy. The amount of the jointure will not, therefore, be material to its legal effect, except in cases where the wife was an infant at the time of the marriage (*i*), or where the jointure was made before marriage without her assent (*j*). Nor is it essential to the validity of a jointure, that it should be exempt from incumbrance (*k*), as the widow, if evicted, has a right to claim her dower (*l*).

(*f*) 1 Roper, H. and W. 475; Anon. Moor. p. 28 pl. 91; *Ibid.* p. 93, pl. 231; Ashton's Case, Dyer, 228 a, pl. 46; 3 Prest. Abstr. 376; Scribner on Dower, vol. ii. p. 381.

(*g*) 2 Eden, 57.

(*h*) Co. Litt. 36 b, 37 a.

(*i*) See *post*, pars. 48-52.

(*j*) Jacob's Note, 1 Roper, H. and W. 462; *Levering* v. *Heighe*, 2 Md. Ch. Decis. 81; *Gould* v. *Womack*, 2 Ala. 83; *McCartee* v. *Teller*, 2 Paige, 511; *post*, pars. 19-22.

(*k*) *Ambler* v. *Norton*, 4 Hen. and Munf. 23.

(*l*) *Post*, pars. 53-60; Scribner on Dower, vol. ii. p. 381-2.

19 We have seen that a jointure settled after the marriage may be avoided at the election of the wife (*m*); but under the statute of Henry VIII., a jointure made before the marriage is binding on the wife without her assent (*n*). In commenting upon the case of *Drury* v. *Drury* (*o*), in which the principal question was whether an infant may be barred of dower by a jointure settled before the marriage, Mr. Jacob says (*p*): "The argument on this point ultimately depended, in a great measure, upon the question whether the agreement of the wife to a legal jointure made before marriage, was necessary to make it binding upon her under the statute. It is not required that the wife should concur in the settlement by which the jointure is made, and it is not in terms required that she should assent to it. But from the provisions of the statute as to settlements made after marriage, it is clear that it was not intended to enable the husband by his own act to impose on the wife in lieu of her dower, any jointure which he might think fit. The legislature seems to have assumed, that all ante-nuptial jointure's must be settled by agreement of the parties, and there seems some reason for contending, that without such agreement the jointure would not, in strictness, be within the act, as by the common law the estate conveyed to the wife by way of jointure, would not be effectually vested in her without an actual or presumed acceptance on her part. If it was made with her privity, her marrying with notice of it, would of course be an acceptance of the settlement, and conclusive evidence of her agreeing to it (*q*). But if it was made without her privity, she had the power of disagreeing to the estate conveyed to her, as soon as she became *sui juris*, and

(*m*) *Ante*, par. 16.

(*n*) 4 Bro. C. C. 506, note; 2 Eden, 60; 1 Greenl. Cruise 199; 1 Washb. R. P. 2nd ed. p. 263, pl. 9.

(*o*) *Drury* v. *Drury*, Wilmot's Opinions, 177; Bro. Parl. Cas. 492.

(*p*) Jacob's Note, 1 Roper, H. and W. 477.

(*q*) *Estcourt* v. *Estcourt*, 1 Cox. 20.

was apprised of the fact. Her disagreement would render the conveyance void, and it would seem that a jointure thus prevented from taking effect, would not bar her right of dower under the statute. It was, however, determined that a legal jointure was to be considered, not as a compensation for dower agreed for by the wife, but merely as a provision conferred upon her, and that it was not founded on any idea of contract; and hence it followed that in the case of the wife being an infant, no objection arose from her incapacity to contract (*r*)." Mr. Justice Wilmot, in his judgment, entered fully into the discussion of this question. He observed, that the bar to the right of dower did not arise from the agreement of the woman to a jointure made before marriage, but from the energy and force of the Act of Parliament substantiating the settlement against her for this particular purpose (*s*). He thought that the meaning of the legislature with respect to women then married, was that those who had settlements made before their marriages should acquiesce under those settlements, and abide by the provisions thereby made for them, whether they were great or small, adequate or inadequate, whether they had been made by the agreement of themselves or their friends, or had been the mere spontaneous act of the husband or his ancestors (*t*). The objection that the husband might, before marriage, settle an inadequate jointure on the wife without her assent or knowledge, for the purpose of depriving her of dower, did not, as he observed, apply to cases of jointure made before the statute, as a fraud of that description could not then have been contemplated. But in cases subsequent to the statute, he thought that such jointures would be void on the ground of fraud, that the fraud might be pleaded at law, and that the fairness and competency

(*r*) See 2 Eden, 62, 72.
(*s*) Wilmot's Opinions, 194.
(*t*) *Ibid.* 202.

would be a question to be decided by a jury, taking into consideration all the circumstances of the transaction. 'A pocket jointure,' he added, 'made upon a woman without her privity, or upon an infant with her privity, but without the interposition of parents or guardians, would be such an evidence of fraud as would be sufficient to condemn it.' In another case Lord Hardwicke suggested that equity might relieve against a jointure merely illusory (*u*).

20. If, however, a jointure is settled before marriage without the assent of the wife, she is required to elect between the jointure and her dower; she cannot take both (*v*).

21. Where the husband, previously to the marriage, gave a bond to the wife's mother, conditioned for the settlement of land to the wife for life in bar of dower, and after her decease, to the uses of the marriage, (which settlement was liberal and reasonable in regard to the wife's fortune); and after the marriage, but during a period of disagreement and separation the settlement was executed accordingly, the wife being made a party; it was held, that this precluded the wife from her legal claim of dower, and it was no objection that the wife was not a party to the bond, or was a *feme covert* at the time when she joined in the execution of the settlement; and as the bond was good for the issue of the marriage, so it must be for the wife, for it could not be set aside as to one party, and deemed good as to the other (*w*).

(*u*) 3 Atk. 312. See also *Darby* v. *Lynch*, 3 Bro. P. C. 478, ed. Toml. In England, the provisions of the Statute of Henry VIII. relating to jointure, are superseded by the 3 and 4 Wm. IV. cap. 105, by which the right of dower is placed within the absolute control of the husband. See Appendix.

(*v*) Scribner on Dower, vol. ii. p. 384. The rule in regard to the election in such cases is the same as where the jointure is made during coverture. See *ante*.

(*w*) *Estcourt* v. *Estcourt*, 1 Cox, 20.

22. H., a married man entitled in fee simple in possession to real estate became bankrupt. On the sale of his estate by the assignees the deed of conveyance after reciting that H. and his wife joined for the purpose, thereinafter mentioned, the operative part, omitting altogether the name of the wife, proceeded as follows:—"The said H. hath, and by this present deed, intended to be acknowledged by the said "wife," as her act and deed, doth bargain, sell, etc. The deed was properly executed and acknowledged, and the wife having survived H., it was held, that she had effectually barred her right to dower (*x*).

23. It may be convenient, in treating upon this subject, to revert to the requisites of a good legal jointure, and then to show in what particulars equity differs, or varies from the law in these respects; the reader not forgetting, that the authority of courts of law for admitting collateral provisions in bar to the right of dower, is founded upon a special statute, and that the jurisdiction of Courts of Equity, in these matters, existed before that Act, upon the principle of enforcing agreements entered into between individuals (*y*).

24. The first requisite, which, as before noticed, is necessary to a binding legal jointure, is, that it be made to commence in possession or profit immediately from the husband's death (*z*). With this agrees the rule in equity (*a*), except the intended wife be a party to the deed, and by executing it, consent to accept a more uncertain and disadvantageous provision in lieu of dower, for then she will be bound, and absolutely barred of her common law right.

(*x*) *Dent.* v. *Clayton*, 33 Law J. Rep. (N. S.) Chanc. 503; 10 Jur. N. S. 671; 12 W. R. 903; 10 L. T. N. S. 865.

(*y*) 1 Roper, H. and W. 487; Scribner on Dower, vol. ii. p. 385.

(*z*) *Ante*, pars. 5-8.

(*a*) *McCartee* v. *Teller*, 2 Paige, 511; 8 Wend. 267; *Crain* v. *Cavana*, 36 Barb. 410; *Levering* v. *Heighe*, 2 Md. Ch. Decis. 81.

Accordingly, Lord Alvanley, adverting to this subject in *Caruthers* v. *Caruthers* (*b*), said:—"That if the wife had been adult, she might have taken a chance in satisfaction of her dower, acting with her eyes open" (*c*).

25. With respect to the legal requisite, that the estate limited in jointure be such an estate of freehold as should continue during the wife's life (*d*), no such circumstance will be necessary in equity in order to make the jointure an absolute bar to dower, if the intended wife be of age and a party to the deed; because, as she is able to settle and dispose of all her rights, she is competent to extinguish her title to dower upon any terms to which she may think proper to agree. If, therefore, she accept of a term for years (*e*), on an annuity (*f*), or copyhold lands (*g*), in lieu of her dower, she will be concluded, and barred of her common law right (*h*).

26. It has been held in the United States that almost any *bona fide*, and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or a portion of that of her husband, whether, during the coverture, or after his death, will be carried into execution in a Court of Chancery (*i*).

(*b*) *Caruthers* v. *Caruthers*, 4 Bro. C. C. 513.

(*c*) *Dyke* v. *Rendall*, 13 Eng. Law and Eq. 404, 411; 2 De G. M. and G. 209.

(*d*) *Ante*, pars. 9-12.

(*e*) *Rose* v. *Reynolds*, 1 Swan. 446; *Charles* v. *Andrews*, 9 Mod. 152.

(*f*) *Vizard* v. *Longdale*, Kelynge's Ch. Cas. 17, *sub nomine Vizod* v. *Louden*, cited 2 Eden, 66, 13 Eng. Law and Eq. 408, note.

(*g*) *Lacy* v. *Anderson*, 1 Swan. 445; *Gladstone* v. *Ripley*, cited 2, Eden. 59.

(*h*) 1 Roper, H. and W. 487-8; Scribner on Dower, vol. ii. p. 385-6.

(*i*) *Stilley* v. *Folger*, 14 Ohio, 610; *Findley* v. *Findley*, 11 Gratt. 434; *Charles* v. *Charles*, 8 Gratt. 486; *Ellmaker* v. *Ellmaker*, 4 Watts, 89; *Selleck* v. *Selleck*, 8 Conn. 85, note; *Andrews* v. *Andrews*, 8 Conn. 79; *Murphy* v. *Murphy*, 12 Ohio St. 407; Heald's Petition, 2 Foster (N. H.) 265; *Canley* v. *Lawson*, 5 Jones' Eq. 132; *Gelzer* v *Gelzer*, 1 Bailey's Eq. 387; *Logan* v. *Phillips*, 18 Misso. 22; Scrib. on Dower, vol. ii. p. 386-392.

27. It is settled that a jointure will be equally good and binding upon the husband and wife, and bar her of dower, if it be not absolutely and completely settled upon her by deed, but rest merely in covenant or articles before the marriage, because a Court of Equity will decree a specific performance of such a covenant or articles, by directing a settlement which will have relation to the period when it ought to have been made (*j*).

28. That the jointure in order to be an absolute bar of dower, ought to be made before marriage, is equally a rule of equity as of law (*k*); and in both jurisdictions, when the provision is a jointure after marriage, within the statute of Henry VIII., but waivable by the widow, she will be obliged to elect between such jointure and her dower; but if such provision be not a legal jointure within the Act, then the law, as we have seen (*l*), cannot put her to an election, but she will be entitled to both the provision and her dower (*m*). Here, the concordance between law and equity ceases; for Courts of Equity, acting upon the intention of the parties making and accepting the provision, and upon the conscience of the widow, oblige her to elect between her dower and the provision settled in jointure upon her, and on this principle, that it would be unconscientious in her to take a thing itself, and also that which is given in lieu of it, so that whether the provision be made before or after marriage, if it be not conclusive against her, but voidable only, she will not be permitted in equity to take both it and her dower,

(*j*) 3 P. Wm's, 369; 1 Roper, H. and W. 488; *Vincent* v. *Spooner*, 2 Cush. 467; *Caruthers* v. *Caruthers*, 4 Bro. C. C. 507, note 512-513; Scrib. on Dower, vol. ii. p. 395.

(*k*) *Townsend* v. *Townsend*, 2 Sandf. S. C. 711; *Crain* v. *Cavana*, 36 Barb. 410; *Martin* v. *Martin*, 26 Ala. 86; *Walsh* v. *Kelly*, 34 Pa. St. 84; *Carson* v. *Murray*, 3 Paige, 483; *Rowe* v. *Hamilton*, 3 Greenl. 63. *Ante*, par. 16.

(*l*) *Ante*, par. 16, *et seq.*

(*m*) Co. Litt. 36 b.

but will be put to her election between them (*n*). This equity doctrine prevails in the United States (*o*).

29. Upon a treaty of marriage, it was agreed by the husband, that in case there should be issue of the marriage, all the property to which the wife was entitled, either in possession or in action, should be settled upon her. The marriage took place, and after the birth of a son, the husband executed the following instrument: "Be it known to all whom it may concern, that I, J. L., of, etc., having intermarried with F. H., widow, etc., and by her, having had one son, called R. L., I do hereby certify, that all the property which came by my said wife, of every description, I give to her and her heirs forever. In witness," etc. The wife being the survivor, it was adjudged that she could not be compelled to elect between the provision thus secured to her, and her rights under the law (*p*). The Court said: "The principle to be extracted from all the cases is, that an intention to exclude that right must be shown, either by express words, or a manifest implication; but there is here nothing from which such an intent can be inferred (*q*)."

30. It has been noticed as one of the requirements of a legal jointure, that it shall be made, though it need not in the deed be expressed to be, in satisfaction of the whole of the wife's dower, or at least of her dower in lands particularly described (*r*). The practice of courts of equity so far agrees with the rules of law, that if it appear on the face of the instrument that the provision was only intended in satisfaction of part of the dower, leaving the proportion in

(*n*) 1 Roper, H. and W. 488-9; *Parham* v. *Parham*, 6 Humph. 287.
(*o*) Scribner on Dower, vol. ii. p. 396.
(*p*) *Liles* v. *Fleming*, 1 Dev. Eq. 185.
(*q*) See also *Swaine* v. *Perine*, 5 John. Ch. 482.
(*r*) *Ante*, par. 15.

uncertainty, and in respect of what lands dower was meant to be barred by it, such provision will not bar the widow, but she will be entitled to dower upon giving up the provision (*s*).

31. The intention that the provision was to be in lieu or satisfaction of dower, may be manifested by the nature of the provision; and it will be sufficient, if it can be clearly collected from the instrument that it was so intended (*t*).

32. In the late case of *Hamilton* v. *Jackson* (*u*), by marriage articles the husband covenanted, that in case he should die in the life of his wife without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of, and that in preference to any creditor of his, or to any deed or will, which he might make or execute in his lifetime, contrary to the true intent and meaning of the articles. There being no issue of the marriage, it was held by Sir E. Sugden, C., that the wife surviving, was entitled to one-half of the real and personal estate of which her husband died seised or possessed, but not to dower, or to a distributive share of the personalty (*v*).

33. Where a *verbal* ante-nuptial agreement was made between parties in contemplation of marriage, by which the intended wife was permitted during coverture, to enjoy and

(*s*) *Gilkison* v. *Elliot*, 27 U. C. R. 95; 1 Roper, H. and W. 489; *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500; Scribner on Dower, vol. ii. p. 398.

(*t*) *Jamieson* v. *Fisher*, 2 Er. and App. 242 Arg.; *Gurly* v. *Gurly*, 8 Cl. and F. 743; Affirmed 2 Dr. and Wal. 463; *Vizard* v. *Longdale*, Kelynge's Ch. Cas. 17, *sub nomine Vizod* v. *Louden*, cited 3 Atk. 8, 1 Ves. Sr. 55; 2 Eden's R. 66, 13 Eng. Law and Eq. 408, note; *Creagh* v. *Creagh*, 8 Ir. Eq. Rep. 70; *Gilkison* v. *Elliot*, 27 U. C. R. 95; 1 Roper, H. and W. 491; 1 Roper, H. and W. 490, note; *Walker* v. *Walker*, 1 Ves. Sr. 54; *Warsley* v. *Warsley*, 16 B. Mon. 469; *Ilvis* v. *McCreary*, 3 Met. (Ky.) 151.

(*u*) *Hamilton* v. *Jackson*, 2 Jones and Lat. 295; *Dyke* v. *Rendall*, 13 Eng Law and Eq. 404, 2 De G. M. and G. 209; *McCartee* v. *Teller*, 2 Paige, 511, 8 Wend. 267; *Shaw* v. *Boyd*, 5 S. and R. 309; *Levering* v. *Heighe*, 2 Md. Ch. Dec. 81; *Gould* v. *Womack*, 2 Ala. 83.

(*v*) 1 Bright, H. and W. 451.

dispose of her personal estate, and the proceeds of her real estate, as if she were *sole*, and by which it was stipulated, that in case she survived, she should claim no distributive share of her intended husband's personal estate, and no dower in his realty; and the husband accordingly did permit the wife during coverture, to give to her children by a former marriage, the personal estate which before marriage was hers, and also the proceeds of her real estate; it was held, that the agreement was one made "upon consideration of marriage," within the Statute of Frauds; and that there was no such part performance as would, in equity, put it out of the operation of the statute. It was further held, that such agreement was, under the circumstances stated, no bar to the claim of dower (*w*). But where a parol ante-nuptial contract has been fully performed by the parties, it will be sustained in equity (*x*).

34. In some of the United States, it is held that the provision made for the wife by articles entered into before the marriage, must be fair and reasonable, in order to warrant a Court of Equity in enforcing a specific performance against her (*y*).

35. A future contingent provision accepted by an adult female on her marriage in lieu of dower is in equity a valid bar to dower (*z*).

36. Where by a marriage settlement provision is made out of real and personal estate, and declared to be in lieu of dower and thirds, the widow is not only barred of dower,

(*w*) *Finch* v. *Finch*, 10 Ohio, 501; *Hall* v. *Hall*, 2 McCord's Ch. 267, 274, 276, 277.

(*x*) *Dygert* v. *Remerschneider*, 39 Barb. 417; Scribner on Dower, vol. ii. p. 399-400.

(*y*) *Gould* v. *Womack*, 2 Ala. 83; *Rivers* v. *Rivers*, 3 Desaus. 109; Scribner on Dower, vol. i. p. 400-1.

(*z*) *Re* Heron's Fl. and K. 330.

but also of all interest in her husband's estate under the Statute of Distributions (*a*).

37. A covenant by the husband in marriage articles to provide a jointure of £200 sterling per annum, such jointure to be levied on the lands of D. and B., though the jointure be paid, will not bar the wife's right to her distributive share of the personal estate (*b*).

38. Leasehold estate settled on the wife "in lieu of dower," is not a bar of thirds (*c*).

39. The word "thirds" is a general expression which may signify according to the intent and scope of the instrument in which it is used, the interest of a widow in any property, personal or real, of her deceased husband in case of his intestacy (*d*). An agreement to accept a provision in lieu of dower made by the wife after marriage will constitute no bar as she is unable to contract (*e*).

40. Where marriage articles were executed by a tenant in tail in remainder, and his intended wife, whereby he agreed to execute, when he should become entitled in possession, a legal post nuptial settlement to secure her a jointure of a specified amount, and having become entitled, died without executing any such settlement, the articles were held to be in equity a bar to the wife's right of dower (*f*).

(*a*) *Benson* v. *Bellasis*, 1 Ven. 15, 2 Chy. Rep. 252; *Darila* v. *Darila*, 2 Vern. 724; *Thompson* v. *Watts*, 2 Johns. and H. 291; Jur. N. S. 760; 6 L. T. N. S. 817; *Gurly* v. *Gurly* 8 Cl. and H. 743; Affig. 2 Dr. and Wl. 463; *Druce* v. *Denison*, 6 Ves. 385; *Lee* v. *Cox*, 3 Atk. 419; 1 Ves. 1; *Garthshore* v. *Chalie*, 10 Ves. 1; 31 L. J. Chy. 445; 10 W. R. 485; *Blandy* v. *Widmore*. 3 Vern. 709; *Walker* v. *Walker*, 1 Ves. 54.

(*b*) *Creagh* v. *Creagh*, 8 Ir. Eq. Reps. 68.

(*c*) *Creswell* v. *Byron*. 3 Bro. C. C. 362.

(*d*) *Canbourne* v. *Barry*, 6 Ir. Eq. R. 28.

(*e*) *Cooper* v. *Watson*, 23 U. C. R. 347.

(*f*) *Pennefather* v. *Pennefather*, 6 Ir. R. Eq. 171.

41. Where by a marriage settlement, part of the husband's real estates and the lady's fortune was vested in trustees upon trust to pay the rents and interest of the lands, tenements, hereditaments and premises, stocks, funds and securities to the husband for life; and after his death to pay the wife for her life an annuity to be in full for her jointure, and be in bar and full satisfaction of and for her dower and thirds at common law which she could or otherwise might have or claim out of, etc., the said lands, tenements, hereditaments and premises, stocks, funds and securities whereof or whereunto "the husband at any time during the said intended coverture should be seised or entitled for any estate of inheritance to which dower and thirds is incidental and subject thereto and in the event which happened, viz., there being an only child of the marriage to £7,000 for such child in trust for the husband absolutely; it was held, that the settlement barred the wife of dower and her distributive share of the real and personal estate, comprised in the settlement, but not of dower or of her distributive share out of or in the other real and personal estate of the husband (*g*).

42. Where provision is made in a settlement that the wife should not be barred of anything the husband should give or leave by deed or will and he dies intestate; her shares by the statute are not a satisfaction of the covenant (*h*).

43. Lands the property of A. held under leases for lives, renewable forever and for long terms were upon the marriage of A. with B. conveyed to trustees upon trust to receive the rents, etc., and pay over the same to A. for his life so long as he should continue solvent and able to support and maintain B. and no longer; and from and after his death,

(*g*) *Sanbourne* v. *Barry*, 6 Ir. R. Eq. 28.

(*h*) *Kirkman* v. *Kirkman*, 2 Bro. C. C. 95; *Onslow* v. *Onslow*, 1 Sim. 18; S. C. 5 L. J. Chy. 63.

or from and after his becoming insolvent, failing in his trade, or being unable suitably and competently to maintain and support the said B., then to pay the said rents to the said B. for her life and for her own sole and separate use; it was held, that this settlement did not bar B. of her right out of fee simple estates acquired by A. since his marriage (*i*).

44. Where by a marriage settlement some property to the principal part of which the intended wife was entitled for life was conveyed to trustees for her separate use; and it was agreed that the trustees should effect an insurance on her life and pay the premium out of the trust money, and should invest the amount assured when received and pay the dividends to the intended husband for life; and after his decease pay as the wife should appoint and in default to the persons entitled under the statute of distributions of intestates estates. The wife survived the husband and it was held that she had then a right to refuse to keep up the policy, and that the Court would not consider her bound to perform the agreement for the benefit of mere volunteers (*j*).

45. Where by a marriage settlement £400 the wife's fortune was given to the husband and some was conveyed by his father to trustees to pay the wife if she survived, an annuity or jointure of £40 and the husband covenanted that if these properties should fail or be deficient all the real and personal estate he should die seised of, etc., should be vested in the trustees to raise £400 or buy an annuity of £40 for the wife, it was held sufficient to bar her right to dower (*k*).

(*i*) *Fyan* v. *Henry*, 2 Dr. and Wal. 556.

(*j*) *Hodsal* v. *Webb*, 2 Keen, 99; S. C. 7 L. J. (N. S.) Ch. 103.

(*k*) *Killen* v. *Campbell*, 10 Ir. Eq. R. 461.

46. In the case of *Robinson* v. *Wilson* (*l*), an ante-nuptial settlement recited that the intended wife was entitled to certain choses in action, and that the intended husband then in trade, it was considered more beneficial for the parties that he should not for the present make any settlement of any part of his property. The choses in action were then conveyed to a trustee in trust to pay the interest, etc., arising from them to the husband for life and after his death to assign them to the wife if she should survive, but if not to assign them to him; but in case he should secure to her at any time thereafter an annuity of £250 during her life then in trust to assign the choses in action to him; "such annuity to be taken by the wife in lieu and bar of dower or thirds, or claim to any share of his personal estate under the statute of distributions. The husband subsequently to the marriage acquired by purchase the lands of T. in fee, farm, and died without having secured to the wife the annuity of £250; it was held, that she was entitled to dower out of the lands of T."

47. Where defendant purchased a real estate of plaintiff's husband, and the estate being in mortgage for a term, it was paid off out of the purchase money and the term assigned to a trustee for the purchaser to attend the inheritance. Several years after the husband's death the plaintiff brought her bill against defendant for an account of profits and to be paid her dower but it was dismissed. It is a settled rule, that if a purchaser takes in a term precedent to the right of dower, be it a satisfied one or money paid for it, it is a bar to the wife's dower, but if the mortgage had subsisted at the husband's death the wife might have redeemed and been entitled to dower; or if he had paid it off and taken an assignment of the term to attend the

(*l*) *Robinson* v. *Wilson*, 13 Ir. Eq. R. 168.

inheritance and died seised, the wife would have been endowed (*m*).

48. Infants may be barred at law by sufficient legal jointure under the Statute of Henry VIII., as already explained. If the jointure be competent it will be good though it be not of the value of the dower; and though at law an infant may not be bound by her ante-nuptial agreement to accept a provision in lieu of dower, still in equity a provision made for an infant on her marriage, at least, if with the assent of her father, or guardian, in all respects as certain, secure and substantially equivalent to a good legal jointure, would be sufficient as a good equitable jointure to restrain her from enforcing her legal right to jointure (*n*).

49. In *Harvey* v. *Ashley*, page 611, *supra*, the Lord Chancellor (Lord Hardwicke), after disposing of the objection that the wife was an infant at the time the settlement was made, says: "The second objection is, that the parents of Dorothy (the infant), did not make so beneficial a bargain for her as they might have done; admitting this was so, I apprehended it would not be a sufficient reason to set aside the marriage agreement; the law has entrusted parents with the marriage of their children; there are many considerations which may induce a parent to agree to a marriage, besides a strict equality of fortune, as the inclination of the parties, their rank and quality, the persons superior perhaps, in this respect, to whom the infant is to be married,

(*m*) *Hill* v. *Adams*, 2 Atk. 208.

(*n*) *Jamieson* v. *Fisher*, 2 Er. and App. 242, per Esten, V C.; *Earl of Buckingham* v. *Drury*, 3 Bro. P. C. Foul. ed. 492; *Drury* v. *Drury*, 4 Bro. C. C. 506 note; Wilmot's Opinions, 177; *Harvey* v. *Ashley*, 3 Atk. 607; Tud. Lg. Cas. 3rd ed. p. 76; Davidson, Conv. vol. iii. 2nd ed. p. 728 note a; Sugd. Statutes, 2nd ed. p. 246; Leith and Smith's R. P. p. 150; *Williams* v. *Chitty*, 3 Ves. Jr. 545; *Vizard* v. *Longden*, 2 Eden. 66; *Boynton* v. *Boynton*, 1 Bro. C. C. 445; *McCartee* v. *Teller*, 2 Paige, 511, 556-9; 8 Wend. 267; *Levering* v. *Heighe*, 2 Md. Ch. Dec. 81; 1 Washb. R. P. 2nd ed. p. 264 pl. 16; *Shaw* v. *Boyd*, 5 S. and R. 309; *Temple* v. *Hawley*, 1 Sandf. Ch. R. 153; *Lee* v. *Stewart*, 2 Leigh, 76.

and other advantageous circumstances; the convenience too, and propriety of such a match as to preserve the whole estate in the family, which are matters proper for parents to judge of. The Statute of Henry VIII., shows strongly the opinion of the Legislature in this respect; for though at law, no jointure upon a woman, even of full age, could bar her of dower; yet the statute makes it a bar, and a jointure will even bind an infant and preclude her from dower; consider the trust put in parents and guardians; suppose a female infant is married to a gentlemen of great estate, the dower is one-third, and yet she has a jointure made to her of only one-tenth of the value, and notwithstanding this, as the law has entrusted parents and guardians with the judgment of the provision for infants, she shall not set it aside upon the inequality between the dower and the jointure. I will not say how far a mere illusory jointure might be relieved against, but if it is not adequate to what she would have had in dower, it is no reason to set it aside" (*o*).

50. A mere precarious and uncertain provision which she might never enjoy, though it might bar an adult on her contract to accept it as above mentioned, would not bar in case of an infant, even though her parents or guardians assented (*p*). Thus, the settlement of an estate on an infant for life, after the death of the intended husband and of some third person, will not be a bar as a good equitable jointure; for the third person might not only survive the husband, but the wife, who might therefore never take anything (*q*).

(*o*) See also *Connel* v. *Buckle*, 2 P. Wm's. 244; *Williams* v. *Chitty*, 2 Ves. Jr. 545; *Dwinford* v. *Lane*, 1 Bro. C. C. 116; *Milner* v. *Lord Harewood*, 18 Ves. Jr. 275.

(*p*) *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500, 513; *Smith* v. *Smith*, 5 Ves. 188.

(*q*) Leith and Smith's R. P. 151.

51. It seems that a jointure on an infant is not void, though the enjoyment of it may be uncertain by reason of the husband's title to the settled property being defective. If the defect be cured, she will be bound to accept the jointure in lieu of dower (*r*). If, on the other hand, the jointure fails, she will be entitled to recover the amount out of the estates of which she is dowable, as in other cases where a jointress is evicted (*s*).

52. Upon the necessity as to the assent of parents or guardians, Mr. Jacob says (*t*): "Though the assent of parents or guardians is generally mentioned as material to the validity of a jointure on an infant, it does not seem to be in all cases indispensible, with respect to legal jointures, as they are, according to *Drury* v. *Drury*, binding independently of contract (*u*), when fairly made and conformable to the statute, the assent of parents or guardians is material only for the purpose of obviating any suspicion of fraud, and of evidencing the fairness of the transactions. It seems to follow that their assent is not necessary, if the fairness of the transaction appears from other circumstances, and the jointure be in other respects free from legal objections. Probably the analogy followed with respect to equitable jointures, at least where the want of the concurrence of a parent or guardian is reasonably accounted for, as in the case of their being dead or absent, or where, as in *Williams* v. *Chitty* (*v*), the settlement is made on the supposition of the wife being of age at the time" (*w*).

(*r*) *Ambler* v. *Norton*, 4 Hen. & M. 23.

(*s*) *Corbet* v. *Corbet*, 1 Sim. and Stu. 612; 2 L. J. Ch. 9; 1 Roper, H. and W. by Jacob, 482. See *post*, pars. 53-60.

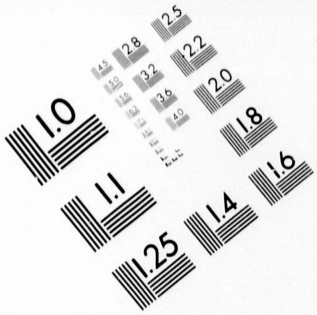
(*t*) 1 Roper, H. and W. 486. note.

(*u*) *Ante*, par. 2.

(*v*) *Williams* v. *Chitty*, 3 Ves. Jr. 545.

(*w*) See, however, the remarks of Sir J. Leach, M.R., in *Simpson* v. *Jones*, 2 Russ. and M. 377.





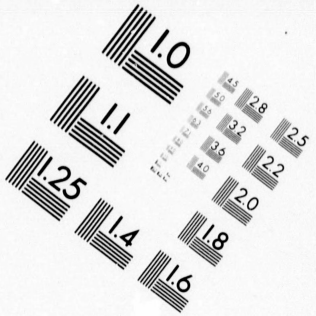
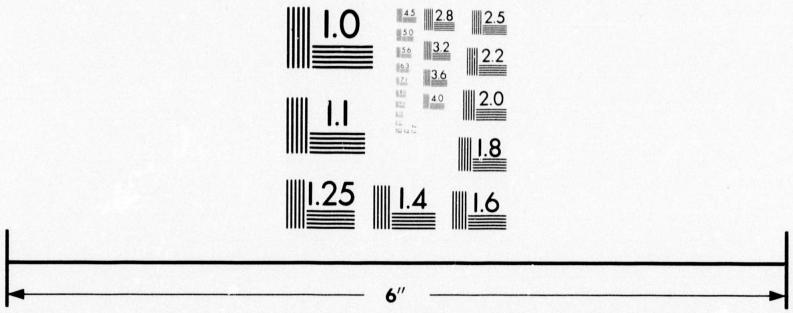
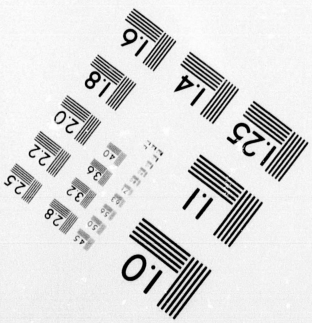
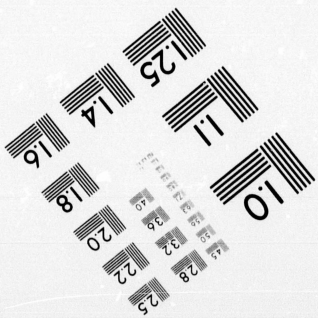


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

53. Where a widow having a legal jointure is evicted of the whole, or a part of it (*x*), by a superior title, she is, under the Statute of 27 Henry VIII., cap. 10, sec. 7, entitled to be endowed of as much of the residue of her husband's real estate as the land of which she is evicted amounts to (*y*).

54. The right of the widow to be endowed in such cases, exists, whether the jointure has been made before or after the marriage (*z*); and if the eviction of the jointure lands take place during the coverture, the widow has the same right to compensation by endowment out of the other estates (*a*). If the husband has aliened his other estates, the widow's right to dower being revived on the eviction, she may enforce it at law against the purchaser (*b*). And the wife's acceptance, after the death of her husband, of a part not evicted, will not defeat her claim to a recompense for the part evicted (*c*).

55. The effect of the eviction is to remit the widow to her dower *pro tanto* if the value of the dower be greater than that of the jointure, she recovers the amount of the latter only (*d*). If the value of the jointure be greater than that of the dower, she is not entitled under the statute, to recover anything beyond her dower (*e*); and she will only be entitled to hold the lands recovered during her life,

(*x*) Gervoye's Case, Moore, 717.

(*y*) 1 Roper, H. and W. by Jacob, 493; 3 Prest. Abstr. 377.

(*z*) Gervoye's Case, Moore, 717; *Beard* v *Nutthall*, 1 Vern. 427.

(*a*) Gervoye's Case, Moore, 717.

(*b*) Mannsfield's Case, Co. Litt. 33 a, note 8.

(*c*) Gervoye's Case, Moore, 717, 4 Co. 3 b, note (c 1); Scribner on Dower, vol. ii. p. 408.

(*d*) Sim. and Stu. 620.

(*e*) *Beard* v. *Nutthall*, 1 Vern. 427; *Tew* v. *Winterton*, 3 Bro. C. C. 489; 1 Ves. Jr. 451.

though her jointure may have been settled on her in tail, or in fee simple (*f*).

56. But if the jointure made by an ante-nuptial settlement, in consideration of which the wife, being adult, expressly agrees to relinquish her dower, and she is afterwards evicted, it seems that although her right to dower is revived at law, she will, in equity, be precluded from claiming it against a purchaser of other lands of the husband not charged with the jointure (*g*). Thus, in *Simpson* v. *Gutteridge* (*h*), where a jointure rent charge had been settled in pursuance of articles made before marriage, the wife being of age at the time, it was held, that she was barred from all claims of dower, and therefore that a purchaser of other lands belonging to the husband was not entitled to call for the production of the title to the rent charge. But the wife is at liberty to resort to any remedies she may have against her husband's assets by covenant or otherwise (*i*).

57. Where the jointure is equitable, the consequences of eviction will, it is presumed, be the same as if it were legal. In *Drury* v. *Drury*, Lord Hardwicke observed, that if the husband, who, on marrying an infant, had covenanted for the payment of an annuity by way of jointure, had dissipated his property, that would have been an eviction in equity, and consequently would have given the wife a right to dower, like the case of an eviction at law (*j*). So it has been suggested, that if, on the marriage of an infant, an annuity charged on money in the funds in the names of trustees,

(*f*) 4 Co. 3 b; Scribner on Dower, vol. ii. p. 409.

(*g*) 1 Roper, H. and W. 493; 1 Greenl. Cruise, 202.

(*h*) *Simpson* v. *Gutteridge*, 1 Madd. 609. See *post*, pars. 57-60.

(*i*) *Beard* v. *Nutthall*, 1 Vern. 427; *Dyke* v. *Rendall*, 13 Eng. Law and Eq. 404; 2 De G. M. and G. 209; *Tevis* v. *McCreary*, 3 Met. (Ky.) 151.

(*j*) 2 Eden. 68; Acc. *Hastings* v. *Dickinson*, 7 Mass. 153, 155; *Gibson* v. *Gibson*, 15 Mass. 106, 111.

were settled by way of jointure, and the funds were wasted by the trustees, this would amount to an eviction, and the widow would not be restrained from proceeding for her dower (*k*).

58. In *Tew* v. *Winterton* (*l*), the husband gave a bond to secure an annuity to the wife, in case of her surviving, and by a memorandum subscribed to the bond, she declared, that she accepted the said jointure in bar, and satisfaction of all dower and thirds. On the husband's death, the Court decreed the payment of the annuity out of his assets, and in case they should not be sufficient, then out of certain estates of which he was tenant in tail, provided the deficiency did not exceed the amount of the dower to which the wife would have been entitled, if she had not, by the memorandum, accepted the annuity. This was said by Lord Thurlow, to be a very subtle equity (*m*), and the case seems to be at variance with *Simpson* v. *Gutteridge*, unless the memorandum signed by the wife, was looked upon as amounting only to a conditional relinquishment of her right to dower (*n*).

59. Where a marriage contract, fixing the share of the wife in her husband's estate, was destroyed by the husband during the coverture, and after his death, the act of the husband was ratified by the wife, it was held that she was restored to her dower (*o*). And where, by an ante-nuptial contract, it was agreed that the husband should provide by will, or an annuity to his widow, for her life, with an interest in a certain part of his real estate, in lieu of dower or any portion of his estate; and the husband, by will, gave

(*k*) See 2 Sugd. V. and P. 10th ed. 220; 1 Washb. R. P. 2nd ed. 266, pl. 20; Scribner on Dower, vol. ii. p. 409.

(*l*) *Tew* v. *Winterton*, 3 Bro. C. C. 489.

(*m*) 1 Ves. Jr. 452.

(*n*) 1 Roper, H. and W. by Jacob, 493-4; 1 Bright, H. and W. 468, 470; Scribner on Dower, vol. ii. p. 410.

(*o*) *In re* Gangwere's Estate, 14 Pa. St. (2 Harris) 417.

her an annuity, during her widowhood only, it was held that he had failed to perform upon his part, and that the wife was not bound by the agreement (*p*). So, where it was stipulated by marriage articles, that the wife should receive no portion of the estate possessed by the husband, at the time of the marriage; but the husband deserted his wife, and failed to provide for her, and she was compelled to support herself by her daily labour; it was decided that the ante-nuptial contract did not prevent her from demanding dower even from a purchaser (*q*).

60. Where by a settlement or agreement before marriage, the intended wife accepts any provision in her favor, which is declared to be lieu of dower, in present or future, to be acquired property; and if the intended wife were adult at the time of the agreement, the inadequacy, precariousness, or failure of the provisions for her, will not, as to purchasers from the husband, prevent her from being barred (*r*). In the case of *Dyke* v. *Rendall*, upon the marriage of an adult lady, a settlement was made, which was recited to be, "for providing a competent jointure and provision of maintenance," for the lady, in case, she should outlive her intended husband, and for securing a provision for their issue; and it was agreed that the intended husband should give a bond to the trustees of the settlement, conditioned for the payment of £2,000 within six months after the marriage, to be held by them upon trust for the husband for life, then for the wife for life, and then for the children of the marriage. The husband duly gave the bond, but only paid a small portion of the £2,000, and died, having

(*p*) *Sheldon* v. *Bliss*, 4 Seld. 31; 7 Barb. 152.

(*q*) *Spiva* v. *Jeter*, 9 Rich. Eq. 434; Scribner on Dower, vol. ii. p. 410.

(*r*) *Dyke* v. *Rendall*, 2 De G. M. and G. 209; 21 L. J. Rep. N. S. Chy. 905; overruling *dictum* in *Power* v. *Shiel*, 1 Mol. 311; *Earl of Buckingham* v. *Drury*, 2 Eden 60; *Corbet* v. *Corbet*, 1 Sim. and Stu. 612; Tud. Lg. Cas. 3rd ed. p. 76; *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500; *Birmingham* v. *Kirwin*, 2 Sch. and Lef. 444, 452; *Simpson* v. *Gutteridge*, 1 Madd. 609.

sold real estate, of which he was seised during the marriage. It was adjudged, that the settlement was a good equitable bar of dower, and that the widow was not entitled to a lien upon the estate in respect of the provision that had failed. "I confess, however," said the Lord Chancellor, "that I do not understand the observations attributed to him (Sir A. Hart, in *Power* v. *Shiel*), to the effect that an adult female cannot, in equity, contract herself absolutely out of her dower. In my opinion, there can be no doubt whatever of her right so to contract previously to her marriage, and to bar herself of all dower or thirds that may accrue to her from her husband's estate; if that is so, the question is what has the plaintiff here contracted for," and again on page 218, "If the present were a jointure operating as a bar under the Statute of Uses, the case would have been governed by the seventh section of that statute, but in equity the bar rests solely on contract, and my opinion is, that, in this Court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone, and cannot, in case of eviction, come against anyone in possession of the lands, on which, otherwise, her dower might have attached; this has nothing to do with the performance of covenants or the like. . . . My conclusion is, that the plaintiff has accepted in lieu of dower, payment of money at least, and that she is also concluded by the acceptance of the bond, and although the bond was not satisfied, that she has no right to resort to the lands of her husband, bought after and sold during the marriage."

61. If the husband and wife join in conveying lands settled upon the wife as a jointure before the marriage, her interest in the jointure lands will be extinguished, and she will be precluded from claiming dower in the residue of her husband's freehold estates; because her right of dower

was barred by the jointure, and the latter is extinguished by the conveyance (*s*). But if the jointure had been made after the marriage, and the wife joined in a conveyance, although she would be barred of her jointure, she might, nevertheless, claim her dower out of the other freehold lands of her husband; for the estate in jointure being but a conditional bar of dower, namely, upon the wife's consenting to it after her husband's death (*t*), she may, notwithstanding the conveyance, disagree to the jointure, and elect to take her dower (*u*).

62. The wife does not forfeit her jointure by elopement or adultery (*v*).

63. Interest is not allowed on arrears of jointure, except on a very special case indeed (*w*).

64. In equity an agreement to make a jointure is equal to a jointure (*x*).

(*s*) Co. Litt. 36 b.

(*t*) *Ante*, pars. 19-22.

(*u*) Dyer, 358 b; Bulstr. 173; 1 Leon. 285; 1 Roper, H. and W. 520; 1 Washb. R. P. 2nd ed. 264, pl. 14; 1 Bright, H. and W. 464-7; Scribner on Dower, vol. ii. p. 412.

(*v*) *Re* Walker, Ll. and G. temp. Sug. 299; *Buchanan* v. *Buchanan*, 1 Ball & B. 206; *Sidney* v. *Sidney*, 3 P. W. 275.

(*w*) Anon. 2 Ves. 661.

(*x*) *Leys* v. *Price*, 9 Mod. 219.

CHAPTER XXXIV.

DEVISE OR BEQUEST IN LIEU OF DOWER.

1-8. *The general doctrine.*

9-13. *Devise of lands in which the widow is entitled to dower.*

14-16. *Devise of lands in trust for sale.*

17-25. *Devise to widow of the entire estate.*

26-29. *Interests in futuro devised to the widow.*

30-38. *Devise of rent or annuity charged upon lands of which the widow is dowable.*

39. *Bequest of personal interest.*

40-54. *Devises during widowhood.*

55-68. *Provisions inconsistent with dower.*

69-70. *Parol evidence inadmissible to explain will.*

71. *Statutory modification in England.*

72. *The rule in Ontario.*

73. *The widow is entitled to be informed before electing, of the true condition of the estate.*

74. *The right of election must be exercised by the widow in person.*

75. *Election where the widow is insane.*

76-79. *Election where the widow is an infant, or has contracted a second marriage.*

80-87. *Implied election.*

88-93. *The widow must be fully informed of her rights, and intend to elect.*

94-96. *Widow not concluded by election made under a mistake as to the condition of the estate.*

97-98. *An election induced by fraud is not binding upon the widow.*

99. *Remedy of the widow where she has been deprived of the provision given in lieu of dower.*

100. *A widow taking a testamentary provision in lieu of dower, is regarded as a purchaser for a valuable consideration.*

1. It has been observed, that in general, a widow's right to dower cannot be barred at law by a collateral satisfaction, except in cases where the provision comes strictly within

the operation of the Statute of Jointures (*a*). The Courts of Equity, however, have extended the legal rule, and in instances of testamentary provisions by the husband for his widow, it is the practice of those Courts to consider them in the nature of *equitable* jointures (*b*), although not conforming to the strict requisites of the Act, whenever it appears that they were intended to be in lieu of dower. In cases of this nature, the widow may be compelled to elect between the provision made for her in the will, and her dower under the law (*c*).

2. The doctrine of election is founded upon this principle, that a person shall not be permitted to claim under any instrument, whether it be a will or a deed, without giving full effect to it in every respect, so far as such person is concerned; the equity of the Court of Chancery operating upon the devised interest, *quousque* satisfaction be made to the disappointed devisee. But the Courts have adopted a distinction between that class of cases which relates to the election of widows between dower and provisions under the wills of their husbands, and the ordinary cases to which the doctrine is applicable.

3. As dower is a legal right, the intention to exclude that right by a devise, or bequest of something else, must be demonstrated, if not by express words, at least by (what appears to the Court to amount to) necessary implication.

