

[That for desertion, adultery, or extreme cruelty in either of the parties, committed or that may be committed, the court of chancery may decree a divorce from the bed and board forever thereafter, or in the case of extreme cruelty, for a limited time, as shall seem just and reasonable, (a) but in every such case, except for extreme cruelty, the party applying shall prove that he or she has conscientious scruples against applying for a divorce from the bond of matrimony; when such proof has been made, the court, in case it shall deem it just so to do, may also decree that the guilty party shall forfeit all right to dower, curtesy and administration of or participation in the property or estate of the party in whose favor the decree is entered.] (b)

Court of chancery may decree a limited divorce for extreme cruelty, adultery or desertion.

(a) What constitutes extreme cruelty. *Clutch v. Clutch*, 3 *Sax.* 474. *Graeven v. Graeven*, 1 *Gr. Ch.* 459. *Cook v. Cook*, 3 *Stock* 195. *Anshutz v. Anshutz*, 1 *C. E. Gr.* 162. *Moore v. Moore*, 1 *C. E. Gr.* 275. *Fisher v. Fisher*, 3 *C. E. Gr.* 300. *Davis v. Davis*, 4 *C. E. Gr.* 180. *Thomas v. Thomas*, 5 *C. E. Gr.* 97. *Laing v. Laing*, 6 *C. E. Gr.* 248. *Close v. Close*, 10 *C. E. Gr.* 528. *Cook v. Cook*, 5 *Stew.* 475. See *Amos v. Amos*, 3 *Gr. Ch.* 171. A divorce a mensa et thoro, for extreme cruelty, will be granted where there is a gross abuse of marital rights. *English v. English*, 12 *C. E. Gr.* 579. A separation is not decreed as a punishment for past misconduct only, but mainly as a protection against future probable acts of cruelty, this probability being based upon the former conduct and the character and disposition of the parties. *Id.* Where there is no reasonable apprehension of a continuance of such cruelty, such divorce will not be granted. *Id.* The words "extreme cruelty," in our act concerning divorces, are not stronger in meaning than the term *sevittia*, derived from the

civil law. *Smith v. Smith*, 13 *Stew.* 586. A charge of incest, made by a husband against his wife, persisted in without cause, attended with slight acts of violence, jealous watchings, suspicious conduct and reasonable apprehension of bodily harm, is good ground for judicial separation from bed and board. *Id.* It is not a good defense to such complaint that the husband appears to be under an insane delusion, where there is not general insanity or dementia. *Id.* See *O'Neill v. O'Neill*, 3 *Stew.* 119. What not sufficient ground to sustain a divorce for cruelty. *Coles v. Coles*, 5 *Stew.* 547. *Chadwick v. Chadwick*, 7 *Dick.* 539. Refusal of a husband to live with his wife is not extreme cruelty, in the absence of proof that it has had, or tends to have, a serious effect on her health. *Burton v. Burton*, 7 *Dick.* 215. (b) As to effect of a decree for divorce a mensa et thoro where the common law is in force. *American Legion of Honor v. Smith*, 13 *Stew.* 466.

Dower.

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30. Chancellor may direct release of right of dower of person mentally incapacitated.
31. Application to be by petition. Reference, &c.

An act relative to dower.

Approved April 16, 1846.

R. S. 71.

P. L. 1870, p. 22.

1. That the widow, whether alien (a) or not, of any person dying intestate or otherwise, shall be endowed, for the term of her natural life, of the one full and equal third part of all the lands, tenements and other real estate, (b)

Widow, of what endowed.

(a) A widow may have dower in lands purchased by her husband while an alien enemy, if he retain such lands until after the act of January 22d, 1817, confirming the title of such purchasers. *Yeo v. Mercereau*, 3 *Har.* 387. See *Kemp v. Kennedy*, *Pet. C. C.* 30. Before the passage of this act (1799, *Pat.* 343), the alienism of the husband could be pleaded in abatement. *Coxe v. Gulick*, 5 *Hal.* 328.

(b) A widow is entitled to dower in wild or unimproved lands. *Brown v. Richards*, 2 *C. E. Gr.* 32. *Doughty v. Doughty*, 2 *C. E. Gr.* 38. In the excess of partnership real estate, over and above what may be required for the payment of partnership debts. *Uhler v. Sample*, 5 *C. E. Gr.* 289. In an estate of her husband defeasible on his death without issue. *Kennedy v. Kennedy*, 5 *Dutch.* 185. So, in an estate determinable on a brother of the husband becoming *compos mentis*; although the husband died before such brother. *Jackson v. Berry*, 3 *Hal.* 241. In mines and quarries actually opened and worked during her husband's lifetime. *Reed v. Reed*, 1 *C. E. Gr.* 249. Where executors were ordered to sell lands for the payment of debts, in the excess beyond what was required for that purpose. *Cook v. Cook*, 5 *C. E. Gr.* 375. Where lands are not devised to the executors, but a simple power of sale given, the widow of a son dying before such sale is entitled to dower. *Romaine v. Hendrickson*, 9 *C. E. Gr.* 232. *Aliter* where the executors are ordered to sell and divide the proceeds. *Berrien v. Berrien*, 3 *Gr. Ch.* 37. After a partition she can only receive her dower in the share allotted to

her husband, and not in his undivided portion of the whole. *Lloyd v. Conover*, 1 *Dutch.* 47. Nor in a moiety. *Osborn v. Rogers*, 4 *C. E. Gr.* 429. It may be recovered in parcels of the several tenants in possession. *Sip v. Lawback*, 2 *Har.* 442. *Matter of Ann Garrison*, 2 *McCart.* 393. *Macknet v. Macknet*, 9 *C. E. Gr.* 449. Or she may claim one-third of the whole estate, at her election. *Leard v. Wilson*, *Pen.* *284. *Den v. Miller*, 1 *South.* *321. See *Hautenback v. Cronkright*, 8 *C. E. Gr.* 407. So, where a husband and wife executed a bond and mortgage and the obligee purchased the land covered by the mortgage under an execution and sale on a judgment obtained on his bond. *Harrison v. Eldridge*, 2 *Hal.* 392. So, dower is paramount to a title obtained by a sale for the debts of the husband. *Hyatt v. Ackerson*, 2 *Gr.* 584. *Chiswell v. Morris*, 1 *McCart.* 101. And paramount to a judgment obtained for a legacy, in lands charged in the hands of the devisee with the payment of such legacy. *Lloyd v. Conover*, 1 *Dutch.* 47. See *Hayes v. Whittall*, 2 *Beas.* 241. And to a sale by order of the orphans' court, to pay debts. *Sip v. Lawback*, 2 *Har.* 443. But see *Thompson v. Egbert*, 2 *Har.* 459. The widow is entitled to dower in an equity of redemption. *Montgomery v. Bruere*, 2 *South.* *865(a). *Thompson v. Boyd*, 1 *Zab.* 58, 2 *Zab.* 543. *Hartshorne v. Hartshorne*, 1 *Gr. Ch.* 349. *Hinchman v. Stiles*, 1 *Stock.* 361, 454. *Opdyke v. Bartles*, 3 *Stock.* 133. Where the legal title of the husband in the equity of redemption has been obtained by the mortgagee, see *Chiswell v. Morris*, 1 *McCart.* 101. *Eldridge v. Eldridge*, 1 *McCart.* 195.

whereof her husband, or any other to his use, was seized (a) of an estate of inheritance, at any time during the coverture, to which she shall not have relinquished or released her right of dower, by deed executed and acknowledged in the manner prescribed by law for that purpose. (b)

Quarantine.

2. That until such dower be assigned to her, it shall be lawful for the widow to remain in, and to hold and enjoy the mansion-house of her husband and the messuage or plantation thereto belonging, without being liable to pay any rent for the same. (c)

May sue for dower.

3. That if the widow be deforced of her dower, or cannot have it without suit, or if her dower be unfairly assigned, or not assigned, within forty days after the death of her husband, then she may sue for and recover the same, with damages; that is to say, the value of the whole dower to her belonging, from the time of her husband's death, if he died or shall die seized, or from the time of demanding dower, if the husband was or shall be seized, but did not or shall not die so seized, unto the day that she shall recover seisin of her dower by judgment of the court. (d)

Writ, when to abate.

4. That the writ of dower called unde nihil habet, shall not abate by the exception of the tenant, that the demandant hath received her dower of another person, before her writ was sued out; unless he can show that the dower, so received, was in satisfaction of her right of dower in the lands or tenements whereof she demands dower.

Land lost by covin or default no bar.

5. That if the husband, being impleaded for land, give up the same unto his adversary by covin, his widow shall recover her dower of the said land; and if the husband lose the land in demand, by default, the widow demanding her dower thereof, shall be heard, and if it be alleged against her, that her husband lost the land whereof dower is demanded, by judgment,