4. Lord Redesdale, in *Birmingham* v. *Kirwan* (*d*), says: "If the Court cannot say that it was clearly the *intention to exclude*, then the averment that the gift was made in lieu of dower cannot be supported; and to make a case of

(*a*) *Ante*, see cap. 33.
(*b*) *Ante*, see cap. 33.
(*c*) Scribner on Dower, vol. ii. p. 413.
(*d*) *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452.

election, that is necessary; for a gift is to be taken as pure, until a condition appear. * * * The only question made in all the cases is, whether an intention not expressed by apt words, could be collected from the terms of the instrument. * * * The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands to be set out by metes and bounds. The difference of opinion which may be found in the cases is not to be ascribed to any doubt of the correctness of this rule, but merely to the difficulty of applying it to the facts of each particular case (*e*).

5. It is only when the claim of dower would be inconsistent with the will, or plainly tend to defeat some other part of the testator's disposition of his property, that the widow can be compelled to elect whether she will take her dower or the interest devised to her (*f*), and in *Gibson* v. *Gibson* (*g*), Kindersley, V. C., thus expresses himself in reference to the principle upon which, in construing a will, it must be determined whether the widow must elect between her dower, and any benefit given to her by the will.

6. "It is not enough to say, that upon the whole will it is fairly to be inferred, that the testator did not intend that his widow should have dower; in order to justify the Court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from her dower, either expressed or clearly implied," and in *Parker* v. *Sowerby* (*h*), the same learned judge again says:—"You must find an intention so to dispose of his estate, that her claim to dower would be inconsistent with that disposition."

(*e*) 1 Roper, H. & W. 576; 1 Bright, H. & W. 546-8.
(*f*) *Strahan* v. *Sutton*, 2 Ves. 252; *Thompson* v. *Nelson*, 1 Cox, 447.
(*g*) *Gibson* v. *Gibson*, 1 Drew, 51.
(*h*) *Parker* v. *Sowerby*, 1 Drew, 488; 4 De G. M. & G. 321.

7. In the same case, however, Lord Cranworth (*i*), on appeal finds fault with this statement of the law. "It is not, I think, quite correct," he says, "to state the general rule of law as being, that to raise a case of election against the wife, the will must show that the testator had in his mind her right to dower, and that he meant to exclude it. The rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower."

8. The whole question depends upon intention, and there can be no settled rule on a matter which depends on the intention to be collected from each particular will. Must it be an intention to exclude her from her *dower*, or an intention *to dispose of his property in a manner inconsistent* with the wife's right to dower. At first sight the difference is not very apparent. It is, however, very material, and is this: according to the former statement it must appear that the testator had an intention with reference *to the dower*. While according to the latter, he may have not exhibited and may not have had an intention as to the dower, may never have thought of it, the intention that is material is the intention as to the *mode in which the land devised is to be enjoyed*, whether free from, or subject to dower. If the Court can gather from the will, that the testator intended the other devisees to enjoy what he gives them, *free from any dower by the wife*, she must give effect to this intention, or forego all advantages under the will.

9. A devise to the testator's wife of part of the lands of which she is dowable, is not necessarily inconsistent with her claim to dower in the remainder (*j*), although, of course, she is not dowable of the part so devised to her (*k*). In

(*i*) *Parker* v. *Sowerby*, 4 De G. M. & G. 325.
(*j*) *Lawrence* v. *Lawrence*, 2 Vern. 365; 3 Bro. P. C. 483.
(*k*) *Hall* v. *Hill*, 1 Dr. & W. 94; *Baker* v. *Baker*, 25 U. C. R. 450.

Lawrence v. *Lawrence*, *supra*, which is a leading case, the husband demised his manor of Little Sherrington, mansion house and lands of the annual value of £130 to his wife, *durante viduitate*; with remainder together with all his other lands, to trustees for a term of twenty-four years from his death, with remainders over. The trusts of the term were for the payment of debts and legacies; and as a further provision for his wife, the testator directed that, after two years of the term were expired, his trustees should permit her to receive the rents of one of the farms of £60 a year, and after five years of the term were elapsed, to permit her to receive the rents of another of the farms of £90 a year, for the remainder of the term, so long as she continued a widow. He then gave her several pecuniary and specific legacies, and appointed her sole executrix. No mention was made in the will, that any of the above provisions were to be in satisfaction of dower. The widow proved the will, possessed the personal estate, and entered upon the lands devised to her. She afterwards recovered her dower at law, of the yearly value of £86, and the lands were duly assigned. Upon a bill by the remainderman to be relieved of the judgment, Lord Somers was of opinion that the testamentary dispositions to the widow were intended in satisfaction of her dower, which intention appeared from the manner in which he had disposed of his lands not limited to his wife for life. This decree was reversed by the Lord Keeper Wright, because, in his opinion, there was nothing in the will which showed a sufficiently clear intention, that the widow was meant to be excluded from her dower. This judgment was acquiesced in till after the death of the plaintiff, when A. Lawrence, the next remainderman, became entitled, who commenced his suit to be relieved against the judgment of dower, but Lord Cowper declined to alter, in that respect, Lord Keeper Wright's decree; upon which Lawrence appealed to the

House of Lords, who confirmed Lord Cowper's decree, and consequently that of Lord Keeper Wright (*l*).

10. The reasons for the final judgment of the House of Lords appear to have been, that the devise to the widow of a part of the dowable estates, was consistent with her right to dower in the remainder, and notwithstanding the interests which were given her in the two farms, parcels of the lands not devised to her; because her acceptance of them might not of necessity defeat any of the trusts of the term vested in the trustees, since the remainder of the lands, after the assignment of dower, might be sufficient to pay the debts and legacies in aid of the personalty; hence the implication, that the testator intended by his testamentary dispositions to his widow, to purchase her right to dower in the lands not given to her, was doubtful and conjectural, which is not sufficient to put the widow to her election between her legal right and the testamentary benefit (*m*).

11. In *Brown* v. *Parry* (*n*), the testator died seised of lands of which the defendant, his widow, was dowable. By his will he devised to her some particular estates for life, and bequeathed to her some parts of his personal estate, but did not declare that the provision so made should be in bar of dower. The question was, whether, by accepting the devise and bequests, under the will of her husband, she was not barred of her right to dower; and Lord Thurlow, C., held, that she clearly was not, for it was not her husband but the law that gave her dower, and what her husband gave her was in addition thereto (*o*).

(*l*) See also *Lemon* v. *Lemon*, 8 Vin. Ab. Devise, p. 366, pl. 45; *Hitchen* v. *Hitchen*, Pres. Ch. 133; Scribner on Dower, vol. ii. pp. 417-18.

(*m*) Scribner on Dower, vol. ii. p. 418.

(*n*) *Brown* v. *Parry*, 2 Dick. 685.

(*o*) See also *Strahan* v. *Sutton*, 3 Ves. Jr. 249; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444; *Norcott* v. *Gordon*, 14 Sim. 258; *Lord Dorchester* v. *Earl of Effingham*, Coop. 319; *Incledon* v. *Northcote*, 3 Atk. 433; in which the interest devised to the widow was reversionary.

12. Among the recent English cases which have been decided on this subject, is *Holdich* v. *Holdich* (*p*), where a testator after giving his wife an annuity of £50, gave her permission to reside in the house in which they then lived, and to have the use of the household goods and furniture for her life, if she should continue his widow, and, subject thereto, devised all his real and personal estate to his son in fee. Sir J. L. K. Bruce, V.C., held, that the widow was not bound to elect, remarking, that to put the wife to her election on the ground that her claim was inconsistent with the intention of the testators as to some other legatee or devisee, there must be something beyond the mere gift to the legatee or devisee. There must be such circumstances attending the gift, as that, if dower were admitted, the legatee or devisee would be disappointed of the enjoyment of the property in the mode pointed out by the testator (*q*).

13. It seems that the same principle applies where the devise is made by a third person. Thus, where lands descended to a son, subject to a right of dower in favour of his mother, and the son devised a part of the lands to his mother, and the residue to the defendant in the action, but omitted to make any declaration showing an intention to dispose of the whole estate, including the right of dower, or to require his mother to elect between her dower, and the devise to her, and no such intention being deducible by clear and manifest implication from the provisions of the

(*p*) *Holdich* v. *Holdich*, 2 Y. & C. 18; Acc. *Bending* v. *Bending*, 3 Kay & John. 257.

(*q*) 1 Roper, H. and W. 577; 1 Bright, H. and W. 548. See also *Jackson* v. *Churchill*, 7 Cow. 287; *Rathbone* v. *Dyckman*, 3 Paige, 9; *Fuller* v. *Yates*, 8 Paige, 325; *Havens* v. *Havens*, 1 Sandf. Ch. 324; *Mills* v. *Mills*, 28 Barb. 454; *Stewart* v. *McMartin*, 5 Barb. 438; *Kennedy* v. *Nedrow*, 1 Dall. 415; *Kelly* v. *Stinson*, 8 Blackf. 387; *Clark* v. *Griffith*, 4 Iowa, 405; *Brown* v. *Caldwell*, 1 Speer's Eq. 322; *Cunningham* v. *Shannon*, 4 Rich. Eq. 135; *Seabrook* v. *Seabrook*, 10 Rich. Eq. 495; Scribner on Dower, vol. ii. pp. 420-424.

will, it was held, that the presumption was, that the testator intended only to devise to the defendant his own estate in the premises, subject to the right of dower therein (*r*).

14. A devise of land out of which the widow is dowable, upon a trust for sale, is not inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale is given to her (*s*); and even where there is a subsisting lease, and it is directed that until the sale, the rents shall be applied in a certain way (*t*); but otherwise, where the lease is not subsisting, and the will contains a direction to lease, and as to the application of the rents (*u*).

15. In *Gibson* v. *Gibson* (*v*), a testator gave all his freehold and leasehold messuages, tenements, etc., to trustees, for all his estate and interest therein, in trust to sell and apply the proceeds in manner thereinafter declared, he then gave certain legacies out of his personal estate; and the residue thereof, together with the proceeds, to be derived from the sale of his freehold and leasehold estate, he directed to be divided into four parts; one-fourth he gave to his wife, and the other three-fourths to certain other relations. Among other legacies, sums of money were given, in unequal instalments, to his wife and the other devisees. The testator, after the date of his will, had leased parts of his estates for terms of years, with an option to the trustees to purchase, and had permitted one lessee to erect buildings, which had been done, and the estate was thereby greatly improved. It was held, that the widow of the testator was

(*r*) *Leonard* v. *Steele*, 4 Barb. 20; Scribner on Dower, vol. ii. p. 424.

(*s*) *Ellis* v. *Lewis*, 3 Hare, 310; *French* v. *Davies*, 2 Ves. Jr. 572; *Baker* v. *Baker*, 25 U. C. R. 451; *Berlstein* v. *Berlstein*, 27 Gr. 41.

(*t*) *Fairweather* v. *Archibald*, 15 Gr. 255; *Gibson* v. *Gibson*, 1 Drew. 42-57; *Lawrence* v. *Lawrence*, 3 Bro. P. C. 483.

(*u*) *Armstrong* v. *Armstrong*, 21 Gr. 352.

(*v*) *Gibson* v. *Gibson*, 15 Eng. Law & Eq. R. 349; 1 Drewry, 42.

not to be put to her election, but was entitled to dower, as well as to the benefits given her by the will (*w*).

16. But, in the case of *Savage* v. *Burnham* (*x*), a provision made for a widow, under a trust vesting the entire legal estate in the trustees, was declared to be inconsistent with a right of dower. In that case, the testator devised his estate, real and personal, upon these trusts; (1) To sell the real estate after the death of the widow; (2) That she should, during her life, receive and take to her own use, one-third of the clear yearly rents and profits of the real estate; the residue of the rents and profits, until the sale of the real estate, to be deemed part of the personal estate, and subject to the same dispositions; which were, (3) To apply the income to the maintenance and education of six sons and four daughters, named in the will, in equal shares, until the sons should attain the age of twenty-one years, and the daughters attain that age, or be married respectively; (4) To pay or transfer the principal in equal shares to the sons and daughters, the shares of the sons to become vested at twenty-one, and then to be paid or transferred; the shares of the daughters to be vested in the trustees, the income to be paid to them after twenty-one or marriage, during life, and upon the death of each daughter leaving issue, her share to go to or vest in such issue (*y*).

17. The above cases relate principally to the obligation of the widow, to elect between such of the lands as are devised to her, by her husband, and the dower in the residue of his estate; but they say nothing as to the question whether, when the whole of the lands are devised to her, she

(*w*) *McGarry* v. *Thompson*, 1 C. L. T. 272. See also *Laidlaw* v. *Jackes*, 25 Gr. 291; S. C. affirmed, 27 Gr. 101; *Wood* v. *Wood*, 5 Paige, 596; *Irving* v. *De Kay*, 9 Paige, 521; *Gordon* v. *Stevens*, 2 Hill Ch. 46.

(*x*) *Savage* v. *Burnham*, 17 N. Y. 561.

(*y*) Scribner on Dower, vol. ii. pp. 247-8.

may take two-thirds of them as a purchaser under the will, and the remaining one-third under her title to dower. The principle, however, upon which these cases were decided, appears equally to apply to this subject. "There is no more inconsistency," Mr. Roper remarks, "between the widow's right to dower in the lands devised to her, and her interest in them under the devise, than in the above cases. The husband might intend that she should take no other interest in the lands bequeathed to her than under the will, or he might mean to pass to her his interest subject to her title to dower. His intention is dubious; which is not rendered more clear from any inconsistency between the current enjoyment of her two rights, the one under the will, and the other by the provision of the law. For want, therefore, of this clear implication of intention from the contents of the will, that the testator intended what he had given to his widow should be held and enjoyed under his will, and by no other title, it would seem that she may, in general, elect to take the lands devised to her, both under the will and her title to endowment. This may be of great advantage to her, when her husband dies in embarrassed circumstances; for, as to one-third of the estate, she would enjoy it under a paramount title, free from his encumbrances during the marriage; and for the other two-thirds she would be liable to contribute with the owner of the remainder of the lands, in discharge of the encumbrances" (*z*).

18. Cases have arisen in the United States, says Mr. Scribner, involving a practical application of the foregoing doctrine. Thus, in *Church* v. *Bull* (*a*), a testator devised all his real and personal estate to his wife, during her life, or so long as she should remain his widow; and after her death, or re-marriage, he gave all his property except some

(*z*) 1 Roper, H. & W. 582.
(*a*) *Church* v. *Bull*, 2 Denio, 430; 5 Hill, 206.

small legacies which were bequeathed to his daughters, to his three sons. But he did not state in his will, that he intended this provision for his wife to be in lieu of her dower in his real estate, after the determination of such provision, by her re-marriage. The wife having survived her husband, entered and occupied under the will for several years, and then married a second husband. It was held, that she was entitled to dower. "No question of dower could arise while she continued a widow," said the Chancellor, "as she was entitled to the possession of the whole during that time. And the subsequent devise of his whole real estate to his three sons, is not necessarily inconsistent with an intention on the part of the testator, that his wife should be left to her legal right of dower alone for her support, after the particular estate which had been devised to her had been determined by her marriage. * * * *Primâ facie*, the devise of the testator's whole real estate to his three sons after that time, did not *per se* express an intention to devise such real estate otherwise than subject to its legal incidents, one of which legal incidents was, the widow's common law right of dower therein."

19. The question again came up in *Lewis* v. *Smith* (*b*), where it was explicitly determined that a devise of the testator's whole estate to his widow for life, with remainders over, is not a provision in lieu of dower, unless such intention be implied from other terms of the will; and that the widow may take one-third of the estate as dowress, and the residue as devisee. The lands devised were subject to a mortgage executed by the husband alone during the coverture. "There is no person who takes an interest under the will during her lifetime," observed Denio, J., "with which the claim of dower will conflict; and as to herself there is no incongruity in her taking one-third of the unsold

(*b*) *Lewis* v. *Smith*, 5 Seld. 502; 11 Barb. 152.

land as dowress, and two-thirds as devisee. The former she will hold by a title paramount to the mortgage, and the other is subject to that encumbrance. The mortgagee, it is true, may be disappointed in finding his lien less extensive than that which the instrument professed to confer upon him, but that consequence does not arise out of the will, but from an act not testamentary, and by which the wife cannot be affected (*c*).

20. In *Sandford* v. *Jackson* (*d*), a testator devised all his property, real and personal, to his wife and two other persons, to be kept for her use and support so long as she should continue his widow, and until his youngest child should become of age, and then directed that all his property should be equally divided among his children. The wife survived the testator and contracted a second marriage. It was decided that the devise in her favour, was not inconsistent with her claim of dower in the testator's real estate after his youngest child arrived at the age of twenty-one, and that her acceptance of the devise did not bar her right (*e*).

21. In a case determined in Pennsylvania, a testator devised to his wife during her widowhood, the front room in his farm house, a cellar, and the common use of the kitchen, oven, and draw-well. He also gave her, in consideration of her schooling and well educating the children, the profits of his farm until his sons came of age to possess it. He then ordered his farm to be divided into two parts, one of which he gave to one son, reserving a privilege of water for the part which he gave to another son, upon their respectively coming of age; and directed one of the sons to keep a horse and cow for the wife, and to cut and lay

(*c*) *Corriell* v. *Ham*, 2 Clark (Iowa), 552.
(*d*) *Sanford* v. *Jackson*, 10 Paige, 266.
(*e*) Scribner on Dower, vol. ii. p. 430.

firewood at her door during her widowhood. It was held, that the devises to the latter were not in lieu of dower (*f*).

22. There is, however, a conflict in the authorities upon this subject, some of the Courts holding that a devise to the wife during widowhood, or during life, is an implied exclusion of dower in the said lands, upon the ground that the two estates cannot exist together; especially if coupled with a direction that upon her re-marriage, all her interest in the testator's estate shall cease (*g*). In *Stark* v. *Hunton* (*h*), the will of the testator directed that all debts and expenses should be paid out of the personal estate, and such real estate as was for that purpose designated in the will. Then followed this devise: "I give, devise, and bequeath unto my wife Jane, all my tavern, house and lot, where I now live, together with all the furniture and stock in the same; to have and to hold to my said wife Jane, during her natural life, provided she remains my widow; but in case she should marry again, then it is my will, that my said tavern, house and lot and furniture be disposed of according to law." "I think," remarked the Chancellor, "the manifest intention of the testator was, that the devise to the wife should be in lieu of her dower, at least in the premises thus devised. He never intended that she should hold one-third part of this tavern-house as dowress, and the remaining two-thirds as devisee. It was one property, not susceptible of convenient division. The devise was of the whole and the object was one entire object, the benefit of his wife and children. Some of the cases have been liberal in support of the widow's claim for dower; but I do not find one that goes so far as to maintain that where

(*f*) *Webb* v. *Evans*, 1 Vinn. 566; 1 Yeates, 424; *McCullough* v. *Allen*, 3 Yeates, 10; *Chappel* v. *Avery*, 6 Conn. 31; *Wood* v. *Wood*, 5 Paige, 596; Scribner on Dower, vol. ii. p. 430.

(*g*) 1 Lead. Eq. Cas. 319, as to the rule prevailing where an estate is given during widowhood expressly in lieu of dower. See *post*, cap. 34.

(*h*) *Stark* v. *Hunton*, Saxton, 216.

certain property is given to a wife during her widowhood, that she is also entitled to claim dower out of that same property. The two claims are inconsistent and cannot stand together" (*i*).

23. In *Caston* v. *Caston* (*j*), a testator devised his plantation and a number of negroes to his wife during her widowhood, charging the same with the payment of his debts, and the support of his minor children. The wife occupied and enjoyed the property for eleven years, and then filed her bill claiming dower in the plantation. It was held, that she could not take the plantation under the will, and claim dower in it also; and that her conduct sufficiently indicated her election to take under the will (*k*).

24. In *Wilson* v. *Hayne* (*l*), a testator bequeathed property to his wife during her life, or so long as she remained his widow, with remainders over at her death. The will further provided, that in the event of a second marriage, the estate given to the wife should "devolve upon the persons mentioned in the said will, as if she, my said wife, had departed this life; my will being that she shall have no interest, whatever, in my estate after her second marriage." This was held to be a sufficient implication of an intent to exclude the wife from her dower.

25. In *Hamilton* v. *Buckwalter* (*m*), it was determined that a devise to a wife of lands during widowhood is a bar of dower, though not so expressed. "It appears," said the Court, "that all the testator's lands in Lampeter township were devised to the widow during her natural life, or

(*i*) See *Sanford* v. *Jackson*, 10 Paige, 266, 272-3; Scribner on Dower, vol. ii. p. 431.

(*j*) *Caston* v. *Caston*, 2 Rich. Eq. 1.

(*k*) Scribner on Dower, vol. ii. p. 431-2.

(*l*) *Wilson* v. *Hayne*, 1 Cheves' Eq. 2nd pt. 37.

(*m*) *Hamilton* v. *Buckwalter*, 2 Yeates, 389.

widowhood; and the rest of his lands were devised to Robert Patton, the eldest son, for six years. The devises are entirely inconsistent with the claim of dower. The widow could not hold the lands in Lampeter township under the will, and the eldest son hold the residue of the lands, while she held in dower the one-third part of both tracts at common law." So in *Creacraft* v. *Dille* (*n*), it was held, that a devise by the husband, of one-third of his personal estate to his wife, and the use of one-third of his lands while she remained his widow, and also one cow, over and above her thirds; and all the rest of his estate to his children, would bar the widow of her dower on the acceptance of the devise (*o*).

26. If the interest devised to the widow in the estate be not *in præsenti*, but *in futuro*, she may enjoy that interest, consistently with her dower; and there arises no clear implication of an intention from the devise of such an interest, that the testator meant to exclude her immediate title to dower. The result, therefore, is, that a sufficient case will not be made, to put the widow to elect between her present title to dower in the lands, and her future interest in the same under the will (*p*).

27. In short, wherever a clear incontrovertible result does not arise from the testator's will, that he meant to exclude his widow from dower, she will not be put to her election; he may not have known that she would under the circumstances be dowable; but this will not be enough to exclude her dower; it must appear that he did know it, and meant to bar it; or at least that her demand of dower would be repugnant to the dispositions he has made (*q*).

(*n*) *Creacraft* v. *Dille*, 3 Yeates, 79; Addison. 350. See also *Sanford* v. *Jackson*, 10 Paige, 266, 273.

(*o*) Scribner on Dower, vol. ii. p. 432.

(*p*) *Incledon* v. *Northcote*, 3 Atk. 430; Scribner on Dower, vol. ii. p. 433.

(*q*) *French* v. *Davies*, 2 Ves. Jr. 577-581; *Thompson* v. *Nelson*, 1 Cox, 447.

28. Where the gift to the testator's wife is a remote contingency, she is not put to her election (*r*).

29. In *Travers* v. *Gustin*, a testator devised his real estate to his children in tail, with cross-remainders; and in the event of their dying without issue, he gave the same to his brother; and directed his widow to receive the whole of the rents, etc., during widowhood; and in the event of her marrying, she was to receive one-half thereof during her life. V. C. Strong held, that the contingency of the widow surviving all the children, was too remote to put her to elect between her dower and the provision under the will. In his judgment, pages 113-114, he says :—" To say that the gift to the testator's wife in the remote contingency of all the cross-remainders failing, is enough to put her to elect, would be an extension of the much doubted case of *Chalmers* v. *Stoul* (*s*), entirely unwarranted; for this executory interest so given to the wife, is not of one-half of the corpus of the real estate, but of one-half of the aggregate income arising from such of the realty, as may be still remaining in specie; and from the produce of that portion of the lands which may have been converted under the powers. To point this out, is to take the case out of the authority of *Chalmers* v. *Stoul*."

30. Although a testator has devised his estate to trustees charged with an annuity, or gross sum to his widow; still, as a wife's title to dower is paramount to the devise, a Court of Equity will not readily infer that, because a testator has given all his property to trustees, it was necessarily his intention to give them what was not his, and the mere fact that an annuity is given to the wife is

(*r*) *Travers* v. *Gustin*, 20 Gr. 106. But see *Webb* v. *Earl of Shaftesbury*, 2 Ves. 480.

(*s*) *Chalmers* v. *Stoul*, 2 V. & B. 222.

not sufficient to put her to an election (*t*). In order to oblige the widow to elect between the rent or annuity devised to, or in trust for, and her dower of her lands, charged with it, a clear implication must arise from the will, and the provisions contained in it, as the ground of inconsistency between them and the title to dower, that the latter was intended to be purchased by the former, and that the benefits under the will were meant to be the only interests which the widow should have, or entitled to in the premises.

31. Circumstances may justify the construction, that a testator, by the bequest of an annuity, or a gross sum, meant to put the widow to her election (*u*), for if the estates would be insufficient to satisfy the charges expressly imposed upon them in case the title to dower were sustained, that might show an intention to bar the claim of dower, and a reference to ascertain that part will be granted (*v*.)

32. In *Lapp* v. *Lapp* (*w*), a testator at the time of making his will, and of his death, had real estate to the value of $7,600, and personal estate to the value of $305, of which

(*t*) *Hall* v. *Hill*, 1 Dr. & W. 94; Ld. St. Leonard's (1841), approved in *Baker* v. *Baker*, 25 U. C. R. 450; and also in *McLennan* v. *Grant*, 15 Gr. 68; *Coleman* v. *Glanville*, 18 Gr. 46; *Murphy* v. *Murphy*, 25 Gr. 81; *Holdick* v. *Holdick*, 2 T. & C. C. C. 11; *Pitts* v. *Snowden*, 1 Bro. C. C. 292; *Pearson* v. *Pearson*, 1 Bro. C. C. 291; *Foster* v. *Cook*, 3 Bro. C. C. 347; *Greatrex* v. *Carey*, 6 Ves. 616; *Dawson* v. *Bell*, 1 Kee, 761; *Harrison* v. *Harrison*, 1 Kee, 765; *Northcott* v. *Gordon*, 14 Sim. 258; *Wetherell* v. *Wetherell*, 4 Griff. 51; *Chalmers* v. *Stoul*, 2 Ves. & Bea. 222. See also *Villa Real* v. *Ld. Galway*, 1 Bro. C. C. 292; *Jones* v. *Collier*, Ambl. 730; *Roadley* v. *Dixon*, 3 Russ. 192; *Lowes* v. *Lowes*, 5 Hare, 501; 10 Jur. 453.

(*u*) *Druce* v. *Denison*, 6 Ves. 400; *Judd* v. *Pratt*, 13 Ves. 174; *Attorney-General* v. *Grote*, 3 Merw. 320; Penticost, 6 Ley; 2 Jac. & Walk. 210; *Hewson* v. *Reid*, 5 Mad. 451; *Forrester* v. *Cotton*, 1 Eden, 535; *Dillon* v. *Parker*, 1 Swan. 359.

(*v*) *Lapp* v. *Lapp*, 16 Gr. 159; 19 Gr. 608; *Becker* v. *Hammond*, 12 Gr. 485; *Ripley* v. *Ripley*, 28 Gr. 610; *McLellan* v. *McLellan*, 28 Gr. 1; *Murphy* v. *Murphy*, 25 Gr. 81; *Walmsley* v. *Bull*, 15 Gr. 210; *Pearson* v. *Pearson*, 1 Bro. C. C. 292; *French* v. *Davies*, 2 Ves. Jr. 580; Roper on H. and W. 59; Roper on Legacies, 1427; Jarman on Wills, 434.

(*w*) *Lapp* v. *Lapp*, 19 Gr. 608.

really to the amount of about $3,805, he disposed of by his will during his wife's life, and he left legacies to the amount of $3,100. To his wife he left a life interest in his homestead farm, and a legacy of $1,000. The other real estate he directed to be sold. The residue he divided. There would be no residue if the widow was to have her dower. There was nothing on the face of this will to show that the testator intended to exclude his widow from *her dower*. But such an intention was gathered from (1) a direction to sell part of the real estate; (2) The provision for the widow; (3) Andthe direction as to the disposition of an expected surplus.

33. The learned Chancellor (Spragge), page 611, says :— "These several things are material upon the question of intention, as appearing upon this will, and the surrounding circumstances—the provision made for the widow—the direction to sell that not given to the widow, and the direction as to the disposition of an expected surplus. The provision for the widow was a life estate in the homestead farm, upon which the testator and his family were, as I gather from the will, living; a lot in Cobourg in fee valued at $160, and a legacy of $1,000. The then actual value of the homestead is stated by the master at $3,600, ($600 more than the value of the mill property) and its annual value at $150. The provision for the widow was liberal under the circumstances, even assuming that she was to take that provision in lieu of dower. The direction to sell is also material as indicating the mind of the testator. If there were no direction to sell it might with some reason be assumed that he meant his property to remain as it was, and incident to any rights which would accrue upon his death. But when he directs a sale, the question of the effect of a sale upon his wife's rights would be more likely to present itself to his mind, if he did not conceive that he had provided for her otherwise. The direction as to the

disposition of a surplus after payment of legacies is also material. The will assumes that there will be a surplus, "whatever shall be left after the above sums are paid, shall "be divided equally among my children by my executors." This surplus would be utterly insignificant, (perhaps about $100), if not absolutely nil, if the sale were made subject to the widow's dower; while the testator might reckon up on a surplus if not subject to her dower. In the one case this provision of the will would be defeated; in the other it would have the operation intended. It comes to this: can the Court placing itself in the situation of the testator, see with sufficient distinctness that "the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower." (Per Lord Cranworth, in *Parker* v. *Sowerby*). "This case I suppose is not so strong as some that have been referred to, less strong I think than *Becker* v. *Hammond*; but the provisions of the will, and the situation of the testator, leave upon my mind a very strong impression, that it was his intention that his widow should have the provision he made for her, and that only. I do not mean to say that it is a case which admits of no doubt, but I am able to say that I have no doubt that such was the intention of the testator."

34. In the United States, the principle established by the foregoing authorities, where there has been a devise of rent, or an annuity charged upon lands of which the widow is dowable, has been applied (*x*).

35. In the case of *Smith* v. *Kinskern*, *supra*, the provision for the maintenance of the wife was payable out of both the real estate and the personalty; but it is held that where such a provision is payable out of the real estate alone, it is a bar of dower. Thus, in *White* v. *White* (*y*),

(*x*) *Adsit* v. *Adsit*, 2 John. Ch. 448; *Smith* v. *Kinskern*, 4 John. Ch. 9.
(*y*) *White* v. *White*, 1 Han. 202.

the testator directed that his wife should have one room in his dwelling house, "and a comfortable maintenance *out of his real estate*, during her natural life or widowhood"; and then devised his real estate to his two sons. It was decided that the maintenance was intended to be in lieu of dower. "If the demandant shall be allowed to recover dower in the real estate," said Ford, J., "it will disturb and prevent the testator's own intentions from being carried into effect. He has provided for her a comfortable maintenance, and has made it a charge upon his whole real estate, so that it goes with the estate as a burden into the hands of his two sons; they are to furnish the maintenance, and in consideration of it they are to have the whole estate. Now, if the widow takes one-third of it for her dower, and they obtain only two-thirds of it during her lifetime, it wholly deranges the testator's settlement, which was that they should have the whole estate, and be liable in respect of it for her maintenance. The will can never be executed according to his intent, for the sons will have only two-thirds of what the testator intended; and the settlement for the widow would be only two-thirds of the maintenance provided and intended for her. The testator's settlement would be broken up, and some other would have to be submitted in the place of it. Either the widow must loose her whole maintenance, or it must be apportioned on the sons, according to the proportional part of the lands they obtain" (*z*).

A gift to the widow of an annuity charged on all the testator's property, and a gift of the whole of the testator's real estate though specified by name, to some other person, are not together of themselves sufficient to put the widow to her election (*a*).

(*z*) See also *Duncan* v. *Duncan*, 2 Yeates, 302.
(*a*) *Holdrich* v. *Holdrich*, 2 Y. & C. 17.

37. The enquiry whether or not the testator's estate is insufficient to pay an annuity to the wife, and to answer her dower, the state and value of his estate at the date of his will and not at the date of his death, is what is to be taken into consideration (*b*).

38. When a testator having land of which his wife is dowable, gives her an annuity in satisfaction of her dower, she has privity over the other legatees although the annuity may greatly exceed the amount of any dower she would be entitled to, and there is no such rule as that where a testator's widow is entitled under his will to what would exceed her dower, she is thereby put to her election (*c*). A legacy to a widow in lieu of dower has no priority over other legacies where the testator leaves no real estate (*d*).

39. When a pecuniary legacy, personal annuity, or other interest merely affecting the personal assets is bequeathed by the husband to his widow, without a declaration that it is intended in satisfaction of dower, no implication whatever arises that the disposition was made with that view or intent, and she will be entitled to both (*e*).

40. Mr. Scribner says: (*f*) "The question as to the effect of demises during widowhood, in lieu of dower, has been

(*b*) *Lapp* v. *Lapp*, 16 Gr. 609.

(*c*) *Stasblchmidt* v. *Lett*, 1 Sm. & G. 421; *Bending* v. *Bending*, 3 Kay & J. 57; 3 Jur. N. S. 536; 26 L. J. Ch. 469.

(*d*) *Acsy* v. *Simpson*, 5 Beav. 35; *Roper* v. *Roper*, 3 L. J. Ch. D. 714; 33 L. T. 155; 24 W. R. 1013.

(*e*) 1 Roper on H. and W. 577; 1 Bright on H. and W. 548; Scribner on Dower, vol. ii. p. 446; *Strahan* v. *Sutton*, 3 Ves. Jr. 249; *Ayres* v. *Willis*, 1 Ves. Jr. 230; *Adsit* v. *Adsit*, 2 John. Ch. 448; *Vanarsdale* v. *Vanarsdale*, 2 Dutch. 404; *Wiseley* v. *Findlay*, 3 Rand. 361; *Shaw* v. *Shaw*, 2 Dana, 341; *Timberlake* v. *Parish*, 5 Dana, 345; *Hall* v. *Hall*, 8 Rich. L. 407; *Whilden* v. *Whilden*, Riley Ch. 205; *Guignard* v. *Mayrant*, 4 Desans, 614; *Fulton* v. *Fulton*, 30 Missis. 586; *Ostrander* v. *Spickard*, 8 Blackf. 227; *United States* v. *Duncan*, 4 McLean, 99; *Jennings* v. *Smith*, 29 Ill. 116; *Chandler* v. *Woodward*, 3 Harring. 428; *Kinsey* v. *Woodward*, *Ibid*, 459; and see 3 & 4 Wm. IV. Ch. 105, par. 10.

(*f*) Scribner on Dower, vol. ii. p. 447.

frequently discussed by the Courts; and it may be stated as the result of the adjudged cases upon that subject, that a devise so limited, whether of real or personal estate, will, if accepted, operate as a bar of dower; and that the interest given by the testator will cease upon the termination of the widowhood by a subsequent marriage."

41. It has been held in Ontario, that where there has been a devise of the whole of the testator's lands, to the widow during widowhood, she must elect to take under the will, or claim her dower (*g*).

42. In the case of *Westacott* v. *Cockerline*, Vankoughnet, C., said:—"In this case I am of opinion that the wife was by the will put to her election to take under it, or claim her dower, and that she made her election to take under the will, and cannot now assert a right to dower, and that she should be restrained from so doing at law. The devise to her during widowhood gave her freehold estate. Her election was made immediately after the testator's death; she could not then have both the estate and her dower in the same land. She became, and was herself tenant of the freehold; and how could dower be assigned to her, she holding this estate? I think that her election once made was final, and that she could not, on losing by her own act the estate given by the will, claim that her right to dower then arose. It existed at the death of the testator, and from that time, or not at all; and so existing, she abandoned it when she took under the will."

43. When the provision made for the widow by the will is an estate during widowhood, which she has elected to

(*g*) *Westacott* v. *Cockerline*, 13 Gr. 79. See also *Coleman* v. *Glanville*, 18 Gr. 42; *Miall* v. *Brian*, 4 Mad. 119; *Ellis* v. *Lewis*, 3 Hare, 310; *Lawrence* v. *Lawrence*, 2 Ver. 365; *Holditch* v. *Holditch*, 2 Y. & C. 11; *Dawson* v. *Bell*, 1 Keen, 761; *Parker Sowerby*, 4 D. M. & G. 321.

accept, her right to dower is not resuscitated on her second marriage (*h*).

44. Where a testator devises certain land to his wife during widowhood, and he is at the time of his death possessed of lands other than those devised, it would seem that the widow is not put to her election between the provision made for her by the will and those other lands.

45. It has been held in a number of cases, that a devise *durante viduitate*, so far inconsistent with the enjoyment of dower in the estate devised, has of itself to furnish evidence of an intention to exclude that right (*i*). In some of these cases the point was directly determined that all right in the estate of the testator is lost by a second marriage (*j*), other adjudications have been made, holding that a gift during widowhood does not necessarily compel an election by the widow, nor prevent her from claiming dower (*k*).

46. A distinction is taken between a conditional limitation during widowhood and a condition subsequent in restraint of marriage attached to a bequest of personalty; and it is said that in a case of the latter description, the condition will be without effect, unless coupled with a specific limitation over in the event of a breach. Thus, in *Parsons* v. *Winslow* (*l*), a testator bequeathed thirty thousand dollars to trustees "for the sole use of his wife during her widowhood and life," and then, after giving directions for the investment of the legacy and the payment of the interest

(*h*) *Coleman* v. *Glanville*, 18 Gr. 42.

(*i*) *Stark* v. *Hunton*, Saxton, 216; *Caston* v. *Caston*, 2 Rich. Eq. 1; *Wilson* v. *Hayne*, 1 Cheve's Eq. 2nd pt. 37; *Hamilton* v. *Buckwalter*, 2 Yeates, 389; *Creacroft* v. *Dille*, 2 Yeates, 79; Addison, 350.

(*j*) *Stark* v. *Hunton*, Saxton, 216; *Hamilton* v. *Buckwalter*, 2 Yeates, 389.

(*k*) *Sanford* v. *Jackson*, 10 Paige, 266; *Church* v. *Bull*, 2 Denio, 431; 5 Hill, 206; *Lewis* v. *Smith*, 5 Seld. 502; *Webb* v. *Evans*, 1 Birm. 565; *Lasher* v. *Lasher*, 13 Barb. 106; Scribner on Dower, vol. ii. p. 445.

(*l*) *Parsons* v. *Winslow*, 6 Mass. 160.

to the wife, went on to provide, that the trust which he had raised should "cease with the widowhood of his wife, and expire at her death, and the money bequeathed to her use, in whatever form it might then be, should go to his son." This was construed to be a bequest upon condition subsequent, without limitation over, and held not to be defeated by the marriage of the widow (*m*). "The principles established upon this subject by the English authorities," said Sedgwick, J., "to which our opinion in this case conforms, are plain and intelligible. It is a general rule that a condition annexed to a devise or bequest for life, whereby it is to be divested by the marriage of the devisee or legatee, is to be considered as intended merely *in terrorem*, and it is therefore void. To this rule there is an exception, that such condition shall be effectual, if the subject of the devise or bequest be given over, so as to *create* an interest in another person. And again, this exception is restrained and limited. To give it effect, the giving over to a third person must be an express giving over of the *particular* devise or legacy, unincorporated with any other subject; and it must also be immediate to take effect at the time of the marriage. Neither of these circumstances attends the bequest under consideration. It was not an *express* bequest of the *particular* legacy, nor was it to have an immediate effect" (*n*).

47. The principle above discussed was applied to the cases of *McIlwaine* v. *Gethen* (*o*), and *Hoopes* v. *Dundas* (*p*). In the last named case, a testator bequeathed to his executors, an annuity to be paid to the widow of his deceased son

(*m*) 2 Lead. Eq. Cas. pt. 1, p. 298.

(*n*) Scribner on Dower, vol. ii. pp. 448-9.

(*o*) *McIlwaine* v. *Gethen*, 3 Whart. 375.

(*p*) *Hoopes* v. *Dundas*, 10 Barr, 75; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; S. C. 10 Eng. Law and Eq. 139.

during the term of her natural life, if she so long remained a widow and unmarried; and there was a general devise over of the residue of his estate. It was held, the Court following the decision of *McIlwaine* v. *Gethen*, that this was not a conditional limitation, but a bequest on condition in restraint of marriage, and that the bequest was absolute and the condition void. It was further determined, in both cases, that a general residuary bequest will not convert a specific or pecuniary bequest on condition, into a conditional limitation, and that to produce this result, the bequest must be given over specifically on the breach of the condition (*q*).

48. In *Bennett* v. *Robinson* (*r*), the provision in question was in the following terms: "I allow my wife one-third of the profits arising off of my real estate, only so long as she remains my widow." This was held to be a devise of one-third of the land itself, and strictly a conditional limitation marking the extent of the interest given, and determinable by the subsequent marriage of the widow, without entry by the heir, or devise over. The validity of a restraint on the marriage of a widow, was again held in the case of *Commonwealth* v. *Stauffer* (*s*), where it was also decided, that such a restraint is equally effectual in the case of realty, whether put in the form of a conditional limitation, or of a condition subsequent; the difference in this respect between real and personal estate being, that the heir is entitled to enforce a breach of condition in the case of realty, but not of personalty (*t*). "A mistaken notion has been entertained," said Gibson, Ch. J., who delivered the opinion of the Court, "that a restraint to marriage, to be valid in a devise of

(*q*) 2 Leading Eq. Cas. pt. 1, pp. 297-8; Scrib. on Dower, vol. ii. p. 449.
(*r*) *Bennett* v. *Robinson*, 10 Watts, 348.
(*s*) *Commonwealth* v. *Stauffer*, 10 Barr, 350.
(*t*) 2 Lead. Eq. Cas. pt. 1, p. 298.

land, must not be general; but that would bring such a devise to the level of a bequest of chattels and abolish the distinction between legacies and devises altogether. Yet the notion has received color from the very same text. Writers who, in 2 Powell on Dev. 291, and 1 Jarman on Wills, 843, have asserted that, even in regard to devises of land, it seems to be generally admitted (by whom?) that unqualified restrictions on marriage are void, on grounds of public policy; though the point rests, they say, rather on principle than decision. I know of no policy on which such a point could be rested except the policy which, for the sake of a division of labor, would make one man maintain the children begotten by another. It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood. Such is not the policy of the Statute of Wills, which allows a man to devise his land 'at his own free will and pleasure;' nor is it the policy of the common law, which allows him to give his property on his own terms, or not at all, and if he might not do the one, he would assuredly do the other; so that it is not easy to see how the cause of population would be promoted by binding his hands. To throw the widow of a landless merchant on her dower at the common law would not do it. It may be the present policy of the country to encourage reproduction—though the time will certainly come when excess of population will be a terrific evil here, as it is elsewhere—but no political regulation, which looks no further than inducements to second marriage will either advance or retard it" (*u*).

49. In *Dixon* v. *Ramage* (*v*), it was held, that a devise

(*u*) Scribner on Dower, vol. ii. p. 450.

(*v*) *Dixon* v. *Ramage*, 2 Watts and Serg. 142.

"to my wife Mary and son Jonathan, share and share alike, so long as she remains my widow," charged by certain duties and payments of money by the son, created in him but an estate during the widowhood of his mother, although there was no other disposition of the estate by the will. So where a testator charged upon a part of his real estate devised to his son, the sum of fifteen hundred dollars, the interest of which he directed should be paid to his widow during her widowhood, and the bequest was sanctioned by the heirs and the widow, by an agreement executed after the death of the testator, it was held, that upon the marriage of the widow, the fifteen hundred dollars was recoverable from the devisee, by the executors, for distribution under the will (*w*).

50. In *Taylor* v. *Birmingham* (*x*), a testator devised lands to his wife for her support during widowhood, and in the event of her death or marriage, to any child or children of his born of her; and in case of her death or marriage, leaving no heir by him, then he devised the estate to his nephew in fee. Before the death of the testator, his wife bore him a daughter, who died shortly after her father, and the widow conveyed the lands, and afterwards contracted a second marriage. It was held (1) That the widow having forfeited her estate by a voluntary breach of the condition upon which she held it, it went to the remainderman designated in the will. (2) That having taken under the will the portion therein given to her, it was in *lieu* of dower, and her right to dower could not be restored by a voluntary breach of her tenure (*y*).

(*w*) *Falis* v. *Falis*, 6 Watts, 213; Scribner on Dower, vol. ii. p. 451.

(*x*) *Taylor* v. *Birmingham*, 29 Pa. St. (5 Casey), 306.

(*y*) Scribner on Dower, vol. ii. p. 451.

51. In *Irvine* v. *Sibbetts* (*z*), a testator devised as follows: "I give unto my beloved wife Nancy, during her lifetime, or widowhood, all my estate, real and personal, to be by her applied towards raising and schooling my children; and at her decease, the remainder, if any, to be divided according to the laws of the commonwealth, share and share alike; and in case she should see cause to marry, she is to have only her bed and bedding, and an equal share with the children, that may then be living, out of my estate." It was determined that the devise gave the widow the whole estate during her widowhood, and upon the subsequent marriage an equal share with the children in fee simple. It was further decided, that upon her marriage, her interest in the estate, except her equal share with the children, determined by the limitation contained in the devise without entry or claim by those who had the next expectant interest (*a*).

52. In *Chappel* v. *Avery* (*b*), a testator devised to his wife the use of one-third part of his home farm house during her widowhood, and in a subsequent clause, the use of all his estate, both real and personal, until his children (a son and daughter), should become of age; and then devised to his son two-thirds of his home farm, and provided that he should have the whole of his landed property after the marriage or decease of his mother. It was held, that on the marriage of the mother, before either of the children arrive at full age, her right ceased, and the title of the son became perfect, to the real estate devised. In *Phillips* v. *Medbury* (*c*), the same principle was recognized and applied. Referring to the power of Courts of Equity to declare

(*z*) *Irvine* v. *Sibbetts*, 26 Pa. St. 477.
(*a*) Scribner on Dower, vol. ii. p. 451.
(*b*) *Chappel* v. *Avery*, 6 Conn. 31.
(*c*) *Phillips* v. *Medbury*, 7 Conn. 568.

restraints upon marriage in wills void, as made *in terrorem*, the Court remarked: "It is admitted that this power is not given by the common law; nor is it ever exercised in relation to real estate, but only as to personal estate, which is in the case of legacies, subject to the control of a Court of Chancery. Nor is it applied to a widow. It would seem very reasonable, that a man leaving a widow with seven children, as in the present case, should be permitted to encourage her, by suitable provisoes in his will, to remain single, and not subject his own offspring to the probable evils of a stepfather, to waste her substance, and thereby render her less able to support and educate them. Indeed, it entirely accords with reason, as it appears to me, that she should have an option to take such provision, and remain unmarried, or refuse it, and be thrown upon the general provision of law,—her dower (*d*).