Dower is extinguished by the widow's taking a conveyance of the equity of redemption, after the death of her husband, her dower right being paramount to the mortgage. *Wade v. Miller*, 3 Vt. 286. After foreclosure the widow can have one-third of the surplus invested and the interest thereon paid to her after her husband's death, but not during his life. *Vreeland v. Jacobus*, 4 C. E. Gr. 281. So, where lands are condemned under the right of eminent domain, one-third of the amount awarded by the commissioners may be similarly invested for her benefit. *Wheeler v. Kirtland*, 12 C. E. Gr. 534. See *Southard v. Morris Canal Co.*, 522. If the husband absconds the widow cannot have dower until the legal presumption of his death arises. *Hamilton v. Ross*, 3 Hal. Ch. 465. *Wambough v. Schenck*, Pen. *229. A husband was seized in fee of lands during coverture and alienated the same without his wife relinquishing her dower. Afterwards, and before his death, annual taxes and two assessments for municipal improvements were levied upon the property. Held, that the widow was entitled to dower free from the taxes, but that her dower should be assigned with the increased value arising from the improvements, and charged with the payment during her tenure of interest upon one-third of the principal of the assessments. *Jonas v. Hunt*, 13 Stew. 660. The widow and son of an intestate inherited from him two farms, S. and W., and the widow's dower was never assigned in either. The son married and died testate, leaving his mother and his wife surviving, but no lawful issue. He devised the S. farm to his mother in fee, and the W. farm to his mother and wife for life, and the fee to the survivor of them. They accepted the devises. Held, that the mother thereby lost her dower in the W. farm and the wife hers in the S. farm. *Snook v. Snook*, 16 Stew. 132. The right of a widow domiciled here to dower in lands in New York is governed by the laws of the latter state. *Burnet v. Burnet*, 1 Dick. 144. Where a decedent's mortgage, in which his wife joined, is satisfied by a sale of the premises by his executors, her right of dower therein is not enlarged as it is where such incumbrance is paid out of his personal assets. *Id.* A widow is entitled to dower in an equitable estate of her husband. *Cushing v. Blake*, 8 Stew. 699. *Young v. Young*, 18 Stew. 27.

(a) The seisin, not the title of the husband is to be proved. *Sheppard v. Wardell*, Coxe 452. *Griggs v. Smith*, 1 Hal. 22. *Woodhall v. Reid*, 1 Har. 132. *Rockwell v. Morgan*, 2 Beas. 284. See, also, *Coxe v. Higbee*, 6 Hal. 385. *Conover v. Tindell*, Spen. 513, 1 Zab. 651. *Den, Hopper v. Demarest*, 1 Zab. 528. Or of another to his use. *English v. Wright*, Coxe 497. *Hyatt v. Ackerson*, 2 Gr. 564. *Yeo v. Mercereau*, 3 Har. 387. The common-law right of survivorship among joint tenants has not been abolished in this state by statute and no title of dower attaches. *Babbitt v. Day*, 14 Stew. 392.

(b) What is a sufficient conveyance and acknowledgment. See CONVEYANCES, ante, p. 864, notes (b) and (c). The widow's right will be protected as against post-nuptial mortgages not executed by her. *Hayes v. Whitall*, 2 Beas. 241. A parol agreement to receive a certain amount in satisfaction and release of dower, cannot be enforced. *Keeler v. Tatnell*, 3 Zab. 62. See *White v. White*, 1 Har. 202. Where a deed, duly executed, is set aside as fraudulent as to creditors, the wife's dower is not revived. *Den, Stewart v. Johnson*, 3 Har. 88. See *Den, Smallwood v. Bilderback*, 1 Har. 497. *Atter* where her release was obtained by fraud. *Young v. McPherson*, Pen. *895. See *Ely v. Ferrine*, 1 Gr. Ch. 398. Nor where a third person becomes seized of the lands by a title superior to that of her vendor. *Frey v. Boylan*, 8 C. E. Gr. 90. See *Boorum v. Tucker*, 6 Dick. 135.

(c) The right of the widow to retain possession of the homestead does not attach where there is no dower to be assigned. *Morgan v. Tibus*, 2 Gr. Ch. 201. Before the assignment of her dower she has a freehold for life, unless sooner defeated by the act of the heir. *Ackerman v. Shelp*, 3 Hal. 125. The crops growing at the time of her husband's death, do not belong to her. *Budd v. Hiler*, 3 Duch. 43. But see *Laird v. Wilson*, Pen. *281. A widow whose dower has not been assigned, and who remains on the homestead farm of her husband, is entitled to the crops growing thereon after her husband's death. *Merchant's Case*, 12 Stew. 506. The nature of her possession. *Den, Halsey v. Dodd*, 1 Hal. 387. *Den, Smallwood v. Bilderback*, 1 Har. 497. *Bleecker v. Hennion*, 8 C. E. Gr. 123. She cannot be required to pay rent for the homestead. *McLaughlin v. McLaughlin*, 7 C. E. Gr. 505. Whether occupied by herself or another from whom she receives rent. *Craig v. Morris*, 10 C. E. Gr. 467. She is not bound to pay taxes, interest on incumbrances, or for repairs; otherwise as to water rates, which are personal charges. *Spinning v. Spinning*, 14 Stew. 427; affirmed, 16 Stew. 215. She is not entitled to hold without paying rent, until her dower is assigned, a farm without any buildings upon it, belonging to her husband and adjoining and used by him in connection with a farm belonging to the wife, upon which latter was the mansion-house occupied by the husband and wife before and at his death. *McKaig v. McKaig*, 5 Dick. 325.