53. Decisions to the same effect have been made in other States (*e*). "The devise to the wife during her widowhood," said the Court, in *Vance* v. *Campbell* (*f*), should not be construed as a condition in restraint of marriage, but should be deemed only an allowable limitation to the estate devised. The marriage, *ipso facto*, terminated the devisee's right to any portion of the estate as derived from the will, and as she had not renounced the provision made for her by the will, but had elected to hold under the will, she cannot be entitled to any part of the estate by operation of law, and contrary to the provisions of the will. Having elected to hold under the will, and having so held until after the time allowed for renunciation had expired, she cannot be per-

(*d*) Scribner on Dower, vol. ii. p. 452.

(*e*) *Delay* v. *Vinal*, 1 Met. 57; *Craig* v. *Walthall*, 14 Gratt. 518; *Vance* v. *Campbell*, 1 Dana, 229; *Pringle* v. *Dunkley*, 4 Smedes and Marsh, 16; *Stevenson* v. *Brown*, 3 Green, Ch. 503; *Van Orden* v. *Van Orden*, 10 John. 30; *Wilkie* v. *Meir*, Superior Ct., Cincinnati, General Term, Feb. 1865; *Paine* v. *Gripton*, 11 Humph. 402; *Blunt* v. *Gee*, 5 Call. 481.

(*f*) *Vance* v. *Campbell*, 1 Dana, 229.

mitted to assert a right against the will, or independently of it. As, therefore, she terminated her interest as devisee by her second marriage, she can have no right now to any portion of the testator's estate which was devised" (*g*).

54. The point was also directly ruled by Vice-Chancellor Kindersley, in the recent English case of *Lloyd* v. *Lloyd* (*h*). "The law recognizes in the husband," said the Vice-Chancellor, "that species of interest in the widowhood of his wife as makes it lawful for him to restrain a second marriage—that is to say, that the provision which he has made shall cease. I have no doubt, also, that, with respect to either his wife, or a stranger, a testator may give an annuity, to continue so long as she remains single or unmarried; but as to a person not a wife, if he first gives her a life or other estate, and then appends a condition to defeat that estate if she marries, that would not be good" (*i*).

55. A provision made for a widow, although it may not in express terms be declared to be in lieu of dower, may be so clearly inconsistent with an intention that she should enjoy both the provisions made for her and her dower, as to raise an implication that the provision should be in satisfaction of her dower. In such cases the widow will be obliged to elect.

56. Where a testator devised certain houses to his wife "in lieu and satisfaction of all her dower and other right therein," and the will indicated that the testator was dealing with all his estate, it was held, that the wife was barred of her dower in all the testator's real estate (*j*).

(*g*) Scribner on Dower, vol. p. 453.

(*h*) *Lloyd* v. *Lloyd*, 2 Simons, N. S. 255; 16 Jur. 306; *Boynton* v. *Boynton*, 1 Bro. C. C. 445.

(*i*) See also 2 Lead. Eq. Cas. pt. 1. 280, *et seq.*; Jarmin on Wills, 836, *et seq.*; Scribner on Dower, vol. ii. p. 453.

(*j*) *Knighton* v. *Young*, 22 Md. 359.

57. Where the testator has indicated an intention that the property should be kept in entirety, and be personally occupied and enjoyed by the devisee, the widow is put to her election (*k*).

58. In *Coleman* v. *Glanville*, V.C. Strong says: "Putting out of question for the present, the effect of the second marriage which has taken place, I have no doubt but that according to the proper construction of this will, the claim of dower is inconsistent with the enjoyment of this provision which is made for the widow. The gift of the annuity though charged on all the real estate would not of itself raise a question of election; this is well established by authority; Jarmin on Wills (*l*), *Holdich* v. *Holdich* (*m*). But by the will, an estate for life determinable upon the widow marrying again, is given to her in a certain portion of the house situated upon the farm of which the real estate consists; and subject to this estate of the widow in a portion of the house, the testator has most anxiously indicated an intention that the farm including the part of the dwelling house not given to the widow should be kept in entirety, and be personally occupied and enjoyed by his son's until his youngest son should attain the age of twenty-one, when it was to be divided equally amongst the three sons. This destination of the property would be utterly defeated if one-

(*k*) *McLellan* v. *McLellan*, 28 Gr. 1; *Stewart* v. *Hunter*, 2 Ch. Ct. 336-338; *Coleman* v. *Granville*, 18 Gr. 42; *McLennan* v. *Grant*, 15 Gr. 65, 69; *Hutchinson Sargeant*, 16 Gr. 78; *Lee* v. *McKinley*, 18 Gr. 527; *Miall* v. *Brian*, 4 Mad. 125; *Sutcher* v. *Kemp*, 5 Mad. 61; *Goodfellow* v. *Goodfellow*, 98 Beavan, 356; *Roadley* v. *Dixon*, 3 Russ. 192; *Birmingham* v. *Kirwan*, 2 Sch. and Leg. 444; *Raynard* v. *Spence*, 4 Beav. 103; *Taylor* v. *Taylor*, 1 Vand. C. 727; *O'Hara* v. *Chaine*, 1 J. and L. 662; *Holdich* v. *Holdich*, 2 V. and C. 22; *Lowes* v. *Lowes*, 3 Hare, 501; *Robinson* v. *Wilson*, 13 Ir. Eq. 168, 183; *Pepper* v. *Dixon*, 17 Sim. 200; *Grayson* v. *Deakin*, 3 De G. and Sm. 298; *Taylor* v. *Linley*, 5 Jur. N. S. 701; *Ld. Dorchester* v. *Earl of Effingham*, Corp. C. C. 319; *Bending* v. *Bending*, 3 Kay and John. 257; *Norris* v. *Clark*, 2 Stock. Ch. 51; *Lord* v. *Lord*, 23 Conn. 327.

(*l*) 2nd ed. pp. 390-391, and cases there cited.

(*m*) *Holdich* v. *Holdich*, 2 Y. and C. C. C. 11.

third of it was to be set off by metes and bounds and assigned to the widow for her dower."

59. Where a power to lease the estate out of which dower is claimed is given by the will to trustees the widow is put to her election (*n*).

60. In *Patrick* v. *Shaver*, that learned and able Judge Blake, V.C., says page 125: "But a long series of cases has decided, though a devise to trustees in trust for sale is not inconsistent with the widow's right to dower, yet a devise in trust to manage or to lease, does indicate an intention so to dispose of the estate that the widow's enjoyment of dower is inconsistent with it. The cases deciding that are too numerous to say that it is not the law. If then, the devise is here to trustees, either with power to lease, or in trust to lease, I am bound to follow the decisions." The V.C. proceeds: "Then it has been argued that the benefit given to the widow by the will, is not out of the property in which she claims dower; but the rule of law is, that if a testator has devised any part of his real estate, so that the claim of dower is inconsistent with carrying into effect the testators whole intention, she is put to her election. I am therefore of opinion that in this case the widow is put to her election." I should not feel confident that I was bound to follow this decision carrying as it does the rule further than other cases, and differing as it does from *Warbutton* v. *Warbutton*, *supra*, but that the case was carried to the Court of Appeal in Chancery, and there received the sanction of Lord Chancellor Cranworth, and the Lords

(*n*) *Patrick* v. *Shaver*, 21 Gr. 123; *Armstrong* v. *Armstrong*, 21 Gr. 352; *Fairweather* v. *Archibald*, 15 Gr. 255; *Stewart* v. *Hunter*, 2 Chy. Chrs. 336-338; *Baker* v. *Baker*, 25 U. C. R. 451; *Hall* v. *Hill*, 1 Dr. & W. 94, followed in *Grayson* v. *Deakin*, 3 De G. & S. 298; *Parker* v. *Sowerby*, 1 Drew, 488; S. C. in Appeal, 4 De G. N. & S. 425; *Warbutton* v. *Warbutton*, 2 Sim. & G. 163; *O'Hara* v. *Chaine*, 1 J. & L. 662; *Butcher* v. *Kemp*, 5 Mad. 51; *Peffer* v. *Dixon*, 17 Sim. 200; *Tobias* v. *Ketchum*, 32 N. Y. 319; S. C. 36 Barb. 479.

Justices, Knight Bruce and Turner. It was there argued broadly, that a power to lease could not of itself warrant the conclusion that the testator intended to dispose of the estate freed from the wife's right of dower. It was submitted that the V.C. had followed his own decision in *Gibson* v. *Gibson*, *supra*, which proceeded in the case of *Hall* v. *Hill*. It was shewn to the Court that *Warbutton* v. *Warbutton*, proceeded upon a different view of *Hall* v. *Hill*, and that the matter came there for adjudication before a tribunal not fettered by any of these decisions. The case was fully argued and all the authorities reviewed. The Lord Chancellor commences by removing a misapprehension as to the principle on which the decisions should proceed. "It is not," he says, "I think quite correct to state the general rule of law as being, that to raise a case of election, the will must show that the testator had in his mind her right to dower, and that he meant to exclude it; the rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower." His Lordship then proceeds, "The decisions of Lord St. Leonards in *Hall* v. *Hill*, and *O'Hara* v. *Chaine*, followed as they have been by cases in this country, proceeded upon the power to lease given to trustees, thus laying hold of a reasonable and very intelligible distinction, and one which is consistent with all the cases against the right to elect, even supposing those cases to have been rightly decided. The power to lease which must mean a power to lease the whole, cannot as Lord St. Leonards observed, be exercised subject to the wife's right to have a third part of the estate set out by metes and bounds. * * * The case thus seems to me to be quite clear, and the decisions of Lord St. Leonards, followed by the Lord Justice Knight Bruce when V.C., by Sir James Wigram and by V.C. Kendersley, not only show that the power to lease is a distinction, but that it has been recog-

nized and acted on, and I think we ought not to raise a doubt on the point." The Lord Justice Turner says: "The question is whether the testator meant here to pass his own interest only in the estate, or to pass the entire estate. He has given to the trustees a power to lease; this power could not be exercised if the wife was entitled to dower, such a right would be clearly inconsistent with the power. It is said, that it is not shown that the testator had present to his mind the question of dower, or that he knew that his wife was entitled to dower; but a man devising a property must be taken to know what his interest in that property is." I have cited thus largely from this case, because it was argued that in the cases against the widow's contention, there were circumstances other than the right to lease, and that the Court based its decision upon these other matters. I think the quotations made, prove clearly, that whatever else there may have been on which the decision could be rested, the Court thought proper to base it upon the one plain and distinct ground, that the power to lease was inconsistent with a claim for dower. This being so, *Parker* v. *Sowerby* furnished an authority upon the very point argued before me. I think the widow is under the authorities, put to her election."

61. A direction to cut timber upon the lands out of which the widow claims dower, is inconsistent with her right to dower, and when the testator made such a direction, the widow is put to her election (*o*).

62. When there is a devise of all the testator's real estate, and the substance of the will is, that there should be an equal division of property, the widow is put to her election (*p*).

(*o*) *Taylor* v. *Linley*. 5 Jur. N. S. 701; W. & T. 363.

(*p*) *McGregor* v. *McGregor*, 20 Gr. 453; *Becker* v. *Hammond*, 17 Gr. 489; *Kerr* v. *Leishman*, 8 Gr. 435; *Chalmers* v. *Stone*, 2 V. & B. 222;

63. In *McGregor* v. *McGregor*, the Chancellor said: "For the wife's contention the rule is invoked, that where a testator says he gives all his estate, he does not mean to give his wife's estate, *i. e.*, her right to dower; but it must always be a question in what sense the word estate is used by the testator, whether the property itself, which is the subject of devise, or that which in the contemplation of law, is the testator's interest in that property. It is entirely a question of intention, and it is quite clear that if the Court can see from the frame and the provisions of the will, that what the testator means to dispose of is the land itself, and not his own interest in it, the widow is put to her election; or, as it is generally put, if the claim of dower is inconsistent with the disposition of the land, made by the will, the widow is put to her election. The provisions of the will, in *Chalmers* v. *Stone*, resemble very closely the provisions of the will in this case. The testator gave to his wife and his two children, (a daughter and a son), "all my estates whatsoever, to be equally divided amongst them, whether real or personal, making no distinction in favour of the male, as it is my intent that my daughter shall have an equal share with my son of all my property, after paying the following legacies," which were specified. The testator then, as the report says, specified the property bequeathed by him; and this, it is true, was considered by the learned Judge as tending to show that it was the property itself there described, and not his interest in it, that was the

Dickson v. *Robinson*, Jac. 503; *Roberts* v. *Smith*, 1 Sim. & Stu. 513; *Padbury* v. *Clark*, 2 Mac. & G. 298; *Minton* v. *Clifton*, 21 Beav. 447; *Grovesnor* v. *Durston*, 23 Beq. 99; *Usticke* v. *Peters*, 4 K. & J. 437; *Fitzsimmons* v. *Fitzsimmons*, 28 Beav. 417; *Howells* v. *Jenkins*. 2 J. & H. 706; *Muller* v. *Thingrod*, 33 Beav. 496; *Wilkinson* v. *Kent*, 6 L. R. Chy. 339; *Chave* v. *Chave*, 2 J. & H. 713; *Honywood* v. *Forster*, 30 Beav. 14; *Sadlier* v. *Butler*, 1 Ir. Eq. R. 415-423; *Foster v. Cook*, 3 Bro. C. C. 347; *Gosling* v. *Warburton*, Cro. Eliz. 1-8; *Bailey* v. *Bryce*, 4 Strobh. Eq. 84; *Dixon McCue*, 14 Gr. 540; *Dodge* v. *Dodge*, 31 Barb. 413; *Brown* v. *Pitney*, 39 Ill. 468; *Worthen* v. *Pearson*, 33 Ga. 385; *Apperson* v. *Bolton*, 29 Atk. 418; *Alling* v. *Chatfield*, 42 Conn. 279.

subject of devise. Besides that reason, however, he gave this, which is applicable to the case before me: "The testator, directing all his real and personal property to be divided, etc., the same equality is intended to take place in the division of the real as of the personal estate; which cannot be, if the widow first takes out of it her dower, and then a third of the remaining two-thirds"; and he held the claim of dower to be directly inconsistent with the disposition of the will. Sir Thomas Plummer proceeded upon the same principle as *Dickson* v. *Robinson*, where there was a devise of all the real and personal estate of the testator in trust for the equal benefit of his wife and two daughters, and of any of which his wife was then *enceinte*. Mr. Jarman says (*q*), that this case was decided on the authority of *Chalmers* v. *Stone*. The Master of the Rolls said, indeed, that he could not distinguish the two cases; but he added his own assent to the earlier case, observing: "The substance of the will is, that there should be an equal division of the property, which cannot take place if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and, is not the real estate intended to be given in the same manner? The principle certainly is, that the Court will go as far as it can, not to exclude the claim to dower, but here it would be inconsistent with the will." There was in that case no designation of the property bequeathed and devised; and no such words as share and share alike, and no equivalent words appear to have been in the will. *Roberts* v. *Smith*, before Sir John Leach, was a decision upon the same principle. The Master of the Rolls said: "The principle referred to in *Chalmers* v. *Stone* decides this case. The plain intention of the testator was, that the wife should have half the income of his property

(*q*) 3rd ed. p. 436.

for the maintenance of herself and her children by a former husband; and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed, if the wife were in the first place to take her dower." Mr. Jarman, in his valuable work on the law of wills, takes exception to all these decisions. If I agree with him, which I do not, I should still feel bound to follow the decided cases. He seems to me to push to an extreme length the doctrine, that when a testator devises all his estate, he is to be taken to mean all his interest in the estate devised, leaving the right of dower in the wife intact; and he reasons from this that where a testator directs all his estate, real and personal, to be equally divided, he is to be taken to mean his estate after satisfying his wife's dower; although the wife be one of those between whom this equal distribution is to take place. Such a construction appears to me a forced and unnatural one, and one that would almost certainly disappoint the intention of the testator." But V. C. Blake, in *Patrick* v. *Shaver* (*r*), says: "I think the more reasonable conclusion as to such a will (one in which there is a power to lease or deal with the property in such a manner as would be inconsistent with dower) is, that the testator intended to deal with the interest he had in the land, and to leave the widow with her interest untouched."

64. It would seem (although the point has never been decided), that where the testator conveyed real estate, with a provision for the support and maintenance of his wife, such provision is by implication in lieu of dower (*s*).

(*r*) *Patrick* v. *Shaver*, 21 Gr. 125.

(*s*) *McLennan* v. *Grant*, 15 Gr. 68 to 70; *McLellan* v. *McLellan*, 28 Gr. 11; *Becker* v. *Hammond*, 12 Gr. 485; *Goldsmith* v. *Goldsmith*, 17 Gr. 213; *Bending* v. *Bending*, 3 K. & J. 257; *White* v. *White*, 1 Harrison, 202-211; *Duncan* v. *Duncan's Exors*, 2 Yeates, 302; *Stratfield* v. *Stratfield*, 1 W. & T. L. Ca. in Equity, 286-287; *Herbert* v. *Wren*, 7 Cranch, 370.

65. In *McLennan* v. *Grant*, *supra*, that learned and careful Judge, V. C. Mowat, page 67, says: "This will directed the devise of his real estate to support the devisee's mother during her natural life. The effect of this direction is to charge the real estate with such support; but in *Baker* v. *Baker* it was held by the Court of Queen's Bench, that such a charge did not imply that it was intended to be in lieu of dower. The learned Counsel for the plaintiff argued that the decision, being on a question of equity, was not binding on this Court. But I have not sufficiently considered the effect of such a devise to enable me to say whether, in the absence of that case, I would not have decided the question in the same way; and I am of opinion that this will affords other grounds for a decree in favour of the plaintiff. Dower is defined to be that estate which a widow acquires in a certain portion of her husband's real property after his death for her support and maintenance, and a charge of her support and maintenance on the same land by the testator, does not seem identical with the case of an annuity given by will of a fixed sum of money, which may be sufficient or insufficient as a provision for the widow; it having been held to make the right to dower depend on the sufficiency of a provision made for her by will, "would be opening a door to a greater inconvenience than hitherto the Court has had to struggle with." Accordingly, an annuity is held not to imply that the testator meant it in lieu of dower, though learned Judges have intimated that if the question had been left unmolested by decision, they would have arrived at an opposite conclusion, even in the case of an annuity. There is no English case as to the effect of a provision for the widow's maintenance *eo nomine*. In the American courts it appears to have been held that such a provision, charged on the real estate, be construed to be in lieu of dower therein. The decision in *Baker* v. *Baker* treated such a case as analogous to the

case of an annuity to the widow; and I am not prepared at present either to assent to this view or to dissent from it.

66. The words, "as my wife's portion," although, perhaps, not sufficient in themselves to put the widow to her election, are significant. It is not necessary that a will should in so many words express, that the provision made by it is in lieu of dower, but any language tantamount to it is sufficient (*t*.)

67. If a testator devise his real estate from his heir, after giving his widow a provision in lieu of dower, and the devisee die in the lifetime of the testator, the heir will take the estate, but the widow will be obliged to elect (*u*).

68. Where a testator gives his widow a certain sum "in lieu of dower annually during the term of her natural life," it must be taken to be in lieu of dower in all the testator's lands, and is not to be restricted to a satisfaction for dower in those passing under the will (*v*). But it is otherwise in the case of a gift in lieu of thirds, as the testator is only to be considered as purchasing the thirds for the benefit of his legatees (*w*).

69. The admissibility of parol evidence to enlarge the effect of the terms used in a will, though not in all cases to be absolutely rejected, is strongly discountenanced by the very highest authorities.

70. Upon this subject, Mr. Roper observes (*x*):—"It is presumed that parol evidence is inadmissible to explain

(*t*) Per Spragge. C., in *Armstrong* v. *Armstrong*, 21 Gr. 354; *Boynton* v. *Boynton*, 1 Bro. C. C. 447.

(*u*) *Pickering* v. *Stanford*, 3 Ves. Jr. 337; Lead. Eq. Cas. 300.

(*v*) *Davidson* v. *Boomer*, 18 Gr. 478; *Nottley* v. *Palmer*, 2 Drew, 93.

(*w*) *Pickering* v. *Stamford*, 3 Ves. 332.

(*x*) 1 Roper, H. & W. 590.

the words of the will, by showing that the testator meant by them to pass dower, the effect of which, if admitted, would be to put the widow to her election (*y*).

71. By the Statute 3 and 4 Wm. IV., cap. 105, which applies to the dower of widows, who have been married since January 1st, 1834, the wife's dower will be defeated by a devise of lands, or any estate or interest therein, unless a contrary intention shall be declared by the will (*z*).

72. In Ontario, the rule is directly opposed to this, and unless the will shows a clear intention, that the provision is to be in satisfaction of dower, or the provision made therein is clearly inconsistent with the enjoyment of dower, the widow will not be put to her election.

73. Persons compelled to elect are entitled previously to ascertain the relative value of their own property, and that conferred upon them; and she may file a bill in equity for the ascertainment of those values; for an election cannot be satisfactorily made between the two estates until the person electing actually knows their relative values (*a*).

74. Except where otherwise provided by law, the statutory right of election conferred upon the widow in cases of the

(*y*) *Fairweather* v. *Archibald*, 15 Gr. 255; *Strattin* v. *Best*, 1 Ves. Jr. 285; contra, *Druce* v. *Denison*, 6 Ves. Jr. 385. See *Doe* v. *Chichester*, 4 Dow. 65; *Doe* v. *Jersey*, 3 Barn. & Cress. 870; *Dummer* v. *Pitcher*, 2 M. & K. 275. See also the following American cases, *Hall* v. *Hall*, 8 Rich. Law, 407; *Timberlake* v. *Parish*, 5 Dana, 345; *Chapin* v. *Hill*, 1 R. T. 446; *Bailey* v. *Duncan*, 4 Mon. 256-266; *ante*, cap. 33.

(*z*) See Appendix.

(*a*) 1 Roper, H. & W. 600; 2 Story's Eq. 1098; 1 Lead. Eq. Cas. 301, 320; *Newman* v. *Newman*, 1 Bro. C. C. 186; *Edwards* v. *Morgan*, 13 Price, 787; *Wake* v. *Wake*, 3 Bro. C. C. 255; 1 Ves. Jr. 335; *Chalmers* v. *Stoul*, 3 V. & B. 222; *Hender* v. *Rose*, 3 P. Wms. 124, note; *Whistler* v. *Webster*, 2 Ves. Jr. 367-371; *Boynton* v. *Boynton*, 1 Bro. C. C. 445; *Kidney* v. *Coussmaker*, 12 Ves. Jr. 136, note (a); *Buttricke* v. *Broadhurst*, 3 Bro. C. C. 88; 1 Ves. Jr. 171; *Pusey* v. *Desbonvrie*, 3 P. Wms. 315; *United States* v. *Duncan*, 4 McLean, 99; Meliget's Appeal, 17 Pa. St. (5 Harris) 449; *Hall* v. *Hall*, 2 McCord's Ch. 269.

character now under consideration, is regarded as a strictly personal right, and cannot be exercised by another person in her behalf (*b*). In the application of this will, it has been held, that the incapacity of the widow to elect by reason of insanity, furnishes no sufficient cause for its relaxation (*c*).

75. In the United States it has been held, that where a testator made provision by will for his wife, who was insane at its date, and continued so until her own death, which occurred more than four years after that of her husband, that her administrator could not renounce the will for the benefit of her estate, nor claim the share of the property of her husband to which she would have been entitled, had he died intestate (*d*).

76. Where infants are bound to elect, the period of election has, sometimes, been deferred until after they become of age (*e*). In other cases, there have been references to enquire what would be most beneficial to the infants (*f*); but an order may be made for an infant to elect without any reference (*g*). There is no presumption of election where there is incapacity (*h*). The practice as to the election by married women in the Court of Chancery varies;

(*b*) *Sherman* v. *Newton*, 6 Gray, 307; *Boone* v. *Boone*, 3 Har. and McH. 95; *Hinton* v. *Hinton*, 6 Ired. L. 274; *Lewis* v. *Lewis*, 7 Ired. L. 72; *Collins* v. *Carman*, 5 Md. 503; *Welch* v. *Anderson*, 28 Misso. 293.

(*c*) *Lewis* v. *Lewis*, 7 Ired. L. 72; *Collins* v. *Carman*, 5 Md. 503; *Boone* v. *Boone*, 3 Har. & McH. 95 (1791); *Sherman* v. *Newton*, 6 Gray, 307; *Hinton* v. *Hinton*, 6 Ired. L. 274; Scribner on Dower, vol. ii. p. 469.

(*d*) *Collins* v. *Carman*, 5 Md. 503; *Lewis* v. *Lewis*, 7 Ired. L. 72.

(*e*) *Streatfield* v. *Streatfield*, Cas. Temp. 2 Abbott, 176; *Boynton* v. *Boynton*, 2 Ves. Sr. 12; *Box* v. *Box*, 3 Bro. P. C. 173.

(*f*) *Chetwynd* v. *Fletwood*, 1 Bro. P. C. 300; *Goodwyn* v. *Goodwyn*, 1 Ves. Sr. 226; *Gretton* v. *Hayward*, 1 Sm. 413; *Ebington* v. *Ebington*, 5 Mad. 517; *Ashburnham* v. *Ashburnham*, 13 Jur. 44; *Prole* v. *Soady*, 8 W. R. 131; *Byland* v. *Hudderston*, 3 Bro. C. C. 285, note.

(*g*) *Blunt* v. *Lack*, 26 L. J. Ch. 148; *Lamb* v. *Lamb*, 5 W. R. 772.

(*h*) *Ashley* v. *Palmer*, 1 Merin. 296; *Re* Marriott, 3 Moll. 516.

but in general there will be an enquiry what is most beneficial for them, and they will be required to elect within a limited time (*i*).

77. Where possession is taken by the husband of estates to which his wife was entitled, paramount the will, will not prevent her electing to take under the will (*j*).

78. A married woman may elect so as to affect her interest in real property; and when she has once so elected, though without deed acknowledged, the Court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of a fraud. Having elected, she is bound (*k*).

79. Where a man, on his marriage, covenanted to settle lands of £400 a year to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies, and if he died before a settlement, the wife might elect either to have the £400 a year, or £3,000 in money in lieu of dower and thirds. The husband died before a settlement was made. On a bill by the creditors, the wife by answer elected to take the £3,000, and the children insisted on having a settlement made according to the articles, expectant on their mother's death, by which means all the assets would be exhausted. It was decreed that a settlement should be made on the wife and children, notwithstanding the election (*l*).

(*i*) *Pultney* v. *Darlington*, 7 Bro. P. C. 546; 2 Ves. Jr. 560; 3 Ves. Jr. 385; *Vance* v. *Lord Dungannon*, 2 S. and L. 133; *Davis* v. *Page*, 9 Ves. Jr. 350; *Barrow* v. *Barrow*, 4 Kay and J. 409.

(*j*) *Wilson* v. *Lord Townsend*, 2 Ves. Jr. 693.

(*k*) Taylor's Eq. 400-401-402; *Ardesoife* v. *Bennett*, 2 Dick. 463; *Barrow* v. *Barrow*, 4 K. and J. 409; *Willoughby* v. *Middleton*, 2 J. and H. 344; *Sisson* v. *Giles*, 11 W. R. 558; *Saville* v. *Saville*, 2 Coll. 721; *Anderson* v. *Abbott*, 23 Beav. 457; but see *Campbell* v. *Ingelby*, 21 Beav. 467; *Frank* v. *Frank*, 3 M. and C. 171.

(*l*) *Hancock* v. *Hancock*, 2 Vern. 605.

80. It is not necessary, to constitute a binding election, that positive acts of acceptance or renunciation should be shown. Presumptions equally strong may arise from long acquiescence, or from other circumstances of a stringent nature. Upon such a subject no general rule can be laid down, but every case must be left to be decided upon its own particular circumstances, rather than upon any definite abstract doctrine (*m*). But it has been frequently adjudged that taking possession of property under a will, and exercising unequivocal acts of ownership over it, for a long period of time, will amount to a binding election to confirm the instrument (*n*).

81. Where a testator having devised to his wife all his real and personal property during her widowhood, under which she immediately on her husband's death, entered upon the real estate, and applied to her own use the personal estate, the Court restrained an action of dower, brought by her after second marriage, holding that she had elected against her dower, and that she was bound by the election she had made (*o*).

82. The fact of the widow remaining on the land, devised to her for six months, after the testator's death, does not amount to an election (*p*).

83. Where a testator devised his personal estate, and all his real estate to his widow, until his two sons shall come

(*m*) Story's Eq. Juris. sec. 1057; 1 Lead. Eq. Cas. 302, 320, and cases there cited.

(*n*) *Ibid.* 321; *Westacott* v. *Cockerline*, 13 Gr. 79; *Blunt* v. *Gee*, 5 Call. 481; *Upshaw* v. *Upshaw*, 2 Hen. and M. 381; *Reed* v. *Dickerman*, 12 Pick. 146; *Delay* v. *Vinal*, 1 Met. 57; *Breadfords* v. *Kents*, 45 Pa. St. 474; *Thompson* v. *Hoop*, 6 Ohio St. 480; *Stark* v. *Hunton*, Saxton Ch. 216; *Davison* v. *Davison*, 3 Green (N. J.) 235; *Caston* v. *Caston*, 2 Rich. Eq. 1; *Wilson* v. *Hayne*, 1 Chev. 2nd pt. 37; *Craig* v. *Walthall*, 14 Gratt. 518; *Clay* v. *Hart*, 7 Dana, 1, 6; Scribner on Dower, vol. ii. p. 481-4.

(*o*) *Westacott* v. *Cockerline*, 13 Gr. 79; *Coleman* v. *Coleman*, 18 Gr. 42.

(*p*) *Cooper* v. *Watson*, 23 U. C. R. 345.

of age, when each was to have a portion subject to certain charges in the widow's favor, and the widow took possession of, and enjoyed all her husband's real estate, and took possession of the personal estate, and used and disposed of the same for the support of the family, and had claimed dower from the person in possession, and he paid $50 a year, it was held, that this was no evidence of election (*q*).

84. When a will expressly declares, that what is given is intended to be in lieu of the dower, and when the widow accepts it, she is as much bound by her election in a court of law as in equity, and her claim to dower is as effectually barred (*r*).

85. Acts of implied election, which will bind a party, will also bind her representatives (*s*), and some acts which would not be binding upon her, if insisted upon, in her lifetime, will bind her representatives upon that principle only, not to disturb things long acquiesced in, in families upon the footing of rights, which those, in whose place they stand, never called in question (*t*). But if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them and determine for themselves (*u*).

(*q*) *Reynolds* v. *Reynolds*, 29 U. C. R. 225; *Walmsley* v. *Walmsley*, 29 U. C. R. 214; *Slatter* v. *Slatter*, 1 Scott, 82; 1 Bing. N. C. 259.

(*r*) *Walton* v. *Hill*, 8 U. C. R. 562.

(*s*) *Earl of Northumberland* v. *Earl of Aylesford*, Amb. 540, 657; *Stratford* v. *Powell*, 1 B. and B. 1; *Aroesoife* v. *Bennett*, 2 Dick. 463.

(*t*) *Tomkins* v. *Ladbroke*, 2 Ves. Sr. 593; *Worthington* v. *Wiginton*, 20 Beav. 67; *Sopinith* v. *Mayham*, 30 Beav. 235-239; *Whitley* v. *Whitley*, 31 Beav. 173.

(*u*) *Dillon* v. *Parker*, 1 Sm. 385; *Moore* v. *Butler*, 2 S. & L. 268; *Tyssen Benyon*, 3 Bro. C. C. 5.

86. Where a testator devised one parcel of land to his wife in lieu of dower, and another parcel, without expressing that it was to be in lieu of dower, and then devised his remaining lands to other parties, and the will contained other evidence, showing an intention that such last mentioned devises should be free from dower, it was held, that on the widow electing to take dower, she forfeited both parcels of land (*v*).

87. A husband having power to jointure the wife, executes that power by will, and dies seised of estates, over which the power did not extend; though the testator did not express an intention that the wife should take the jointure in bar of dower, yet she shall not take, refer to the case of *Parker* v. *Sowerby, supra*. There it was argued that *Hall* v. *Hill, supra*, was not decided alone upon the power to lease, and on this ground, counsel sought to distinguish the cases. V. C. Kindersley, says he adheres to the general propositions he laid down in *Gibson* v. *Gibson*, and adds:—"If I were not bound by decision, if the question were *res integra*, I do not think I should adopt the conclusion to which, in the present case, I am obliged to come; but in questions of this sort, I am not justified in departing from the result of established cases. * * * But both jointure and dower must make election (*w*).

88. Any acts to be binding on the widow must be done with a knowledge of her rights, and with the intention of electing. Where the widow had remained on the farm from the time of the testator's death, and had received some small sums of money for her own use, but had never had set apart for her exclusive enjoyment the portion of the house devised to her; it was held, that these acts did

(*v*) *Stewart* v. *Hunter*, 2 Chy. Ch'rs. Rep'ts. 336. See also as to effect of election, *Lee* v. *McKinley*, 18 Gr. 527.

(*w*) *Fust* v. *Fust*, Romilly's Notes of Cases, 90.

not amount "to the exercise of that deliberate and well considered choice, made with a knowledge of rights, and in full view of consequences, which is requisite to constitute an election" (*x*).

89. But where a testator bequeathed large legacies to his wife *durante viduitate* in lieu of dower, and more valuable than her dower would have been, and she enjoyed them for two years, during which the will was in other respects also acted upon. Having then married the brother of the deceased husband, she filed her bill, alleging that she accepted the bequests in ignorance of her right to dower, and praying that dower might be assigned to her. In her evidence she swore that she was ignorant of her right, until informed of it in 1880, shortly before her second marriage. It was held, that the maxim, *Ignorantia juris neminem excusat* applied, and the bill was dismissed (*y*).

90. In *Wake* v. *Wake* (*z*), an annuity had been received by the widow for three years after the death of her husband, yet the Court held that her right of election remained open. So in *Reynard* v. *Spence* (*a*), where the widow received the annuity for five years, it was held, that under the circumstances she had not elected. In *Butricke* v.

(*x*) *Coleman* v. *Glanville*, 18 Gr. 42; *Fairweather* v. *Archibald*, 15 Gr. 255; *Ripley* v. *Ripley*, 28 Gr. 610. See also *Douglas* v. *Douglas*, L. R. 12 Eq. 617; *Stratford* v. *Powell*, 1 B. & B. 1; *Dillon* v. *Parker*, 1 Su. 380; *Edwards* v. *Morgan*, 13 Price, 782; 1 Bligh, N. R. 401; *Worthington* v. *Wiginton*, 20 Beav. 67; *Wintour* v. *Clifton*, 21 Beav. 447-468; 8 De G. M. & G. 641; *Campbell* v. *Ingilby*, 21 Beav. 52; 1 Lead. Eq. Cas. 302, 320; Anderson's Appeal, 36 Pa. St. (12 Casey) 476-496; *Bradfords* v. *Kents*, 43 Pa. St. 474; *Duncan* v. *Duncan*, 2 Yeates, 302; *English* v. *English*, 2 Green Ch. 504-510; *O'Driscoll* v. *Roger*, 2 Desans, 295-299; *Tooke* v. *Hardeman*, 7 Geo. 20; *Dixon* v. *McCue*, 14 Gratt. 540; *Reaves* v. *Garrett*, 34 Ala. 558; *McCallister* v. *Brand*, 11 B. Mon. 370; *Phelps* v. *Phelps*, 20 Pick. 556.

(*y*) *Gillam* v. *Gillam*, 1 C. L. T. 278.

(*z*) *Wake* v. *Wake*, 1 Ves. Jr. 335.

(*a*) *Reynard* v. *Spence*, 4 Beav. 103.

Broadhurst (*b*), Lord Thurlow, in observing upon the case of *Beaulien* v. *Cardigan* (*c*), finally decided in the House of Lords, in which the right of election continued five years, said, "All that was decided by the case was, that under circumstances, election may continue till the whole affair be wound up, and the trusts executed" (*d*).

91. But when the respective amounts of the two rights are clear, or may be easily discerned after the husband's death, the widow's acceptance of the bequests given to her, will be an irrevocable election to abide by the will, and to forego her dower (*e*).

92. Thus in *Butricke* v. *Broadhurst* (*f*), the husband, by will, (of which he appointed his wife sole executrix), devised to trustees all his real and personal estates, in trust to permit his wife to receive the rents and profits for her life, provided she did not marry. The trustees never acted. She received the rents for five years after her husband's death, and then filed a bill claiming to elect to take an interest for life in a trust fund of £2,000, under her marriage articles, instead of the property under the will, between which she was under the necessity of electing; but Lord Thurlow was of opinion that there was no foundation for the suit, observing that the widow having taken possession under the will, and the estate being a free fund from the beginning, he could not think of a principle upon which the Court would say that she was then competent to elect. He further observed, and expressed his wish of being understood, that his judgment was founded upon the

(*b*) *Butrick* v. *Broadhurst*, 1 Ves. Jr. 171; 3 Bro. C. C. 88.

(*c*) *Beanlien* v. *Cardigan*, 3 Bro. Pail. Ca. 277, 8 v. ed.; Ambl. 533.

(*d*) Scribner on Dower, vol. ii. p. 486; 1 Roper, H. & W. 603; 1 Bright, H. & W. 573; 1 Lead. Eq. Cas. 302. See also *Elond* v. *Elond*, 2 Jur. 852.

(*e*) Scribner on Dower, vol. ii, p. 487.

(*f*) *Butricke* v. *Broadhurst*, 1 Ves. Jr. 171; 3 Bro. C. C: 88.

particular circumstance that the bill was filed without any ground, and no suggestion that the real or personal estates were in such a situation as to render it doubtful what the result would be, and consequently that the widow had laid no ground which entitled her to elect, after an acquiescence and enjoyment for five years (*g*).

93. It appears from this case, that the widow could not be unacquainted with the annual amount of either fund, since that under the marriage settlement was specified and certain; and she could not be ignorant of the yearly value of the rents and interest of her husband's real and personal estates, after receiving them for five years from his death. Under such circumstances, it would have been an abuse of the general principle to have extended it to such a case as the present (*h*).

94. If the election be made by the widow, under the supposition that the estate devised to, and accepted by her, is free from all claims and demands, when the fact is the reverse; or if it be made before the circumstances necessary to a judicious and discriminating choice, are ascertained, then such election will not bind her, because made under a mistake, and in ignorance of the real state of the property; and, under these circumstances, she will be entitled, in equity, to relief (*i*).

(*g*) Scribner on Dower, vol. ii. p. 488. See also *Parker* v. *Downing*, 2 Jur. 28; *Bradfords* v. *Kents*, 23 Pa. St. 474.

(*h*) 1 Roper, H. & W. 601-2; 1 Bright, H. & W. 574-5; Scrib. on Dower, vol. ii, p. 488.

(*i*) 1 Leadg. Cas. 302-321; 1 Roper, H. & W. 602; 1 Bright, H. & W. 575; Scribner on Dower, vol. ii. p. 488; *Sopwith* v. *Manghan*, 30 Beav. 235; *Boynton* v. *Boynton*, 1 Bro. C. C. 445; *Pusey* v. *Desbouvrie*, 3 P. Wms. 315; *Wake* v. *Wake*, 3 Bro. C. C 255; *Kidney* v. *Coussmaker*, 12 Ves. Jr. 136; *Dillon* v. *Parker*, 1 Swanst. 381 and note; Anderson's Appeal, 36 Pa. St. (12 Casey) 476; *Hall* v. *Hall*, 2 McCord's Ch. 269; *Pinckney* v. *Pinckney*, 2 Rich. Eq. 219, 237; *Upshaw* v. *Upshaw*, 2 Hen. and Munf. 381, 390, 393; *Snelgrove* v. *Snelgrove*, 4 Desaus. 274; *United States* v. *Duncan*, 4 McLean, 99; *Adsit* v. *Adsit*, 2 John. Ch. 448, 451; *Dabney* v. *Bailey*, 42 Ga. 521; *Macknet* v. *Macknet*, 29 N. J. Eq. 54; Contra, *McDaniel* v. *Douglas*,, 6 Humph. 220.

95. It is doubtful whether a wife electing by answer to take her dower, and not under her husband's will, is bound by such election (*j*). In *Boynton* v. *Boynton* (*k*), although Lady Boynton had, by her answer, elected to take her dower, instead of the benefits given to her by her husband's will, Sir Thomas Sewell, M.R., declared on the hearing, that as no account of the testator's personal estate and of his debts had been taken, she was not obliged to make any election until the account should be taken, and it should appear out of what real estate she was dowable at the time of the testator's decease, and it was referred to the Master to take an account of the personal estate, and also to state out of what estate she was dowable. Therefore, a person compelled to elect may file a bill to have all necessary accounts taken (*l*).

96. But if the widow, at the time she makes her election to take under the will, is acquainted with the material *facts* of the case, such election will be binding, even though she do not understand her legal rights, provided no imposition is practised upon her, or no unfair advantage taken of her ignorance of the law, and the consideration is not grossly inadequate (*m*).

97. If, by means of fraud and imposition practised upon her, a widow is induced to make an election contrary to her true interests, and different from what she would otherwise have done, a Court of Equity will afford her proper

(*j*) *Johnson* v. *Richardson*, Romilly's Notes of Cases, 78; 1 Bro. C. C. 445.

(*k*) *Boynton* v. *Boynton*, 1 Bro. C. C. 445.

(*l*) *Butricke* v. *Broadhurst*, 1 Ves. Jr. 171; 3 Bro. C. C. 88; *Pusey* v. *Desbouvrie*, 3 P. Wms. 315.

(*m*) *Light* v. *Light*. 21 Pa. St. (9 Harris) 407; Scribner on Dower, vol. ii. p. 490. See, however, *Tooke* v. *Hardeman*, Geo. 20.

relief (*n*). If she be prevented by fraud from renouncing her husband's will within the time required by law, she will be placed, in equity, in the same situation, in all respects, as if she had dissented in time. An instance of the application of this principle occurred in *Smart* v. *Waterhouse* (*o*). There, the widow intended to dissent from her husband's will; but the executor represented to her that it would produce great confusion in the estate; that her distributive share was about five thousand dollars, and that if she did not dissent she would be paid that amount; in consequence of which she did not dissent. The executor, at the time he made these representations, knew, or, from his situation, had the means of knowing, that her share would be double that amount. It was held that this was a fraud upon the widow, and that a Court of Equity would grant her relief (*p*).

98. The rule is the same where the widow has been led, either by fraudulent misrepresentations or an unfair concealment of material facts, to renounce the provisions of the will (*q*).

99. When the annuity secured to the widow, by the provisions of a will, abates in consequence of the failure of the trust scheme, a previous election by her, to take the provisions of the will in lieu of dower, should not impair her right of dower in the residuary real estate (*r*); but she cannot have both the annuity and her dower (*s*).

(*n*) *Smart* v *Waterhouse*, 10 Yerg. 94; *McDaniel* v. *Douglas*, 6 Humph. 220; *Morrison* v. *Morrison*, 2 Dana, 13; *Light* v. *Light*, 21 Pa. St. (9 Harris) 407. See *Reed* v. *Dickerman*, 12 Pick. 146, 151; *Adams* v. *Adams*, 29 Ala. 274, 602.

(*o*) *Smart* v. *Waterhouse*, 10 Yerg. 94.

(*p*) Scribner on Dower, vol. ii. p. 492.

(*q*) *Morrison* v. *Morrison*, 2 Dana, 13; Scribner on Dower, vol. ii. p. 492-4.

(*r*) *Marrice* v. *Marrice*, 1 Laws. (N. Y.) 348.

(*s*) *Camden Mut. Ins. Assn.* v. *Jones*, 23 N. J. Eq. 171.

100. A legacy given by a testator to his widow as a price of her release of dower must be fully paid before any mere legatees can claim (*t*); for the widow, in such case, is a purchaser, and justly entitled to a preference (*u*), and it will not vary the principle of the case to show, that the legacy was not the only consideration for the release to dower (*v*).

(*t*) *Burridge* v. *Bradyl*, 1 P. Mis. 127; *Davenhill* v. *Fletcher*, Ambl. 245; *Durham* v. *Rohodes*, 23 Md. 233.

(*u*) *Blower* v. *Merret*, 2 Ves. Sr. 420.

(*v*) *Death* v. *Handy*, 1 Russ. 543; *Norcott* v. *Gordon*, 14 Sim. 258; *Collins* v. *Melton*, 40 Misso. 242; *Cleyton* v. *Aikin*, 38 Ga. 320. For American cases on the same subject, see Scribner on Dower, vol. ii. p. 496, note (1).

CHAPTER XXXV.

THE STATUTE OF LIMITATIONS AS AFFECTING DOWER.

1-2. *Statutory provisions in Ontario.*
3-6. *The state of the law prior to the statutes.*
7. *When the statute begins to run, when wife in actual possession.*
8-10. *When the statute begins to run.*
11. *The statute merely bars the remedy.*
12. *Fraser v. Gunn.*

1. The statute (*a*), provides that "no action of, or suit for dower, shall be brought, but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress, or of any person claiming under her."

2. The same statute, section 16, also provides that "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."

3. It had been decided prior to the Statute, 38 Vic., cap. 16, sec. 14, that dower came within the old Act C. S. U. C., cap. 88, sec. 1, which provided that, "no person shall make an entry, or distress, or bring an action to recover any land

(*a*) R. S. O. cap. 108, sec. 25; 38 Vic. cap. 16, sec. 14.

or rent, but within twenty years next, after the time at which the right, etc., accrued" (*b*).

4. It had also been decided, that the statute began to run from the husband's death (*c*), and that the mere fact of the widow being in possession, but not having her dower assigned to her did not alter the rule (*d*), and that an acknowledgement from the tenant after the expiry of the twenty years did not revive the right (*e*), and also, that the fact of the tenant of the freehold being absent from the Province did not stop the statute running (*f*).

5. It had also been held, that where the testator by his will executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children during widowhood; and after her death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of

(*b*) *German* v. *Grooms*, 6 U. C. R. 414; *McDonald* v. *McIntosh*, 8 U. C. R. 388; *Begley* v. *The St. Patrick's Literary Association of the City of Ottawa*, 23 U. C. R. 395; *Marshall* v. *Smith*, 34 L. J. Ch. 189; L. R. P. 235-236 n.

(*c*) *McClelland* v. *Meggatt*, 7 U. C. R. 31; *Leach* v. *Dennis*, 24 U. C. R. 129; *McDonald* v. *McIntosh*, 8 U. C. R. 388. See also *Laidlaw* v. *Jackes*, 25 Gr. 293; S. C. on rehearing, 28 Gr. 101.

(*d*) *Leach* v. *Shaw*, 8 Gr. 498; *McDonald* v. *McIntosh*, 8 U. C. R. 388; *German* v. *Groom*, 6 U. C. R. 414; *Begley* v. *The St. Patrick's, etc.* 23 U. C. R. 395. See also *Laidlaw* v. *Jackes*, 25 Gr. 293; S. C. on rehearing, 27 Gr. 101. And *Banks* v. *Bellamy*, 27 Gr. 342.

(*e*) *McDonald* v. *McIntosh*, 8 U. C. R. 388.

(*f*) *Begley* v. *The St. Patrick's, etc.* 23 U. C. R. 395.

the heirs, seeking an account of rents received by the widow, and a partition of descended lands; it was held, on rehearing that, notwithstanding the lapse of time, the widow was entitled, out of the devised lands, to retain one-third of the rents in respect of past and future dower; but, that as to the descended lands, the remedy, (although not the right), was barred by the statute of limitations, but that even as to these lands she was entitled to one-third of the rents and profits, even after the expiration of the twenty years, and was only bound to account for the excess, after deducting what she was so entitled to receive as dowress; and it was also held that the claim by the widow in her answer, that she was entitled to dower in some of the lands in question to the suit, which claim was awarded her by the decree was a pursuing the remedy so as to bring the case within the statute (*g*.)

6. It will have been observed that the law in force at the time of the decision of the case last cited was most unjust. A farmer owning nothing but his land and farm stock and implements, dies intestate, leaving a widow and a number of small children. The widow remains on and works the farm, and supports and educates the children until they are able to make their own living. This goes on for say twenty years after the husband's death, and the children then of age claim the farm as their own. The widow during all this time has never dreamt of asserting her rights, if, indeed, she knew of their existence, and her claim to dower, would (until recently), have been extinguished.

7. To remedy this injustice it was enacted by statute (*h*), that, "where a dowress has, after the death of her husband, actual possession of the land of which she is dowable,

(*g*) *Laidlaw* v. *Jackes*, 27 Gr. 101.

(*h*) 43 Vic. cap. 14, sec. iii. See Appendix.

either alone or with heirs or devisees of her husband, the period of ten years within which her action of dower is to be brought shall be computed from the time when such possession of the dowress ceased. This section does not apply to any case in which the right of action has ceased before the passing of this Act."

8. The filing of a petition to quiet the title by a person claiming adversely to the dowress, and under the proceedings taken, the dowress was brought in, this would not prevent the statute running (*i*). When a title by possession is acquired against the husband of the dowress, her right to dower is not affected thereby (*j*).

9. In *McDonald* v. *McMillan* (*k*) an action of dower in the west half of a lot, the husband's seisin being denied, it was proved that upwards of sixty years before the suit, his father whose title was not shown died in possession, leaving the husband, his eldest son, and heir-at-law. He married demandant 45 years before the suit, and moved on to the east half of the lot about 1814. His brother who had always lived with him and the mother on the west half, remained there, but knew that the husband claimed it until his death, eight years before the trial, this was held sufficient to support a verdict for demandant, for the husband's seisin by descent from his father, was in full force when he married, and if afterwards his brother had obtained a title by possession that could not effect the demandant's right.

Draper, C. J., in his judgment, page 304, says: "As the marriage of Donald (the husband), to the demandant, took place before the war, as stated in one place or 45 years

(*i*) *Laing* v. *Avery*, 14 Gr. 33.

(*j*) *Leach* v. *Dennis*, 24 U. C. R. 129.

(*k*) *McDonald* v. *McMillan*, 23 U. C. R. 302. See also *Durham* v. *Angier*, 20 Maine, 242; *Moore* v. *Frost*, 3 N. H. 126; *Hart* v. *McCollum*, 28 Geo. 478.

ago, as stated in another, he was at the time of the marriage in possession of the whole lot as heir-at-law to his father, and the seisin by descent was in full force at the time of his marriage. Since that time he may have lost the right of entry into the west half, and his brother Angus or those claiming under him, may by an uninterrupted possession and enjoyment of the west half have acquired a statutory title thereto against Donald and his heirs; but this can no more affect the demandant's right to dower, than if her husband at any time during the coverture had made a conveyance of it in fee to a stranger."

10. The statute having once commenced to run does not stop for any disability (*l*).

11. The statutes merely bar the remedy without extinguishing the right (*m*).

12. Where the widow and heir joined in creating a term in the descended lands for ten years, and in the lease it was stated that it had been mutually agreed between the parties thereto, that one-third of the rent should be paid to the widow in each year which was accordingly done during the currency of the term, it was held, that this had the effect of preventing the lapse of time, being set up as a bar under the statute of the widow's right to dower (*n*).

(*l*) *Jones* v. *Cleaveland*, 16 U. C. R. 9.

(*m*) *Laidlaw* v. *Jackes*, 25 Gr. 293; S. C. 27 Gr. 101; *Fraser* v. *Gunn*, 27 Gr. 63.

(*n*) *Fraser* v. *Gunn*, 27 Chy. 63.

CHAPTER XXXVI.

DAMAGES IN ACTIONS OF DOWER.

1. *At common law no damages recoverable by the widow.*
2. *The Statute of Merton.*
3-4. *By the terms of the statute, the husband must die seised.*
5-8. *Extent of the recovery against the heir where the plea of "tout temps prist" is not interposed.*
9. *Rule in Ontario as to arrears of dower, or damages for such arrears.*
10. *Damages when only an appearance entered.*
11. *Endorsement of notice on writ.*
12. *Whether judgment for seisin of dower final and conclusive.*
13-14. *Where judgment signed against two only of three defendants.*
15-17. *Whether damages can be claimed where defendant enters appearance with acknowledgment that he is tenant, and consents to demandant having dower.*
18-30. *Recovery where "tout temps prist" is pleaded.*
31. *Damages as against the alienee of the husband.*
33-35. *Damages as against the alienee of the heir.*
36. *Measure of damages where there is an outstanding term of years.*
37. *Instances in which damages are not recoverable.*
38-40. *Method of ascertaining the damages.*
41. *Distinction between the judgment for dower and the award of damages.*
42. *Death of demandant pending the proceeding.*
43-44. *Death of the tenant.*
45. *The Statute of Limitations as affecting the recovery of damages.*
46-48. *Recovery of mesne profits in a court of equity.*
49. *Interest on arrears.*
50. *The widow not entitled to an allowance "pendente lite."*
51-52. *Death of the defendant pending the suit.*
53. *Death of the widow before dower has been assigned.*

1. Dower being a real action, no damages were at the common law recoverable by the wife for the detention.

By the Statute of Magna Charta (*a*), her dower was to be assigned to her within forty days after the death of her husband; but as Coke observes, "Of little effect was that Act, for, that no penalty was thereby provided if it were not done" (*b*).

2. By the Statute of Merton (*c*), however, the grievance was partially remedied by the following provision: "Of widows which after the death of their husbands are deforced of their dowers, and cannot have their dower or quarantine without plea, whosoever deforce them of their dowers or quarantine of the lands whereof their husbands died seised, and that the same widows after, shall recover by plea, they that be convicted of such wrongful deforcement, shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows, by judgment of our court have recovered seisin of their dower, etc., and the deforcers, nevertheless, shall be amerced at the King's pleasure" (*d*).

3. The statute extends the recovery of damages to those cases only, where the husband died seised (*e*), and the seisin intended by the statute is held to be a seisin of the inheritance, so that upon the death of the husband, the possession immediately devolves upon the heir (*f*). If, therefore, the husband make a feoffment to the use of himself for life, remainder to his son in tail, and die during the continuance of the entail, his widow will not be entitled to damages under the statute, because the husband was only

(*a*) *Ante*, cap. 7.

(*b*) Park on Dower, 301; 1 Roper, H. and W. 437. See 2 Inst. 286; 10 Co. 116.

(*c*) 20 Hen. III. cap. 1.

(*d*) Park on Dower, p. 301; 2 Inst. 80.

(*e*) Jenk. Cent. 1 Ca. 85; Dyer, 284 a, pl. 33; Bro. Damages, pl. 52.

(*f*) Co. Litt. 32 b.

actually seised of an estate of freehold when he died, viz: for his life, with a reversion expectant upon the determination of an estate tail (*g*), but if he die seised of an estate tail, this is sufficient to entitle the widow to damages (*h*). The provision of the Statute of Merton, restricting the right to recover damages, to cases where the husband died seised, is adopted in Ontario (*i*), but it is not necessary that there should be an averment in the declaration that the husband died seised (*j*).

4. But a term for years carved out of the estate, will not, as it has been before shown (*k*), prevent the husband's seisin of the inheritance. If, therefore, the lands of which the widow is dowable, be subject to a demise for years, created by the husband previously to the marriage, upon which a rent is reserved, his widow will be entitled to recover a third part of the reversion, and a like proportion of the rent and damages; because the husband died seised of the freehold, and of the inheritance (*l*), and it has been held, that where the husband has made a contract for the sale and conveyance of his lands, but dies before the execution of the conveyance, the legal seisin of the title

(*g*) Yelv. 112; Dame Egerton's Case cited Litt. R. 341; Hargr. Co. Litt. 32 b, note (4); 3 Bulstr. 278; 1 Roper, H. and W. 438. And it has been held, that if the husband be outlawed, the wife shall not recover damages, upon the ground that this is a forfeiture of the frank-tenement. Bro. Dow. pl. 98; Bro. Meagury, pl. 36. But Brooke makes a quære thereof, for the forfeiture was but of the profits, and not of the frank-tenement. And see Bro. Forfeiture de Terre, pl. 30-75; Bro. Utlagary, pl. 59; Park on Dower, 302, note.

(*h*) *Thynn* v. *Thynn*, Styles, 69; Park on Dower, 302.

(*i*) *Dayton* v. *Auldjo*, 6 O. S. 143; *Lockman* v. *Nesse*, 5 O. S. 505; *Walker* v. *Boulton*, 6 O. S. 553; *Lossee* v. *Armstrong*, 11 Gr. 517; *Hawkshaw* v. *Hodgins*, 11 U. C. R. 71; *Humphries* v. *Barnet*, 16 U. C. R. 463. See also *Ryckman* v. *Ryckman*, 15 U. C. R. 266: *Scratch* v. *Jackson*, 26 U. C. R. 180; *Cook* v. *Phillips*, 23 U. C. R. 69; *White* v. *Grimshaw*, 23 U. C. R. 75.

(*j*) *Cameron* v. *Gilchrist*, 43 U. C. R. 512.

(*k*) *Ante*, cap. 11.

(*l*) Co. Litt. 32 b; 1 Roper, H. and W. 438. See *post*, par. 36, as to the measure of damages in such case.

with which he is invested, will entitle his widow to damages (*m*).

5. By the words of the statute damages are given from the death of the husband, to the day that the widow recovers seisin by judgment. By damages are to be understood according to the English authorities, the profits of the third part of the estate since the death of the husband, (after deducting outgoings), and such additional sums as will compensate the widow for any further loss she may have sustained by reason of the detention of her dower (*n*). The value of the rents and profits, and the additional compensation for the delay, are usually assessed severally, although damages given generally, without finding the value of the land, are good (*o*).

6. If judgment be obtained upon the default or *nil dicit* of the tenant, and a writ of enquiry issue to ascertain the damages, they may be carried down to the time of the inquisition (*p*), unless the demandant has been in possession of her third part of the lands under execution awarded upon such judgment; in which case the value is computed only to the time of seisin delivered (*q*). If, however, damages be assessed without allowance for taxes and repairs, the assessment will be erroneous, and liable to be set aside; for under the words *ultra reprisas* in the writ of

(*m*) *McElroy* v. *Wathen*, 3 B. Mon. 135; Scribner on Dower, vol. ii. p. 660.

(*n*) Doct. and Stud. 140; Hargr. Co. Litt. 32 b, note (4). And see *Spiller* v. *Andrews*, Lill. Ent. 188; 8 Mod. 25; *Walker* v. *Neville*, 1 Leon. 56; *Penrice* v. *Penrice*, 2 Barnes, 191.

(*o*) Hawe's Case, Hetl. 141; Park on Dower, 306; Scribner on Dower, vol. ii. p. 661. See 2 Saund. 44 e, note; *Ibid*, 331; Bull. N. P. 117.

(*p*) *Dobson* v. *Dobson*, Ca. Temp. Hardw. 19; 2 Barn. B. R. 180, 207; Park on Dower, 308; Scribner on Dower, vol. ii. p. 661. And see the record in *Spiller* v. *Andrews*, Lill. Ent. 189; incorrectly reported in 8 Mod. 25; *Thynn* v. *Thynn*, T. 1649, cited Hargr. Co. Litt. 32 b, note (4); *contra*, *Penrice* v. *Penrice*, 2 Barnes, 191.

(*q*) *Walker* v. *Neville*, 1 Leon. 56; Park on Dower, 308.

dower, deductions of such, and the like articles are required to be made (*r*).

7. It is expressly provided by statute in this Province, that in estimating damages for the detention of dower, 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 account; but such damages 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 (*s*).

8. So it has been held that the widow is entitled to receive one-third of the yearly value or yearly rents received, and the actual productiveness of property at the date of alienation or death, is not necessarily its yearly value if it has subsequently been made more valuable by reason of improvements or otherwise, either by the heir or vendee, as in such case a portion of the rent is attributable to the land (*t*).

9. In this Province it is provided by statute (*u*), that 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 suit.

10. It is provided by statute (*v*), that in case only an appearance to the writ is entered, the plaintiff may at once

(*r*) *Penrice* v. *Penrice*, Barnes, 234; 1 Roper, H. and W. 440; Scribner on Dower, vol. ii. p. 661.

(*s*) R. S. O. cap. 55, sec. 28.

(*t*) *Wallace* v. *Moore*, 18 Gr. 560.

(*u*) R. S. O. cap. 108, sec. 16.

(*v*) R. S. O. cap. 55, sec. 24; 32 Vic. cap. 7, sec. 18.

(*w*) R. S. O. cap. 55, sec. 10; 32 Vic. cap. 7, sec. 7.

declare, and when damages are claimed in the writ, they may also be claimed in the declaration.

11. Section 10 (*w*), of the same statute, provides that in case the plaintiff claims damages for detention of her dower, there shall be endorsed upon the writ, a notice that she claims damages for the detention of her dower from some day to be stated in the notice.

12. It was held in *Linfoot* v. *Duncombe* (*x*), that a judgment for seisin of dower under section 16, of 32 Vic., cap. 7, Ont. (*y*), is absolutely final and conclusive, and there is no provision of law in such case, entitling the demandant to any damages of any nature or description, nor any mode of proceeding provided by law, for ascertaining any such damages. Gwynne, J., who delivered the judgment of the Court in *Linfoot* v. *Duncombe*, says page 486 :—"We are of opinion that the only judgment which we can give upon this record, is, that no judgment can be given which can be entered of record, and enforced. The argument of the learned counsel for the demandant, was, that by the Statute of Merton there may be two judgments, the one for seisin of dower, and a separate one afterwards for damages assessed on a writ of enquiry of damages, and he contends that the same may be done under the recent Statute of Ontario, 32 Vic., cap. 7; but we are of opinion that it cannot, and it becomes, therefore, unnecessary for us to determine whether in the case of a widow residing with the heir on the premises, from the death of her husband, for seventeen years, when he sells, up to which time the heir was always ready to have rendered dower, and could have successfully pleaded *tout temps prist*, and the grantee being always ready to render the dower from the time of the conveyance to him, and offering to do so, the widow can by refusing to accept such

(*x*) *Linfoot* v. *Duncombe*, 21 U. C. C. P. 484.
(*y*) R. S. O. cap. 55, sec. 20.

assignment of dower, otherwise than by action, demand from the grantee of the heir damages as for detention of dower, and mesne profits during all the period that the widow herself, with the heir, was enjoying the benefit of, and was living upon the premises, and whether the law is so rigid, that there is no plea by way of defence open to the defendant, which can relieve him from such a demand other than the ancient course of vouching the heir to warranty. That is the naked contention of demandant's counsel. The Statute 20 Vic., cap. 40, sec. 18, enacted that no action for dower should be brought until one month's notice in writing, demanding the same, had been given by the claimant to the tenant of the freehold. The effect of that wholesome and just provision was, that a claimant could claim no damages for mesne profits or for detention of dower further back than the demand. This wholesome provision is repealed with the rest of the Act, by 32 Vic., cap. 7, and different provisions are made. By this Act it is enacted, that every action for dower shall be commenced by writ of summons in the form given in this Act. On every such writ shall be endorsed a notice addressed to the defendant to the effect following:—'You are served with this writ to the intent that you may enter an appearance, and denial that you are tenant of the lands mentioned in this writ, or that you may enter an appearance only; 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 against you the dower claimed with costs.'

"By the 7th section it is enacted that 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. Now, damages for detention of dower and mesne profits, or thirds, are two very distinct

things, and when we find the Legislature refer to the damages for detention only, we must, I think, conclude that this section has no reference to mesne profits. The language of the Statute of Merton is very different from this, and is as follows:—'Of widows, which, after the death of their husbands are deforced of their dowers, and cannot have their dowers or quarantine without plea, whosoever deforce them of their dowers or quarantine of the lands whereof their husbands died seised, and that the same widows, after, shall recover by plea, they that be convicted of such wrongful deforcement, shall yield damages to the said widows; that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows, by judgment of our Court, have recovered seisin of their dower, etc., and the deforcers, nevertheless, shall be amerced at the King's pleasure.'

"In Coke on Litt. Title Dower, sec. 361, it is shown that the value of the dower from the time of the death of the husband, is a thing distinct from damages for the detention thereof; for there it is said:—'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.' Many reported cases show this distinction, wherein questions have arisen as to what may be recovered under the head of, 'damages for detention of dower,' but it is unnecessary to refer to them, for the distinction is well settled, and the demandant claims the two as separate and distinct. The statute then, section 8, provides that:—'Any defendant named in a 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 individual demandant to dower, as stated in the writ.

"The 17th section then provides for this case, that, upon such an appearance being entered, 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 obtain a verdict she shall be entitled to costs, and to enter judgment of seisin of her dower against such defendant. Now, here it is to be noticed, that in this case, where the defendant admits the demandant's claim to dower, but denies that he is tenant of the freehold, no provision is made for the recovery of any damages. Then again, by the 16th section it is provided, that 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 or her attorney 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 seisin 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 of entering such judgment against the defendant. Now, clearly, there is no analogy between the provisions of this section and the provisions of the Statute of Merton; nay, on the contrary so different is the judgment of seisin

hereby authorized, from that referred to in the Statute of Merton, that upon judgment of seisin under this section, the demandant is deprived of those costs, which, upon a judgment of seisin under the Statute of Merton, she would be entitled to. Again the persons made chargeable with liability for damages, are those who deforce widows of their dower, and keep them out of such dower, until after a count in dower, they shall recover by plea, a judgment convicting the defendant of such deforcement. True it is, that the statute was held to extend to a recovery of judgment upon *nil dicit* to a count in dower, as well as on a plea; but the judgment referred to in the 16th Section of 32 Vic., cap. 7, bears no analogy to a judgment recovered in an action of dower, under the Statute of Merton, for under our statute there is no count under this section, and, therefore, there cannot be as, indeed there is not any plea or judgment by *nil dicit*, nor any recovery of a judgment in dower wherein, in the words of the Statute of Merton; the defendant can be said to be convicted of such wrongful deforcement, as should subject the deforcer to damages. The proceeding then to judgment, under the 16th section of 32 Vic., being in no sense a judgment recovered under the provisions of the Statute of Merton or at common law, or in any sense analagous to a judgment under the Statute of Merton, there is no authority for charging the defendant with any damages at all, and, therefore, the judgment recovered under section 16, of 32 Vic., is final and conclusive, and there is no action therefore, now pending, wherein any writ of enquiry or assessment of damages can be had; the writ of summons in dower has served its purpose, and the final and only judgment which can be entered in the action commenced thereby, is entered. That this is the true construction to put upon the statute, appears from the 18th section. That section provides that, '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 to the effect following: A. B. widow who was the wife of C. B. deceased, by her attorney, demands against the defendant, the third part of the land, (describing it) with the appurtenances 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 endowment in the said lands, from the day of , 18 , and she claims $.' Now, here it is to be observed, that it is only in the case of an appearance being entered, that any provision is made for there being a declaration, and that if damages are claimed, they must be claimed in a declaration filed upon an appearance only being entered, and that such damages can be claimed in the declaration only, if they have been claimed in the writ of summons, and that the damages so claimed, are to be for the detention only of her endowment; and, that it is not provided as in the Statute of Merton, that the damages so recoverable, shall be recovered from the death of the husband, but from a given day to be named, which seems reasonable to construe, to refer to a day from which the defendant, individually, was guilty of a detention, in fact, so as to exclude the construction contended for by analogy to the Statute of Merton, to make the grantee from the heir, liable for damages during the period that the heir was seised, although the heir himself, would not have been liable if the writ had been against him. But further, the 43rd section of 32 Vic., cap. 7, enacts that '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 writs and actions of dower, before the tenth day of August, A.D., 1850,' which law was

alone the Statute of Merton, what case there could well be, other than those provided for in the Act, I fail to see, but if there be any, then the Statute of Merton is to apply. It appears, therefore, to me, to be very clear, that a judgment for seisin of dower, as the judgment obtained by the demandant, was against the defendant under section 16, of 32 Vic., cap. 7, is absolutely final and conclusive, and that there is no provision of law in such a case, entitling a demandant to any damages of any nature or description, nor any mode of proceeding provided by law for ascertaining any such damages. If a demandant is still entitled to damages under the Statute of Merton, her proceedings would have to be taken as pointed out by the 43rd section; but, if she claims damages for detention under 32 Vic., cap. 7, she must declare under the 18th section and so proceed to judgment. In the case of damages being so claimed, the question will probably arise, whether the damages for detention referred to in 32 Vic., are the same damages as are referred to in the Statute of Merton, and, whether they are recoverable from the death of the husband, or from any other, and what time. In the present case, we simply determine that there is no question legally before us which we can adjudicate upon, as upon a judical proceeding whereupon any judgment can be entered of record, the demandant having taken judgment under the 16th section of the Act, which is final and conclusive."

13. Where a judgment of seisin of dower has been signed against two only of three defendants, one of whom had filed with his appearance, the acknowledgment and consent required by the statute, a declaration against the third who had appeared for damages, is not irregular (*z*).

14. In *Cameron* v. *Gilchrist* (*a*), Wilson, J., says, page

(*z*) *Cameron* v. *Gilchrist*, 7 P. R. 184; 43 U. C. R. 512.
(*a*) *Cameron* v. *Gilchrist*, 7 P. R. 184.

185, "Janet Gilchrist, although she did not appear, cannot, by such means, escape from the damages claimed, if she be liable to them. Nor can the Ontario Loan and Savings Company by acknowledging the demandant's right to dower, etc., avoid in my opinion, the claim for damages, if they are answerable for them; although, sitting in chambers, I must, of course, accept the decision of *Linfoot* v. *Duncombe*, to the contrary as a binding decision, * * But for that decision, I should have thought it very clear then, when damages were claimed, as well as the dower, that a defendant by not appearing, or by appearing and acknowledging, that he was tenant of the freehold, etc., could not avoid the liability for damages. The statute does not prevent the suit being carried on for damages in such a case, where the defendant acknowledges that he is tenant of the freehold, etc., the judgment against him of seisin, without costs, is only in case, that is, the final judgment, and no claim is made upon him for damages. To discharge him from damages, where he should pay them, by his acknowledging after suit brought, that he is tenant of the freehold, etc., after years of wrongful detention of the dower, and the unjust reception and appropriation of the rents and profits during all that time to his own use, is to enable him to commit a fraud of the very worst description, a fraud under the sanction of the law. The statute enables damages to be claimed and recovered as well as the dower; and the giving of the dower when it can no longer be withheld is not a satisfaction or bar, or extinction, or exclusion of the damages for the wrongful detention of the dower."

15. Where a summons under "The Dower Procedure Act," R. S. O., cap. 55, with the statutory notice endorsed under section 10, claiming damages, the defendant entered an appearance under section 20, with an acknowledgment, that he was tenant of the freehold, and consent that

demandant might have judgment for her dower, and take the necessary proceedings to have the same assigned to her. The demandant then served a declaration claiming dower as well as damages for its detention. It was held, that the declaration was bad, and must be set aside, the defendant having admitted her right to dower (*b*).

16. In *Harvey* v. *Pearsall* (*c*), Wilson, C. J., says : "We may dispose of this application without determining the points argued by Mr. Cassels, or giving an absolute opinion upon the case referred to of *Linfoot* v. *Duncombe* (*d*). The defendant, according to the statute, has admitted by his acknowledgment filed and served, that he is tenant of the freehold, and he has consented that the plaintiff shall have judgment for her dower, yet she has declared against him as one who is still denying her right to dower. That form is manifestly wrong. For why try a right which has been already confessed, and must appear to be so when the record is made up? That is all which we decide. The reason that the plaintiff has so declared, is that she may recover damages for the detention of her dower, which she has claimed, but which *Linfoot* v. *Duncombe*, has decided, she cannot recover, because the Dower Act, it is said, has provided no remedy in such a case. The statute gives a dowress a right to damages for the detention of her dower; and having that right, there must in my opinion be a remedy for it. If a count or record were framed according to the facts and pleadings, which would show her right to judgment of seisin, was admitted, praying an enquiry of the damages which she had claimed by her writ, and which the defendant had not answered, the question would be fairly presented, whether that part of her claim given her by the statute must not be determined in such a case as

(*b*) *Harvey* v. *Pearsall*, 31 U. C. C. P. 239.
(*c*) *Harvey* v. *Pearsall*, 31 U. C. C. P. 239.
(*d*) *Linfoot* v. *Duncombe*, 21 C. P. 484.

the present, in like manner, as if the defendant had denied, instead of confessing her right to dower. It appears to me strange, that a claim to dower and damages can be satisfied by giving the dower without the damages; and upon the ground, too, that although there is the right, there is not the remedy. I should desire to consider the case referred to before I could hold myself bound by it."

17. From these cases, it may with safety be said, that a defendant cannot by consenting to the plaintiff's having judgment for her dower, escape his liability for damages for the detention of such dower, and there is but little doubt, that upon a properly framed record as suggested in the judgment just quoted, such would be the decision of the Court.

18. The heir may as has been already noticed (*e*), save himself from damages, if he come in and acknowledge the action, and plead *tout temps prist*, *i.e.*, aver that he was at all times ready to render dower, if it had been demanded. If the demandant take issue upon it the damages will await the result of the issue. For this reason it is, that Lord Coke observes: "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 always been ready, and yet is to render dower, etc., 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 (*f*).

(*e*) *Ante*, pars. 5-8.

(*f*) Co. Litt. 32 b 334; Gilb. Dow. 375-376; Doct. and Studt. 141; Bro. Damages, pl. 52, 79; Bro. Dower, pl. 32; Gilb. Uses, 375; Park on Dower, 304.

19. When the husband dies seised, his heir succeeds to his estate by legal right; so that his entry and enjoyment of it being under a lawful title, he does no wrong in retaining the possession of the whole until he be demanded by the widow to assign, and deliver up to her a third part of it for her dower. Previously to such demand the widow's title to damages, under the Statute of Merton, is defective, for it only gives them to such widows who cannot obtain their dower *sine placito*, *i.e.*, without suit, after a prior demand. Lord Coke, therefore, recommends the widow to demand her dower before good testimony as soon after her husband's death as she is able (*g*), in order to obviate all doubt as to her title to recover damages and costs.

20. If, however, the widow has made no demand of dower prior to the suing out of her writ of dower, the heir may plead *tout temps prist*, and pray that she may not have damages; and if the plea be true the widow will lose the mesne profits and damages, from the death of her husband to the commencement of this suit, from which latter period to the execution of the writ of enquiry, she will be entitled to them (*h*). But if she has demanded her dower, then she ought to reply to the plea, stating the fact, and putting the question in dispute in issue (*i*).

21. But if the heir do not take advantage of the widow's neglect in demanding dower by a plea, he will lose the benefit of that circumstance (*j*); and in such event she will be entitled to mesne profits and damages from her husband's death, together with costs (*k*).

(*g*) Co. Litt. 32 b; 2 Saund. 44 d note; Scribner on Dower, vol. ii. p. 96.

(*h*) Barnes, 234; Bull. N. P. 117; 1 Rich. Prac. C. P. 509; 2 Saund. 44 d note.

(*i*) See Hagr. Co. Litt. 33 a, n (1); 13 Edw. IV. f. 7; 1 Lutw. 717; 2 Saund. 44 d note; Scribner on Dower, vol. ii. p. 96.

(*j*) *Dobson* v. *Dobson*, Ca. temp. Hardw. 19; *Kent* v. *Kent*, 2 Stra. 971.

(*k*) Bull. N. P. 117.

22. A demand of endowment, without an express refusal on the part of the tenant, will be sufficient to entitle the widow to damages and costs (*l*).

23. In *Corsellis* v. *Corsellis* (*m*), upon a trial at bar, the issue was, whether there was a demand of dower and refusal to entitle the plaintiff to damages. The plaintiff proved an actual demand of the heir, being of the age of fourteen years, and then in her custody; though by his father's will committed to another person. The infant said his guardian would not let him assign dower. But it was held, that dower was demandable of the heir, though under age, and that his guardian was but in the nature of a guardian in socage, and that the dower was not demandable of him, but of the heir, though not in the custody of the guardian; and that if the heir had entered upon the land to assign dower, and he would not be a trespasser upon the guardian, though the custody of the land was committed to such guardian during the infancy of the heir, and also that the neglect of the heir in not assigning dower, upon demand, though he did not actually refuse to do it, was such a refusal in law as to entitle the widow to damages (*n*).

24. The alienee of the heir cannot plead *tout temps prist*, because he was not in possession of the estate during all the period which elapsed since the husband's death, and, therefore, had not the power of assigning dower at all times during that period (*o*).

25. If the heir controvert the title of dower, he cannot, of course, have the benefit of the plea of *tout temps prist*;

(*l*) *Reid* v. *Foster*, 19 U. C. R. 298; *Cook* v. *Phillips*, 23 U. C. R. 69; *Corsellis* v. *Corsellis*, Bull. N. P. 117.

(*m*) *Corsellis* v. *Corsellis*, Bull. N. P. 117; 1 Cruise Dig. 169.

(*n*) Park on Dower, 303.

(*o*) Co. Litt. 33 a; 2 Bac. Abr. 392; Park on Dower, 305; 1 Roper, H. and W. 444-445. And see 1 Keb. 87.

and, therefore, whatever delay may have occurred, the widow will, if judgment be given in her favor, be entitled to damages from the death of her husband (*p*). The same rule applies where the heir omits to set up the widow's neglect to demand her dower (*q*). Lord Coke, indeed remarks, that, "some say that the demandant, in a writ of dower, that delayeth herself, shall not recover damages (*r*); but this seems to be no further true, than, as it may enable the heir to save himself of damages on the plea of *tout temps prist*. In *Dolson* v. *Dolson* (*s*), in error upon a judgment in dower, one of the errors assigned was, that damages were given *à morte viri*, whereas they ought only to have been given from the time of suing out the writ, since it did not appear there was any demand of dower *in pais*; and Co. Litt. 32, 33, was cited, that the demandant should take care to make demand as soon as possible, lest she lose the value of her dower, and that the heir does no wrong till a demand is made. But it was replied that it was incumbent on the tenants, would they have excused themselves from damages, to plead *tout temps prist*, as the words of the statute (*t*), expressly require; and upon this answer, the Court overruled the exception. And in *Kent* v. *Kent* (*u*), the same exception was overruled in a case where the writ was not brought till two years after the death of the husband.

26. Where the demandant, after the death of her husband, entered and continued in possession five years, and afterwards the heir entered, upon which she brought dower, it was agreed that the tenant need not plead *tout*

(*p*) Park on Dower, 304.

(*q*) Bull. N. P. 117; 1 Roper, H. and W. 445.

(*r*) Co. Litt. 32 b, and see Gilb. Dow. 375-376.

(*s*) *Dolson* v. *Dolson*, Ca. temp. Hardw. 19; 2 Barn. B. R. 180.

(*t*) *Quære*, what statute; Park on Dower, 305, note 1.

(*u*) *Kent* v. *Kent*, 2 Barn. B. R. 357.

temps prist, after his re-entry, for the time the demandant had occupied, was sufficient recompense for the damages (*v*).

27. Even where the heir pleads *tout temps prist* with success, the demandant is entitled to recover damages from the teste of the original, to the execution of the writ of enquiry (*w*).

28. Where the husband dies seised, the tenant, to save himself from damages, must plead *tout temps prist*, and the demandant may answer this by averring a demand, and refusal to assign dower. Unless the tenant does so plead, the widow recovers damages without setting forth or showing a demand in those cases in which the husband died seised (*x*).

29. The widow's residence on the premises, in the family, and at the expense of the heirs-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 (*y*).

30. 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, it was held that she was entitled to damages, to be computed from the decease of her husband, and not from the date of the demand only, and it was also held

(*v*) *Phillips* v. *Zimmerman*, 18 Gr. 224; Riche's Case, 3 Leon. 52; Dal. 100. But see *Belfield* v. *Rowse*, 4 Leon. 198, and *quære*.

(*w*) Barnes, 234; Bull. N. P. 117; Park on Dower, 303; 1 Roper, H. and W. 445.

(*x*) *Empey* v. *Loucks*, 8 U. C. R. 374; Hardw. 19; Park on Dower, 302.

(*y*) *Robinet* v. *Lewis*, Dra. Rep. 260. But see *Phillips* v. *Zimmerman*, 18 Gr. 224, and *Long* v. *Long*, 16 Gr. 239; S. C. 17 Gr. 251.

that dower may be demanded by another person, on behalf of the widow, and a demand in the presence of witnesses is not necessary (*z*).

31. Upon the question of damages against the alienee of the husband, Mr. Park says (*a*), "It seems, however, that although the husband does not die seised, the wife may become entitled to damages against the alienee by a demand and refusal of dower, but such damages will be recovered only from the time of the demand (*b*). On this point the books observe that, "she can lay no default in the feoffee till she demand her dower, upon the ground, and that the tenant be not there to assign it; or if he be there, that he will not assign it, for he that hath the possession of land, whereunto any woman hath title of dower, hath good authority, as against her, to take the profits till she require her dower" (*c*).

32. Mr. Roper remarks, in regard to this matter, as follows (*d*): "If, on the other hand, the husband did not die seised, having aliened the lands, she will not be entitled at law to mesne profits, damages, or costs, because such a case is not within the provisions of the Statutes of Merton and Gloucester, and by the common law, as we have seen, she was only entitled to recover one-third of the lands, and of their value from the time she obtained judgment for her dower." To this, Mr. Jacob appends the following note (*e*): "It is said in Jenkins (*f*), that where the husband does not die seised, if the widow demands her dower, and the tenant refuses, she shall recover damages from the

(*z*) *Watson* v. *Watson*, 20 Law J. Rep. (N. S.) C. P. 25; 10 C. B. Rep. 3.
(*a*) Park on Dower, 302.
(*b*) Jenk. Cent. 1 Ca. 85; Doct. and Stud. Dial. II. ch. 14.
(*c*) Doct. and Stud. Dial II ch. 14.
(*d*) 1 Roper, H. and W. 440.
(*e*) *Ibid.* note.
(*f*) Page 45.

time of the refusal; but, this dictum is not supported by the other authorities, and the case is certainly not within the Statute of Merton."

33. If the heir alien the lands after the husband's death, and the widow recover dower against the alienee, she will be entitled to mesne profits and damages against him, to be computed from her husband's death; and, it will be no excuse for him to say, that he has not been in possession of the premises during the whole of that period, because damages, including mesne profits, having been given to the widow when her husband died seised, she could only bring her writ of dower against the tenant of the freehold, which, in this case was the alienee of the heir (*g*).

34. Nominal damages may be given where there has been a demand, and a wrongful withholding by the husband, even where the husband did not die seised (*h*).

35. As the purchaser from the heir, cannot aver that he was in possession of the estate, during all the period which elapsed after the husband's death, and, therefore, is unable to show that he had the power of assigning dower at all times during that period, he is not permitted to avail himself of the plea of *tout temps prist* (*i*).

36. If the lands were leased for years before the marriage, the wife will recover dower, not according to the value of the land, but according to the rents (*j*); and it

(*g*) 1 Roper, H. and W. 440; *Belfield* v. *Rowse*, Co. Litt. 33 a; Mo. 80; 4 Leon. 198; Bull. N. P. 117; Stearn's Real Act, 312; Scribner on Dow. vol. ii. p. 670. See also *Bishoprick* v. *Pearce*, 12 U. C. R. 306; *Scratch.* v. *Jackson*, 26 U. C. R. 189.

(*h*) *Scratch* v. *Jackson*, 26 U. C. R. 189.

(*i*) Park on Dow. 305; 1 Roper, H. and W. 445; Co. Litt. 33 a; 2 Bac. Abr. 392. And see 1 Keb. 87.

(*j*) Hargr. Co. Litt. 32 b, 33 a, note (5); M. Winch. 80, in a case where lands were let for years, rendering rent, it is said, this doth save to the tenant damages; but it is in all probability a mistake of the reporter. It is obvious that if the widow was dowable of the rent, she is as much entitled to damages for the detainer of that, as if she were dowable of the land. Park on Dower, 306, note.

follows, that if the rent reserved, was nominal, no damages, or none but nominal damages can be recovered (*k*). In the case of *Hitchens* v. *Hitchens* (*l*), 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 executors should pay the same out of the rents and profits of his real estate; and when debts and legacies were paid, devised his real estate to his son, J. H., in tail, with remainder over, and shortly afterwards died; the executors enter on the real estate, J. H. married the plaintiff Sylvestra, and died in 1681, 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 they were carried too far back, and that she ought to have had damages, but, from the time of debts paid, and trusts performed (*m*).

37. No damages can be recovered under the Statute of Merton on a writ of right of dower (*n*), because damages can only be given for the detention of possession; and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done until the right is determined (*o*). So, if the heir, or his alienee, assign dower, and the widow accept thereof, she cannot, afterwards claim damages; because, having accepted the dower, which is the principal, she cannot afterwards sue for damages, which are only accessory (*p*).

(*k*) Chase's Case, 1 Bland Ch. 206-231.

(*l*) *Hitchens* v. *Hitchens*, 2 Vern. 403.

(*m*) Park, 306-7; Draper, 54-6.

(*n*) Co. Litt. 32 b; 1 Keb. 86, arg.

(*o*) 1 Cruise Dig. 169.

(*p*) Park on Dower, 309; Co. Litt. 33 a; 1 Cruise Dig. 170; Fitzh. N. B. 148 n; Gilb. Dow. 375.

38. The Statute of Merton, in giving damages, has left the method of ascertaining them, to the Court; and, in England, the usual practice is, unless the damages are admitted by the party, or ascertained by the jury who try the action, to grant a writ of enquiry (*q*); and, if judgment be given for the demandant by default, confession, or in any other way than by verdict, there must, of necessity, be a jury impannelled to assess the damages (*r*). In these cases a writ of enquiry of damages issues, commanding the Sheriff to enquire, whether the husband died seised; and, if he did, what value the lands are by the year, and how long it is since the husband died; and upon return of the inquisition, judgment is entered for the damages (*s*). And upon damages being adjudged, they shall be recovered against the tenant to the writ *in toto*, notwithstanding, there may have been several in receipt of the profits successively, since the death of the husband, and not against everyone for his time, as in cases of disseisin (*t*), for the Statute of Gloucester does not extend to this case (*u*).

39. Where the widow recovers in her suit, and the jury who try the case, pass upon the question of damages, their verdict should find the following particulars:—first, that the husband died seised; secondly, the yearly value of the lands or tenements; thirdly, the damages which she has sustained from the detention of her dower. But, if any of these requisites be imperfectly found, or are omitted by

(*q*) *Kent* v. *Kent*, 2 Barn. 442; Hargr. Co. Litt. 32 b, note (4). And see 2 Towns. Judg. 100-101, pl. 22-23; *Ibid*, 102, pl. 24.

(*r*) 1 Keb. 85, Marq. And see Rast. Ent. 238 a, 238 b.

(*s*) Rast. Ent. 238 a, 238 b; *Dennis* v. *Dennis*, 2 Saund. 331.

(*t*) See 1 Keb. 86, Marq.; *Belfield* v. *Rowse*, Mo. 80; N. Bendl. 153; Co. Litt. 33 a; *Brown* v. *Smith*, Bull. N. P. 117.

(*u*) Park on Dower, 307; Scribner on Dower, vol. ii. p. 674.

the jury, the defect may be remedied by the award of a writ of enquiry, as above stated (*v*).

40. In Ontario the commissioners appointed under the statute, have no authority to assess the damages, and damages are ordinarily found by the jury which tries the case, although they may be assessed by the Court (*w*), or referred to the Master (*x*).

41. The judgment for dower of a third part of the lands, by metes and bounds, being founded on the common law, and the award of damages on the Statute of Merton, are separate and distinct judgments. Hence, an act of the widow, which may deprive her of the benefit of the one, may not, in the least degree, prejudice her interest in the other (*y*). If, therefore, a widow release to the tenant damages *occasione detentionis dotis*, it will not bar her right to the mesne profits (*z*). And, upon the same principle, the first judgment of seisin, in favor of the widow, may be confirmed upon a writ of error, before the second judgment is given for damages (*a*); and the second judgment may be reversed without prejudice to the first, so that the judgment intended by the Statute of Merton, is not the first, but the second (*b*).

42. If the demandant die before the damages are ascertained, the right to them is entirely lost, and there can be no recovery by the executor. Nor does it make any differ-

(*v*) *Butler* v. *Ayres*, 1 Leon. 92. See *Barnett* v. *Barnett*, 16 S. and R. 51, 55.

(*w*) R. S. O. cap. 55, ss. 24, 25, 26.

(*x*) *Wallace* v. *Moore*, 18 Gr. 560.

(*y*) *Bishoprick* v. *Pearce*, 12 U. C. R. 306; 1 Roper, H. and W. 441.

(*z*) *Harvey* v. *Harvey*, T. Raym. 366; *Butler* v. *Ayres*, 1 Leon. 92.

(*a*) 1 Lev. 38.

(*b*) 2 Stra. 971-973; Hargr. Co. Litt. 32 b, note 4; 1 Roper, H. and W. 441; Park on Dower, 308; Scribner on Dower, vol. ii. p. 677-8; 1 Washb. R. P. 2nd Ed. 232-3. And see 2 Raym. 1385, arg.

ence in such case, that the tenant had entered into a recognizance, upon bringing a writ of error, to pay the damages and costs, if the judgment should be affirmed (*c*).

43. If the first judgment be merely that, the widow shall recover seisin, and which is done and executed; and the the tenant die before the second judgment is obtained for damages under the Statute of Merton, they are gone by his death, and no *scire facias* will lie against his heir to obtain a writ of enquiry of them, because they are considered a personal demand, and like damages in trespass, if they be not recovered during the life of the party, they die with him (*d*).

44. Yet, an instance may occur in which the tenants death will not deprive the wife of her right to damages. Thus, if her demand be against two tenants of the freehold, and she recover judgment for her dower, damages and costs, against both of them; if one of them die, the survivor will be answerable to the widow for the whole of the damages and costs, because both tenants are considered joint trespassers (*e*).

45. In Ontario, it is provided by statute (*f*), that 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. It has been held, in

(*c*) *Mordant* v. *Thorold*, Carth. 133; 1 Salk. 252; 1 Show. 97; 3 Mod. 281; 3 Lev. 275, Rep. temp. Holt. 305; Park on Dower, 309; Scribner on Dower, vol. ii. p. 678-9. But in equity a different rule prevails. See *post*, p.

(*d*) *Aleway* v. *Roberts*, 1 Sid 188; 1 Lev. 38; 1 Keb. 85, 171, 646, 711; *Whitehead* v. *Clinch*, 2 Murp. Law and Eq. 128; S.C. 2 Hay. 240; 1 Roper, H. and W. 442; Park on Dower, 308; Scribner on Dower, vol. ii. p. 680.

(*e*) *Kent* v. *Kent*, 2 Stra. 971; Ca. Temp. Hardw. 50; Ridgway, 21; 2 Barnard, 357, 386, 441; 1 Roper, H. and W. 442.

(*f*) R. S. O. cap. 108, sec. 16.

the United States, that an alienee of the husband, who receives the rents after the death of the latter, is regarded in equity as a trustee or bailiff to the extent of the widow's claim, and cannot defeat an action by her to recover her proportion of the amount so received by pleading the statute of limitations (*g*). But, if the widow be guilty of laches, and delay her proceeding for many years, without being able to assign a satisfactory reason therefor, her claim will be barred (*h*).

46. Mr. Scribner says (*i*): "Some difference of opinion has existed in England as to the extent of the widow's right to mesne profits in a Court of Equity." Upon this point, Mr. Roper remarks: "It has been said that mesne profits will be decreed to the widow in equity in instances only where she has demanded dower, in analogy to the rule of law, and the construction of the Statute of Merton; and a case of *Delver* v. *Hunter* (*j*), has been cited to that effect; as also to prove that there shall be no mesne profits decreed except where the husband dies seised of the lands, as required by the same statute. This doctrine, however, seems to be open to objection; for it is presumed that Courts of Equity do not in this instance proceed either upon the Statute of Merton, or with reference to any legal rule in decreeing to the widow mesne profits; the principle which they adopt appears to be the title of the widow to endowment immediately upon the death of her husband; this right drawing to it an account of the profits of her share, received by the person whose duty it was to have assigned dower, so that such person incurs a debt to the widow which he in his lifetime, or his representatives after

(*g*) *Sellman* v. *Bowen*, 8 Gill and J. 50.