(d) Where the husband died seized, it is the duty of the heir or devisee to assign dower without demand, and no demand is necessary to enable the widow to recover the value from the death of the husband, therefore *tout temps prist* is not a good plea. *Hopper v. Hopper*, 2 Zab. 715, overruling *Woodruff v. Brown*, 2 Har. 246. If she gives up the possession of which her husband died seized, her only remedy is by action. *Den, Smallwood v. Bilderback*, 1 Har. 497. Yet, if she is in possession, her right to dower is a good bar to an ejectment. *Den, Halsey v. Dodd*, 1 Hal. 387. She cannot recover against the heir or devisee for the use and occupation of the lands of her husband, merely because she is entitled to dower, and it has not been assigned to her. *Andrews v. Andrews*, 2 Gr. 141. Her remedy is not confined to *unde nihil habet*; after an assignment she can maintain case for an injury to her portion before the assignment. *Rogers v. Potter*, 3 Vr. 78. So, a rule to stay waste will be granted her before assignment. *Harker v. Christie*, 2 South. *717 (a). Service of the writ where defendant lives out of the state. *Heulings v. Hurst*, 1 South. *374. Damages cannot be recovered, or costs, where the husband did not die seized. *Fisher v. Morgan*, Coxe 125. *Sheppard v. Wardell*, Coxe 452. *Martin v. Martin*, 2 Gr. 125. That the widow has received compensation for the annual value of her dower, may be given in evidence in mitigation. *Woodruff v. Brown*, 2 Har. 246. See *Keeler v. Tatnell*, 3 Zab. 62. *Young v. McPherson*, Pen. *895. Where the land is aliened in the lifetime of the husband, subsequent improvements are not liable to dower. *Van Dorn v. Van Dorn*, Pen. *698. *Chiswell v. Morris*, 1 McCurt. 102. See *Coxe v. Higbee*, 6 Hal. 385. *Leggett v. Steele*, 4 Wash. C. C. 305. How a writ of inquiry and seisin is executed. *Statope v. Copner*, Pen. *132. *Pierce v. Williams*, Pen. *709. *Martin v. Martin*, 2 Gr. 125. In an action for dower, the demandant is a competent witness against the devisees under the testator's will. *Smith v. Smith*, 23 Vr. 207. A widow who has dower by the judgment of a court which cannot award her damages or compensation for mesne profits, may maintain a suit in equity for their recovery. *Shields v. Hunt*, 12 Stew. 485. See RULES OF SUPREME COURT, Secs. 64 to 69.

whereby she ought not to have dower, and then it be inquired by what judgment, and it be found that it was by default, whereunto the tenant must answer ; then the tenant must answer further, and show that he had and hath right in the said land, according to the form of the writ that the tenant before sued out against the husband ; and if he show that the husband of such wife had no right in the lands, nor any other but he that holdeth them, the tenant shall go quit, and the widow shall not recover her dower therein ; but if he show not the same, the widow shall recover her dower.

6. That where a widow having no right to demand dower, sues out a writ of dower against the guardian of the heir, such heir being within age, and the guardian endows the widow by favor, or makes default, or by collusion defends the plea faintly, whereby she is awarded her dower in prejudice of the heir, in every such case, the heir when he comes to full age, shall have the like action to demand the seisin of his ancestor against such widow, as he should have against any other deforcere ; but the widow shall, in such action, be allowed to show that she had right to her dower, and if she show such right, she shall go quit and retain her dower, and if she show it not, the heir shall recover his demand ; and be it further enacted, that in like manner the widow shall be aided, if the heir or other person implead her for her dower, or if she lose her dower by default ; in which case the default shall not be so prejudicial to her, but that she shall recover her dower, if she have right thereto, and she shall have a writ in this form :

Rule as to widows and heirs.

Command A., that justly and without delay, he render to B., who was the wife of C., so much land (specifying the land), with the appurtenances, in D., which she claims to be her reasonable dower, or of her reasonable dower, of which the aforesaid A. deforceth her, &c.

The writ.

And to this writ the tenant shall have his exception, to show that she had no right to be endowed ; and if he can verify his exception, he shall go quit, and if not, the widow shall recover the land whereof she was before endowed.

Tenant may have exception.

7. That a writ of admeasurement of dower shall be granted to a guardian, and the heir, when he comes of full age, shall not be bound by the suit of such guardian, if it be by collusion ; but he may admeasure the dower after, as it ought to be admeasured by law.

When heir not bound.

8. That in the writ of admeasurement of dower, as well as in the writ of admeasurement of pasture, if the defendant come at the day contained in the writ, to answer the plaintiff, the plea shall pass between them, and if he come not, admeasurement shall be made upon his default.

Plea and default.

9. That no sheriff shall hold a plea of admeasurement of dower or of pasture ; *and further*, that every writ of dower and of admeasurement of dower or of pasture, shall issue out of and be returnable to, the supreme court or to the circuit court of the proper county ; which courts are hereby declared to have cognizance of the same.

Which courts have cognizance of dower.