(*h*) *Steiger* v. *Hillen*, 5 Gill and J. 121; *Kiddall* v. *Trimble*, 8 Gill, 207; *Chew* v. *Farmer's Bank*, 9 Gill, 361; Scribner on Dower, vol. ii. p. 681.

(*i*) Scribner on Dower, vol. ii. p. 685-6.

(*j*) *Delver* v. *Hunter*, Bunb. 57.

his death, is considered in equity as liable to discharge. In addition to this it may be remarked, that the tenant may probably be considered in equity as holding the widow's one-third of the estate, as her trustee or bailiff, from the death of her husband, and therefore answerable to her for his receipt of rents in respect of that proportion of the property. Under all the circumstances, and the favourable disposition of Courts of Equity to extend the rights of the widow beyond her title at law (*k*), it is conceived, notwithstanding the case of *Delver* v. *Hunter*, (reported in a book of little authority; and said by Lord Mansfield (*l*) to consist of very loose notes, and never intended to be published), that in respect to mesne profits in dower, the widow's right to an account of them in equity, may be enforced either against the heir or alienee, or their representatives, without regard to any previous demand by the widow for endowment, or to the circumstance whether her husband died seized, or not; the title to mesne profits being inseparably attached to the right of endowment of one-third part of the estate (*m*).

47. In a note appended to this text, Mr. Jacob, says (*n*): "The remarks attributed to Lord Hardwicke (*o*), and those of Lord Alvanley, in *Curtis* v. *Curtis* (*p*), imply that a dowress may have a larger relief, in respect of mesne profits in equity, than at law. But the passage in Atkins is, as observed (*q*), founded on a misconception of the right to damages at law. And the decision in the case of *Curtis* v. *Curtis*, turned only upon the ordinary principle of equity,

(k) 2 Bro. C. C. 629.
(*l*) 5 Burr. 2658.
(*m*) 1 Roper, H. and W. 453-454.
(*n*) 1 Roper, H. and W. 454, note.
(*o*) 3 Atk. 130.
(*p*) 2 Bro. C. C. 628.
(*q*) 2 Bro. C. C. 633.

that the decree is to be made according to the rights of the parties as they exist at the institution of the suit; the death of the parties during the suit did not therefore alter the right (*r*); and on this ground, Lord Alvanley distinguished the case from that of the heir dying before the filing of the bill (*s*). In *Mundy* v. *Mundy* (*t*), one of the questions made, was whether the widow was entitled in equity to the arrears, where the heir had always been willing to assign her dower. Lord Redesdale treats the right to arrears in equity as being the same as at law, observing that Courts of Equity, in assigning dower, consider themselves to be proceeding merely on a right which may be asserted in a court of common law (*u*). And upon the same principle, Courts of Equity, in deciding on the costs of suits for dower, have professed to be guided by analogy to the rules prevailing at law (*v*).

48. The following observations by Mr. Park are upon the same subject (*w*):—"It seems that Courts of Equity, following the analogy to damages under the Statute of Merton, will not entertain a bill for mesne profits, where the husband did not die seised" (*x*).

49. It is a general rule of Courts of Equity not to allow interest on arrears of dower, except under very particular circumstances, one of which is where the widow has been

(*r*) *Post*, pars. 52-53.

(*s*) 2 Bro. C. C. 632.

(*t*) 2 Ves. Jr. 122; 4 Bro. C. C. 294.

(*u*) Mitf. Pl. 122, 4th ed.

(*v*) See also *Lessee* v. *Armstrong*, 11 Gr. 517; *Phillips* v. *Zimmerman*, 18 Gr. 224.

(*w*) Park on Dower, 332.

(*x*) But see *Oliver* v. *Richardson*, 9 Ves. Jr. 222; Scribner on Dower, vol. ii. p. 687, *et seq.*

under the necessity of taking up money at interest for her maintenance whilst her dower was withholden (*y*).

50. An order for maintenance *pendente lite* will not be made in behalf of a widow on her bill for dower (*z*). But in consideration of the fact, that she requires the profits of her dower for her immediate support, if her claim form an ingredient only, in the suit, and several matters are referred to a master to enquire into, and make a general report, the Court will not delay the payment of arrears of the widow's dower until the general report is made, but will direct the master to make an immediate separate report of what is due to her for arrears, in order that she may receive them for her maintenance. This was accordingly done in *Eccleston* v. *Berkley* (*a*), where an account was directed to the master in regard to several encumbrances made by the husband after the marriage upon the dowable estate. Lord Hardwicke, upon the application of the widow, directed the master to make a separate report of what was due to her in respect of dower, she being entitled to one-third of the rents, paramount to the claims of the encumbrancers (*b*).

51. At law, mesne profits, under the term "damages," in the Statute of Merton, are lost by the death of either the plaintiff or the defendant, before they are assessed and ascertained (*c*). But the rule is otherwise in equity. That Court has been more liberal to the widow, from the

(*y*) 1 Bright, H. and W. 428, pl. 22; 1 Roper, H. and W. 457-459, note; 2 Bro. C. C. 629; *Tew* v. *The Earl of Winterton*, 3 Bro. C. C. 495; S. C. 1 Ves. Jr. 451; *Knight* v. *McLean*, 3 Bro. C. C. 496; *Mellish* v. *Mellish*, 14 Ves. Jr. 516; 2 Ves. Sr. 662. See 2 Ves. Jr. 167; *Anderson* v. *Dwyer*, 1 Sch. and Lef. 303; *Burton* v. *Todd*, 1 Swan, 255. See also Park on Dower. 332; Scribner on Dower, vol. ii. p. 692-4; 2 Crabb R. P. 190; 2 Dan. Ch. Pr. 1344; *Wakefield* v. *Childs*, 1 Fonbl. 22.

(*z*) *Rockwell* v. *Morgan*, 2 Beasl. Ch. 119.

(*a*) *Eccleston* v. *Berley*, Ridg. La temp. Hardw. 253.

(*b*) 1 Roper, H. and W. 456; Crabb, R. P. 190; Scribner on Dower, vol. ii. p. 695.

(*c*) *Ante*.

consideration that the profits of a third part of her husband's real estate are her principle, and sometimes her only means of subsistence from the time of his death. It is, therefore, the course of the Court to assign to her dower, and to give to her an account of the mesne profits, provided, that at the time of the bill filed the right to damages was not gone, and not to permit her title to them to be defeated by the death of the tenant, *pendente lite*; upon the principle that it would be unjust if the defendant's denial of her right of dower, and the accident of his death before the establishment of it, should be allowed to place her in a worse situation than if he had thrown no impediment in her way, and had fairly and candidly admitted her claim (*d*).

52. In Ontario it has been held that where the plaintiff, in an action of dower, recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question, she must proceed against the devisee by *scire facias*, and not by suggestion or revivor (*e*).

53. In the English Equity Courts the rule is well established, that the omission to obtain an actual assignment of dower, will not affect the right of the widow while living, to obtain payment of mesne profits in equity, nor deprive her personal representative of them in the event of her death (*f*). The want of a formal assignment of dower,

(*d*) *Curtis* v. *Curtis*, 2 Bro. C. C. 620; *Dormer* v. *Fortescue*, 3 Atk. 130; 1 Roper, H. and W. 452; Park on Dower, 330; 2 Crabb, R. P. 189; 2 Dan. Ch. Pr. 1344; Adam's Eq. 234; 1 Story's Eq. Juris. 625; Scribner on Dower, vol. ii. p. 696-8. See Lord Redes, 122. Mr. Park insists, that it is not necessary the bill should be filed in the lifetime of the heir to entitle the widow to a decree for mesne profits. See his comments upon the observations of Lord Alvanley, in *Curtis* v. *Curtis*. Park on Dower, 330.

(*e*) *Davis* v. *Dennison*, 8 P. R. 7.

(*f*) *Wakefield* v. *Childs*, 1 Fonbl. Eq. 22, note; *Lindsay* v. *Gibbon*, cited 3 Bro. C. C. 495; 1 Story's Eq. Juris. 625.

said Lord Cowper, in *Hamilton* v. *Mohun* (*g*), is nothing in equity, since the widow's right in conscience, is the same as if it had been made. His Lordship, therefore, in that case, decreed to the widow in a suit instituted against her by the heir, for an account of the profits of the dowable estate of which she had been in possession as his guardian, an allowance of one-third of them in respect of her right to dower. That case was followed by Lord Hardwicke, in *Graham* v. *Graham* (*h*), a case in which the widow was the plaintiff, who being a trustee of the dowable estate for her son, and having received the profits, and being, therefore, accountable to him for them, claimed an allowance for her dower in rendering the amounts; and his Lordship, not only allowed to her the amount of the arrears, but also secured to her the future payment of her dower (*i*).

(*g*) *Hamilton* v. *Mohun*, 1 P. Wms. 118-122.

(*h*) *Graham* v. *Graham*, 1 Ves. Sr. 262.

(*i*) 1 Roper, H. and W. 455; Park on Dower, 330; Scribner on Dower, vol. ii. p. 697. See *Tompkins* v. *Forder*, 4 Paige, 448; *Evertson* v. *Tappen*, 5 John. Ch. 497; *Mathers* v. *Bennett*, 1 Foster (N. H.) 204.

CHAPTER XXXVII.

COSTS IN ACTIONS FOR DOWER.

1. *The Statute of Gloucester.*

2-8. *Demand of dower in relation to costs.*

9. *The Statute* 24 *Vic. cap.* 40, *sec.* 1.

10-19. *The present statutory rule as to costs.*

20. *No demand now necessary before action to recover damages or costs.*

21-22. *The rule in equity as to costs.*

23. *Dowress sometimes entitled to costs, though she fails in her contention.*

24. *Security for costs in actions of dower.*

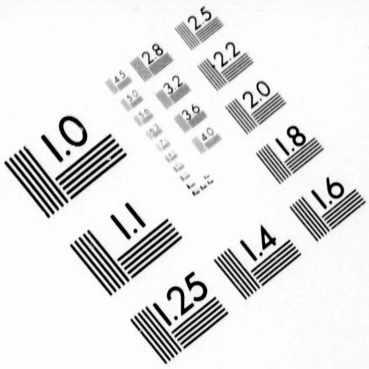
1. If damages are obtained upon a verdict in dower, the Statute of Gloucester gives the demandant costs (*a*), but if no damages are given, the demandant, although she obtained judgment for her dower, must pay her own costs (*b*). But, even when damages are not recovered, she is entitled as against the heir or his feoffee to costs, whenever her dower has been assigned to her and set out, and this, though the heir had pleaded *tout temps prist*, for she has the right to the mesne value and damages, from the commencement of her suit until the obtaining the writ of enquiry (*c*).

(*a*) 6 Ed. 1 cap. 25.

(*b*) Park on Dower, 310.

(*c*) Bac. Abr. Dow. D. 2; *Bishoprick* v. *Pearce*, 12 U. C. R. 312.





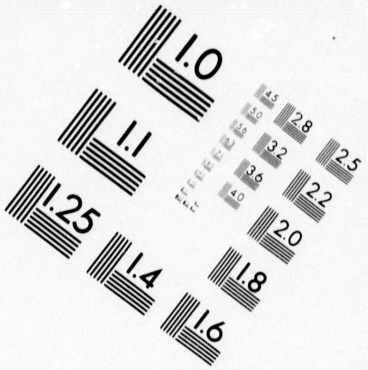
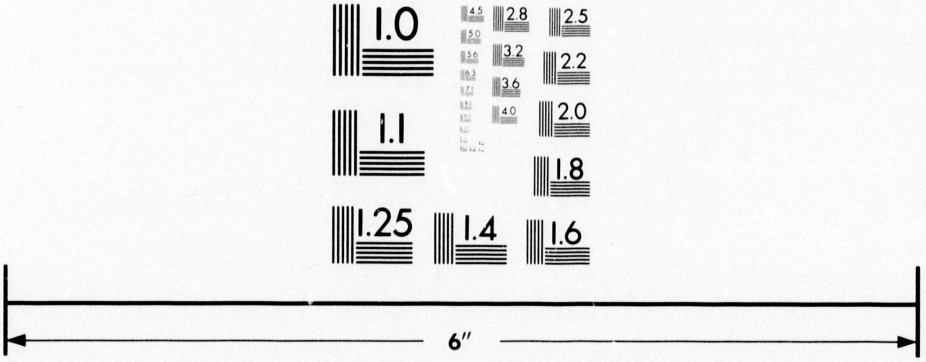
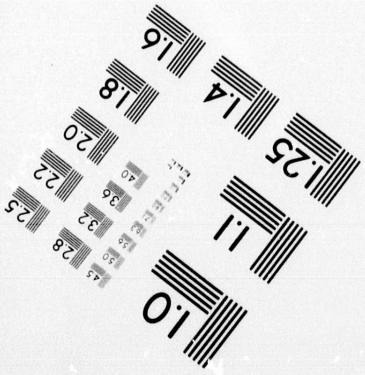
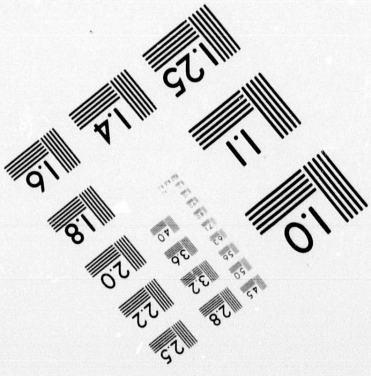


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2. In Ontario, it was enacted by statute (*d*), that: "In case it appeared upon 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 should be allowed to the demandant, whether damages were recoverable or not, in the same manner as costs are allowed to a plaintiff or defendant in personal actions; but, if it appeared on the trial, that the defendant offered to assign the dower demanded before action brought, the demandant should not recover costs."

3. In *Bishoprick* v. *Pearce* (*e*), Draper, J., said, page 313: "The statute gives no new right as to costs where damages are recoverable; for, there, without the aid of this statute, she would recover costs, and the question then would rather appear to be whether any condition not existing before—*ex. gr.*, making a demand in writing a month before bringing her action, is imposed on her as necessary to enable her to recover costs, where she is already entitled to damages. I do not read our statute as diminishing any previous right of the demandant to costs, or as any otherwise intended, than to give a right to costs, subject to the provisions in cases where that right did not previously exist. Upon any issue, therefore, merely affecting the right to damages where costs would follow independently of this statute, it seems to me the statute has no operation." In the same case, Robinson, C.J., said, page 309: "It appears to me, that what the Legislature meant by the provisions referred to, was, that the demandant in dower should not have costs from the tenant except where the tenant had denied the right to dower, or at least had

(*d*) 13 and 14 Vic. cap. 58, sec. 5; C. S. U. C. cap. 28, sec. 7.

(*e*) *Bishoprick* v. *Pearce*, 12 U. C. R. 306. See also *Scratch* v. *Jackson*, 26 U. C. R. 189, 194.

declined or omitted upon written demand made, to acknowledge it."

4. In *Ryckman* v. *Ryckman* (*f*), Burns, J., said, page 270: "My brother Draper seems to have thought, that the heir would be subject to costs where damages were assessed, even though he succeeded on the plea of *tout temps prist*, under the operation of the Statute of Gloucester. I am not prepared to assent to that proposition. It was not necessary to determine that point in *Bishoprick* v. *Pearce*, nor is it necessary to do so in this case."

5. In *Humphries* v. *Barnett* (*g*), Robinson, C.J., said: "I think * * * that the effect of 13 and 14 Vic., cap. 58, sec. 5, is to give or withhold costs, according as the proof may be of a demand of dower, having been served as required by that Act, and according as it may or may not appear, that the tenant offered to assign dower before action brought, and this, without regard to whether damages were recovered or not."

6. It was held that where the tenant has allowed judgment to go by default, and the demandant has entered a suggestion of demand, before action brought, to which the tenant makes no answer, and a *venire* is awarded on which the jury finds, that such demand was made, this is a trial within section 5, of 13 and 14 Vic., cap. 58, and, therefore, the demandant is entitled to costs (*h*).

7. Where judgment was signed in default of plea to a declaration, which averred a demand of dower, one month before action, and that the action was brought in less than one year from such demand; but no affidavit of service of

(*f*) *Ryckman* v. *Ryckman*, 15 U. C. R. 266.

(*g*) *Humphries* v. *Barnett*, 16 U. C. R. 463. See also *Quin* v. *McKibbin*, 12 U. C. R. 323.

(*h*) *Anderson* v. *Marriott*, 14 U. C. R. 161.

the demand was produced to the master on taxation. An offer to assign dower was made before action brought; it was held, that the demandant was entitled to costs, and that the judgment was regular. The declaration is a proper place for averring the necessary demand of dower, and where it does contain it, the averment is admitted by a judgment by default (*i*).

8. Where a demand was averred in the declaration, and judgment was allowed to go by default, costs may be recovered (*j*).

9. The next statute referring to the question of costs was 24 Vic., cap. 40, sec. 1, which enacted that, "Whenever a widow's right to dower shall have been established in an action for that purpose, she shall be entitled to a writ of assignment."

Section 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. * * * And in all other cases all such costs shall be in the discretion of the Court."

Section 18 provided that no action should be brought until one month after demand had been made. Where a declaration alleged demand, and judgment was signed in default of plea, for seisin and costs, the judgment was held to be regular, though the tenant had offered to assign dower before action brought (*k*).

(*i*) *Gilleland* v. *Reid*, 5 P. R. 96.

(*j*) *Street* v. *Rowe*, 8 U. C. C. P. 213; *Harris* v. *Morden*, 17 U. C. R. 278.

(*k*) *Gilleland* v. *Reid*, 5 P. R. 76; *Cook* v. *Phillips*, 23 U. C. R. 69; *White* v. *Grimshawe*, 23 U. C. R. 75; *Scratch* v. *Jackson*, 23 U. C. R. 598, and 26 U. C. R. 189; *Harris* v. *Morden*, 17 U. C. R. 278; *Street* v. *Rowe*, 8 U. C. C. P. 213; *Humphries* v. *Barnett*, 16 U. C. R. 463; *Bishoprick* v. *Pearce*, 12 U. C. R. 306; *Quin* v. *McKibbin*, 12 U. C. R. 323; *Ryckman* v. *Ryckman*, 15 U. C. R. 266.

10. The R. S. O., cap. 55, now regulates the practice as to costs. Section 3 provides that the tenant of the freehold may at any time before action commenced, serve upon a dowress a notice in writing, that he is willing to assign her dower in the land, (describing it), out of which she is entitled to dower, and may thereafter apply to one of the Superior Courts, or to a Judge thereof, for a rule or order directing that a writ shall issue for the assignment of dower; and a writ therefor, may thereupon issue, and the like proceedings may be had thereon, as upon a writ sued out after judgment in an action (*l*).

11. Section 4 provides, that a Court or Judge granting a rule or order under the preceding section, may make such order as to the costs of the proceedings as appears just (*m*).

12. Section 15 provides. In case of non-appearance by the defendant, if the plaintiff files the writ, and an affidavit of personal service thereof, or a rule of Court, or Judge's order for leave to proceed, as if personal service had been affected, the plaintiff may enter judgment of seisin forthwith, and sue out a writ of assignment of dower; but she shall not be entitled to tax, or recover the costs of suit, or of entering such judgment against the defendant, unless the Court, or a Judge, so orders (*n*).

13. Section 20 provides, that: "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 plaintiff may have judgment for her dower therein, and may take the proceedings authorized by this act to

(*l*) 37 Vic. cap. 7, sec. 43.
(*m*) 37 Vic. cap. 7, sec. 44.
(*n*) 37 Vic. cap. 7, sec. 41.

have the same assigned to her, unless the parties otherwise agree, and he shall forthwith serve the plaintiff, or her attorney, 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 where the defendant so admits the right to recover, the plaintiff may enter judgment of seisin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified; but shall not be entitled to tax, or recover the costs of suit, or of entering such judgment against the defendant (*o*).

14. Section 21 provides, that: "In case the defendant has filed and served an acknowledgment and consent under the preceding section, and the plaintiff does not within three months, thereafter, sue out and cause to be executed a writ of assignment of dower, the defendant may by leave of the Court, or a Judge, sue out such writ; and the writ shall be as nearly as may be in the same form as a writ sued out by the plaintiff, and the like proceedings shall be had thereon (*p*).

15. Section 22 provides, that: "The Court, or Judge, granting a rule or order under the preceding section; may make such order as to the costs of the proceedings as appears just (*q*).

16. Section 23 provides, that: "In case an appearance is entered with a denial by the defendant, that he is tenant of the freehold, the plaintiff may at once, and without further pleadings, take issue on that denial, and make up a record of the issue setting out the writ, the appearance and denial, and the issue thereon, and may give notice of trial,

(*o*) 32 Vic. cap. 7, sec. 16.
(*p*) 37 Vic. cap. 7, sec. 42.
(*q*) 37 Vic. cap. 7, sec. 44.

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 seisin of her dower as against such defendant (*r*).

17. Section 29 provides, that: "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 with damages, where damages have been adjudged, may be sued out and executed as in personal actions (*s*).

18. Section 43 provides, that: "The commissioners shall be entitled to receive from the plaintiff 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 one hundred words for drawing up their report, and ten cents for every one hundred words of each copy furnished by them to either party (*t*).

19. Section 44 provides, that: "The plaintiff shall pay the costs of suing out, and the costs of the commissioners in executing the writ of assignment of dower, and making the report thereof; but each party shall pay his own costs of witnesses, or of attorney, or counsel, attending before the said commissioners (*u*).

20. It has been held, that under the existing law, no demand is necessary before action to recover damages or costs (*v*).

(*r*) 32 Vic. cap. 7, sec. 17.
(*s*) 32 Vic. cap. 7, sec. 25.
(*t*) 32 Vic. cap. 7, sec. 39.
(*u*) 32 Vic. cap. 7, sec. 40.
(*v*) *Grieve* v. *Woodruff*, 1 App. R. 617.

21. Apart from the statutes, the rule in equity is, that if the bill is simply for dower, and the title is admitted, no costs will be given (*w*), but where the defendant makes an unreasonable defence and fails, or vexatiously, and without just pretence, keeps the widow out of her dower, he will be made to pay the costs (*x*).

22. In *Grieve* v. *Woodruff*, *supra*, Proudfoot, V.C., says: "The costs in dower suits are generally regulated by the practice in such cases at law, and where no vexatious defence is raised, the plaintiff gets no costs. The practice at law is governed by the Dower Act of 1868, (32 Vic., cap. 7). The 16th section enacts that a defendant may file an appearance and acknowledgment, that he is tenant of the freehold together with his consent, that the demandant may have judgment for her dower, etc., and in every such case the demandant may enter judgment, etc., but she shall not be entitled to tax or recover costs against the defendant. The 25th section gives plaintiff costs, unless where in the Act there is an express declaration to the contrary. The costs of the assignment are provided for by the 40th section. The defendant's answer in effect, admits the plaintiff's title to dower; that defendant is tenant of the freehold; that he is willing that the plaintiff should have her dower,

(*w*) *Craig* v. *Templeton*, 8 Gr. 483; *Thorpe* v. *Richards*, 15 Gr. 403; *Lossee* v. *Armstrong*, 11 Gr. 517; *Grieve* v. *Woodruff*, 1 App. R. 617; Beames on Costs, 35; *Lucas* v. *Calcraft*, 1 Bro. C. C. 134; 2 Dick. 594; Mitf. Plead. 983, 3rd ed.; *Curtis* v. *Curtis*, 2 Bro. C. C. 632; *Smith* v. *Spencer*, 2 Juris. N. S. 778; *Hagen* v. *Thursber*, 4 John. Ch. 604; *Shaine* v. *Perine*, 5 John. Ch. 482; *Hale* v. *James*, 6 John. Ch. 258; *Russel* v. *Austin*, 1 Paige, 192.

(*x*) *Meggot* v. *Meggot*, Seton's Decrees, 261; *Outhwaite* v. *Outhwaite*, Beames' on Costs, 22 n; *Oliver* v. *Richardson*, 9 Ves. 222; *Mundy* v. *Mundy*, 2 Ves. Jr. 122; *Bamford* v. *Bamford*, 5 Hare, 203; *Fry* v. *Noble*, 20 Beav. 598-605; S. C. 7 Deg. M. and G. 687; *Lucas* v. *Calcraft*, 1 Bro. C. C. 134; *Worgan* v. *Ryder*, 1 V. and B. 20; *Curtis* v. *Curtis*, 2 Bro. C. C. 632; *Craig* v. *Templeton*, 8 Gr. 483; *Thorpe* v. *Richards*, 15 Gr. 403; *Lossee* v. *Armstrong*, 11 Gr. 517; *Grieve* v. *Woodruff*, 1 App. R. 617. See also *Russel* v. *Austin*, 1 Paige, 192; 1 Roper, H. and W. 456; Park on Dower, 332; *Hale* v. *James*, 6 John. Ch. 258; Scribner on Dower, vol. ii. p. 162.

and consents to her having it. And, had the answer stopped there, the plaintiff would not have been entitled to costs under or by analogy to the 16th section of the Dower Act. But by the 8th section of his answer the defendant submits, that the plaintiff should have taken the proceedings to obtain an assignment of her dower in the manner and form provided by the Dower Act, and claims the same benefit as if he had formally demurred to the bill. Whether the plaintiff proceeded under the Dower Act, or by bill in Chancery, was a matter of the utmost indifference to the defendant, for so long as he admitted her title and consented to her getting her dower, he would be liable to no costs except such of the costs of the assignment as he is subjected to by the 40th section. The only reason I can imagine, therefore, for this contention, was to harass the plaintiff with a vexatious cavil, which might injure the plaintiff, but could be of no service to him. In *Bamford* v. *Bamford* (*y*), the defendant denied the title of plaintiff and failed, and was exempted from costs. Wigram, V.C., says: 'On a bill to assign dower the rule is, that no costs shall be given on either side; but, if the defendant adds another case as by disputing the title of the plaintiff, denying the marriage, or the seisin of the husband as in this case, or sets up any other ground of defence on which he fails, he may be liable to pay the costs of the suit occasioned by that unsuccessful defence.' The defendants there had been misled by information obtained from the office of the Secretary of State, and on that ground were not made to pay the costs. In *Fry* v. *Noble* (*z*), the defendant contested the right to dower under the construction of the Dower Acts. The plaintiff was allowed her costs. The Master of the Rolls says: 'This is not, in fact, one of the cases in which upon an undisputed question, the plaintiff comes merely for the

(*y*) *Bamford* v. *Bamford*, 5 Hare, 203.
(*z*) *Fry* v. *Noble*, 20 Beav. 598, 605.

purpose of having partition, or the dowable lands set out by metes and bounds; but, it is in truth a disputed right to dower, resisted upon grounds which failed, though I admit the question was one of considerable nicety, and justified the defendant in contesting the plaintiff's right. But, I repeat the observation which Lord Cottenham frequently made, that the mere fact of a case being one of difficulty, is not a sufficient ground for saying, that the person who is in the right shall not recover what he claims, together with the costs, to which he has been subjected to in obtaining it.' And, notwithstanding, that the conduct of the defendant had been as proper as it was possible to be, the plaintiff got her costs and this decree was affirmed by the Lord Justice on rehearing (*a*). In *Craig* v. *Templeton* (*b*), the decree was made without costs where the defendant contested the right to dower out of unpatented lands. Esten, V.C., saying, that a defendant will be made to pay costs, if he fail in an unreasonable defence. But, as he had not offered a vexatious opposition to the plaintiff's claim, he was not made to pay costs. The principle acted on in *Fry* v. *Noble*, *supra*, would have entitled the plaintiff to her costs in *Craig* v. *Templeton*. In *Lossee* v. *Armstrong* (*c*), the defendant made no defence. In *Lucas* v. *Calcraft* (*d*), Lord Thurlow says, that: 'In cases where there is an apportionment of dower by commission, not by writ, costs are not to be given unless previous questions are raised in litigating of which the party is vexatious.' And *Worgan* v. *Ryder* (*e*), is to the same effect. I apprehend that the jurisdiction of equity in cases of dower, has not been ousted by the Dower Act. But that is a subject the defendant has chosen to litigate, and without any conceivable benefit to himself, has compelled the

(*a*) *Fry* v. *Noble*, 7, Deg. M. and G. 687.
(*b*) *Craig* v. *Templeton*, 8 Gr. 483, 485.
(*c*) *Lossee* v. *Armstrong*, 11 Gr. 518.
(*d*) *Lucas* v. *Calcraft*, 1 Bro. C. C. 134.
(*e* *Worgan* v. *Ryder*, 1 V. and B. 20.)

plaintiff to maintain her right. It is quite immaterial whether the costs have been increased by the proceedings or not. In most of the cases the costs were not increased by the defence. But the defence itself is the objection. I think this defence unwarrantable and vexatious, and that the defendant should enjoy the pleasure of settling the law on the subject, and paying the costs of doing so."

23. A dowress is, under certain circumstances, entitled to her costs, although she fails in her contention. Where a widow insisted on her right to dower, as well as to the bequests made by the will, the Court allowed her costs although unsuccessful in such contention; the question having arisen from the terms of the will, dower not having been in terms excluded, and it was held to be excluded on extrinsic evidence (*f*). 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 (*g*).

24. Security for costs may be obtained in an action of dower (*h*).

(*f*) *Becker* v. *Hammond*, 12 Gr. 485.
(*g*) *Harris* v. *Harris*, 11 W. R. 62; 7 L. T. N. S. 411.
(*h*) *Nolan* v. *Reid*, 1 Pr. 264.

CHAPTER XXXVIII.

PLEADING AND PRACTICE IN ACTIONS OF DOWER.

1. *Governed by Judicature Act and by R. S. O., cap. 55.*
2. *R. S. O., cap. 55, not altogether superseded by the Judicature Act.*
3-4. *How action to be commenced.*
5. *Endorsements in actions of dower.*
6. *Service of writ in case of vacant possession.*
7. *Service of appearance on plaintiff where defendant does not require delivery of statement of claim.*
8-9. *Limited appearance.*
10. *Limitation of defence as to amount claimed only.*
11. *Judgment in default of appearance, or of limited appearance.*
12. *Assessment of damages where judgment has been entered for the land.*
13. *Judgment where defence applies only to part of claim.*
14. *Delivery of statement of claim.*
15. *Statement of claim may be delivered with writ.*
16. *Statement of defence.*
17. *Delivery of reply.*
18. *When pleading closed.*
19-20. *Default where claim for land and damages.*
21-23. *Execution.*
24-25. *Writ of possession.*
26. *Costs to be in discretion of Court, except in certain cases.*
27-29. *Pleas in abatement.*
30-51. *Pleas in bar.*
52. *Irregular to style parties demandant and respondent.*
53. *When demandant not entitled to inspection.*
54. *Infant liable for costs.*
55-56. *Plea of "alien ne."*
57. *Exact number of acres of which dower demanded, not material.*
58-62. *Points of practice.*
63. *What sufficient plea of devise in lieu of dower.*
64. *Plea of reference to arbitrators.*
65. *Reply to plea of "ne unques accouple," etc.*
66. *Plea of "ne unques accouple" admits the seisin.*
67-69. *What declaration and plea should contain.*

70. *Master's discretion as to mode of vouching accounts.*
71. *Widow's claim where land purchased by Railway Co.*
72. *When widow made defendant as being entitled to dower, what should be alleged.*
73-78. *The judgment—Mortgage and administration suits.*
79. *Reference to Master as to intention to bar dower when deed signed but no bar inserted.*
80. *Dower an exception to rule, that to sustain bill for account there must be mutual demands.*
81. *In ejectment, widow may set up counter claim for dower.*
82. *What sufficient allegation of bar by statute limitations.*
83-87. *Plea of purchase for value without notice.*
88-90. *Proof that defendant tenant of freehold, etc.*
91-97. *Parties to actions of dower.*

---

1. The pleading and practice in actions of dower, are now regulated by, "The Ontario Judicature Act, 1881" (*a*); and by R. S. O., cap. 55, wherever the new procedure does not prescribe the proceedings appropriate to such actions.

2. Although in the R. S. O., cap. 55, a special form of declaration is given, that is only because of the special allegations incidental to the peculiar nature of the action, and the subsequent proceedings are by section 26 of the same statute, directed to be in the usual forms. There can be little doubt, however, that the whole of the statute referred to is not superseded by the Judicature Act. For instance, the sections referring to damages and to the assignment of dower (*b*), and to cases where an action of dower is not maintainable (*c*), and to assignments of dower by consent (*d*), would seem to be unaffected by the Judicature Act (*e*).

3. Order 1, rule 1, provides that all actions which have hitherto been commenced by writ in the Superior Courts of

(*a*) 44 Vic. cap. 5.
(*b*) Sec. 28, *et seq*,
(*c*) Sec. 2.
(*d*) Secs. 3, 4, 5.
(*e*) Parts of secs. 7, 9 and 20 would also seem to be unaffected.

Common Law, and all suits which have hitherto been commenced by bill or information in the Court of Chancery, shall be instituted in the High Court of Justice by a proceeding to be called an action.

4. Order 2, rule 1, provides that every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and specifying the Division of the High Court to which the action is assigned.

5. In an action of dower the endorsement would be:—"The plaintiffs claim is for dower out of lot No. (or describing the property otherwise with reasonable certainty). And take notice that the plaintiff claims damages for the detention of her dower from the day of ."

6. Order 6, rule 11, provides that service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling house, or other conspicuous part of the property.

7. Order 8, rule 6, provides that in case a defendant does not require the plaintiff to deliver a statement of claim he shall so state in his memorandum of appearance, and in that case shall serve a copy of such appearance on the plaintiff.

8. Order 8, rule 17, provides that any person appearing to a writ of summons for the recovery of land, shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance; or in a notice intituled in the cause, and signed by him or his

solicitor, such notice to be served within four days after appearance upon the solicitor whose name is endorsed on the writ, if any; and if none, then filed in the proper office; and an appearance where the defence is not so limited, shall be deemed an appearance to defend for the whole.

9. Order 8, rule 18, provides for the form of such notice.

10. Order 8, rule 19, provides that any person appearing to a writ of summons in other cases, may limit his defence to the question of the amount to which the plaintiff is entitled, and in that case may in his appearance, or by notice served within four days thereafter, state that he disputes only the amount claimed by the plaintiff; and he need not file any further defence for the purpose of disputing such amount; and the plaintiff is to proceed as if the defendant had filed a defence disputing the amount of the claim.

11. Order 9, rule 8, provides that in case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered, but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

12. Order 9, rule 9, provides that where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding rule mentioned, for the land; and may proceed as in the other preceding rules of this order, as to such other claim so endorsed.

13. Order 10, rule 4, provides that in any case if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied, or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

14. Order 15, rule 2, provides that unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of claim, the plaintiff shall within three months from the time of the defendant's entering his appearance (*f*), deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled.

15. Order 17, rule 1, provides that the plaintiff may, if he thinks fit, deliver a statement of claim with the writ of summons, or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided, that in no case where a defendant has appeared shall a statement be delivered more than three months after the appearance has been entered, unless otherwise ordered by the Court or a Judge.

16. Order 18, rule 1, provides that where a statement of claim is delivered to a defendant he shall deliver his

(*f*) Order XVII., Rule 1.

defence within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge.

17. Order 20, rule 1, provides that a plaintiff shall deliver his reply, if any, within three weeks after the defence, or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge.

18. Order 21 provides that as soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto, or as soon as the time for amending the pleadings under these rules or under any order made in the action, or for delivering a reply or subsequent pleading, or demurrer, has expired the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party.

19. Order 25, rule 7, provides that in an action for the recovery of land, if the defendant makes default as mentioned in rule two, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the lands with his costs.

20. Order 25, rule 8, provides that where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, if the defendant makes default as mentioned in rule two, or if there be more than one defendant, and some, or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in rules four and five.

21. Order 38, rule 1, provides that a judgment for the recovery by, or payment to, any person of money may be

enforced by any of the modes by which a judgment or decree, for the payment of money, of any of the Superior Courts, might have been enforced at the time of the passing of the said Act.

22. Order 38, rule 3, provides that a judgment for the recovery, or for the delivery of the possession of land may be enforced by writ of possession.

23. Order 38, rule 14, provides that every person to whom any sum of money or any costs shall be payable under a judgment, shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fieri facias*, to enforce payment thereof, subject nevertheless as follows:—

(*a*) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b*) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the period hereinbefore prescribed.

24. Rule 2 of order 42, provides that where by any judgment any person therein named is directed to deliver up possession of any lands to some other person on, or at any specified time after, being served with the judgment, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession, on filing an affidavit showing due service of such judgment, and that the same has not been obeyed.

25. Rule 3 of order 42, provides that a writ of possession shall have the effect of a writ of assistance as well as a writ of *habere facias possessionem*.

26. Rule 1 of order 50, provides that subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person, of any right to costs out of a particular estate or fund, to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the Judge before whom such action or issue is tried, or the Court shall otherwise order.

27. To the writ of dower *unde nihil habet*, the defendant may plead in abatement *non tenure*, either of the whole or of a part (*g*); or that he holds jointly with A. not named (*h*). But in these cases, as the writ of dower *unde nihil habet* is a writ *de libero tenemento*, generally, and not, like a *præcipe quod reddat*, a demand of a certain number of acres, if the plea is only to a part, the demandant may abridge or narrow her demand to the residue (*i*), and the writ will remain good, for the abridgment does not falsify it, as it would the *præcipe quod reddat* (*j*). This right of the widow to abridge her demand may be exercised even though the tenant do not plead in abatement (*k*). But it is said if the writ is *de libero tenemento*, in D. and S. there can be no abridgement as to *all* the lands in either of the vills named (*l*).

(*g*) *Nolan* v. *Reid*, 1 P. R. 266; *Mitchell* v. *Hyde*, 1 Leon. 92; Moor, 80.

(*h*) Rast. Ent. 225 b.

(*i*) Lev. Ent. 76; 3 Lev. 68; Herne, 342.

(*j*) 14 H. VI., 3, 4; Bro. Abr. pl. 12; 2 Saund. 44 a note.

(*k*) See 2 Saund. 44 a, 330, 339.

(*l*) 3 Lev. 68; Scribner on Dower, vol. ii. p. 90.

28. It is to be remarked, however, that the plea of *non-tenure*, either of the whole, or of a part, though usually called a plea in abatement, concluding with praying judgment of the writ, is not strictly a plea in abatement, though dilatory in its nature; for so far from giving the demandant a better writ, the plea is that the tenant is not liable to the action, inasmuch as he does not hold the land in any shape; and besides, it is frequently pleaded as to part along with a plea in bar to the rest (*m*).

29. The defendant may also plead in abatement ancient demesne (*n*), or that the demandant married, pending the writ (*o*).

30. In this action, pleas in bar are either such as deny the right of the demandant to any dower at all, or such as admit her title, but allege some reason why she should not be permitted to recover. The former will be first noticed.

31. (1) *Ne unques seisiè que dower.* This plea alleges that the demandant's husband was never seised of such an estate in the lands as entitles her to be endowed of them (*p*).

32. (2) *Ne unques accouplè in loyal matrimoniè.* By this plea the tenant controverts the validity of the demandant's marriage with the person of whose lands she claims dower (*q*).

(*m*) 2 Saund. 44 a, note; Scribner on Dower, vol. ii. p. 90.

(*n*) 1 Roll. Abr. 322 (E), pl. 2; Rob. Ent. 250.

(*o*) Co. Ent. 173 b; 2 Saund. 44 a, note; Park on Dower, 287-8; Scribner on Dower, vol. ii. p. 90. The late statutes relating to married women may obviate the necessity for joining the second husband.

(*p*) For the form of this plea, see 3 Chitty's Pl. 1316 See also 2 Saund. 44 b, and 229; Rast. Ent. 230 a; Co. Ent. 176 a. As to the necessity of pleading the special matter where there has been a remitter, see Park on Dower, 145, 154.

(*q*) The form of this plea will be found in 3 Chitty's Pl. 1317; 2 Saund. 44 b, note. See 2 H. Bl. 145. The plea *ne unques accouplè* cannot be joined with the plea *ne unques seisie que dower*. *Anderson* v. *Anderson*, 2 W. Bl. 1157; *Hillier* v. *Fletcher*, *Ibid.* 1207.

33. (3) The tenant may also plead that the demandant eloped from her husband during the coverture, and lived with another person in adultery (*r*). To which, the demandant replies, either that she did not elope (*s*), or that she was afterwards reconciled to her husband (*t*).

34. (4) The tenant may also plead a divorce, *a vinculo matrimonii* (*u*).

35. (5) Or he may plead a jointure, made by the demandant's husband on her before marriage (*v*); or that it was made after marriage, and the wife agreed to it after her husband's death (*w*). To which, the demandant may reply, that the estate was not made to such uses, or that it was not for a jointure (*x*).

36. (6) So the tenant may plead that the husband of the demandant is alive (*y*). To which plea, the demandant replies that her husband is dead (*z*).

37. (7) The tenant may plead that he assigned a rent of so much per annum, to the demandant, in recompense of her dower. But he must show what estate he had in the land at the time of granting the rent, so that it may appear to the Court that he had power to grant it; and if he omit to do this, the demandant may demur (*a*).

(*r*) See 3 Chitty's Pl. 1318; Rast. Ent. 230 a; Rob. Ent. 260; 2 Saund. 44 c, notes, and the form in 6 Bing. 135; *ante*, cap. 6.

(*s*) See 3 Chitty's Pl. 1319; Rast. Ent. 230 a; 2 Bro. Ent. 109; 2 Saund. 44 c, note.

(*t*) Dy. 107 a; 1 Bro. Ent. 204; Co. Litt. 32 b; 2 Saund. 44 c, note; Scribner on Dower, vol. ii. p. 92.

(*u*) Co. Litt. 32 a; 2 Saund. 44 c, note; *ante*, cap. 6.

(*v*) Co. Ent. 172 a, b; Hob. 71, 104.

(*w*) Co. Ent. 171 b, 172 a; 2 Saund. 44 c, note; *ante*, cap. 33.

(*x*) Co. Ent. 172 a, b; Scribner on Dower, vol. ii. p. 92.

(*y*) 1 Bro. Ent. 205; Bendl. pl. 131; 1 And. 20; Com. Dig. Pleader (2 Y 9.)

(*z*) Scribner on Dower, vol. ii. p. 93.

(*a*) *Beaumont* v. *Dean*, 2 Leon. 10; Moor, 59; Cro. Eliz. 451; Scribner on Dower, vol. ii. p. 93.

38. (8) The tenant may plead that the demandant is seised of a third part of the land demanded already; but he must show who assigned it, or that she recovered it; for if she were in by disseisin, she must have dower of the remaining two parts, nevertheless. (*b*).

39. (9) Or he may plead that other lands were assigned for dower by the heir (*c*), or by himself, he being the assignee of the husband (*d*).

40. (10) Or that the demandant had released her dower to the tenant of the freehold (*e*).

41. If the husband alien his estates in parcels to different persons, the widow recovers from each of them the third part of the lands conveyed to him (*f*). And if one of these persons has assigned her a portion of his lands in satisfaction of her whole dower, it seems that the others cannot plead this assignment as a legal defence to writs of dower brought against them (*g*).

42. The tenant cannot plead a prior term of years *in bar* of the action, for it is no bar in dower; but he may plead it in delay of execution, and to save himself the damages if no rent was reserved upon the term; or if there was, praying that the demandant may be endowed of the reversion and the rent (*h*). And if the tenant do not plead such term he cannot set it up afterwards as a prior title, to an ejectment

(*b*) 39 Ed. III. 17; Scribner on Dower, vol; ii. p. 93.
(*c*) Moor, 26, 59; Co. Litt. 35 a; Perk. 409; Carter, 187.
(*d*) Com. Dig. Pleader (2 Y 15).
(*e*) Cro. Jac. 151; *ante*, cap. 31.
(*f*) Perk. 423; *ante*, cap. 26.
(*g*) Co. Litt. 35 a; 1 Roper, H. and W. 437; Perk. 402; Scribner on Dower, vol. ii. p. 94.
(*h*) *Booth* v. *Lindsey*, 2 Raym. 1294; Rob. Ent. 237; Anon. 2 Mod. 18; *Villers* v. *Handley*, 2 Wilson, 49; *ante*, cap. 16.

brought by a tenant in dower, after her recovery, to obtain possession (*i*).

43. Pleas which admit a right of dower, but allege some excuse or reason for not making an assignment, are as follows:—

44. (1) *Detinue of charters.* This plea alleges that the demandant detains the deeds and evidences of title belonging to the estate, and that the tenant was always ready to assign her dower if she would deliver them; consequently it cannot be pleaded after imparlance (*j*). No person but the heir can plead this plea, for it lies only in privity (*k*). And if he pleads this plea he must shew the certainty of the charters, so that a certain issue may be joined, or that they are in a chest or box locked or sealed (*l*). And if the heir delivered the charters to the wife, he cannot plead detinue, for she has them by his own act (*m*). And as the privity is the foundation of this plea, it shall not be pleaded even by the heir, if he has the land by purchase and not as heir (*n*). Or if he be not immediately vouched, but only by the vouchee of the tenant (*o*). Or if he comes in as vouchee, having no lands in the county where the dower is demanded (*p*). Or if he comes in as tenant by receipt (*q*).

(*i*) *Lindsey* v. *Lindsey*, 1 Salk. 291; 2 Raym. 1294; Scribner on Dower, vol. ii. p. 94.

(*j*) Rast. Ent. 224 b, 229 b; Bro. Dow. pl. 53; Moor, 81; Hob. 199; 9 Co. 18 a; Dal. 100; Perk. 356; *Burdou* v. *Burdou* 1 Salk. 252. It is now held that an imparlance is not to be granted in dower. *Foster* v. *Kirby*, Barnes 2.

(*k*) 9 Co. 18 a; Dy. 230 a.

(*l*) 9 Co. 18 a, 110 a; Plowd. 85 a, b; Dyer, 230 a.

(*m*) 9 Co. 18 b.

(*n*) 9 Co. 18 b; Dy. 230 a; Perk. 356.

(*o*) 9 Co. 18 b; Dy. 230 a; Perk. 358.