10. That where any man hath purchased, or hath an estate made and conveyed of and in any lands, tenements or hereditaments, unto him and his wife, and to the heirs of the husband or wife, or to the husband and to his wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to his wife for the term of their lives, or for the term of the life of the said wife, or where any such estate or purchase of any lands, tenements or hereditaments hath been, or hereafter shall be made to any husband and to his wife, in manner and form above expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife as is before mentioned for the jointure of the wife, that then, and in every such case, every married woman having such jointure made, or hereafter to be made, shall not claim or have any dower of the residue of the lands, tenements or hereditaments, which at any time were her said husband's, by whom she hath or shall have any such jointure, nor shall demand or claim her dower of or against them or any of them, who have or shall have the lands, tenements or hereditaments of her said husband.

Jointure to bar dower.

But not if evicted.

11. *Provided always*, that if a widow be lawfully expelled or evicted from her said jointure, or from any part thereof, without fraud or covin, by lawful entry or action, or by discontinuance of her husband, she shall be endowed of as much of the residue of her husband's lands, tenements or hereditaments, whereof she was before dowable, as the same lands, tenements or hereditaments, from which she shall be so evicted or expelled, shall amount or extend unto. (a)

When jointure may be waived.

12. That if any deed, conveyance or assurance of lands, tenements or hereditaments, for jointure as aforesaid, be made before the marriage and during the infancy of the feme, or be made after marriage, in either case the widow may, at her election, forego and waive such jointure, and demand and have her dower. (b)

But shall not have both.

13. That when any deed, conveyance or assurance of lands, tenements or hereditaments, by way of jointure as aforesaid, and in lieu of dower, shall, through any defect, fail to be a legal bar to dower, and the widow availing herself of such defect, shall demand her dower, then the estate and interest so conveyed or assured to such widow shall thereupon cease and determine.

Barred by adultery.

14. That if a wife voluntarily leave her husband, and go away and continue with her adulterer, she shall be disabled and forever barred from having her jointure or dower, unless her husband be voluntarily reconciled to her and suffer her to dwell with him; in which case she shall be restored to her jointure or dower. (c)

Or by consent to ravisher.

15. That if a wife, after being ravished, consent to the ravisher, she shall be disabled and forever barred from having her jointure or dower, unless her husband be voluntarily reconciled to her, and suffer her to dwell with him, and then she shall be restored to her jointure or dower.

Devise of lands a bar, unless she dissent in writing in six months.

16. That if a husband shall devise to his wife, by a will duly executed to pass real estate, any lands or real estate for her life or otherwise, and without expressing whether such devise to her is intended to be in lieu or bar of dower, or not, and the said wife shall survive her said husband, that then the said wife so surviving, shall not be entitled to dower in any lands or real estate devised by her said husband, unless she shall, in writing, express her dissent to receive the lands or real estate so devised to her in satisfaction and bar of her right of dower in the other lands and real estate devised in and by the said will, and file the same with the surrogate of the county wherein she resides, or in which the lands or real estate devised to her shall be situated within six months after the probate of the said will, and then and in that case she shall be considered as renouncing the benefit of the said devise to her. (d)

(a) An ante-nuptial contract to release or not to claim dower, in consideration of an annuity or a provision out of personal property covenanted to be paid in lieu of it, will not bar the claim of dower if the provision on the part of the husband fails. *Camden Insurance Co. v. Jones*, 8 C. E. Gr. 171.

(b) An agreement by an infant to accept a pecuniary consideration in lieu of dower is not a bar to a claim of dower. *Drew v. Drew*, 13 Stew. 458. But she cannot claim dower and enforce the payment of a promissory note given to secure such consideration. *Id.*

(c) A divorce *a vinculo* obtained by the wife for the adultery of her husband, takes away her right of dower. *Calame v. Calame*, 9 C. E. Gr. 440. See *S. C.*, 10 C. E. Gr. 543, 550. *American Legion of Honor v. Smith*, 15 Stew. 466. In absence of statutory or implied statutory provision to the contrary, a divorce *a vinculo matrimonii*, for the fault of either party, will bar dower. *Fullen v. Fullen*, 7 Dick. 9.

(d) Whether the widow shall be put to her election, depends upon the intention of the testator, to be gathered from the will. *Stark v. Hunton*, Sax. 216. *Norris v. Clark*, 2 Stock. 51. *Freeland v. Mandeville*, 1 Stew. 559. *Stewart v. Stewart*, 4 Stew. 398. *Brokaw v. Brokaw*, 14 Stew. 304. *Griggs v. Veghte*, 2 Dick. 179. *Helme v. Strater*, 1 Dick. 591. Or the situation of the estate, as to realty and personal estate, &c. *Adamson v. Ayres*, 1 Hal. Ch. 349. If the provisions in the will are inconsistent with her right of dower, the widow is put to her election. *Colgate v. Colgate*, 8 C. E. Gr. 372. As a devise of the use and enjoyment of certain rooms in a house. *Morgan v. Titus*, 2 Gr. Ch. 201. *White v. White*, 1 Har. 202. A devise of the use of a house in another state, during life, will not bar her dower or put her to her election. *Van Arsdale v. Van Arsdale*, 2 Dutch. 404. Nor land given to trustees for her benefit. It must be a direct devise to her. *Id.* *Colgate v. Colgate*, 8 C. E. Gr. 372. Her election need not be made while a controversy in regard to the will is pending. *Dutch Church v. Ackerman*, Sax. 40. What acts of the widow amount to an election. *English v. English*, 2 Gr. Ch. 504. *Stark v. Hunton*, Sax. 216. If she accept a legacy in lieu of her dower, interest will be allowed on it after one year from the testator's death. *Dutch Church v. Ackerman*, Sax. 40. *Howard v. Francis*, 3 Stew. 444. A legacy so given will be a charge on the land. *Bird v. Davis*, 1 McCart. 485. *Snyder v. Warbasse*,

3 Stock. 463. But where a legacy and devise were given, her acceptance did not render the legacy such charge. *Paxon v. Potts*, 2 Gr. Ch. 313. A legacy given in lieu of dower, where the testator had no estate of which his widow could be endowed, will abate in proportion to other legacies. *Perrine v. Perrine*, 1 Hal. 133. See *Dey v. Dey*, 4 C. E. Gr. 137. Where land accepted by the widow is devised charged with the payment of legacies, she takes it subject to such incumbrances. *Kay v. Kay*, 3 Gr. Ch. 503. So, such lands are liable to their proportion of the debts of the testator. *Bray v. Neill*, 6 C. E. Gr. 344. After an election fairly made, she cannot retract and recover her dower. *Davison v. Davison*, 3 Gr. 235. *Stark v. Hunton*, Sax. 216. See *S. C.*, Hal. Dig. 393, § 49. If, after an election, she be evicted from the lands devised, by a sale of the lands for the payment of debts under an order of the orphans' court, she may recover her dower. *Thompson v. Egbert*, 2 Har. 459. See *Sip v. Lawback*, 2 Har. 443. Where a testator leaves real estate, of which his widow is dowable, a legacy given to her in lieu of her dower, does not, as between legatees, abate on deficiency of assets, but is entitled to preference over other gifts merely voluntary. *Howard v. Francis*, 3 Stew. 444. A widow's election to take her dower instead of a legacy in lieu thereof made under a mistake as to her rights, may be revoked *nunc pro tunc*, and thus placed *in statu quo*, unless the situation has so changed since her election that it cannot be done without prejudice to the subsequently-acquired rights of others. *Macknet v. Macknet*, 2 Stew. 54. To make a case for an election by the widow between her right of dower and a testamentary disposition, her claim of dower must be inconsistent with and repugnant to some of the dispositions of the will, and must disturb or disappoint the will. *Pratt v. Douglass*, 11 Stew. 516. After directing his debts to be paid and making a specific devise, a testator gave the "balance and residue" of his estate to his wife, declaring that that gift to her was in lieu of her dower. In the settlement of the estate, and the payment of testator's debts, all his personal estate was exhausted, and all his lands, other than those specifically devised, sold by order of the orphans' court. *Held*, that his widow was not deprived of her right of dower in those other lands by her failure to file her dissent to the devise to her within the time limited by the statute. *Osmun v. Porter*, 12 Stew. 141; affirmed, 14 Stew. 668.

17. [Amended by Sec. 27, *post.*]

18. That the party petitioning for the appointment of commissioners to assign and set off dower as aforesaid, shall give twenty days' previous notice, in writing, to the other person or persons interested, and to the guardians (if any) of minor children, of the said intended application, by serving the same personally, or leaving it at his or her usual place of dwelling, or where any person entitled to notice of such intended application, shall not reside in this state, and shall not be served with notice as aforesaid, then notice may be given by advertisement in a newspaper, published in the county where the said lands or real estate are situated, or in the county nearest thereto in which a newspaper shall be published, for at least four weeks successively, once at least in each week. (a)

Notice to be given.

19. That it shall be the duty of the said commissioners to make a full report of all their proceedings, with the distances and courses of the land so assigned and allotted by them to the widow for her dower, and amount of their charges, to the court which appointed them, at the next or subsequent term after their appointment; which report, if approved and confirmed by the court, shall be entered at large by the surrogate on the records of his office, in some proper book for that purpose; and all persons concerned therein shall be concluded by the judgment or decree of the said court, unless the same shall be set aside or reversed. (b)

Commissioners' report.

Recorded.

20. That it shall be lawful for any widow, heir or heirs, or guardian of any minor child, or any purchaser who shall conceive himself or herself aggrieved by the proceedings, judgment or decree under this act, of any orphans' court, at any time within twenty days after the final judgment or decree, to give notice in writing of the causes of complaint, and of his or her intention to apply to the surrogate-general, at the next stated term to be holden after such notice for relief, who shall review the proceedings, judgment or decree complained of, and do therein what shall be just. (c)

Appeal to surrogate-general.