(*p*) 9 Co. 18 b.

(*q*) 9 Co. 18 b; Dy. 230 a; Perk. 358.

45. In two of these cases there would be an obvious absurdity in the plea, for it affirms that the tenant has been always ready, and yet is, to render dower, if the demandant would deliver to him his charters; and tenant by receipt, or vouchee over, cannot render the demandant her dower, nor can she recover it against him (*r*). In these cases, therefore, the widow may recover her dower, although she persists in detaining the charters, but an action of detinue will lie against her for them (*s*).

46. And it is said, that if the wife be with child, the heir for the time being, cannot plead detinue of charters, for she may keep them for the infant (*t*).

47. If the demandant reply to this plea that she is willing to deliver the charters to the tenant, and bring them into Court, she may pray judgment upon his confession immediately. The demandant may also reply, that she does not retain the deed. So the tenant may plead that he has always been and still is ready to render dower; and if he pleaded this plea of *tout temps prist* at the return of the summons, he may pray that the demandant may not have damages.

48. But the demandant may reply, that she requested her dower and the tenant refused to assign it, and issue shall be taken upon that (*u*).

49. (2) *Tout temps prist.* The nature of this plea has been considered in a former chapter (*v*).

(*r*) Park on Dower, 295.

(*s*) Park on Dower, 296.

(*t*) Bro. Dow. pl. 80; Perk. 360.

(*u*) Draper on Dower, 86, 87; Park on Dower, 295, 296, 297; Roscoe on Real Actions, 223, 224; 9 Co. 18; Perk. 358; Dyer, 230, pl. 52; Bac. Ab. tit. Dower, p. 143.

(*v*) *Ante*, cap. 36.

50. Tenant may plead to the whole declaration "*ne unques accouplè*," and "*ne unque seisiè 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 (*w*).

51. Particulars of the premises cannot be obtained by the demandant (*x*). A denial of the seisin and marriage are allowed together, but a third plea that demandant had assigned her right will be struck out (*y*).

52. 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 (*z*).

53. A demandant in dower is not entitled under the Common Law Procedure 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 discovery could have been maintained before the Common Law Procedure Act (*a*).

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

55. The replication to a plea of *alien ne*, 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.

(*w*) *Nolan* v. *Reid*, 1 P. R. 266.

(*x*) *Nolan* v. *Cherry*, 1 P. R. 277.

(*y*) *Street* v. *Dolsen*, 2 P. R. 306.

(*z*) *Ferguson* v. *Malone*, 1 U. C. R. 519.

(*a*) *Gomm* v. *Parrott*, 3 Jur. N. S. 1150; 2 6 L. J. C. P. 279; 3 C. B. N. S. 471.

(*b*) *Phelan* v. *Phelan*, Dra. Rep. 386.

56. *Alien ne* is a plea in bar (*c*).

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

58. In an action of dower, judgment was given in favor of the tenant, in June, 1856. In August the tenant died, and an entry of the judgment was delayed by the difficulty in procuring the affidavit of disbursements, etc. 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*. It was held too late (*e*).

59. The *nisi prius* record in dower may be made up the same as in personal actions (*f*).

60. The writ of summons, if served upon the tenant, need not be served on the premises (*g*).

61. The plaintiff in dower, having served a demand on defendant, the tenant of the freehold, residing in Scotland, served the declaration and notice to plead on the tenant in possession of the land, and on this entered judgment by *nil dicit* against the defendant for seisin and costs, and issued execution. The sheriff delivered possession according to the report of the commissioners, appointed under 24 Vic., cap. 40; and their fees, including the charge of the surveyor employed by them, amounted to $266. An order was after-

(*c*) *Robinet* v. *Lewis*, Dra. Rep. 44.

(*d*) *Garrard* v. *Tuck*, 8 C. B. 231; 13 Jur. 871; 18 L. J. C. P. 338.

(*e*) *Stafford* v. *Trueman*, 2 P. R. 154.

(*f*) *Williams* v. *Rider*, 1 P. R. 41; *Bishoprick* v. *Pearce*, 12 U. C. R. 306.

(*g*) *Honsburgh* v. *Fritz*, 5 O. S. 73. For decisions as to the writ and proceedings connected therewith under the old practice, see *Phelan* v. *Phelan*, Dra. 386; *Frazer* v. *Richardson*, 4 O. S. 391; *Bissonet* v. *Radenhurst*, M. T. 1 Vic. R. and H. Digest, 170; *Fullmer* v. *Dougan*, 1 U. C. R. 402; *Henderson* v. *Stephens*, 2 U. C. R. 64; *Amiot* v. *Woodcock*, 2 U. C. R. 119; *Cox* v. *Hand*, 4 U. C. R. 281.

wards made to refer this charge to taxation, on a summons calling on the sheriff and the commissioners and surveyor, but not on the plaintiff. It was held that the judgment was irregular, and must be set aside; for service of the declaration on the tenants of the land, could not enure as a service on the defendant, the tenant of the freehold (*h*).

62. In *Sills* v. *Lang* (*i*), the plaintiff claimed dower. A decree was made less extensive than she claimed. The master made his report in pursuance of the decree. The solicitor on the same day signed a consent to a decree on further directions being made on certain terms stated in the consent. These terms were in accordance with the decree and report. They provided, also, that in lieu of dower, the plaintiff should be paid a certain annual sum named. The decree was not drawn up, but the agreement which it embodied was acted on for eight years. It was held that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favorable to her.

63. Where the plea states that the husband devised certain lands to the demandant, in bar and satisfaction of dower, and that she agreed to the devise, it is sufficient without setting out the words of the devise. But it is otherwise where the devise is not in express terms in bar of dower (*j*).

64. Where the tenant pleaded a reference to arbitrators, and an assignment by them of certain specified land, of which demandant had notice, and averred that he had always been, and still was, ready to abide by such an assignment. It was held on demurrer, that the plea was

(*h*) *Gourlay* v. *Gourlay*, 27 U. C. R. 178.
(*i*) *Sills* v. *Lang*, 17 Gr. 691.
(*j*) *Breakenridge* v. *King*, 4 O. S. 180; *ante*, cap. 34.

bad, for not shewing that the assignment had been actually made (*k*).

65. To a plea of *ne unques accouple*, it is sufficient for the demandant to reply that she was on such a day, and before suit, accoupled to her husband in lawful matrimony. It is not necessary for her to allege when, or by whom, or by what form of religious rite she was married (*l*).

66. A plea that the demandant never was accoupled to the husband during the time that he was seised of the land, admits the seisin and denies the coverture (*m*).

67. The declaration should not contain an allegation that the husband died seised, as it is not material to the recovery of dower, and the fact is therefore not admitted, by not pleading to it (*n*). The declaration is the proper, although not the necessary place for averring demand of dower. Where it does contain such an allegation, and there is no plea, judgment may be signed for costs without proving a demand (*o*).

68. Where, in an action of dower, there was a plea on equitable grounds, that the land was part of the partnership property, and stock in trade of the husband and S., trading together as merchants, and was purchased by them as such partners, and was paid for out of their partnership moneys, and used in the said partnership business, and that the husband was never seised thereof, otherwise than as such partner. It was held that the plea sufficiently

(*k*) *McLean* v. *Horton*, 9 U. C. R. 685.

(*l*) *Williams* v. *Lee*. *Williams* v. *Vansittart*, 2 U. C. C. P. 175.

(*m*) *Losee* v. *Murray*, 24 U. C. R. 586.

(*n*) *Scratch* v. *Jackson*, 25 U. C. R. 598.

(*o*) *Gilleland* v. *Reid*, 5 P. R. 96; *Harris* v. *Morden*, 17 U. C. R. 278; but see *Scratch* v. *Jackson*, 26 U. C. R. 189, 191.

shewed the land to have been purchased for partnership purposes, and formed a good defence (*p*).

69. In a bill for dower, it must be alleged that the husband has been seised during coverture. In *Gordon* v. *Gordon* (*q*), the plaintiff alleged that her husband was, in his lifetime, at the time of his death, and also at the time of making his last will, *seised, or entitled* in fee, in possession; and in another part of the bill, that the husband had in his lifetime, contracted for the sale of the premises, out of which the dower was sought. The bill was held bad on demurrer, it no where appearing that the husband had been seised during coverture, or that the contract of sale had not been entered into before marriage.

70. Where the executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate, and expend them in the support of herself and children, and on the eldest son coming of age in 1852, the executor pointed out to him the clause in the will, directing a distribution of the personal estate, but the only estate the executor then had was some household furniture. In 1867, the widow having set up a claim for dower, rejecting an annuity, provided for her by the will, the heir-at-law filed a bill against the executor for an account. It was held that the Statute of Limitations did not bar the relief; but inasmuch as the executor had had reason to believe he would never be called on for an account, the Court thought the Master, in proceeding under the decree, should act liberally upon the rule of Court, giving the Master a discretion as to the mode of vouching the accounts in his office (*r*).

(*p*) *Conger* v. *Platt*, 25 U. C. R. 277.
(*q*) *Gordon* v. *Gordon*, 10 Gr. 466.
(*r*) *Walmsley* v. *Bull*, 15 Gr. 210.

71. Under 16 Vic., cap. 99, sec. 7, on the purchase of lands by the Great Western Railway Company from the proprietors, the price agreed upon is made the compensation to be paid for such lands, and to stand in the stead thereof; and "any claim to or encumbrance on said land, etc.," is converted into a claim on such compensation. When, therefore, the company agreed with the then owner in fee for the purchase of land and obtained a conveyance; it was held, that on his death his widow could not maintain an action of dower against the company (*s*).

72. Where a widow is made a defendant, as being entitled to dower, it is not sufficient for the bill to allege that the husband died, leaving her his widow; the bill should further expressly aver that she is entitled to dower, or that she claims to be so entitled (*t*).

73. The judgment in this action, generally speaking, is to recover seisin of a third part of the tenements in demand in severalty by metes and bounds, and the mesne profits and damages. But if the judgment be obtained against several tenants in common, it is error if it be said "in severalty by metes and bounds;" but it may be "in three parts to be divided" (*u*).

74. If the tenant should neither plead to the right nor to the damages, but altogether make default, then if the demandant claims mesne value and damages she will enter the usual suggestion of her husband dying seised, and obtain the writ of enquiry on the execution whereof she will get damages, and as a consequence, costs (*v*).

(*s*) *Chewett* v. *Great Western Railway Co.*, 26 U. C. C. P. 118.
(*t*) *Martin* v. *McGlashan*, 15 Gr. 485.
(*u*) *Glefold* v. *Carr*, Brownl. and Goldsb. 127; Park on Dower, 136, 137.
(*v*) *Bishoprick* v. *Pearce*, 12 U. C. R. 315. Per Draper, J., *Cook* v. *Phillips*, 23 U. C. R. 69, 175; *Watson* v. *Quilter*, 11 M. and W. 760, and the cases there cited.

75. Where the plea is *tout temps prist*, if the demandant admits the tenants plea she takes judgment of seisin immediately without any judgment for damages or costs; but if she disputes the truth of the plea and claims damages she must reply demand and refusal, and upon that there is a trial, and if she succeeds then she is entitled to a second judgment for damages and costs (*w*).

76. Where a mortgagor has executed several mortgages, in one only of which his wife joined, the proper decree on a bill for foreclosure against the widow and devisees of the mortgagor, is one in the usual form against them all, with a declaration that upon payment of the mortgage executed by the widow, she shall if she chose be let into her dower (*x*).

77. In an administration suit, the testator's widow agreed that the real estate should be sold freed from her dower, and the Master by his Report approved of this, but the sale was delayed at the instance of the creditors in order to obtain a better price; the widow, therefore, petitioned for payment of a small sum towards the allowance that might be made to her in lieu of dower; the creditors were too numerous to be all served with the petition, but many of them, including the plaintiff, having consented thereto, and there being no opposition, the court granted what was prayed, although it was not alleged that the sum asked for was due on account of arrears; and in the event, therefore, of the widow's death before the sales were effected the amount she asked for might possibly never become due (*y*).

78. Where a foreclosure suit had been brought, and a final order obtained therein, and sometime afterwards the

(*w*) *Bishoprick* v. *Pearce*, 12 U. C. R. 317, per Burns, J.
(*x*) *Thibodo* v. *Collar*, 1 Gr. 147.
(*y*) *In re Thompson*, *Bigger* v. *Dickson*, 1 Ch. Chamb. R. 323.

mortgagor had filed a bill to redeem, and the court had opened the foreclosure and granted redemption; it was held on a motion by the mortgagee for payment out of court of the mortgage money, that as a final order of foreclosure was a defeasible instrument, and as there had been no change in the relative position of the parties it was unnecessary for the mortgagee's wife to join in the conveyance to the mortgagor to bar dower (*z*).

79. Where a married woman had signed a deed, which however, contained no bar of dower, a reference to enquire whether she thereby intended to bar her dower will not be directed (*a*).

80. The case of dower is an exception to the rule, that to sustain a bill for an account there must be mutual demands (*b*).

81. In an action of ejectment against a widow, she may set up a counter claim for dower out of the land in question (*c*).

82. In a bill seeking to obtain the benefit of a sale of land, freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant E. B. (the widow) is not entitled to dower:" it was held that this was a sufficient allegation that the defendant's right to dower was barred by the statute, though it omitted to state that this was the legal result of any particular statute (*d*).

(*z*) *Simpson* v. *Simpson*, 1 Ch. Ch. R. 265.

(*a*) *Thompson* v. *Thompson*, 2 Ch. Ch. R. 211.

(*b*) *Dunwiddie* v. *Bailey*, 6 Ves. 141. As to decreeing an account upon a bill for arrears of dower, see *Mundy* v. *Mundy*, 2 Ves. Jr. 128; *Graham* v. *Graham*, 1 Ves. 262.

(*c*) *Glass* v. *Glass*, 1 C. L. T. 700.

(*d*) *Banks* v. *Bellamy*, 27 Gr. 342.

83. The earlier English cases decided, that where a widow filed a bill against a purchaser from her husband, claiming dower, and the defendant pleaded that he was a purchaser of the estate for value, without notice of the vendor being married, the plea could not prevail (*e*). These decisions were very much questioned, and it seems now to be settled that a plea of a purchase for valuable consideration, without notice, will prevail against a legal as well as an equitable claim (*f*).

84. Lord Sugden, referring to the case of *Williams* v. *Lambe*, *supra*, says: "Thus the point rested until the case of *Williams* v. *Lambe*, before Lord Thurlow, when he overruled the plea to a demand for dower; he thought that when the party is pursuing a legal title, as dower is, that plea did not apply, *it being only a bar to an equitable*, not to a legal claim. No authority was cited, nor any reason given for the distinction. But the case might, perhaps, be supported upon its own circumstances; for, as the law then stood, if a married woman was dowable out of her husband's estate, he could not bar her right, and a purchaser must, therefore, take the estate *cum onere*, and was bound to enquire.

85. In Ontario, as the right to dower cannot be barred, or in any way impaired by the husband's own act, it is submitted that the plea of purchase for value without notice cannot prevail against the widow's legal claim to dower.

(*e*) *Williams* v. *Lambe*, 3 Bro. C. C. 264; *Collins* v. *Archer*, 1 Russ. and My. 284; *Phillips* v. *Phillips*, 4 De G. F. and J. 208; 8 Jur. N. S. 145; 2 W. and T. 25-26; Snell's Eq. Juris. p. 25.

(*f*) *Joyce* v. *De Moleyns*, 2 Jones and Lat. 374; *Bowen* v. *Evans*, 1 Jones and Lat. 178; *Frazer* v. *Jones*, 17 Law J. Ch. 353; *Att'y-Gen'l* v. *Wilkins*, 17 Beav. 285; *Gorum* v. *Parrott*, 3 Com. Bench R. N. S. 47. See also 2 Lead. Eq. Cas. pt. 1 p. 43; *Finch* v. *Shaw*, *Colyer* v. *Finch*, 19 Beav. 300; 5 H. L. Cas. 920; Sugden on V. and P. 792, *et seq.*

86. In the American Courts, the doctrine is well settled, that the plea of a *bona fide* purchase for value, is no defence, even in a court of equity, against a legal claim to dower (*g*).

87. It has also been held in the American Courts, that, when the widow applies for *equitable* relief, and her claim to dower is not founded upon a *legal* right, cognizable in a court of law, the defendant may avail himself of any equitable defence existing in his favour (*h*).

88. In *Cumming* v. *Alguire* (*i*), W. C. died seised in fee of the land in question, having devised the same to his wife for life, and after her 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.* against 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. It was held, that the demandant could not succeed, for the tenant was not tenant of the freehold but the mortgagee.

89. Where in an action of dower in three lots of land, to prove that defendant was tenant of the freehold, a witness stated that he had occupied one of the lots as tenant to the defendant, and about ten years ago conveyed all three lots

(*g*) *Snelgrove* v. *Snelgrove*, 4 Desaus. 274 (1812); *Blain* v. *Harrison*, 11 Ill. 384; *Rankin* v. *Oliphant*, 9 Misso. 239; *Larrowe* v. *Beam*, 10 Ohio, 498; *Brown* v. *Hood*, 6 Rich. Eq. 155; *Blaks* v. *Heyward*, 1 Bailey, Eq. 208; *Campbell* v. *Murphy*, 2 Jones Eq. 357; *Ridgway* v. *Newbold*, 1 Harring. 385; *Jenkins* v. *Bodley*, 1 Smedes and M. Ch. 338; *Wailes* v. *Cooper*, 24 Miss. 208; *Gano* v. *Gilruth*, 4 G. Greene (Iowa), 453; *Daniell* v. *Hollingshead*, 16 Geo. 190; Scribner on Dower, vol. ii. p. 157.

(*h*) 1 Roper, H. and W. 451; 1 Story's Eq. 630; *Snelgrove* v. *Snelgrove*, 4 Desaus. 274; *Larrowe* v. *Beam*, 10 Ohio, 498; Scribner on Dower, vol. ii. p. 158.

(*i*) *Cumming* v. *Alguire*, 12 U. C. R. 330.

to one H., who swore that he conveyed to defendant after having occupied as owner, and built upon the land. A certified copy of the memorial of this deed was put in, notice to produce having been given to defendant, it was held sufficient evidence to go to the jury (*j*).

90. Where the defendants were executors under the will of N. S., who devised "all and every, the messuages and tenements whatsoever, whereof or wherein, I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants), to the intent," &c., it was held, that they took such an estate as to make them liable in an action for dower (*k*).

91. The tenant of the freehold can be sued only when within the jurisdiction; if out of it, then a mere occupier may be sued, but a recovery against him will not bind the right of the tenant of the freehold (*l*).

92. To a bill for equitable dower, the tenant in actual possession of the premises may be a proper, though not a necessary party (*m*).

93. A widow cannot, without the leave of the Court, bring an action for dower against a tenant to whom, without express authority, the property has been leased by a preceiver, in a suit in Court (*n*). Where the evidence shows that the tenants in an action of dower, could have assigned dower, which would be binding upon themselves, the demandant is entitled to succeed upon the issue of *non tenuerunt*,

(*j*) *Fisher* v. *Harty*, 23 U. C. R. 408.
(*k*) *Low* v. *Sparks*, 14 U. C. C. P. 25.
(*l*) *Gourlay* v. *Gourlay*, 27 U. C. R. 178.
(*m*) *McIntosh* v. *Wood*, 15 Gr. 92.
(*n*) *Coleman* v. *Glanville*, 18 Gr. 42.

without any reference to the comparative goodness of the tenant's title (*o*).

94. An action for dower may be maintained against a mortgagee in fee although not in possession (*p*).

95. An infant demandant may sue for dower (*q*).

96. Where a testator devised lands to A. for life, or till marriage, and after A.'s decease or marriage, to the testator's executors, in trust to sell the same, and apply the proceeds for the benefit of infant children of the testator, and in payment of certain legacies; it was held that the children were not necessary parties (*r*).

97. Where an owner of real estate enters into a contract of sale, his wife joining with him in the contract, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant; and the fact that the bill alleges that her only interest is that of an inchoate dowress, forms no ground for dispensing with her being so joined (*s*).

(*o*) *McClellan* v. *Megott*, 6 U. C. R. 551.
(*p*) *Walker* v. *Boulton*, 6 O. S. 553; *Stewart* v. *Kay*, 25 U. C. R. 15.
(*q*) *Phelan* v. *Phelan*, Dra. Rep. 386.
(*r*) *Craig* v. *Templeton*, 8 Gr. 483.
(*s*) *Loughead* v. *Stubbs*, 27 Gr. 387.

APPENDICES.

APPENDIX A.

REVISED STATUTES, ONT.

CAP. 55.

AN ACT RESPECTING THE PROCEDURE IN ACTIONS OF DOWER.

[This Act is retrospective in its operation. *Re* Tate 5 L. J., N. S. 260.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "The Dower Procedure Act."

When Action not to Lie.

2. No action of dower shall be hereafter maintained, in case the doweress has joined in a deed to convey the land or to release her dower therein to a purchaser for value, although the acknowledgement required by law at the time may not have been made or taken, or though any informality may have occured or happened in the making, taking or certifying such acknowledgement. 32 Vic., cap. 7, sec. 23.

Assignment of Dower by Consent.

3. The tenant of the freehold may at any time before action commenced serve upon a doweress a notice in writing, that he is willing to assign her dower in the land (describing it), out of which she is entitled to dower, and may thereafter apply to one of the Superior Courts, or to a judge thereof, for a rule or order directing that a writ shall issue for the assignment of

dower; and a writ therefor may thereupon issue, and the like proceedings may be had thereon, as upon a writ sued out after judgment in an action. 37 Vic., cap. 7, sec. 43.

4. The Court or Judge granting a rule or order under the preceding section may make such order as to the costs of the proceedings as appears just. 37 Vic., cap. 7, sec. 44.

5. The doweress 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 affidavits may administer, shall be registered in the Registry Office of the Registration Division in which the lands lie, and shall entitle the doweress 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 sum, and shall be a bar to any action, suit or proceeding by the doweress for dower in the lands mentioned therein. 32 Vic., cap. 7, sec. 41.

Procedure in Actions of Dower.

6. 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. 32 Vic., cap. 7, sec. 2.

The Writ, Service thereof, etc.

7. Every action for dower shall be commenced by writ of summons, which 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 name, place and county 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:—

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

To , of (naming each defendant and the place and county of the residence and abode of each defendant). We command you (or 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 certainty as will show 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, etc. 32 Vic., cap. 7, sec. 4.

8. 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 endorsed with the name and place of abode of the attorney suing out the same, or (if no attorney), the name and residence of the plaintiff shall be endorsed thereon in like manner as the endorsements 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 endorsed thereon, and who the plaintiff is and her abode, and as to the staying proceedings upon writs issued without authority, as in personal actions. 32 Vic., cap. 7, sec. 5.

9. On every such writ and on each copy thereof shall be endorsed 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 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 plaintiff will have a right to sign judgment to recover as against you the dower claimed with costs of suits." 32 Vic., cap. 7, sec. 6.

10. In case the plaintiff claims damages for detention of her dower, such notice shall contain a further statement that the plaintiff claims damages for the detention of her dower from some day to be stated in the notice. 32 Vic., cap. 7, sec. 7.

11. The writ of summons may be served in Ontario, and the service shall be personal wherever that is practicable, but the plaintiff 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 appears 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 evaded service of the same, and has not appeared thereto, such

Court or Judge may by rule or order, grant leave to the plaintiff to proceed as if personal service had been effected, subject, however, to such conditions as to the Court or Judge seem fit. 32 Vic., cap. 7, sec. 13.

12. If no person is in actual occupation of the lands of which the plaintiff claims dower, the writ shall nevertheless be served on the tenant of the freehold named therein. 32 Vic., cap. 7, sec. 12.

13. Every tenant in possession, who is not also tenant of the freehold, and 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' improved rent of the premises in the possession of such tenant, to the person 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 Ontario. 32 Vic., cap. 7, sec. 10.

14. The landlord, or other person under whom such tenant as is mentioned in the next preceding section, holds or entered into possession, may, if he has not been served 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 plaintiff's claim to dower, and the Court or Judge may, after summons to or rule upon, the plaintiff, order that such applicant be substituted as defendant in the action, in lieu of the tenant in possession, upon such conditions as to the Court or Judge appear just. 32 Vic., cap. 7, sec. 11.

15. In case of non-appearance by the defendant, if the plaintiff files the writ, and an affidavit of personal service thereof, or a rule of Court, or Judge's order for leave to proceed, as if personal service had been effected, the plaintiff may enter judgment of seisin forthwith, and sue out a writ of assignment of dower, but she shall not be entitled to tax or recover the costs of suit, or of entering such judgment against the defendant, unless the Court or Judge so orders. 37 Vic., cap. 7, sec. 41.

16. In all cases where the tenant of the freehold resides out of Ontario, the plaintiff may issue a writ of summons in the form above set forth, but 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 endorsement and notice or notices as the writ of summons hereinbefore set forth, making such changes as the nature of the case renders indispensable. 32 Vic., cap. 7, sec. 14.

17. 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 Ontario, 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 plaintiff may proceed in the action in like manner, as if the defendant had been served under this Act in Ontario, subject to such conditions as to such Court or Judge seem fit, having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case. 32 Vic., cap. 7, sec. 15.

Appearance.

18. Any defendant named in the writ may appear within the time appointed, and with the appearance may file a notice addressed to the plaintiff, 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 plaintiff to dower as stated in the writ. 32 Vic., cap. 7, sec. 8.

19. 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. 32 Vic., cap. 7, sec. 9.

20. Any defendant named in the writ may, within the time appointed, file an appearance and acknowledgement that he is tenant of the freehold of the land named in the writ, together with his consent that the plaintiff 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 otherwise agree, and he shall forthwith serve the plaintiff or her attorney with a copy of such appearance, acknowledgement 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 plaintiff may enter judgment of seisin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified, but shall not be entitled to tax or recover the costs of suit, or of entering such judgment against the defendant. 32 Vic., cap. 7, sec. 16.

21. In case the defendant has filed and served an acknowledgement and consent under the preceding section, and the plaintiff does not within three months thereafter sue out and cause to be executed a writ of assignment of dower, the defendant may, by leave of the Court or a Judge, sue out such writ; and the writ shall be, as nearly as may be, in the same form as a writ sued out by the plaintiff, and the like proceedings shall be had thereon. 37 Vic., cap. 7, sec. 42.

22. The Court or Judge granting a rule or order under the preceding section may make such order as to the costs of the proceedings as appears just. 37 Vic., cap. 7, sec. 44.

Pleadings, etc.

23. In case an appearance is entered with a denial by the defendant that he is tenant of the freehold, the plaintiff may at once, and without further pleadings, take issue on that denial and make up a record of the issue 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 seisin of her dower, as against such defendant. 32 Vic., cap. 7, sec. 17.

24. In case only an appearance is entered, the plaintiff may at once declare, and when damages are claimed in the writ, they may also be claimed in the declaration. 32 Vic., cap. 7, sec. 18.

25. The declaration may be in the form, or to the effect following:—

In the (the style of the Court)

County of
To Wit: } The day of 18

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 part of (the land and premises as described in the writ) with the appurtenances in the (Township, etc.,) 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 endowment in the said lands from the day of , 18 ; and she claims $ 32 Vic., cap. 7, sec. 18.

26. 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 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 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. 32 Vic., cap. 7, sec. 19.

27. Special cases may be stated by leave of the Court or a Judge in like manner as in other actions. 32 Vic., cap. 7, sec. 20.

Damages, Costs.

28. 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 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. 32 Vic., cap. 7, sec. 21.

29. 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 with damages, where damages have been adjudged, may be sued out and executed as in personal actions. 32 Vic., cap. 7, sec. 25.

Assignment of Dower.

30. After judgment has been rendered in the plaintiff's favour 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 plaintiff has recovered judgment to recover her dower. 32 Vic., cap. 7, sec. 26.

31. 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 upon the assessment roll for real estate, of a value not less than two thousand dollars each, and a licensed Provincial Land Surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the said 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. 32 Vic., cap. 7, sec. 27.

32. 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. 32 Vic., cap. 7, s. 28.

33. 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 person duly authorized and 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:

"I, , do swear that I am not of kin to the plaintiff (naming her), or to the defendants (naming him or them), or 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 plaintiff and the said defendants, according to law." 32 Vic., cap. 7, sec. 29.

34. After taking and subscribing such affidavit, the Commissioners and each of them shall, for all purposes in the fulfilment of the duties by law required of them, be considered as 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 proceedings as a Sheriff, in the discharge of his duty. 32 Vic., cap. 7, sec. 30.

35. It shall be the duty of the Commissioners:

(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 and premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such lands and premises;

(2) To ascertain and determine what permanent improvements have been made upon such lands and premises since the death of the plaintiff'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 out of such part 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 plaintiff 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 permanent improvements;

(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 clear yearly rents of the premises, after deducting any rates or 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 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;

(4) Such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless the Commissioners specially direct otherwise, and make the same issuable and payable out of some 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;

(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 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. 32 Vic., cap. 7, sec. 31.

36 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 thereof, 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 records of Nisi Prius, and subject to the same liabilities in case of his default. 32 Vic., cap. 7, sec. 32.

37. 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. 32 Vic., cap. 7, sec. 33.

38. 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 any rule or summary proceedings against him. 32 Vic., cap. 7, sec. 34.

39. 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 have been made parties to the rule, to pay such Commissioners their costs of answering the same; and if the rule is discharged, or if the report is not moved against within the proper time, or if the Court refuses to grant a rule to show cause, the report shall thenceforth be final and conclusive on all parties to the action of dower, 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 Registration Division in which the lands lie, for which service the Registrar shall be entitled to receive one dollar. 32 Vic., cap. 7, sec. 35.

40. After such registration the plaintiff 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 her for her dower, and to levy all such costs as by the judgment and any rule of Court, or either, have been awarded to her against the defendant. 32 Vic., cap. 7, sec. 36.

41. In case judgment is given against the plaintiff and costs are 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 *fieri facias* to recover the same. 32 Vic., cap. 7, sec. 37.

42. 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.

(2) The person so required to attend shall be entitled to be paid the same fees, allowance and conduct money as if he had been subpœnaed as a witness in an ordinary suit, but no witness shall be obliged to attend more than two consecutive days. 32 Vic., cap. 7, sec. 38.

43. The Commissioners shall be entitled to receive from the plaintiff 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. 32 Vic., cap. 7, sec. 39.

44. The plaintiff shall pay the costs of suing out, and the costs of the Commissioners in executing the writ of assignment of dower, and making the report thereof, but each party shall pay his own costs of witnesses, or of attorney or counsel attending before the said Commissioners. 32 Vic., cap. 7, sec. 40.

Cases not within the Act.

45. 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, in the year of our Lord one thousand eight hundred and fifty. 32 Vic., cap. 7, sec. 43.

CAP. 126.

AN ACT RESPECTING DOWER.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Widows to be entitled to Dower in certain cases.

1. Where 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. C. S. U. C., cap. 84, sec. 1.

2. Where a husband has 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. C. S. U. C., cap. 84, sec. 2.

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, fencing or otherwise for the purposes of cultivation or occupation; but this shall not restrict or diminish the right to have woodland assigned to the doweress under the thirty-fifth section of "The Dower Procedure 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 of the same lot, tract or parcel. 32 Vic., cap. 7, sec. 3.

Dower abolished in certain cases.

4. No widow shall be entitled to dower *ad ostium ecclesiæ*, or dower *ex assensu patris*. C. S. U. C., cap. 84, sec. 3.

How Dower may be barred.

5. A married woman may bar her dower in any lands or hereditaments, by joining with her husband in a deed or conveyance thereof in which a release of dower is contained. C. S. U. C., cap. 84, sec. 4.

6. A married woman may also bar her dower 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; but no such deed or conveyance shall be effectual to bar her dower unless made in conformity with "The Married Woman's Real Estate Act." 40 Vic., cap. 7, Sched. A. (157 and 158). See C. S. U. C., cap. 84, sec. 5.

7. A power of attorney executed by a married woman authorizing the attorney to execute a deed barring or releasing her dower shall be valid both in Law and in Equity, provided that the power of attorney is executed in conformity with said Act. 40 Vic., cap. 7, Sched. A. (157 and 158). See 29 Vic., cap. 28, sec. 22, part.

Ascertaining value of Dower.

On sales where wife is a lunatic.

8. Where an owner of land, whose wife is a lunatic, or of unsound mind, and confined as such in a lunatic asylum, is desirous of selling the land free from dower, he may apply in that behalf to the Judge of the County Court of the County in which he resides, or to a Judge of one of the Superior Courts, and if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon such notice as he may deem requisite, dispense with the concurrence of the wife for the purpose of barring her dower, and also he shall ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best, and thereupon a conveyance by the husband, expressed to be free from his wife's dower, shall, subject to the terms and conditions mentioned in the order, be sufficient to bar her right thereto, as if she were of sound mind, and had duly executed a deed jointly with her husband for that purpose.

(2) On every such application the Judge shall be entitled to his own use to a fee of five dollars, and no other fee or charge of any kind shall be payable in respect thereof, either to the Clerk, or otherwise.

(3) Sections six, seven, eight and ten of "The Married Woman's Real Estate Act" shall apply to the order to be made on the said application. 40 Vic., cap. 8, sec. 34 (1-3).

On certain other sales.

9. The next preceding section shall apply to any case in which an agreement for sale has been made and a conveyance has been executed by the husband, and any part of the purchase money has been retained by the purchaser on account of dower, and to any case in which an indemnity has been given against the dower of the wife. 40 Vic., cap. 8, sec. 34 (4).

10. Where the wife of an owner of land has been living apart from him for two years, under such circumstances as by law disentitle her to alimony, and such owner is desirous of selling the land free from dower, he may apply to a Judge of one of the Superior Courts, and, if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon notice (to be served personally unless Judge otherwise directs), dispense with the concurrence of the wife for the purpose of barring her dower, and thereupon a conveyance by the husband, expressed to be free from his wife's dower, shall, subject to any terms mentioned in the order, be sufficient to bar her right thereto, as if she had duly executed a deed jointly with her husband for that purpose.

(2) Sections six, seven, eight and ten of "The Married Woman's Real Estate Act" shall apply to the order to be made on the said application. 40 Vic., cap. 8, sec. 35.

Deeds barring Dower before 2nd March, 1877, confirmed.

11. Where a husband has before the second day of March, one thousand eight hundred and seventy-seven, duly conveyed land of which he was the owner, any deed or conveyance executed before the said day by his wife for the purpose of barring her dower, to which deed or conveyance her husband is not a party, is and shall be taken and adjudged to be valid and effectual to have barred her dower in the lands in which such deed or conveyance professed to bar dower, notwithstanding the absence or want of a certificate touching her consent to be barred of her dower, and notwithstanding any irregularity, informality, or defect in the certificate (if any), and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any Act on or before the said day in force, respecting the barring of dower. 40 Vic., cap. 8, sec. 36.

ONTARIO.

41 VIC., 1878.

CAP. 8.—PAGE 48.

The Revised Statute respecting dower, cap. 126, sec. 10, is hereby amended, by inserting between the word "dower" and the word "and," in the 10th line, the words following:—

"And he shall (unless the wife has been so living apart from her husband under such circumstances as disentitle her to dower,) ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best."

42 VIC., 1879.

CAP. 22.—PAGE 55.

1. No bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument.

2. In the event of a sale of the land comprised in any such mortgage or other instrument, under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor who shall have so

barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold.

3. A mortgagee or other person holding any money out of which a married woman shall be dowable under the preceding sections of this Act, may pay the same into the Court of Chancery to the credit of such married woman and the other persons interested therein.

(2) The Court of Chancery or any Judge thereof may, on a summary application by petition or motion, make such order for securing the right of dower of any married woman in any money out of which she shall be dowable as may be just.

4. A widow shall not be entitled to take her interest in money under this Act and in addition thereto a share of the money as personal estate.

5. In case of a suit for partition or administration, or any suit in which a partition or sale of land is ordered, and in which the estate of any tenant in dower or tenant by the courtesy or for life is established, if the person entitled to such estate has been made a party to the proceedings, the Court or Judge shall 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.

(2) If a sale is ordered including such estate, all the estate and interest of every such tenant shall pass thereby; and no conveyance or release to the purchaser shall be required from such tenant, and the said purchaser, his heirs and assigns shall hold the 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.

(3) In such case, the Court or Judge may direct the payment of such sum in gross out of the purchase money to the persons entitled to dower or estate by the courtesy or for life as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate; or may direct the payment to the person entitled to dower or estate by the courtesy or for life of an annual sum, or of the interest to be derived from the purchase money, or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money, or any part thereof, as may be necessary.

6. Where any married woman is a party to such proceedings as petitioner, if her claim is an inchoate right of dower, then, in case of sale, the

Court shall determine the value of such right, according to the principles applicable to deferred annuities and survivorships, and shall order the amount of such value to be paid; or shall order the payment to such married woman of an annual sum, or of such income or interest as is provided in section 5 of this Act, and such payment shall be a bar to any right or claim of dower.

---

43 VIC., 1880.

CAP. 14.—PAGE 58.

3. Where a doweress has, after the death of her husband, actual possession of the land of which she is dowable, either alone or with heirs or devisees of her husband, the period of ten years within which her action of dower is to be brought shall be computed from the time when such possession of the doweress ceased. This section does not apply to any case in which the right of action has ceased before the passing of this Act.

4. The 9th section of the Act respecting dower, cap. 126 of the R. S. O., shall apply to any case where any person owns or has the right to sell (whether as trustee or otherwise) land which is subject to the dower of a lunatic, whether such dower is inchoate or complete, and whether the person applying is or is not the husband of the lunatic; and the 10th section of the same Act shall apply to any case in which an agreement for sale had been made, a conveyance executed by the husband before the passing of this Act, and part of the purchase money retained by the purchaser on account of dower, or an indemnity given against such dower.

---

44 VIC., CAP. 14.

AN ACT TO FURTHER PROVIDE FOR THE RELEASE OF DOWER OF MARRIED WOMEN IN CERTAIN CASES.

[*Assented to 4th March*, 1881.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Where the wife of an owner of land has been living apart from him for two years, under such circumstances as by law disentitle her to alimony, and such owner is desirous of mortgaging the land free from dower, he may apply to a Judge of one of the Superior Courts, and, if the Judge approves, he may, by order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon notice (to be served personally unless the Judge otherwise directs), dispense with the concurrence of the wife for the purpose of barring her dower, and he shall (unless the wife has been so living apart from her husband under such circumstances as disentitle her to dower) ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best; and thereupon a conveyance by way of mortgage by the husband, expressed to be free from his wife's dower, shall, subject to any terms mentioned in the order, be sufficient to bar her right therto, as if she had duly executed a deed jointly with her husband for that purpose.

2. In case the gaol surgeon of any county or district in which a married woman resides, and another medical practitioner, to be named by the Judge, shall each certify (Form A.) that he has personally examined such married woman, and that he is of opinion that she is insane, and the Judge of the County Court of the county in which such married woman resides, or a Judge of one of the Superior Courts, also certifies (Form B.) that he has personally examined such married woman, and that from such examination, and from the evidence adduced before him, if such Judge thinks it expedient to hear evidence, he is of opinion that such married woman is insane, the said Judge may make the like order as by the eighth or ninth

section of the revised Statutes of Ontario, chapter one hundred and twenty-six, is authorized, in the case of a married woman of unsound mind who is confined in an asylum for the insane. The examination and certificates required by this section must all be made and granted within a period of one calendar month, or such certificates shall not be acted upon by the said Judge, and the application shall not be entertained unless it is made within one month of the day upon which the last of such examinations took place.

3. The preceding section of this Act and the eighth section of the Revised Statute, chapter one hundred and twenty-six, shall apply to mortgages as well as sales.

4. In case a Judge makes an order under the eighth or ninth section of the said Revised Statute, or under the second or third section of this Act, with reference to any parcel of land, he may afterwards make orders in respect of other sales or mortgages, either on the like evidence as is required for the first application, or on any other evidence which may satisfy him of the continued insanity of the married woman.

5. This Act and the tenth section of the Act respecting dower, chapter one hundred and twenty-six of the Revised Statutes, shall apply to any case where any person owns or has the right to sell or mortgage (whether as trustee or otherwise).

6. Sections six, seven, eight and ten of "The Married Woman's Real Estate Act" shall apply to any order made under this Act.

FORM A.

CERTIFICATE OF MEDICAL PRACTITIONER.

I, the undersigned (here set forth the qualification or degree of the person certifying: for example, "Licentiate of the Medical Board," "M.D. of the University of Toronto, etc.), , a legally qualified Medical Practitioner, residing and practising at , in the County of , do hereby certify that I, on the day of , A.D. 18 , at , in the County of , separately from any

other Medical Practitioner, personally examined A. B., of the Township of , in the County of , and I further certify that the said is insane, and that I have formed this opinion upon the following grounds, namely: (here state the facts upon which the certificate is based).

Signed this day of , A.D. 18 , at , in the County of .

FORM B.

CERTIFICATE OF JUDGE.

PROVINCE OF ONTARIO, }
COUNTY OF . }

I, the undersigned E. F., Judge of the County Court of the County of , do hereby certify that I, on the day of A.D. 18 , personally examined A. B., of the of , in the County of , wife of C. D., of the of , in the County of , and I do hereby further certify that from such personal examination (and from the evidence of G. H. and J. K. adduced before me, if evidence has been taken by the Judge), I am of opinion that the said is insane.

Signed this day of , A.D. 18 , at , in the County of .

---

3 & 4 WILL. IV., CAP. 105.

AN ACT FOR THE AMENDMENT OF THE LAW RELATING TO DOWER (AUGUST 29, 1833).

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or different meaning, shall, in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower,) and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

2. And be it further enacted, that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at Law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be 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.

3. And be it further enacted, that when a husband shall have 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 shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

4. And be it further enacted, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

5. And be it further enacted, that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

6. And be it further enacted, that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

7. And be it further enacted, that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

8. And be it further enacted, that the right of a widow to dower, shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

9. And be it further enacted, that where a husband shall devise any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

10. And be it further enacted. that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

11. Provided always, and be it further enacted, that nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by, or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

12. And be it further enacted, that nothing in this Act contained shall interfere with any rule of Equity, or of any Ecclesiastical Court, by which

egacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

13. And be it further enacted, that no widow shall hereafter be entitled to dower *ad ostium ecclesiæ* or dower *ex assensu patris*.

14. And be it further enacted, that this Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating cr prejudicing any right to dower.

B.

A table, arranged by Chancellor Bland, showing the expectation of life according to various tables prepared in England and in the United States. 3 *Bland's Ch. Rep. pp.* 238, 239.

Age.	London	North-ampton	Carlisle	Equit-able.	Swedish.		Finlaison's.		Philadelphia.		Age.
					Males.	Fe-males.	Males.	Fe-males.	Church	Board of Health.	
0	19.2	25.18	38.72		37.82	41.01	50.16	55.51			0
1	27.0	32.74	44.68		46.26	48.60	50.13	55.59	30.91	25.96	1
2	32.0	37.79	47.55		48.12	50.28	50.04	55.37	34.43	32.92	2
3	34.0	39.55	49.82		48.84	50.90	49.80	55.05	35.74	36.80	3
4	35.6	40.58	50.76		49.05	51.15	49.42	54.65	37.30	36.85	4
5	36.0	40.84	51.25		48.99	51.04	48.93	54.23	37.91	36.94	5
6	36.0	41.07	51.17		48.80	50.79	48.36	53.72	38.60	37.02	6
7	35.8	41.07	50.80		48.60	50.38	47.71	53.15	38.24	36.42	7
8	35.6	40.79	50.24		47.91	49.78	47.02	52.50	37.80	35.85	8
9	35.2	40.36	49.57		47.30	49.23	46.30	51.80	37.50	35.23	9
10	34.8	39.78	48.82	43 73	46.68	48.55	45.57	51.05	37.12	34.59	10
11	34.3	39.14	48.04	43.06	45.95	47 83	44.83	50.27	36 74	33.95	11
12	33.7	38.49	47.27	42.39	45.21	47.09	44.07	49.48	36.09	33.20	12
13	33.1	37.83	46.51	41.71	44.59	46.00	43.31	48.70	35.43	32.44	13
14	32.5	37.17	45.75	41.03	43.67	45.51	42.53	47.93	34.77	31.68	14
15	31.9	36.51	45.00	40.35	42.88	44.72	41.75	47.19	34.10	30.92	15
16	31.3	35.85	44.27	39.68	42.11	43.95	41.01	46.51	33.43	30.16	16
17	30.7	35.20	43.57	39.01	41.34	43.18	40.29	45.86	32.73	29.38	17
18	30.1	34.58	42.87	38.34	40.57	42.73	39.61	45.22	32.02	28.60	18
19	29.5	33.99	42.17	37.68	39.79	41.62	38.98	44.60	31.31	27.82	19
20	28.9	33.43	41.46	37.05	39.05	40.90	38.39	43.99	30.60	27.04	20
21	28.3	32.90	40.75	36.45	38.32	40.05	37.83	43.36	29.88	26.25	21
22	27.7	32.39	40.04	35.88	37.61	39.16	37.34	42.73	29.40	24.57	22
23	27.2	31.88	39.31	35.32	36.91	38.66	36.87	42.09	28.93	25.19	23
24	26.6	31.36	38.59	34.78	36.19	37.91	36.89	41.45	28.46	24.67	24
25	26.1	30.85	37.86	34.24	35.48	37.17	35.90	40.81	27.99	24.14	25
26	25.6	30.33	37.14	33.70	34.75	36.43	35.41	40.17	27.50	23.61	26
27	25.1	29.82	36.41	33.16	34.68	35.69	34.86	39.52	27.00	23.08	27
28	24.6	29.30	35.69	32.62	33.30	34.96	34.31	38.87	26.50	22.55	28
29	24.1	28.79	35.00	32.07	32.57	34.22	33.75	38.22	25.99	22.01	29
30	23.6	28.27	34.34	31.52	31.85	33.49	33.17	37.57	25.50	21.48	30
31	23.1	27.76	33.60	30.97	31.12	32.77	32.59	36.91	24.99	20.93	31
32	22.7	27.24	33.03	30.40	30.39	32.04	32.00	36.26	24.59	20.65	32
33	22.3	26.72	32.36	29.84	29.66	31.33	31.40	35.61	24.19	20.40	33
34	21.9	26.20	31.68	29.26	29.07	30.61	30.79	34.96	23.80	20.16	34
35	21.5	25 68	31.00	28.66	28.20	29.90	30.17	34.31	23.40	19.95	35
36	21.1	25.16	30.32	28.07	27.48	29.19	29.54	33.68	23.01	19.76	36
37	20.7	24.64	29.64	27.47	26.75	28.48	28.91	33.04	22.64	19.57	37
38	20.3	24.12	28.96	26.86	26.03	27.77	28.28	32.04	22.23	19.40	38
39	19.9	23.60	28 28	26.26	25.32	27.26	27,65	31.76	21.83	19.25	39
40	19.6	23.08	27.61	25.65	24.62	26.35	27.02	31.12	21.44	19.15	40
41	19.2	22.56	26.97	25.04	23.93	25.65	26.39	30.46	21.05	19.09	41
42	18.8	22.04	26.34	24.42	23.24	24.97	25.74	29.81	20,80	18.87	42
43	18.5	21.54	25.71	23.80	22.56	24.47	25.08	29.14	20.22	18.54	43
44	18.1	21.03	25.09	23.18	21.87	23.61	24.42	28.48	19.82	18.18	44
45	17.8	20.52	24.46	22.55	21.18	22.92	23.75	27.81	19.42	17.91	45
46	17.4	20.02	23.82	21.92	20 51	22.21	23.07	27.13	18.99	17.64	46
47	17.0	19.51	23.17	21.29	19.84	21.49	22.38	26.44	18.55	17.44	47

B.—*Continued.*

Age.	London	North-ampton	Carlisle	Equit-able.	Swedish.		Finlaison's.		Philadelphia.		Age.
					Males.	Fe-males.	Males.	Fe-males.	Church	Board of Health.	
48	16.7	19.00	22.50	20.65	19.18	20.77	21.68	25.75	18.14	17.24	48
49	16.3	18.49	21.81	20.01	18.53	20.06	20.98	25.06	17.73	17.02	49
50	16.0	17.99	21.11	19.37	17.90	19.37	20.30	24.35	17.32	16.82	50
51	15.6	17.50	20.39	18 73	17.30	18.70	19.62	23.65	16.92	16.66	51
52	15.2	17.02	19.68	18.10	16.72	18.05	18.97	22.93	16.52	16.31	52
53	14.9	16.54	18.97	17.48	16.14	17.39	18.34	22.22	16.13	15.97	53
54	14.5	16.06	18.28	16.87	15.55	16.74	17.73	21.50	15.75	15.64	54
55	14.2	15.58	17.58	16.28	14.97	16.08	17.15	20.79	15.40	15.33	55
56	13.8	15.10	16.89	15.70	14.37	15.45	16.57	20.08	15.04	14 97	56
57	13.4	14.63	16.21	15.14	13.80	14.82	16.02	19.38	14.68	14.62	57
58	13.1	14.15	15.55	14.59	13.25	14.20	15.47	18.69	14.35	14.31	58
59	12.7	13.68	14.92	14.05	12.70	13.58	14.93	18.00	14.04	14.00	59
60	12.4	13.21	14.34	13.53	12.17	12.98	14,39	17.32	13.75	13.71	60
61	12.0	12 75	13.82	13.02	11.66	12.40	13,84	16.64	13.48	13.44	61
62	11.6	12.28	13.31	12.52	11.15	11.84	13.28	15 96	13.04	13.06	62
63	11.2	11.81	12.81	12.03	10.64	11.30	12.72	15.30	12.60	12.68	63
64	10.8	11.35	12.30	11.50	11.11	10.76	12.17	14.64	12.17	12.25	64
65	10.5	10.88	11.79	11.07	9.60	10.16	11.63	14.00	11.70	11.82	65
66	10.1	10.42	11.27	10.59	9.11	9 69	11.10	13.37	11.23	11.41	66
67	9.8	9.86	10.75	10.17	8.61	9.18	10.61	12.76	10.76	11.00	67
68	9.4	9.50	10.23	9.64	8.14	8.67	10.14	12.16	10.30	10.60	68
69	9.1	9.05	9.70	9.16	7.68	8.17	9.67	11.57	9.83	10.21	69
70	8.8	8.60	9.18	8.69	7.25	7.69	9.22	10.99	9.37	9.83	70
71	8.4	8.17	8.65	8.23	6.88	7.25	8.79	10.44	8.92	9.48	71
72	8.2	7.74	8.16	7.77	6.50	6.85	8.37	9.92	8.54	9.15	72
73	7.8	7.33	7.72	7.31	6.16	6.47	7.96	9.41	8.16	8.84	73
74	7.5	6.92	7.33	6.87	5.82	6 11	7.54	8.92	7.75	8.47	74
75	7.2	6.54	7.01	6.43	5.50	5.78	7.12	8.46	7.43	8.23	75
76	6.8	6.18	6.69	6.00	5.22	5.39	6.69	8.00	7.06	7.78	76
77	6.4	5.83	6.40	5.59	4.94	5.10	6.23	7.58	6.72	7.50	77
78	6.0	5.48	6.12	5.20	4.51	4.80	5.78	7.19	6.40	7.25	78
79	5.5	5.11	5.80	4.83	4.41	4.50	5.35	6.83	6.15	7.07	79
80	5.0	4.75	5.51	4.50	4.09	4.22	4.94	6.50	5.95	6.97	80
81		4.41	5.21	4.20	3 86	3.98	4.55	6.20	5.86	7.00	81
82		4.09	4.93	3.91	3.67	3.77	4.18	5.89	5 40	6.65	82
83		3.80	4.65	3.65	3.50	3.55	3 82	5.57	4.94	6.33	83
84		3.58	4.39	3.43	3.36	3.40	3.46	5.22	4.50	6.00	84
85		3.37	4.12	3.23	3.23	3.23	3.12	4.84	4.07	5.85	85
86		3.19	3.90	3.02	3.07	3.16	2.81	4.44	3.66	5.50	86
87		3.01	3.71	2.82	2.95	3.01	2.53	4.03	3.30	5.17	87
88		2.86	3.59	2.58	2.78	2.83	2.31	3.62	3.00	4.92	88
89		2,66	3.47	2.37	2.68	2.57	2.12	3;21	2.83	4.75	89
90		2.41	3.28	2.19	2.50	2.26	1.95	2.83		4.73	90
91		2.09	3.26	2.10	2.38	2.06	1.83	2.49			91
92		1.75	3.37	1.90	2.18	1,83	1.65	2.21			92
93		1.37	3.48	1.65	1.96	1.75	1.49	1.97			93
94		1.05	3.53	1.37	1.87	1.72	1.34	1.75			94
95		0.75	3.53	1.25	1.70	1.70	1.18	1.55			95
96		0.50	3.46	1.00	1.50	1.50	0.97	1.32			96
97			3.28	0.50	1.00	1.00	0.75	1.12			97
98			3.07				0.50	0.94			98
99			2.77					0.75			99
100			2 28					0.50			100
101			1.79								101
102			1.30								102
103			0.83								103

C.

Showing the expectation of life, deduced from Dr. Wigglesworth's Table of Mortality.

Age.	Expectation.	Age.	Expectation.	Age.	Expectation.	Age.	Expectation.
YEARS.	YEARS.	YEARS.	YEARS.	YEARS.	YEARS	YEARS.	YEARS.
0	28.15	24	32.70	48	22.27	72	9.14
1	36.78	25	32.33	49	21.72	73	8.69
2	38.74	26	31.93	50	21.17	74	8.25
3	40.01	27	31.50	51	20.61	75	7.83
4	40.73	28	31.08	52	20.05	76	7.40
5	40.88	29	30.66	53	19.49	77	6.99
6	40.69	30	30.25	54	18.92	78	6.59
7	40.47	31	29.83	55	18.35	79	6.21
8	40.14	32	29.43	56	17.78	80	5.85
9	39.72	33	29.02	57	17.20	81	5 50
10	39.23	34	28.62	58	16.63	82	5.16
11	38.64	35	28.22	59	16.04	83	4.87
12	38.02	36	27.78	60	15.45	84	4.66
13	37.41	37	27.34	61	14.86	85	4.57
14	36.79	38	26.91	62	14.26	86	4.21
15	36.17	39	26.47	63	13.66	87	3.90
16	35.76	40	26.04	64	13.05	88	3.67
17	35.37	41	25.61	65	12.43	89	3.56
18	34.98	42	25.19	66	11.96	90	3.43
19	34.59	43	24.77	67	11.48	91	3.32
20	34.22	44	24.35	68	11.01	92	3.12
21	33.84	45	23.92	69	10.50	93	2.40
22	33.46	46	23.37	70	10.06	94	1.98
23	33 08	47	22.83	71	9.60	95	1.62

D.

Showing the value of an Annuity on a single life, at every age, deduced from the Tables of Dr. Wigglesworth.

Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.
0	9.802	8.584	25	13.574	12.024	50	11.487	10.453	75	5.551	5.284
1	12.877	11.268	26	13.523	11.987	51	11.320	10.317	76	5.284	5.038
2	13.625	11.919	27	13.459	11.938	52	11.146	10.175	77	5.018	4.793
3	14.155	12.384	28	13.395	11.890	53	10.965	10.027	78	4.756	4.550
4	14.509	12.698	29	13.332	11.843	54	10.777	9.872	79	4.503	4.315
5	14.668	12.843	30	13.270	11.797	55	10.581	9.709	80	4.265	4.093
6	14.711	12.887	31	13.208	11.752	56	10.376	9.539	81	4.016	3 860
7	14 745	12.925	32	13.148	11.708	57	10.163	9.359	82	3.775	3.633
8	14.743	12.931	33	13.090	11.665	58	9.939	9.171	83	3.568	3.439
9	14.706	12.906	34	13.033	11.625	59	9.706	8.972	84	3.421	3.301
10	14.646	12.862	35	12.978	11.587	60	9.462	8.763	85	3.380	3.266
11	14.538	12.775	36	12.901	11.529	61	9.205	8.541	86	3,105	3.005
12	14.420	12.679	37	12.825	11 472	62	8.936	8.307	87	2.866	2.777
13	14.296	12.578	38	12.749	11.416	63	8.654	8.060	88	2.696	2.615
14	14.167	12.470	39	12.673	11.360	64	8.356	7.797	89	2.617	2.542
15	14.031	12.357	40	12.598	11.306	65	8.042	7.517	90	2.805	2.731
16	13.976	12.315	41	12.525	11.253	66	7.813	7.317	91	2.481	2.422
17	13.928	12.279	42	12.452	11.201	67	7.579	7.110	92	2.097	2.052
18	13.881	12.244	43	12.382	11.152	68	7.340	6.898	93	1.716	1.683
19	13.835	12.211	44	12.313	11.105	69	7.095	6.680	94	1.350	1,327
20	13.791	12 178	45	12.238	11.052	70	6.844	6.456	95	1.038	1.022
21	13.749	12.148	46	12.098	10.942	71	6.589	6.226	96	0.744	0.734
22	13.702	12.114	47	11.954	10.827	72	6.328	5.991	97	0.562	0.555
23	13.658	12.082	48	11.804	10.707	73	6.064	5.751	98	0.476	0.472
24	13.615	12.052	49	11.649	10.583	74	5.807	5.518	99	0.000	0.000

This table exhibits the value of an annuity on a single life at every age. Thus, a person at the age of 30 must pay $13.27 to secure an annuity of one dollar per annum, interest being at 5 per cent.; or $11.80, interest being at 6 per cent.—*Amer. Almanac*, 1856, pp. 227, 229.

E.

Annuity Table, showing the value of an Annuity of one dollar on a single life, according to the Carlisle Table of Mortality. See Appendix B. for the Carlisle Table.

Age.	4 per cent.	5 per cent.	6 per cent.	7 per cent.	8 per cent.	9 per cent.	10 per cent.
1	16.554	13.995	12.078	10.605	9.439	8.502	7.732
2	17.726	14.983	12.925	11.342	10.088	9.080	8.251
3	18.715	15 824	13.652	11.978	10.651	9.584	8.705
4	19.231	16.271	14.042	12.322	10.957	9.858	8.954
5	19.592	16.590	14.325	12.574	11.184	10.064	9.141
6	19.745	16.735	14.460	12.698	11.298	10.168	9.237
7	19.790	16.790	14.518	12.756	11.354	10.221	9.287
8	19.764	16.786	14.526	12 770	11.371	10.240	9.306
9	19.691	16.742	14.500	12.754	11.362	10.236	9.304
10	19.583	16.669	14.448	12.717	11.334	10.214	9.286
11	19.458	16.581	14.384	12.669	11.296	10.183	9.261
12	19.334	16.494	14.321	12.621	11.259	10.153	9.238
13	19.209	16.406	14.257	12.572	11.221	10.123	9.213
14	19.081	16.316	14.191	12.522	11.182	10.091	9.187
15	18.995	16.227	14.126	12.473	11.144	10.061	9.161
16	18.836	16.144	14.067	12.429	11.111	10.034	9.140
17	18.721	16.066	14.012	12.389	11.081	10.011	9.122
18	18.606	15.987	13.956	12.348	11.051	9.988	9.104
19	18.486	15.904	13.897	12.305	11.019	9.963	9.055
20	18.361	15.817	13.835	12.259	10.985	9.937	9.064
21	18.231	15.726	13.769	12.210	10.948	9.909	9.041
22	18.093	15.628	13.697	12.156	10.906	9.876	9.015
23	17.950	15.525	13.621	12.098	10.861	9.841	8.987
24	17.800	15.417	13.541	12.037	10.813	9.802	8.955
25	17.644	15.303	13.456	11.972	10.762	9.761	8.921
26	17.485	15.187	13.368	11.904	10.709	9.718	8.886
27	17.320	15.065	13.275	11.832	10.652	9.671	8 847
28	17.154	14.942	13.182	11.759	10.594	9.624	8.808
29	16.996	14.827	13.096	11.693	10.542	9.582	8.773
30	16.852	14.723	13,020	11.636	10.498	9.548	8.747
31	16.705	14.617	12.942	11.578	10.454	9.514	8.719
32	16.552	14.506	12.860	11.516	10.407	9.476	8.690
33	16.390	14.387	12.771	11.448	10 355	9.435	8.657
34	16.219	14.260	12.675	11.374	10.297	9.389	8.619
35	16.041	14.127	12.573	11.295	10.235	9.339	8.578
36	15.855	13.987	12.465	11.211	10.168	9.285	8.534
37	15.665	13.843	12.354	11.124	10.098	9.228	8.488
38	15.471	13.695	12.239	11.033	10.026	9.169	8.439
39	15.271	13.542	12.120	10.939	9.950	9.107	8.388
40	15.073	13.390	12.002	10.845	9.875	9.046	8.337
41	14.883	13.245	11.890	10.757	9.805	8.991	8.292
42	14.694	13.101	11.779	10.671	9.737	8.937	8.249
43	14.505	12.957	11.668	10.585	9.669	8.883	8.206
44	14.308	12.806	11.551	10.494	9.597	8.826	8.160
45	14.104	12.648	11 428	10.397	9.520	8.764	8.111
46	13.889	12.480	11.296	10,292	9.436	8.697	8.056
47	13.662	12.301	11.154	10.178	9.344	8.622	7.995
48	13.419	12.107	10.998	10.052	9,241	8.537	7.925
49	13.153	11.892	10.823	9.908	9.121	8.437	7.840
50	12.869	11.660	10.631	9.749	8.987	8.324	7.744
51	12.565	11.410	10.422	9.573	8.838	8.197	7.634
52	12.257	11.154	10.208	9.392	8.684	8.064	7.519

E.—*Continued.*

Age.	4 per cent.	5 per cent.	6 per cent.	7 per cent.	8 per cent.	9 per cent.	10 per cent.
53	11.945	10.892	9.988	9.205	8.523	7.926	7.399
54	11.626	10.624	9.761	9.011	8.356	7.781	7.272
55	11.299	10.347	9.524	8.807	8.179	7.627	7.137
56	10.966	10.063	9.280	9.595	7.996	7.465	6.994
57	10.625	9.771	9.027	8.375	7.802	7.294	6.843
58	10.286	9.478	8.772	8.153	7.606	7.120	6.687
59	9.963	9.199	8.529	7.940	7.418	6.954	6.539
60	9.663	8.940	8.304	7.743	7.245	6.800	6.402
61	9.398	8.712	8.108	7.572	7.095	6.669	6.285
62	9.136	8.487	7.913	7.403	6.947	6.539	6.171
63	8.871	8.258	7.714	7.229	6.795	6.404	6.052
64	8.593	8.016	7.502	7.042	6.630	6.258	5.922
65	8.307	7.765	7.281	6.847	6.457	6.104	5.784
66	8.009	7.503	7.049	6.641	6.272	5.938	5.635
67	7.699	7.227	6.803	6.421	6.075	5.760	5.474
68	7.379	6.941	6.546	6.189	5.866	5.570	5.301
69	7.048	6.643	6 277	5.945	5.643	5.368	5.115
70	6.709	6.336	5.988	5.690	5.410	5.153	4.918
71	6 357	6.015	5.704	5.420	5.160	4 923	4.704
72	6.025	5.711	5.424	5.162	4.922	4.701	4.498
73	5.724	5.435	5.170	4.927	4.704	4.499	4.305
74	5.458	5.190	4.944	4.719	4.511	4.319	4.142
75	5.239	4.989	4.760	4.549	4.355	4.175	4.008
76	5.023	4.792	4.579	4.382	4.200	4.031	3.874
77	4.824	4.609	4.410	4.227	4.056	3.898	3.751
78	4.621	4.422	4.238	4.067	3.908	3.760	3.623
79	4.393	4.210	4.040	3.883	3.736	3.599	3.471
80	4.182	4.015	3.858	3.713	3.577	3.450	3.331
81	3.953	3.799	3.656	3.523	3.398	3.282	3.172
82	3.746	3.606	3.474	3.352	3.237	3.130	3.029
83	3.534	3.406	3.286	3.174	3.069	2.970	2.877
84	3.328	3.211	3 102	2.999	2.903	2.813	2.728
85	3.115	3.009	2.909	2.815	2.727	2.644	2.567
86	2.928	2.830	2.739	2.652	2 571	2.495	2.423
87	2.775	2.685	2.599	2.519	2.443	2.372	2.304
88	2.683	2.597	2.515	2.439	2.366	2.299	2.234
89	2.577	2.495	2.417	2.344	2.276	2.211	2.150
90	2.416	2.339	2.266	2.198	2.133	2.072	2.015
91	2.398	2.321	2.248	2.180	2.115	2.054	1.997
92	2.491	2.412	2.337	2.266	2.198	2.135	2.075
93	2.599	2.518	2.440	2.367	2.297	2.232	2.170
94	2.649	2.569	2.492	2.419	2.350	2.284	2.221
95	2.674	2.596	2.522	2.451	2.383	2.319	2.258
96	2.627	2.555	2.486	2.420	2.358	2.298	2.239
97	2.492	2.428	2.368	2.309	2.253	2.199	2.150
98	2.332	2.278	2.227	2.177	2.129	2.083	2.039
99	2.087	2.045	2.004	1.964	1.926	1.889	1.856
100	1.652	1.624	1.596	1.569	1.543	1.517	1.493

F.

Showing the present value of a Life-Right in the income of $100, *at every age, calculating the interest at* 5 *and at* 6 *per cent., according to Dr. Wigglesworth's Table of Mortality.*

Age.	Interest 5 per ct.	Interest 6 per ct.	Age.	Interest 5 per ct.	Interest 6 per ct.	Age.	Interest 5 per ct.	Interest 6 per ct.	Age.	Interest 5 per ct.	Interest 6 per ct.
0	49.01	51.50	24	68.08	72.31	48	59.02	64.24	72	31.64	35.95
1	64.31	67.61	25	67.87	72.14	49	58.25	63.50	73	30.32	34.51
2	68.13	71.51	26	67.62	71 92	50	57.44	62.72	74	29.04	33.11
3	70.78	74.30	27	67.30	71.63	51	56.60	61.90	75	27.76	31.70
4	72.55	76.19	28	66.98	71.34	52	55.73	61.05	76	26.42	30.23
5	73.34	77.06	29	66.66	71.96	53	54.83	60.16	77	25.09	28.76
6	73.56	77.32	30	66.35	70.78	54	53.89	59.23	78	23.78	27.30
7	73.73	77.53	31	66.04	70.51	55	52.91	58.25	79	22.52	25.89
8	73.72	77.59	32	65.74	70.25	56	51.88	57.23	80	21.33	24.56
9	73.53	77.44	33	65.45	69.99	57	50.82	56.15	81	20.08	23.16
10	73.23	77 17	34	65.17	69.75	58	49.70	55.03	82	18.88	21.80
11	72.69	76.65	35	64.89	69.52	59	48.53	53 83	83	17.84	20.63
12	72.10	76.07	36	64.51	69.17	60	47.31	52.58	84	17.11	19.81
13	71.48	75.47	37	64.13	68.83	61	46.03	51.25	85	16.90	19 60
14	60.84	74.82	38	63.75	68.50	62	44.68	49.84	86	15.53	18.03
15	70.16	74.14	39	63.37	68.16	93	43.27	48.36	87	14.33	16.66
16	69.88	73 89	40	62.99	67.84	64	41.78	46.78	88	13 48	15.69
17	69.64	73.67	41	62.63	67.52	65	40.21	45.10	89	13.09	15.25
18	69.41	73.46	42	62.26	67.21	66	39.07	43.90	90	14.03	16.39
19	69.18	73.27	43	61.91	66.91	67	39.90	42.66	91	12.41	14.53
20	68.96	73.07	44	61.57	66.63	68	36.70	41.39	92	10 49	12.31
21	68.75	72.89	45	61.19	66.31	69	35.48	40.08	93	8.58	10.10
22	68.51	72.68	46	60.49	65.65	70	34.22	38.74	94	6.75	7 96
23	68.29	72.49	47	59.77	64.96	71	32.95	37.36	95	5.19	6.13

This table exhibits the value of a life-right in the income of $100, supposing the rate of interest to be 5 or 6 per cent. Thus, the value of the life-right of a person aged 50, interest being 6 per cent., is 62.72 per cent. Subtracting this from $100, leaves the present value of the reversion 37.28 per cent. Hence, if the estate was worth $10,000, the present value of the life-right would be $6272, and the present value of the reversion $3728.—*Amer. Almanac*, 1856, pp. 227-8.

G.

Showing the value of a Widow's Dower in the income of $100, *at every age, calculating the interest at* 5 *and at* 6 *per cent., according to Dr. Wigglesworth's Table of Mortality.*

Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.	Age.	5 per ct.	6 per ct.
0	16.34	17.17	24	22.69	24.10	48	19 67	21.41	72	10.55	11.98
1	21.46	22.54	25	22.62	24.05	49	19.42	21.17	73	10.11	11.50
2	22.71	23.84	26	22.54	23.97	50	19.15	20.91	74	9.68	11.04
3	23.59	24.77	27	22.43	23.88	51	18.87	20.63	75	9.25	10.57
4	24 18	25 40	28	22.33	23.78	52	18.58	20.35	76	8.81	10.08
5	24.45	25.69	29	22.22	23.69	53	18.28	20.05	77	8.36	9.59
6	24.52	25.77	30	22.12	23.59	54	17.96	19.74	78	7.93	9.10
7	24 58	25.85	31	22.01	23.50	55	17.64	19.42	79	7.51	8.63
8	24.57	25.86	32	21.91	23.42	56	17.29	19.08	80	7.11	8.19
9	24.51	25.81	33	21 82	23.33	57	16.94	18.72	81	6.69	7.72
10	24.41	25.72	34	21.72	23.25	58	16.57	18.34	82	6.29	7.27
11	24.23	25.55	35	21.63	23.17	59	16 18	17.94	83	5.95	6.88
12	24.03	25.36	36	21.50	23.06	60	15.77	17.53	84	5.70	6.6(
13	23.83	25.16	37	21.38	22.94	61	15.34	17.08	85	5 63	6.53
14	23.61	24.94	38	21.25	22.83	62	14.89	16.61	86	5.18	6.01
15	23.39	24.71	39	21.12	22.72	63	14.42	16.12	87	4.78	5.55
16	23.29	24.63	40	21.00	22.61	64	13.93	15.59	88	4.49	5.23
17	23.21	24.56	41	20.88	22 51	65	13.40	15.03	89	4.36	5.08
18	23.14	24.49	42	20.75	22.40	66	13.02	14.63	90	4.68	5.46
19	23.06	24.42	43	20.64	22.30	67	12.63	14.22	91	4.14	4.84
20	22.99	24.36	44	20.52	22.21	68	12.23	13.80	92	3.50	4.10
21	22.92	24.30	45	20.40	22.10	69	11.83	13.36	93	2.86	3.37
22	22.84	24.23	46	20.16	21.88	70	11.41	12.91	94	2.25	2.65
23	22.76	24.16	47	19.92	21.65	71	10.98	12.45	95	1.73	2 04

This table exhibits the value of a widow's dower in the income of $100. It is exactly one-third of the value given by table F. Thus, if a widow has a right of dower in an estate worth $3000, her age being 40 years, and the rate of interest 5 per cent., we should find by the table the present value of her life-right to be worth 21 per cent.; hence we get the present value of her dower, $630. We get nearly the same result from table F., where the life-right is 62.99 per cent. on her third part of $3000, or $1000 set off to her for dower, making its present value $629.90.—*Amer. Almanac*, 1856, pp. 227-229.

H.

VALUE OF THE

TABLE, *showing the present value of the Right of Dower of a Married*

In the following table, as given by Mr. Bowditch, the age of the husband, like that of the wife, begins with 16 years, and embraces all the even numbers to the age of 90 years, inclusive; but with respect to the husband, the ages 16, 18, 20, 24, 28, 78, 82, 86, 88 and 90 are here omitted, in order to reduce the table to the width of the page. The ages near the two extremes are those which will be most rarely wanted in such a table.

Age of the Husband.

Age of the Wife.	22	26	30	32	34	36	38	40	42	44	46	48	50	52	54	Age of the Wife.
16	3.68	4.10	4.58	4.85	5.14	5.43	5.73	6.06	6.42	6.81	7.25	7.74	8.42	9.18	9.93	16
18	3.57	3.99	4.51	4.76	5.03	5.29	5.65	5.99	6.35	6.73	7.08	7.57	8.21	8.96	9.71	18
20	3.45	3.88	4 38	4.64	4.92	5.15	5.49	5.86	6.22	6.60	6.90	7.38	8.00	8.74	9.49	20
22	3.33	3.77	4.25	4.46	4.74	5.00	5.33	5.69	6.03	6.43	6.72	7.19	7.79	8.52	9.27	22
24	3.23	3.65	4.11	4.32	4.57	4.85	5.17	5.52	5.85	6.18	6.54	6.99	7.58	8.30	9.05	24
26	3.12	3.53	3.97	4.18	4.42	4.70	5.01	5.35	5 66	5.98	6.36	6.79	7.37	8.08	8.83	26
28	3.01	3.41	3.83	4.03	4.26	4.54	4.84	5.17	5.47	5.78	6.17	6.59	7.15	7.85	8.60	28
30	2.90	3.28	3.69	3.88	4.10	4.38	4.66	4.99	5.28	5.58	5.96	6.38	6.93	7.61	8.35	30
32	2.79	3.15	3.55	3 73	3.94	4.21	4.48	4.80	5.09	5.38	5.74	6.16	6.70	7.36	8.08	32
34	2.68	3.02	3.40	3.57	3.78	4.03	4.30	4.60	4.88	5.17	5.51	5.92	6.45	7.10	7.80	34
36	2.56	2.89	3.25	3.41	3.61	3.85	4.11	4.40	4.66	4.94	5.26	5.66	6.18	6.83	7.51	36
38	2.44	2.76	3 10	3.25	3.44	3.67	3.92	4.19	4 44	4.70	5.00	5.39	5.90	6.53	7.21	38
40	2.32	2.62	2.95	3.09	3.27	3.49	3 72	3 98	4.22	4.46	4.74	5.11	5.61	6 22	6.89	40
42	2.20	2.48	2.79	2.93	3.10	3.30	3.52	3.76	3.99	4.22	4.48	4 83	5.31	5.90	6.56	42
44	2.07	2.34	2.63	2.76	2.92	3.11	3.32	3.54	3.75	3.98	4.22	4.55	4.99	5.57	6.21	44
46	1.94	2.21	2.47	2.59	2.73	2.92	3.12	3.32	3.50	3.71	3.96	4.26	4.67	5.22	5.84	46
48	1.85	2.10	2.31	2.42	2.54	2.76	2.91	3.10	3.25	3.44	3.71	3.97	4.35	4.85	5.45	48
50	1.71	1.92	2.15	2.24	2.35	2.56	2.71	2 87	3.00	3.17	3.49	3.75	4.03	4.48	5.05	50
52	1.54	1.74	1.95	2.06	2.18	2.31	2.45	2.60	2.76	2.90	3.18	3.46	3.78	4.12	4.63	52
54	1.40	1.58	1.77	1.87	1.97	2.08	2.21	2.34	2.48	2.63	2.81	3.05	3.37	3.77	4.21	54
56	1.30	1.44	1.61	1.70	1.59	1.89	1.99	2.10	2.22	2.35	2.50	2.72	3.00	3.36	3.80	56
58	1.17	1.32	1.48	1.56	1.64	1.72	1.81	1.90	2.00	2.11	2.24	2.39	2.59	2.87	3.27	58
60	1.03	1.17	1.32	1.40	1.48	1.56	1.65	1.74	1.84	1.95	2.07	2.20	2.35	2.57	2.89	60
62	0.91	1.03	1.16	1.23	1.30	1.37	1.45	1.54	1.63	1.73	1.85	1.99	2.17	2.38	2.64	62
64	0.82	0.92	1.03	1.09	1.16	1.23	1.30	1.37	1.44	1.51	1.61	1.75	1.93	2.15	2.41	64
66	0.74	0.82	0.92	0.97	1.02	1.08	1.13	1.19	1.25	1.31	1.37	1.47	1.63	1.85	2.12	66
68	0.65	0.73	0.82	0.86	0.91	0.96	1.01	1.06	1.10	1.15	1.20	1.25	1.36	1.54	1.79	68
70	0.54	0.62	0.70	0.74	0.78	0.83	0.87	0.92	0.97	1.02	1.07	1.12	1.17	1.27	1.43	70
72	0.44	0.50	0.57	0.61	0.65	0.69	0.73	0.77	0.81	0.85	0.90	0.96	1.03	1.11	1.22	72
74	0.38	0.43	0.49	0.52	0.55	0.58	0.61	0.64	0.68	0.71	0.75	0.86	0.89	0.98	1.08	74
76	0.35	0.38	0.42	0.45	0.48	0.51	0.53	0.56	0.58	0.60	0.63	0.67	0.73	0.82	0.94	76
78	0.30	0.34	0.38	0.40	0.43	0.45	0.47	0.49	0.50	0.52	0.53	0.55	0.60	0.68	0.79	78
80	0.24	0.28	0.32	0.34	0.36	0.38	0.41	0.43	0.44	0.46	0.47	0.48	0.50	0.55	0.64	80
82	0.20	0.22	0.25	0.27	0.29	0.32	0.34	9.36	0.38	0.40	0.41	0.43	0.45	0.47	0.52	82
84	0.17	0.18	0.21	0.23	0.24	0.25	0.27	0.29	0.30	0.32	0.34	0.37	0.40	0.42	0.45	84
86	0.14	0.16	0 18	0.19	0.20	0.21	0.22	0.23	0.25	0.26	0.27	0.29	0.32	0.36	0.40	86
88	0.13	0.15	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22	0.23	0.24	0.26	0.30	0.35	88
90	0.11	0.13	0.15	0.16	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22	0.23	0.25	0.29	90
	22	26	30	32	34	36	38	40	42	44	46	48	50	52	54	

Age of the Husband.

RIGHT OF DOWER.

Woman, in an estate worth $100, *provided she survives her Husband.**

The table is to be entered at the top with the age of the husband, and at the side with the age of the wife; under the former and opposite to the latter is the present value of the dower-right in an estate worth $100.

Thus, if the age of the husband be 50 years, and that of the wife 32 years, the present value of the dower in $100 is $6.70; so that if the estate be worth $10,000, the present value of the dower-right would be $670.—*American Almanac*, 1856, pp. 230-31.

Age of the Husband.

Age of the Wife.	56	58	60	62	64	66	68	70	72	74	76	80	84	Age of the Wife.
16	10.69	11.62	12.48	13.20	13.86	14.67	15.63	16.62	17.74	18.53	19.27	20.78	22.10	16
18	10.51	11.40	12.24	12.96	13 63	14.45	15.39	16.41	17.51	18.31	19.03	20.48	21.86	18
20	10.30	11.18	12.03	12.72	13.40	14.22	15.15	16.18	17.26	18.08	18.78	20.18	21.62	20
22	10.09	10.95	11.80	12.48	13.17	13.98	14.90	15.93	16.99	17.85	18.56	19.87	21.34	22
24	9.86	10.71	11 56	12.23	12.94	13.73	14.63	15.66	16.74	17.60	18.25	19.57	21.05	24
26	9.62	10.47	11.30	11.97	12.69	13.46	14 35	15.37	16.46	17.34	17.96	19.26	20.77	26
28	9.37	10.22	11.03	11.70	12.42	13.18	14.05	15.06	16.15	17.06	17.66	18.96	20.47	28
3	9.11	9.96	10.75	11.42	12.13	12.88	13.74	14.74	15.82	16.75	17.34	18 65	20.14	30
32	8.84	9.69	10.46	11.13	11.82	12.57	13.42	14.41	15.48	16.40	17.00	18.32	19 78	32
34	8.56	9 40	10.15	10.82	11.50	12.25	13.09	14.07	15.12	16.01	16.65	17.96	19.39	34
36	8.26	9.08	9.82	10.49	11.16	11.92	12.75	13.71	14.74	15.62	16.28	17.57	19.00	36
38	7.95	8.75	9.48	10.13	10.80	11.57	12.39	13.33	14.34	15.22	15.89	17.15	18.59	38
40	7.62	8.41	9.13	9.76	10 42	11.19	12.00	12.93	13.93	14.80	15.47	16.72	18.16	40
42	7.27	8.04	8.76	9.37	10.02	10.78	11.58	12.50	13.52	14.37	15.03	16.26	17.70	42
44	6.91	7.65	8.37	8.96	9.60	10.34	11.13	12 04	13.08	13.92	14.56	15.76	17.22	44
46	6.53	7.25	7.95	8.52	9.15	9.87	10.65	11.54	12.59	13.52	14.06	15.22	16 70	46
48	6.10	6.84	7.49	8.04	8.66	9.37	10.15	11.00	12.03	12.72	13.50	14.65	16.10	48
50	5.64	6.17	7.01	7.52	8.12	8.83	9.61	10.43	11.39	11.90	12.87	14.05	15.41	50
52	5.28	5.56	6.22	6.97	7.54	8.24	9.02	9.82	10.68	11.27	12.16	13.32	14.63	52
54	4.78	5.18	5.72	6.30	6.92	7.59	8.37	9.18	9.97	10.72	11.37	12.81	13.77	54
56	4.30	4.81	5.33	5.85	6.37	6.89	7.68	8.48	9.26	9.62	10.50	12.01	13.12	56
58	3.79	4.39	4.96	5.50	6.00	6.46	6.89	7.77	8.56	8 64	9.37	10.90	12.06	58
60	3.31	3.83	4.41	4.95	5.47	5.98	6.48	6.98	7.85	8.08	8.69	9.99	11.23	60
62	2.97	3.36	3.82	4.33	4.87	5.43	6.00	6.57	7.15	7.72	8.28	9.36	10.37	62
64	2.70	3.03	3.39	3.78	4.22	4.71	5.25	5.84	6.47	7.14	7.76	8.84	9.70	64
66	2.43	2.74	3 06	3.39	3.74	4.12	4.55	5.04	5 60	6.22	6.88	8.05	9.02	66
68	2.09	2.44	2.77	3.07	3.38	3.69	4.02	4.39	4.82	5.32	5.89	7.08	8.08	68
70	1.67	1.98	2.36	2.70	3.01	3.32	3.65	3.94	4.27	4.65	5.09	6.15	7.12	70
72	1.36	1.57	1.85	2.17	2.50	2.84	3.18	3.53	3.88	4.24	4.61	5.38	6.23	72
74	1.20	1.35	1.54	1.77	2.03	2.33	2.67	3.05	3.43	3.77	4.11	4.80	5.49	74
76	1.09	1.25	1.42	1.59	1.76	1.94	2.16	2.43	2.76	3.15	3.60	4.35	5.03	76
78	0.94	1.12	1.29	1.45	1.60	1.75	1.90	2.08	2.31	2·61	2.98	3.78	4.46	78
80	0.77	0.94	1.10	1.26	1.41	1.56	1.71	1.87	2.06	2.28	2.54	3.20	3.85	80
82	0.60	0.71	0.84	1.00	1.16	1.33	1.50	1.68	1.87	2.07	2.29	2.75	3.28	82
84	0.50	0.58	0.68	0.79	0.90	1.03	1.18	1.36	1.57	1.81	2.04	2.45	2.80	84
86	0.45	0.51	0.58	0.66	0.74	0.83	0.94	1.08	1.25	1.44	1.66	2.09	2.48	86
88	0.41	0.48	0.55	0.62	0.69	0.76	0.83	0.92	1.04	1.20	1.39	1.79	2.17	88
90	0.35	0.42	0.51	0.60	0.68	0.75	0.81	0.87	0.96	1.08	1 23	1.57	1.92	90
	56	58	60	62	64	66	68	70	72	74	76	80	84	

Age of the Husband.

* By the Carlisle Table. See Appendix "B."

I.

A Table corresponding with the Northampton Table (see Appendix "B"), showing the value of an annuity of one dollar, at 6 per cent., on a single life, at any age from one year to ninety-four, inclusive.

"The whole number, and part or parts of one annual payment of an annuity which all the future payments are worth, in present money, is called *the number of years' purchase* the annuity is worth, and, being the sum of the present values of all the future payments, is also the sum which, being put out and improved at compound interest, will just suffice for the payment of the annuity."—3 Encycl. Brit., 8th Ed. p. 233, tit. annuities.

Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.
1	10.107	33	11.423	65	6.841
2	11.724	34	11.331	66	6.625
3	12.348	35	11.236	67	6.405
4	12.769	36	11.137	68	6.179
5	12.962	37	11.035	69	5.949
6	13.156	38	10.929	70	5.716
7	13.275	39	10.819	71	5.479
8	13.337	40	10.705	72	5.241
9	13.335	41	10.589	73	4.781
10	13.285	42	10.473	74	4.565
11	13.212	43	10.356	75	4.354
12	13.130	44	10.235	76	4.154
13	13.044	45	10.110	77	3.952
14	12.953	46	9.980	78	3.742
15	12.857	47	9.846	79	3.514
16	12.755	48	9.707	80	3.281
17	12.655	49	9.563	81	3.155
18	12.562	50	9.417	82	2.926
19	12.477	51	9.273	83	2.713
20	12.398	52	9.129	84	2.551
21	12.329	53	8.980	85	2.402
22	12.265	54	8.827	86	2.266
23	12.200	55	8.670	87	2.138
24	12.132	56	8.509	88	2.031
25	12.063	57	8.343	89	1.882
26	11.992	58	8.173	90	1.689
27	11.917	59	7.999	91	1.422
28	11.841	60	7.820	92	1.136
29	11.763	61	7.637	93	0.806
30	11.682	62	7.449	94	0.518
31	11.598	63	7.253		
32	11.512	64	7.052		

RULE for computing the value of the life estate or annuity:

Calculate the interest at six per cent. for one year, upon the sum to the income of which the person is entitled; multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

Example.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth $350.75: one-third of this is $116.91⅓; interest on $116.91, one year, at 6 per cent., is $7.01; the number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years and 035.1000 parts of a year, which, multiplied by $7.01, the income for one year, gives $77.35 and a fraction, as the gross value of her right of dower.—*Dayton on Surrogates, Appendix* lxvi.

INDEX.

A.

Abatement—

Pleas in. (See *Pleas.*)

Accounts—

Vouching, 557.
To sustain bill for, there must be mutual demands, 560.

Admeasurement—

Of dower. When writ of granted, 330, 331, 332, 333, 334, 335.

Administration—

Dower where, takes place, 364, 365, 559.

Administratrix—

Conveyance of husband's estate by, does not pass her right of dower, 403.

Adultery—

Of husband, effect of on dower, 61.
Of wife, is a forfeiture of her dower, 61, 62.
Unless husband willingly reconciled to her, 61.
No bar, if wife forcibly taken away and detained against her will, 61.
But if she voluntarily remain with adulterer, she will be barred, 61.
Works a forfeiture, if committed after separation, by mutual consent, 61.
If relied on as a defence to action for dower, must be proved affirmatively by tenant, 64.
Reconciliation must be voluntary to restore widow to dower, 64.
Cohabitation alone is not sufficient, 64.
Husband is not bound to become reconciled, 65.
Effect of, on jointure, 441.

Advowson—

Dower may be had of an, 68.

Affidavit—

Of service of notice of application to convey, free from dower, what it must contain, 401.

Aliens—

Rights of the widow of an, 55.
Definition of, 55.
Not formerly entitled to dower at Common Law, 55.
Unless she be Queen Consort, 55.
Have now same rights as to descent, etc., as natural born subjects, under Provincial Statutes, 55, 56.

Alienation—

By husband, effect of, on dower, 261, 262, 263.

Annuity—

Not subject to dower, 205, 206, 207, 208.
Charged upon lands of which widow is dowable, 457, 458.

Antenuptial—

Settlement, in lieu of dower, 411, 427, 428.
Parol antenuptial articles, 427, 428.
Articles must be fair and reasonable, 428.

Appearance—

In ations for dower, 542, 543.
Judgment by default of, 543.

Arrears—

Of dower, interest on, 525, 526.

Assignment of Dower—

In Ontario, 162.
In rents and profits, 163, 334.
Dower after husband's death, but before assignment, 296.
Widow not invested with freehold until, 297, 298.
Rights and liabilities of widows before, 299, 300.
May be compelled to make partition, 300.
Informal, 300, 313.
Widow entitled to, immediately upon death of husband, 302.
Not necessary to resort to legal proceedings to make, 302.
How to proceed to make, 302, 303.
Dowress and tenant may agree upon, 303.
No demand of assignment necessary in Ontario, 303.
How dower may be assigned, 304, 317, 318.

Assignment of Dower—*Continued.*

Must be done by tenant of freehold, 304, 305.
Who need not necessarily have a valid title, 305, 306.
But assignment obtained by collusion voidable, 305.
By person having tortious possession, 306.
By an infant, 307.
By a guardian, 307.
By a joint-tenant, 307.
According to common right, 308.
By metes and bounds, when dispensed with, 308, 309.
What heir compelled to assign, 309.
Contrary to comm on right, 310, 313.
When widow dowable of several manors or lands, 311, 320.
After judgment, recovered for dower, 311, 312.
By Court having no jurisdiction, 312.
Void or irregular, may become obligatory by ratification, 312.
Estoppel arising from, 313, 314.
By metes and bounds, as against the heir, devisee, or alienee of the husband, 315.
In Ontario, provided for by Statute, 316.
Notice to heir of execution of commission to lay off dower not necessary, 316.
Where tenant gives notice that he is willing to assign, 316, 317.
Where dowress, by mistake, fails to attend on day appointed to assign, 317.
Commission to make, 317, 318.
When it may be set aside, 318.
May be of particular rooms in a house, 318.
Must be not less than one-third, 318.
Cannot be made of a portion in fee, 318.
Nor of privilege to cut firewood, or feed stock on land not set off for dower, 319.
Parol evidence inadmissible to show what lands included in, 319.
Where husband tenant in common, 321.
In mines, how made, 321, 322.
Where improvements made since husband's death, 322, 323.
What widow entitled to under, 323.
Where land sold under execution against husband, 323.
Where land increases in value after husband's death, 325, 326.
How value calculated, 326.
Where property indivisible 326, 352.
Where deterioration takes place in hands of assignee, 326, 327, 328.
Remedy where excessive, 330, 331.
Relief in Equity, 332.
When return to writ of, may be set aside, 332, 333.
When granted *de novo*, 333, 334.
According to common right, implies a warranty, 336.
Vests widow with immediate freehold, 341, 342.
Has relation to death of husband, 342, 343.
And considered as a continuation of husband's estate, 342.
By heir, no consideration for anything moving from wife, 343.
Effect of, of one-third, 343, 344.
Defeats charges and encumbrances created by husband alone, 344.
Does not defeat ante-nuptial encumbrances of husband, 344, 345.
If accepted by widow contrary to common right, she takes, subject to encumbrances, 345.

Assignment of Dower—*Continued.*

Of land, subject to a lease for years, widow entitled to rents, 345.
Whether she may enter for condition broken, 346, 347.
Widow cannot maintain assumpsit against tenant for use and occupation between husband's death and assignment, 347.
Of hereditaments lying in appendancy, 347, 348.
Duties and liabilities of widow after assignment, 349, 350, 351.
Discharges other lands of husband from claim of dower, 354.
After assignment dowress need not concur in selling other lands, 354.
Except in certain cases, 354, 355.
Effect of death of widow before, 527, 528.

Attachment—

Of lands before marriage, and a judgment recovered thereon after marriage, defeats dower, 271.

Attainder—

Formerly wife of an attainted felon, could not be endowed, 57.
On attainder, person's inheritable blood blotted out and extinguished, 57.
And his estate escheated to lord of the fee, 58.
By 33 Vic., cap. 9, except in cases of high treason, widow entitled to dower, 58.

B.

Banns—

Marriage by, 13, 14.

Bankruptcy—

Of husband, does not defeat dower, 272, 273.

Base fee—

Dower in, 128.

Bequest—

Of personalty in lieu of dower, 462.
Whether widow entitled to bequest and dower, 462.

C.

Certificate—

Of marriage, 11, 13, 16.

Cestue que use—

Wife of, entitled to dower, 108.
Effect of Statute of Uses, 108.