21. That where a husband shall die seized of lands or real estate in two or more counties, it shall be lawful for the ordinary or surrogate-general, to appoint commissioners to admeasure and set off dower as aforesaid, and to proceed therein in all respects as the orphans' court are by this act authorized to proceed for the making admeasurement of dower as aforesaid. (d)

Where lands in several counties.

22. That the fees to be allowed, taxed and taken by the surrogates, orphans' courts and surrogate-general and other officers, shall be the same as those allowed by law for similar services in other cases.

Fees.

23. That the charges of the commissioners for their services in making of the said admeasurement of dower, and the costs arising and accruing on any proceeding under this act, commenced in the orphans' court or prerogative court, shall be taxed by the surrogate or clerk of the court in which the proceedings may be had, and paid in the first instance by the petitioner or petitioners; and the said costs and charges shall be divided and apportioned by the court among the persons concerned, according to their respective interests in the lands and real estate, out of which the dower shall be so assigned; and in case any person or persons concerned shall not, on demand, pay his, her or their proportion of such costs and charges, that then the petitioner or petitioners shall and may recover the same by the judgment and process of the court or by an action of debt, in any court having cognizance thereof; but in all cases of appeal, each party shall pay his, her or their own costs.

Costs taxed, apportioned and paid.

24. That after dower shall be assigned to a widow by virtue of this act, nothing in the second section of this act shall be considered as entitling

When quarantine to cease.

(a) A decree of the orphans' court setting off dower, where a party whose interests are to be affected by it is not served with notice, as required by this section, is void, at least as against such party. *Hess v. Cole*, 3 Zab. 118. Where all the parties reside in this state the notice must be personal, hence a notice by publication is a nullity and an assignment under proceedings had upon such notice illegal. *Pierson v. Huchener*, 10 C. E. Gr. 129.

(b) Setting off dower by metes and bounds in which the husband was only seized of an undivided moiety, is a radical defect. *Osborn v. Rogers*, 4 C. E. Gr. 429. The requirement that the commissioners shall make their report at the next term is not

imperative, but if the report is made at a subsequent term, it must be by order of the court made upon notice. *Id.*

(c) Each of the tenants is entitled to relief whether the assignment is illegal and unequal as between the widow's dower and the entire estate, or as between such dower and an individual interest. *Matter of Garrison*, 2 McCart. 394. After an appeal, the proceedings may be continued in the prerogative court. *Osborn v. Rogers*, 4 C. E. Gr. 429.

(d) On a widow's petition, in the prerogative court, for commissioners to set off her dower, objections amounting to an equitable bar, which the widow denies, will not be considered. *Fritts' Case*, 5 Stew. 293.

her to remain in and to hold and enjoy the mansion-house of her husband, and the messuage or plantation thereto belonging, except such part thereof as may be assigned to her for dower, without being liable to pay rent for the same.

Supplement.

Approved March 10, 1870.

P. L. 1870, p. 22.

Wife of trustee
not to have dower
in the trust estate.

25. SEC. 1. That whenever any deed, conveyance or will heretofore or hereafter made, vests the title to lands in a trustee or trustees to hold in trust for the benefit of the cestui que trust, and a provision of trust appears on the face of the deed, conveyance or will, the wife of the trustee or trustees shall not have any right or claim of dower in said trust estate, but the trustee or trustees, by his or their individual deed, may convey the same free from any dower right of his or their wives.

Supplement.

Approved March 29, 1878.

P. L. 1878, p. 217.

Purchaser may
have dower por-
tion of lands
set off.

Petition and
procedure in
orphans' court.

26. SEC. 1. That when the estate of any husband in any lands, tenements or other real estate hath been or shall be sold by due course of law by any sheriff, assignee in bankruptcy, or other duly-authorized public officer whereby an inchoate right of dower doth or shall remain it shall be the right of any purchaser of such estate to have one-third part of such lands, tenements and real estate admeasured and set off as and for the dower portion thereof by petition to the orphans' court of the county wherein the said lands are situate, and procedure thereupon according to the course and practice of the orphans' court, of which portion so admeasured and set off, in case the right of dower shall be thereafter perfected, the widow shall be endowed, and the remaining two-thirds part of such lands, tenements and real estate shall be held by said purchaser free of all dower and right of dower from the time of the decree or judgment of the said court unless the same shall be set aside or reversed.

Amendatory act.

Approved March 22, 1888.

P. L. 1888, p. 196.

Proceedings to
assign dower.

27. SEC. 1. That the seventeenth section of the act to which this is amendatory shall be and is hereby amended so as to read as follows :

[That it shall be lawful for any widow entitled to dower in any lands or real estate of which her husband died seized, or for any heir or heirs, devisee or devisees, or guardian of any minor child or children, entitled to any estate in the said lands or real estate, or for any purchaser thereof, to apply by petition to the orphans' court of the county where the said lands or real estate are situated for the appointment of commissioners to assign to such widow her dower in the said lands and real estate, whereupon the said court shall appoint three discreet and disinterested persons, resident in the said county, commissioners to admeasure and set off, as speedily as conveniently may be, one-third part of the said lands and real estate as the said widow's dower, which commissioners before they enter upon the duty assigned them, shall be sworn or affirmed before the surrogate or any other person authorized to administer oaths in the said county, faithfully, honestly and impartially to execute the trust reposed in them respectively.] (a)

(a) A devisee cannot apply to have dower assigned. *Matter of Hopper*, 2 Hal. Ch. 325. The appointment of the commissioners should appear by the records of the court. *Osborn v. Rogers*, 4 C. E. Gr. 429. In the assignment the rights of all the devisees and heirs should be considered. *Macknet v. Macknet*, 9 C. E. Gr. 449. *Matter of Garrison*, 2 McCurt. 393. H. died in-

testate, seized of real estate, leaving a grandson, the only child of a daughter (who was the only child of the intestate), and leaving a widow and two sisters. The grandson died shortly after the intestate, and without issue. On application of the sisters, commissioners were appointed and assigned dower to the widow. *Haring v. Van Buskirk*, 4 Hal. Ch. 515.

An act relative to inchoate dower.

Approved March 27, 1878.

P. L. 1878, p. 193.

28. SEC. 1. That whenever it shall appear to the satisfaction of the chancellor that any person entitled to an inchoate right of dower in any lands or premises is incapacitated, by mental infirmity or disease, from executing a valid release or relinquishment of the same, and that the interests of the owner of such lands and premises require and would be promoted by a sale of the same, it shall be lawful for the chancellor to direct such release or relinquishment to be made by any master of the court of chancery, whose deed or deeds executed in behalf of such person shall release and bar all the dower, or right, or estate in dower, to which such person may be entitled, or would at any time succeed or become entitled to, in the lands and premises therein mentioned.

Chancellor may direct release or relinquishment of inchoate right of dower of person mentally incapacitated.

29. SEC. 2. That upon a petition filed for the purpose aforesaid, the chancellor may, in a summary manner, proceed to inquire into the merits of the application by reference to a master or otherwise; and in case a release is ordered by him in conformity with the prayer of said petition, a bond shall be given to the chancellor in such penalty and with such surety as he may direct, to secure to such person so entitled to such inchoate right of dower, in case she survives her husband, the enjoyment after his decease and during her life, of a fund equal to one-third of the whole proceeds of sale of the said lands or premises, which bond, if forfeited, may be prosecuted in any court having cognizance of the same; or in lieu of said bond, if it shall appear satisfactory to the chancellor, the said sum of one-third of the whole proceeds of sale shall be invested under the direction of the chancellor, and the interest thereon, during the joint lives of the husband and wife, shall go to such husband, and if the husband die first, then to the widow during her life; and the court of chancery shall have full power to make all orders and decrees relative to the final disposition of the bond or fund aforesaid, and as may be necessary to give complete relief to the parties, their heirs and assigns.

Application to be by petition.

Reference.

Bond.

Proceeds of sale to be invested under the direction of the chancellor.

An act relative to dower.

Approved March 28, 1892.

P. L. 1892, p. 201.

30. SEC. 1. That whenever it shall appear to the satisfaction of the chancellor that any person having a right of dower in any lands or premises is incapacitated by mental infirmity or disease from executing a valid release or relinquishment of the same, and that the interests of the owner of such lands and premises require and would be promoted by a sale of the same, it shall be lawful for the chancellor to direct such release or relinquishment to be made by any master of the court of chancery, whose deed or deeds executed in behalf of such person shall release and bar all the dower or estate in dower to which such person may be entitled in the lands and premises therein mentioned.

Chancellor may direct release or relinquishment of right of dower of person mentally incapacitated.

31. SEC. 2. That upon a petition filed for the purpose aforesaid, the chancellor may in a summary manner proceed to inquire into the merits of the application by reference to a master or otherwise, and in case a release is ordered by him in conformity with the prayer of said petition, a bond shall be given to the chancellor or to the guardian of such person, in such penalty and with such surety as he may direct, to secure to the guardian of such person so entitled to dower the enjoyment during her life of a fund equal to one-third of the whole proceeds of sale of the said land and premises, which bond, if forfeited, may be prosecuted in any court having cognizance of the same, or in lieu of said bond if it shall appear satisfactory to the chancellor, the said sum of one-third of the whole proceeds of sale shall be invested under the direction of the chancellor and the interest thereon shall go to the widow during her life, and the court of chancery shall have full power to make all orders and decrees relative to the final disposition of the bond or fund aforesaid and as may be necessary to give complete relief to the parties, their heirs, devisees and assigns.

Application to be by petition.

Bond.

Proceeds of sale to be invested under direction of the chancellor.