Civil death—(See *Death*).

Chattel Interest—

Outstanding, no impediment to dower, 157.

Collateral Limitations—

Estates created by way of, subject to dower, 131.
Example of, 131.
Dower ceases when event which terminates estate happens, 131,132.
Implied, 132.

Collateral Satisfaction—

As a bar of dower, 373.

Commission—

Notice of execution of, to lay off dower, not necessary, 316.

Commissioners—

To assign dower, 317.
Liability of, for acting vexatiously, 318.
Or making improper return, 319.

Common, Tenancy in—

Subject to dower, 111, 112, 171, 172, 173.
Assignment of dower, how made when husband tenant in common, 321.
Rights and liabilities of widow of, 350.

Compensation—

In lieu of dower, 373.

Condition, Estate upon—

Dower out of, 127.
Right of dower destroyed upon entry for condition broken, 127, 128.
Must not be confounded with conditional limitations, 127.

Conditions—

In restraint of marriage, 464.

Conditional Limitations—464, 465.

Dower out of estate conveyed by way of, 132 to 137.

Consent—

To marriage, 15.

Contingent Estate—

Effect of intervening, upon title of dower, 87, 101.
Is destroyed upon determination of particular estate, 88.

Contingent Remainder—

Not an estate, 89.
How defeated, 89, 94, 95, 96, 97.
Will not be defeated by determination of precedent particular estate, 89, 90.
Vesting of, defeats dower, though right has become consummate, 99.

Contracts of Sale—

Made before marriage, defeats dower, 268.
Even though sale by parol, 268.
Or Vendor an infant at time of entering into contract, 268, 269.
And husband may convey after marriage, free from dower, 280.

Contribution—

By dowress, to pay charges, encumbrances, etc., 350, 351, 352, 353.

Conversion, Equitable—

Dower under, doctrine of, 222.
Dower in money directed to be laid out in land, 223, 224.
Dower in land ordered to be turned into money, 224.
Right of election by absolute owner, 224.

Conveyance—

Which is voidable only, must be set aside during coverture, or dower will not attach, 263.
But if wholly void, dower attaches, 263, 264, 265.
Wrongful and not good in law, may defeat dower, 265, 266.
On eve of marriage, to defeat dower, considered fraudulent, 266, 267.
Seldom made in Ontario to defeat dower, 267.
Decisions in the U. S., 267, 268.

Conveyance—*Continued.*

Fraudulent as to creditors, effect on dower when wife joins, 281 to 287.
Fraudulent by acts of husband alone, dower not defeated, 287.
Execution and delivery of, fixes period of alienation, not date, 324.
Free from dower, in certain cases, without wife joining, 399.
When wife living apart from husband, 399.

Coparcenary—

Dower out of estates held in, 171.
Where partition takes place, 173.

Costs—

In actions for dower, 529.
Under the Statute of Gloucester, 529.
Where demand of dower made, 530, 531.
Follow damages, 530, 531.
Where judgment signed in default of plea, 531, 532.
Where demand averred in statement of claim and judgment, goes by default, 532.
Under 24 Vic., cap. 40, 532.
Present statutory rule as to, 533, 534, 535.
No demand now necessary to recover, 535.
Rule in Equity as to, 536 to 539.
Dowress sometimes entitled to, though she fails in her contention, 539.
Security for, in actions of dower, 539.
Under the Judicature Act, 517.
Infant liable for, 553.

Counterclaim—

In dower actions, 560.

Covenants—

When widow estopped by her, 379 to 382.
When by those of her ancestor, 382.
When by those of her second husband, 382.

Crops—

Right of widow to, in lands assigned her for dower, 313.

Custom—

Dower by, 6.
Never could exist in Canada, 6.

D.

Damages in Dower—

Origin of, 5.
Limitation of action for, 5, 493, 522, 523.
No damages recoverable at Common Law, 498.
Under Magna Charta, 499.
Under the Statute of Merton, 499.
Only recoverable when husband died seised, 499, 500.
From what time given, 501.
Meaning of, 501.
How computed, 501, 502.
Where improvements made after alienation by husband, 502.
In Ontario, for arrears of dower, 502.
Where appearance only entered, 502, 503, 506.
Must be claimed by notice endorsed on writ, 503.
No damages recoverable where judgment of seisin of dower, 503 to 509.
Where judgment by default signed against two out of three defendants, 509, 510.
Where defendant enters an appearance with acknowledgment that he is tenant and consents to demandant having dower, 510, 511, 512.
Not recoverable where heir acknowledges action and pleads *tout temps prist*, 512, 516.
Reason for this, 513.
Where no demand made, 513.
Heir must take advantage of it by plea, 513.
What sufficient to entitle widow to, 514.
Alienee of heir cannot plead *tout temps prist*, 514, 518.
Where heir controverts title of dower, 514, 515.
Where widow in possession, 515, 516.
Where heir successful on plea of *tout temps prist*, 516.
Reply to plea of *tout temps prist*, 516.
As against alienee of husband, 517, 518.
" " heir, 518.
Measure of, where there in an outstanding term of years, 518, 519.
Instances in which not recoverable, 519.
Method of ascertaining, 520.
What findings of jury should be, 520, 521.
Assessment of, in Ontario, 521, 542.
Distinction between award of damages and judgment for dower, 521.
Where demandant dies pending action, 521, 522.
Where tenant dies pending action, 522.

Date—

Of alienation is time of execution and delivery, 324.

Death—

Either natural or civil, 40.
Meaning of natural death, 40.
" civil death, 41.
Onus of proof of, 42.
Presumption of, 42 to 53.
How proved, 44, 45, 46, 47, 54.
When legatee presumed to be dead, 50.
Of widow, terminates dower interest, 353, 354.
Of demandant, *pendente lite*, 521, 522.
Of tenant, *pendente lite*, 522.
Of defendant, *pendente lite*, on bill for dower, 526, 527.
Of widow, before assignment, 527, 528.

Dec'arations—

Of husband, when admissible, 119, 120.

Default—

Where claim for land and damages, 545.

Defeasible Estates—

Dower out of, 126.
Right to dower destroyed upon restoration of seisin to rightful owner, 126, 127.

Defence in Dower Actions—

Limitation of, 543.
Statement of, when to be delivered, 544, 545.
Statement of defence in actions of dower. (See *Pleas*).

Descent—

Dower, where estate comes by, 159, 160, 161, 162, 163.

Deterioration—

Of lands, in alienee's hands, rights of widow, 526, 527, 528.

Determinable Estates—

Under power of appointment, 129.

Devise—

Dower in estates acquired by, 164.

Devise in Lieu of Dower—

General doctrine as to, 442, 443.
Considered in the nature of equitable jointure, 443.
Election by widow, 443, 444, 445, 463 to 471, 472, 473, 474, 491.
Of portion of lands out of which widow is dowable, 445, 446, 447.
Whether she may claim dower in remainder, 447.

Devise in Lieu of Dower—*Continued.*

When acceptance of, a bar of dower, 447.
Devise in trust for sale of dowable lands, 449, 450.
" of whole of lands to widow, 450, 451, 452, 453.
Whether widow takes as a purchaser, 450, 451, 492.
Rule in the U. S., 451, 452.
Inconsistent with claim of dower, 453 to 456, 471, 472.
Cases in which devise held not to be in lieu of dower, 453, 454.
What is a sufficient intent to exclude widow from dower, 455, 456.
Devise during widowhood, a bar of dower, 455, 456, 462 to 471.
Of an estate *in futuro*, 456.
Devise must state clearly whether it is to be in lieu of dower, 456, 457.
Of an estate to trustees charged with annuity, not sufficient to put widow to election between rent and annuity, 457, 458.
Of an annuity, 458 to 462.
When estate insufficient to pay dower and annuity, 462.
Dowress has priority over other legatees for annuity, 462.
In restraint of second marriage, 471.
Inconsistent provisions, what held to be, 472 to 480.
Under 3 and 4 Wm. IV., 481.
Rule in Ontario as to inconsistent provisions, 481.

Disseisin—

During coverture, does not impair dower, 107.
Statute of Limitations will not defeat widow's claim, 107.

Divorce—

A vinculo matrimonii, 60.
Avoids marriage and defeats dower, 60.
No court of, in Ontario, 61.
Parliament alone has power to grant, 61.
A mensa et thoro, no bar of dower, 61.
For adultery of husband, no bar of dower, 61.

Domicile—

Meaning of, 28.
Of infants and married women, 28.
May be either original or acquired, 28.
Presumption of law as to abandonment of, 28.

Dos—

Of the civil law, 1.
De dote peti non debet, 159 to 167.

Dower—

Among the Romans, 1.
Not known to Saxons, 2.
At common law, 3, 5.
In Ontario, 3.
Definition of, 4.
What intended for, 5.

Dower—*Continued.*

Paramount to debts, 5.
Division of, 5.
Ad ostium ecclesiæ, 6.
Ex assensu patris, 6.
By custom, 6.
Dela plus belle, 6.
In Canada, 6.
When it begins, 6.
Extinct on death of widow, 7.
Requisites to perfect widow's right to, 7, 77.
When widow not entitled to, 7.
When right of, attaches, 8.
Does not attach when marriage void, 19.
Where husband an idiot, 22.
Property subject to, 66, 68 69, 70, 77.
Does not attach on property strictly personal, 66.
Applicable to realty only, 67.
Tenant in, 67.
Signification of word "lands," 67.
Extent of word "tenements," 67.
In mines and quarries, 70, 71.
Requisites to complete title of, 77.
Estate must be one that issue of wife might inherit, 77, 78, 79.
Possibility of issue suffices, 79.
Capacity to conceive not essential, 80.
Husband must be entitled to immediate freehold, 80.
In estates in remainder and reversion, 80.
Chattel interest in dowable lands does not defeat, 81.
Suspension of freehold during coverture prevents attachment of, 82.
But if suspension for years only, dower will attach, 82.
Freehold and inheritance must both be in husband, 83, 84.
They must meet in him as one integral estate, 83.
Dower will not attach where intervening estate between freehold and inheritance of husband, 84.
Dower will, by Statute, now attach upon an estate equal to estate of inheritance in possession, 85.
Will not be defeated by intervention of chattel interest between freehold and inheritance, 85, 86.
Surrender of life estate will sometimes confer a title of, 87.
Particular estate must determine, in husband's life, to entitle wife to, 87.
Effect of intervening contingent estate upon title of dower, 87, 88.
Qualification of dower interest in gift of the estate, 124.
Rules in England as to qualification, 124, 125.
Estate commensurate with primitive estate from which it is derived, 125.
Estate exists by implication of law, 125.
Defeated by conveyance to uses, 129.
In lands, subject to a prior right of, 159, 160, 161, 164.
Actual assignment of, not necessary, 159 to 163.
Assignment of, in Ontario, 162.
Assignment of, in rents and profits, 163.
How it may be defeated at present day, 211, 261, *et seq.*
When husband contracts to sell before marriage, 214.
Out of trust estates, 214.

Dower—*Continued.*

Out of lands, where husband conveys before marriage and before patent issues, 214, 215.
Out of equity of redemption, 215.
Where husband contracts to purchase, and dies, 216.
Widow entitled to redeem and hold land, 216.
Where purchaser enters into pos ession and dies before conveyance, 217.
Out of equitable estates in Ontario, under doctrine of equitable conversion, 222.
In money directed to be laid out in land, 223.
Where husband contracts to sell, and marries before receipt of purchase money, 224.
In estate of a mortgagee, 230, 231.
Where conveyance made to husband, and mortgage taken back from him on same day, for whole purchase money, 234, 235.
As against vendor's lien for unpaid purchase money, 257.
What is a waiver or extinguishment of lien, 257, 258.
How defeated, 261, *et seq.*
By alienation before marriage, 261, 269.
Rule where alienation does not become fully operative until after marriage, 262, 263.
Where estate conveyed to trustees to pay debts, and sale does not take place till after marriage, dower attaches, 263.
Where conveyance made on day of marriage dower attaches, 263.
Defeated by a contract to sell before marriage, 268
Defeated by charges created before m rriage, 268.
When husband acknowledges a statute or recognizance, and dies leaving an infant heir, 269, 270.
Once it attaches, cannot be defeated by any act of husband alone, 272, 273, 274.
Exceptions to this general rule, 274, 275.
Wife may conclude herself from avoiding charges created by husband after dower attached, 275, 276.
Accepted by widow against common right, 276, 277.
Wife must concur to divest, 279.
Arises by operation of law, not by force of any contract, 288.
After husband's death, but before assignment, 296, 297, 298.
Goverened by the *lex rei sitæ*, 296.
Widow not invested with freehold until assignment, 297.
Dower interest may be sold after husband's death and before assignment, 299.
And may be taken in execution, 299.
Acceptance of estate inconsistent with, 375, 376, 377.
When provision in will to be taken in lieu of, 386.
Effect of widow disposing of all husband's personal estate, 387.
How released, 388.
How released when wife lunatic, 388, 400.
How released when wife living apart from husband, 399.
Is restored if deed from husband avoided, 408, 409.
May be barred either before or after assignment, 410.
Devise or bequest in lieu of, 442,
Pleading and Practice in actions of (See *Pleading*).
In lands appropriated by railway company, 558.

Dowress—

Rights of as against husband's creditors, 235.
Widow entitled to dower in surplus as against creditors after payment of mortgage debt, 235.
But where there is no surplus, widow not entitled as against creditors to have mortgaged estate exonerated out of personalty, 235, 236.
Conflict of cases on this subject, 236 to 246.
Entitled immediately upon death of husband, 300
Rights of creditors of, 300.

Duress—

Marriage procured by, 17.

E.

Election—

By absolute owner where conversion directed, 224, 225.
How made, 225.
Cannot be made by an infant, 225, 226, 482, 483.
Nor by his guardian for him, 226.
Cannot be made by a lunatic, 226, 482.
Between jointure and Dower, 422.
Between devise in will and dower, 443, 444, 445, 448, 455.
No settled rule as to, 445.
Where lands devised by a third person, 448, 449.
Where lands devised in trust for sale, 449, 450.
What a sufficient indication of, 455.
In order to put widow to, devise must state clearly that it is to be in lieu of dower, 456.
Where gift a remote contingency, 457.
Between dower and an annuity, 458 to 461.
Where devise to widow during widowhood, 463, 464.
Where provision inconsistent with dower, 471 to 480.
In Ontario, where inconsistent provisions, 481.
Widow entitled to be informed of true condition of estate before electing, 481.
Must be made by widow personally, 481, 482.
Where widow insane, 482.
Where widow an infant, 482, 483.
No presumption of, where there is incapacity, 482.
By married woman, 482, 483.
Implied, 484, 485.
What acts will constitute a binding, 484 to 490.
To be binding on widow, must be made with a knowledge of her rights, 486.
And she must intend to elect, 486, 487.
Made under a mistake as to condition of estate, 489, 490.
Binding, if widow acquainted with all material facts, 490.
Induced by fraud, not binding on widow, 490, 491.

Elopement—

And adultery of wife, a bar of dower, 63.
There must be a going away from the husband's estate, 63.
Fact of, may be shown in action by the wife for her dower, 64.
Dower in lands purchased and sold during, 65.
Effect of, on jointure, 441.

Emblements—

Who entitled to, upon assignment of dower, 348.
As between tenants in common, 349.
After husband's death and before assignment, 349.

Encumbrance—

Inchoate dower as an, 288, 289.
Created by husband alone, defeated by assignment of dower, 344.
Created prior to marriage, paramount to dower, 344, 345.
Where widow accepts assignment contrary to common right, 345.

Endorsement—

On writ in action of dower, 542.

Entry, Right of—

Dower where husband had, 6.

Equitable Estates—

Dower out of, 6, 210, 218, 219.
Resulting from executory contracts to purchase, are subject to dower, 216, 217.
Husband must be beneficially entitled, 219, 220.
Rule where husband receives legal title after conveying, 220.
Dower in, where mortgaged by husband, 220, 221.

Equitable Conversion—

Dower under doctrine of, 222.

Equitable Jointure—(*See Jointure.*)

Equity of Redemption—

Dower out of, 215, 227, 228, 229.
Dower out of, of mortgages for years, 229.
Rights of widow where mortgagee acquires, 246.
Husband's release of, of mortgage executed during coverture, does not defeat dower, 279, 280.
Sale of, under execution, does not defeat dower, 280.

Estate—

For life, not subject to dower, 191, 192.
Per *autre vie*, no dower out of, 191, 193, 205.
" " " statutes affecting, 192, 193, 194.
For years not subject to dower, 194.
At will, no dower out of, 194, 195.
Dower out of, wrongful, 195, 196.
For years created by husband, no obstacle to dower, 204, 205.
For years granted before coverture, rights of widow, 205.
Where husband seised during coverture, dower will not be defeated by determination of that estate, 123.

Estoppel—

Arising from assignment of dower, 313, 314.
As affecting the right of dower, 366, 367, 369, 370, 371, 406.
At common law, 366, 367.
In the United States, 368.
Parties claiming under husband estopped from denying his seisin, 368, 369.
Where proceedings taken to quiet title, 369.
Where estate not really husband's, 369, 370, 372.
Where widow estopped by her own covenants, 379, 380.
Does not apply where no covenants for title, 380, 381.
Where widow estoppel by covenants of her ancestor, 382.
By covenants of a second husband, 382.
Where widow has released her dower, 382, 383.
Where widow acts fraudulently, 383.
What acts of widow will operate as an, 383 to 387.
In pais, 385.
What constitutes an *estoppel in pais*, 385, 386.

Eviction of Dowress—

From dower assigned, 336.
Dowress may be reinstated, 338.
Where assignment contrary to common right, 338, 339.
Rights of dowress where assignment not made by heir, 339.
Remedy of dowress when evicted from lands assigned her for her dower, 339, 340, 436, 437, 438, 439.
Effect of eviction on widow's rights, 436, 437.
Where jointure made by ante-nuptial settlement, 437, 439, 440.

Exchange—

Meaning of term, 122.
Widow not entitled to dower in land given and taken in, 122.
She must elect out of which she will take, 122.
How proved, 122
Special warranty of title implied upon an, 122.

Execution—

Sale under, against husband does not affect wife's dower, 255, 405, 406.
How enforced, 545, 546.

Executory Devise—

Dower in estate subject to, 132, 133, 137, 139 to 155.

Exoneration—

Of estate conveyed by husband alone from dower, when he dies, seised of other lands, 328, 329.

F.

Fee Simple—

Dower in estates in, 121.
Right to dower not affected by failure of heirs, 123.

Fee Tail—

Dower in estates in, 121.
Failure of issue does not impair dower, 123, 124.
Charges created by tenant prior to inception of dower, 125.

Fine—

Release of dower by, 389.
Where husband dies before fine levied, 402.

Firewood—

Privilege of cutting, cannot be granted to widow of lands, not set off for dower, 319.

Foreclosure—

In husband's lifetime wife need not be made a party, 248, 249.
Proper decree where husband has executed several mortgages, in one only of which his wife has joined, 256, 559, 560.

Forfeiture—

During husband's life, does not deprive widow of dower, 58.
But she is not entitled until actual death of husband, 59.

Fraud—

Marriage procured by, 18.
Practiced by widow in selling dower estate, 383, 384.
Election induced by, not binding on widow, 490, 491.

Fraudulent Conveyances—

Made to defeat dower, effect of, 266, 267.
Made to defeat creditors, in which wife joins, 281.
Effect of, on her right to dower, 281 to 287.

Fraudulent Acts—

Of husband, in conveying, does not defeat dower, 287.

Freebench —195.

Freehold—

Suspension of, during coverture, defeats dower, 82,
Suspension of, for years, does not, 82.
And inheritance must both be in husband, to make wife dowable, 83.

G.

Guardian—

Assignment of dower by, 307.
Conveying interest of her ward, does not transfer her right of dower, 403.

H.

Hereditaments—

Meaning of, 67.
Real, subject to dower, 68.

I.

Idiot—

Wife of, formerly entitled to dower, 22.
Not now dowable, 23.

Impotence—

As an impediment to marriage, 21.

Improvements—

Assignment of dower where made after husband's death, 322, 323.
Made after land sold under execution against the husband, 323.
Where conveyance made upon condition, and condition broken, 323, 324.
Where dower is admeasured on account of an excessive assignment, 334, 335.
Damages where, made after alienation by the husband, 502,

Inchoate right to dower—

Meaning of, 7, 40.
Is an encumbrance, 288, 289.
Is within operation of covenant against encumbrances, 288, 289.
It is an interest, though not an estate in land, 290, 291.
In Ontario, 291.
Protected, when sale of husband's land made in his lifetime, 291.
Is assignable, 292, 293.
And may be sold under a *fi. fa.*, 293
Dowress, when to be made a party to a suit for specific performance, 294.
Dowress may be compelled to suffer partition, 295.
But she cannot demand it, 295.
May be sold and gross sum paid, 265.

Inconsistent—

Acceptance of an estate inconsistent with dower interest, 375, 376, 377.

Incorporeal Hereditaments—

Seisin of, 109.
Dower in, 109, 110.

Infants—

Marriage of, 24.
Infant demandant may sue for dower, 301.
Infant heir may assign dower, 307.
Making excessive assignment of dower, 330, 331.
Release of dower by an, 397.
Where prejudicial it, is void, 397.
Otherwise, it is voidable, 397.
What is a sufficient act of avoidance, 397.
Where voidable only, it is valid until avoided, 397, 398.
Deed made by infant, for necessaries, voidable, 398, 399.
Jointure upon, 433, 434, 435.
Election by, 482, 483.
Liability for costs, 553

Insanity—

Election where widow insane, 482.

Inspection—

When demandant not entitled to, 553.

Intestate—

Rights of widow of an, 301.

Interest—

On arrears of jointure, 441.

J.

Jewish Marriages—18.

Joint Tenant—

Dower in case of partition between, 112.
Assignment of dower by, 307, 308.

Joint Tenancy—

Estates in, not subject to dower, 99, 111.
Dower at Common Law, 168, 169.
If estate determines, in husband's lifetime, dower ordinarily attaches, 170, 171.
In Ontario, 171.

Jointure—

In lieu of dower, 411.
Definition of, 411, 412.
Requisites of a legal, 412, 413, 423.
Of what it must consist, 413.
Rules as to, in Equity, 413.
Must take effect immediately upon death of husband, 413, 414.
Mere possibility not sufficient, 414.
Intervention of a mesne estate, 414, 415.
Where title to property settled, defective, 415.
Estate, limited, must not be for less term than life of wife, 415.
Qualified or conditional jointure, 415, 416.
Must be of a freehold, 417.
Estate must be limited to wife herself and not to another, 417.

Jointure—*Continued.*

Out of trust estate, 417.
May be limited to husband and wife jointly, in fee, 417.
Must be made in satisfaction of dower, 418.
Must be made before marriage, 418.
Need not be derived immediately from husband, 418, 419.
However inadequate, is a bar of dower, 419, 421.
Except where wife an infant, 419.
Estate need not be free from encumbrance, 419.
If made before marriage, binding on wife without her assent, 420.
Assent to, by wife, 420.
Settled without privity of wife, 420, 421.
When wife may disagree to, 421.
Made upon an infant, 421, 433, 434, 435.
Where made to defraud wife of dower, 421, 422.
Where settled before marriage, without consent of wife, she may elect between her dower and jointure, 422, 425.
What considered a good, 422, 423.
Distinctions between legal and equitable, 423.
Equitable, 423, 432.
requisites of, 423, 424.
need not be of a freehold, 424.
in United States, 424.
need not be completely settled upon wife by deed, 425.
covenant in marriage articles sufficient, 425, 427.
to be an absolute bar, should be made before marriage, 425.
Widow must elect between dower and, 425, 426.
Same rule in United States, 426.
Must be intended to be in lieu of dower, 427.
What, deemed sufficient to bar dower, 427, 428.
By acceptance of a future contingent provision, 428.
Remedy where widow has been evicted, 436.
Eviction of widow where jointure equitable, 437, 438.
How jointure may be conveyed, 440, 441.
Where wife elopes, or is guilty of adultery, 441.
Interest not generally allowed on arrears of, 441.
Agreement to make a jointure is, in Equity, equal to a jointure, 441

Judgment—

Recovered before marriage, defeats dower, 271.
Until sale actually made under judgment, widow may have dower assigned her subject thereto, 271.
Rights of widow when compelled to pay off prior judgments, 271, 272.
Where surplus after sale under judgment, widow entitled to dower out of, 272.
In real action against husband, defeats dower, 278.
Where recovery of, against husband collusive, husband may avoid it, 278, 279.
By default of appearance, 543.
Where defence, applies only to part of claim, 544.
What it should contain, 558.

L.

Lands—

Signification of word, 67.

Law—

Which determines widow's right to dower, 296, 297.

Leases—

For life, made before marriage, defeat dower, unless they expire in husband's lifetime, 272.
For years, of lands assigned in dower, widow entitled to rents, 345.
Whether widow may enter for condition broken, 346, 347.
For years, created by a dowress, 349.
Widow dowable out of rent reserved in a, 403.

Leaseholds—

Settled on wife, "in lieu of dower," is not a bar of thirds, 429.

Legacy—

Whether legacy to widow in lieu of dower, has priority over other legacies, 462.

License—

Marriage by, 13, 14.
Punishment for issuing, without authority, 14.
May be issued by deputy, 14, 17.
Expenses of, 15.
Affidavit to be made before granted, 15.
Duties of issuer, 15.

Lien—

Dower, as against vendor's lien for unpaid purchase money, 257.
How it may be waived or extinguished, 257, 258.
Where lien enforced by sale of land, purchaser takes, free from dower, 258.
But if any surplus, wife entitled to dower out of, 258, 259.
And she is entitled to have personalty marshalled to pay lien, 259.
When proceedings taken after husband's death to enforce lien, widow must be a party, 259.
Proceedings must be founded on equitable lien to divest dower, 259.
Dower where lien-holder obtains judgment at law and sells estate, 259.

Lien—*Continued.*

Dower may be claimed out of whole estate, so long as vendor does not assert his lien, 260.
But widow cannot sustain claim for dower where husband never had legal estate, and has not paid purchase money, 260.
Lands re-conveyed to vendor to extinguish lien, pass free from dower, 260.

Life Estate—

No dower out of, 112, 113.

Limitations, Statute of—

Where husband disseised during coverture, and barred by statute, dower would not be defeated, 107.
As affecting dower, 493
Within what period action must be brought, 493.
As affecting arrears of dower and damages, 493, 522, 523.
Law prior to statute, 493, 494, 495.
From what time statute begins to run, 494, 495, 496, 497.
When once commenced to run, does not stop for any disability, 497.
What a sufficient allegation of bar by, 560.

Lunatic—

Wife of, not entitled to dower, 23.
Where wife lunatic, husband can convey, freed from dower, 399.

M.

Marriages—

At Common Law, 8.
Consent only necessary, 8.
Age of consent, 8.
Regular and irregular, 8.
Per verba de presenti, 9.
How contracted, 9.
Per verba de futuro cum copula, 9.
How contracted, 9.
Prior to 1792, 10.
Act of 1793, 10, 11.
Who may celebrate, 12, 13.
After 2nd March, 1831, 12.
Evidence of how preserved, 13.
Must either be by license or banns, 13.

Marriages—*Continued.*

Statutes governing solemnization of, 13.
Who may consent to, 15.
Need not be celebrated in church, 15.
Or within any particular hours, 15.
Record of, must be kept by minister celebrating, 16.
And he is to be provided with books, etc., 16.
Minister, when not liable for celebrating, 16.
In Quebec, 17.
Essence of contract of, 17
Contract founded on consent, 17.
Obtainable by fear or compulsion, 17.
By fraud, 18.
While either parties intoxicated, 18.
Under an assumed name, 18.
Without banns or license, 19.
Impediments to, 19, 21, 23.
De jure, 20.
De facto, 20.
Within prohibited degrees of consanguinity or affinity, 20.
Are mere nullities, 21.
Must be between persons capable of contracting. 24.
Law determining validity of contract, 25, 27.
Invalid, where celebrated invalid, everywhere, as a rule, 26.
Exceptions, 26.
In country where poligamy lawful, invalid here, 26.
Contracted in Ireland, 28.
Celebrated in Scotland, will entitle widow to dower in England, 28.
Legal presumption is in favor of marriage, 28.
How proved, 29 to 39.
What evidence of marriage sufficient in actions of dower, 33.

Marriage Articles—

As a bar of dower, 429.
Must be fair and reasonable, 428.
Parol, ante-nuptial, 427, 428.

Marriage Settlement—

As a bar of dower, 428, 429, 430, 431.

Married Women—

Release of dower by, 389, 390, 391.
Election by, 482, 483.

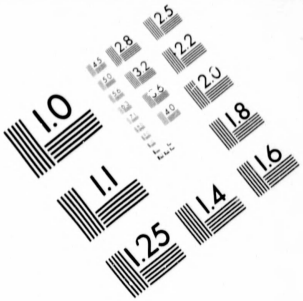
Marshalling—

In favor of widow, to discharge lien for unpaid purchase money, 259.

Maxim—

Cessante statu primitivo cessat derivativus, 125.





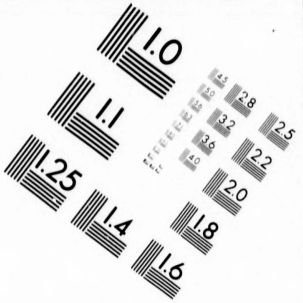
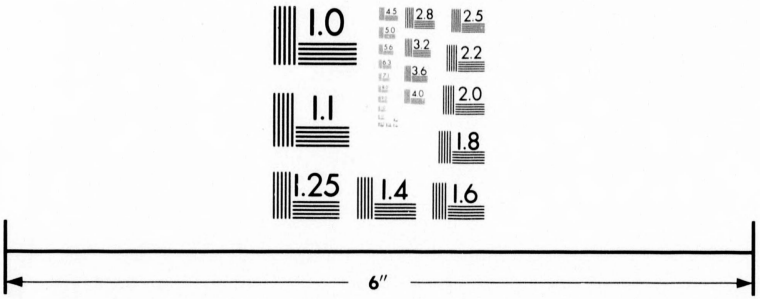
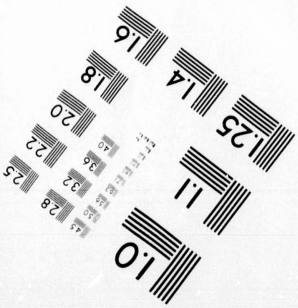
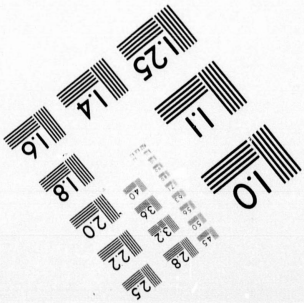


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503


2.5
2.8
2.2
3.2
2.0
3.6
1.8
4.0
1.0
1.1

Mechanic's Lien—

Is subordinate to dower, 280.

Merger—

Meaning of, 89.
When it does not take place, 90.
Effect of, upon right of dower, 90, 91, 92, 93, 98.
Must not defeat intention of dower, 97.

Mines—

Dower may exist in, 70, 71.
How dower assigned in, 321, 322.

Mortgage—

By way of term of years, does not defeat dower, 86.
Widow may redeem, 86.
Dower, where mortgage executed before marriage, 270.
Dower, where husband releases equity of redemption, 270.
Signed by wife, where no bar inserted, 560.
Release of dower contained in, not an absolute bar, 402, 403.

Mortgagee—

Dower in estate of, 230, 231.
Dower as against a mortgagee, before mortgage becomes absolute, 231.
Widow may redeem a, 232.

Mortgaged Estates—

Dower in, 234, 559.
Where widow redeems, she is entitled to hold until re-imbursed, 247.
Contribution by widow, 249, 250, 251.
Dower where there are successive mortgages, 251.
Payment of mortgage lets in wife's title to dower, 252, 253.
By whom payment may be made, 252, 253.
Dower, where wife does not join in mortgage, 253, 254.
Sold under judgment, taken at law on mortgage, operates as a discharge of mortgage, and lets in dower, 254, 255.
When mortgage treated as satisfied, 255.
Dower out of surplus, 263, 364.
Surplus may be paid into Court, 364.

Municipal Corporations—

Dower in lands appropriated by, 190.

N.

Natural Death—(See *Death*).

Nunc pro tunc—

Application to enter judgment, 554.

P.

Paraphernalia—5.

Particular Estate—

To let in dower, must determine in lifetime of husband, 87.
If wife survive husband, and particular estate determine in her lifetime, she will not be dowable, 87.

Parties—

To actions of dower, 563, 564.

Partition—

Of estates in Ontario, 173.
Distribution of proceeds, 173, 174.
Dower where partition takes place, 174, 175, 364, 365, 386, 387.
Effect of, on dower, in United States, 174, 175, 176.
Wife entitled, in Ontario, to dower out of partitioned estates, 177.
Dowress may be compelled to suffer, 295.
But she cannot demand it, 295.

Parol Evidence—

Inadmissible to explain will, 480, 481.

Partnership Lands—

Widow not entitled to dower in, 178, 179, 180.
Rules laid down by Mr. Lindley as to dower in, 179, 180.
Dower out of, in Equity, 180, 181, 182.
Where lands conveyed to one partner, 181.

Pendente lite—

Allowance to widow, 526.

Permissive Waste—358.

Pleading and Practice in Actions for Dower—

By what statutes governed, 541.
How action to be commenced, 541, 542.
Endorsement on writ, 542.
Service of writ when vacant possession, 542.
Appearance, 542, 543.
Limitation of defence, 542.
Judgment by default of appearance, 543.

Pleadings—

When closed, 545.
Difficulties arising in, 554, 555.

Pleas—

In actions for dower, 512, *et seq.*, 548.
In abatement, 547, 548.
In bar, 548, 549, 550, 551, 552, 553.
Of *alien ne*, 553, 554.
Of devise in lieu of dower, 555.
Of reference to arbitration, 555, 556.
Of *ne unques accouple*, admits seisin, 556.
What pleas should contain, 556, 557.
Of purchase for value without notice, 561, 562.
Of *tout temps prist*, 512, 516.

Post-nuptial—

Agreement to accept provision in lieu of dower, not binding on wife, 429.

Possession, Writ of—

Who may sue out, 546.
Effect of, 546.

Power of Appointment—

Dower in determinable estates under, 129.
Estate vested until power exercised, 130.
Dower defeated by exercise of, 130, 131.
Dower becomes absolute if husband die without exercising, 131.

Power of Attorney—

Release of dower by, 394.

Pre-emption—

Right of, does not entitle widow to dower, 217, 218.

Presumptions of Law—

As to domicile, 28.
In favor of marriage, 28.
How rebutted, 28.
Of death, 47.
Of death, after absence for seven years, 48.
No presumption that death occurred at any particular time, 49.
No presumption of continuance of life, 49.

Privity—

In actions for dower, 407, 408.

Profits, Mesne—

Recovery of, in a Court of Equity, 523, 524, 525.

Proof—

That defendant tenant of freehold, 562, 563.

Public Uses—

Widow not entitled to dower out of lands appropriated to, 183.
Right of dower divested by dedication to, 183, 184, 185.
Decisions in United States, 184, 185, 186.
Dower where lands appropriated by Railway Companies, 187.
Dower out of lands appropriated in Ontario, 188, 189, 190.

Purchase—

Dower in estate acquired by, 165, 166, 167.

Purchaser—

Rights of, to exoneration from dower, where husband dies seised of other lands, 328, 329, 356.

Purchase money—

Dower out of, after paying encumbrances, 363.

Q.

Quakers—

Marriage among, 16.

Qualified Fee—

Dower in, 128

Quantity of land—

Demanded for dower, 554.

Quarantine—4.

Remedy, if ejected during, 4.
In Ontario, 5.
Extends only to possession of house, 5.

Quarries—

Dower may exist in, 70, 71.

R.

Railroad Companies—

Dower out of lands appropriated by, 187, 188, 558.

Record—

In actions for dower, 554.

Redemption—

Of mortgaged estates by widow, 232, 233, 234, 247.
Extent to which she must redeem, 233.
By holder of equity, widow must contribute her proportion before she can be endowed, 249.
Contribution by widow when charge on dowable lands, unless made before marriage, 249.
Whether she must contribute where mortgage redeemed in husband's lifetime, 249, 250.
Principal or interest of mortgage debt must be payable before contribution can be required, 250.
By widow before her dower has been assigned her, 299.

Release of Dower—

How made, 388, 391, 392, 393.
Cannot be made by parol, 388.
Nor by husband, without wife's concurrence, 388, 389.
By fine and recovery in England, 389.
By joining in conveyance with husband, 389, 390, 392.
By separate instrument, 390, 391, 392.
Where wife marries a second time, 390, 403.
By certificate endorsed on deed, 390, 392.
How proved, 392.

Release of Dower—*Continued.*

By late statutes, 392, 393, 394.
By power of attorney, executed by wife, 394.
Need not be signed by wife in person, 394, 395.
Must be under seal, 395.
Conveyance must contain words of release, 395, 396.
Need not be in technical form, 396.
By an infant, 397.
Where wife lunatic, 399, 400.
Where wife living apart from husband, 399, 400.
Where husband wishes to mortgage or sell, and wife lunatic or living apart, 400.
Where wife disentitled to alimony, 401.
Proceedings to obtain order for, 401.
When notice of application to be given, 401.
Affidavit of service, what to contain, 401.
Release may be revoked before delivery of deed, 402.
What held a sufficient delivery, 402.
Release not an absolute bar, 402.
As when executed to create an encumbrance, 402.
Release to a stranger, no bar, 404, 405, 406, 407, 408.
Release to husband ineffectual, 408.
After husband's death, 409.
May be made either before or after assignment, 410.
Distinction between release of right of dower and action of dower, 409.
Example, 409, 410.
When widow estopped by release, 382, 383.

Remainder—

Dower not allowed in estate in remainder expectant upon estate of freehold, 80.
Dower out of estate in, 156.
Dower attaches, if prior freehold estate determined or surrendered, 157.
But such determination or surrender must take place while husband seised, 157.
Common Law rule as to dower in estates in, 157, 158.
Dower out of, by Ontario Statute, 158.
Remainder limited on an estate in dower is void, 343.

Rent Charge—

Dower in, 68.

Rent Seck—

Dower in, 68.

Rent Service—

Dower in, 68.

Rents—

No dower in, 199.
Pass exclusively to heir with reversion, 199.
Except where lands conveyed in tail before marriage, and husband reserves rent to himself and heirs, 199, 200, 201.
Granted in tail, dower in, 201, 202.
Granted in fee, dower in, 202.
Rent charge in fee, dower in, 202, 203.
Rent charge in fee, widow must elect where husband purchases inheritance, 202, 203, 204.
Granted *per autre vie*, no dower in, 205.
Widow entitled to, out of lands assigned in dower, 345.
Whether she may enter for condition broken, 346, 347.

Rents and Profits—

Assignment of, in lieu of dower, 334.

Repairs—

Whether dowress can be compelled to make, 350.

Reply—

When to be delivered, 545.
To plea of *ne unques accouple*, 556.

Repugnant Clauses—

In a grant, 124.

Reversion—

Dower in estate in, 156.
Dower not allowed in estate in reversion expectant upon an estate of freehold, 80.
Unless estate of freehold expires during coverture, 106.
And husband must enter and acquire seisin, 106.
Dower attaches, if prior freehold estate determined or surrendered, 157.
But such determination or surrender must take place while husband seised, 157.
Common Law rule as to dower in estates in, 157, 158.
Dower out of, by Ontario Statute, 158.

Right of Entry—

Dower out of, 6, 107, 108.

Romans—

Dower among, 1.

S.

Satisfaction—

Of covenant in marriage articles, what deemed, 430, 431.
What deemed a, of a claim for dower, 373, 374, 375, 376, 377, 378, 379, 387.
Acceptance of an estate inconsistent with dower, 375.

Saxons—

Dower not known to, 2.

Seisin—

As a requisite of dower, 102, 105, 106, 163.
General doctrine relating to, 102.
In deed, 102, 104, 105.
In law, 102, 104, 105.
Living of, 103.
No deed necessary after livery of, 103.
Origin of livery of, 103.
Livery of, abolished, 104.
" in modern English practice, 104.
" at Common Law, 104.
Constructive, 105.
In Ontario, 105.
By wrong. (See *Wrong*).
Of freehold and inheritance, must be sole, 111, 170, 171.
But need not be of entirety, 112.
Must have been of an estate of inheritance in possession, 112.
By relation, on husband's death and attachment of dower, 112, 113.
Transitory, 114, 115.
Proof under issue of non-, 115, 116.
Actual possession is *prima facie* evidence of, in fee, 116, 117.
So is receipt of rents by husband from person in possession, 116.
What are evidences of, 116, 117, 118, 119.
Must be to husband's own use, 214.

Separation Deed—

Not avoided by reconciliation, in certain cases, 408.

Shares in Companies—

Modes of determining whether widow entitled to dower out of, 73, 182.

Specific Performance—

Where wife refuses to join, 289, 290.
When inchoate dowress should be a party to suit for, 294, 295.
Of ante-nuptial articles, 428.

Statement of claim—

Delivery of, 544.
May be delivered with writ, 544.
What it should contain, 556, 557, 558.

Statement of Defence—

When to be delivered, 544, 545.
(See *Pleas.*)

Statutes—

Of Ann, 358.
19 Car., cap. 6, 48.
29 " II., cap. 3, 92.
1 Edward VI., 68.
31 " I., 379.
26 Geo. II., cap. 33, 10, 20, 24.
38 " III., " 4, 12.
59 " " " 15, 12.
33 " " " 5, 12.
11 " IV., " 36, 12, 31.
Statute of Gloucester, 359.
" " 529.
25 Henry VIII., cap. 22, 10.
28 " " " 7 and 16, 10, 20.
32 " " " 38, 10, 20.
27 " " " 68, 411, 418, 436.
31 " " " 68.
1 Jac., cap. 11, 48.
Statute of Merton, 20 Henry III., cap. 2, 5, 348.
Ontario, R. S., cap. 36, 30.
" " " 105, 193.
" " " 106, 193, 210.
" " " 55, 392, 533.
" " " 126, 399, 400.
" " " 127, 393.
Upper Canada C. S., cap. 90, 379.
" " " " 83, 493.
20 Victoria, cap. 66, 13.
10 and 11 Victoria, cap. 18, 13.
24 " " 46, 13.
32 " " 30, 13, 45.
33 " " 22, 13.
20 " " 46, 13.
20 " " 66, 30.
32 and 33 " " 29, 58.
42 " " 22, 258.
29 " " 24, 293.

Statutes—*Continued.*

24 Victoria, cap. 41, 293.
13 and 14 " " 58, 316, 531.
2 " " 6, 391.
44 " " 400.
38 " " 16, 493.
24 " " 40, 532.
5 and 6 Wm IV., cap. 54, 20, 21, 25.
4 " " 1, 58, 209.
3 and 4 " " 74, 389.
3 and 4 " " 105, 389, 481.
Westminster II., 61.

Stock—

In incorporated companies is not subject to dower, 73.
Exceptions to the general rule, 73, 74.
Late English decisions, 75.
American decisions, 75, 76.

Surrender—

Of life estate upon a contingency, will sometimes confer a title of dower, 86, 87.
To reversioner, upon condition, wife of reversioner dowable until entry for condition broken, 87.

Style—

Of parties, 553.

T.

Taxes—

Who must pay, on lands assigned in dower, 352.
Sale of lands for, defeats dower, 255.

Tenant in Dower—67.

Tenements—

Extent of the word, 67.

Timber—

Cut by a dowress, whose property, 359.
Right of widow to cut, before her dower is assigned, 299.

Title Deeds—

Tenant in dower not compellable to give evidence of contents, 119.
When recitals in, may be resorted to, 119.

Thirds—

Meaning of, 429.

Trustee—

Estate held by husband as, subject to dower at Law, 213.
But wife restrained, in Equity, from enforcing, 213.

Trust Estates—

No dower in, prior to 4 Wm. IV., cap. 1, 209.
Husband must die beneficially entitled, to entitle widow to dower, 211, 212, 213.
Held by husband on secret trust, subject to dower, 215.
Made merely to defeat dower, 215, 216.

U.

Uses, Statute of—

Conveyance under the, 108, 412.
Dower attaches on estate of *cestui qui* use, 108, 412.
Conveyances to uses in modern English practice, 108.
Shifting uses, 108, 109.
In Ontario, take effect as they arise, 109.
Conveyance to uses to defeat dower, 129, 209, 210.

V.

Value, Increase in—

Of lands after husband's death, but before assignment, 325, 326.

Voluntary Waste—358.

W.

Waiver—

What deemed a good waiver of dower, 377, 378, 379.

Warranty—

Implied upon assignment of dower according to common right, 336, 356.
How it arises, 336, 337.

Waste—

Widow has no remedy for, in husband's lifetime, 328.
But may obtain injunction to restrain, after husband's death, 328.
By the ancient Common Law, 356.
Who liable for, 356.
Ancient remedies for, 357.
Remedy now in vogue for, 357.
Punishment for, 357, 358.
Definition of, 358.
What damage not considered, 358.
Voluntary and permissive, 358.
Committed by a dowress, 358, 359.
Committed by a dowress' second husband, 359.
Committed by a stranger, 359.
What privity required in action for, 359, 360.
Where dowress leases for life to infant reversioner, 360.
Action for, may be brought against executors, 360, 361.
Committed on wild lands in Ontario, 361, 362.

Water—

For hydraulic purposes, dower not demandable in right to take and use, 76.

Widow—

Rights of, to quarantine, 4.
Is tenant for life after assignment, 7.

Wild Lands—

No dower in, in Ontario, 72, 362.
Not waste to cut timber on, in certain cases, 361.

Will—

Parol evidence inadmissible to explain, 480, 481.

Writ—

De quarentina habenda, 3.
Endorsement on, in action for dower, 542.
Service in case of vacant possession, 542.
When to be served, 554.

Wrong—

Seisin by, 110.
Confers title of dower till avoided, 110, 111, 195.
Law modified in Ontario by statute which provides that a feoffment shall no longer have a tortious operation, 111.
Dower out of estates held by, 197, 198.
Seisin by, does not affect dower in Ontario, 198.

19

7644 4

at a feoffment

