Disposition of a Deceased Person's Estates of Inheritances as Affected by Liability for Debt, Dower, Curtesy, Devise and Descent

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SUBJECT.

DISPOSITION OF A DECEASED PERSON'S ESTATES OF INHERITANCES AS AFFECTED BY LIABILITY FOR DEBT, DOWER, CURTESY, DEVISE AND DESCENT.

BY

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OUTLINE.

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Introduction.

The effect of a person's death upon his real property is determined ultimately by the law, but primarily by the conduct of the deceased himself during life. If he has contracted debts which remain unpaid, it is quite possible that his real property may be taken for their payment. If he has taken unto himself a wife and leaves her still alive and legally his wife, death vests a complete dower right in that property at once: or if the deceased person is a married woman, has had children and has not otherwise disposed of her property, the estate of curtesy will immediately vest in her husband. Or the deceased may still further determine the disposition of his property by aid of a legally executed devise, or "will" as it is called. By means of this he has the widest range of power in determining the course of title to his real property. And lastly, he may by his failure to exercise this power, leave the disposition of his property entirely in the hands of the law.

Our application of these laws and powers, however, will not be exhaustive: for in one way or another some of them apply to every estate, interest and right in the lands, tenements and hereditaments of which the deceased person was at any time the owner. But we shall confine ourselves to particular estates: namely, such estates of inheritance of which he was seized at his death and would descend to his heirs.
CHAPTE R I

LIABILITY FOR DEBT.

Originally this was not an incident of freehold estates, either during the life time of the owner or after his death, for any debts contracted by him whatever. Real property was first made liable to execution for the debts of its owner during his life time by the statute of Edw. I ch. 18; and it was not until the statutes 3 & 4 William 4 ch. 104, that the estates of a decedent were subject to liability for all his debts.

In this country it is now the general rule that all freehold estates as well as leaseholds are liable for the debts of a deceased owner, whether due by matter of record, specialty or simple contract, and it has probably been so from Colonial times and considered as a part of our Common law. (Kents Comm. 419) Notwithstanding this, statutes have been enacted expressly providing for the sale of a decedent's real property in this state, to pay the debts he has contracted during life or the expenses of settling up his estate.

EXCEPTIONS.

Not all of his estate however is subject to this liability. Though creditors and heirs may wrangle among themselves for the possession of his realty and he have not one whit to say concerning its disposition, yet by legislative enactment, he is
made sure of enough ground wherein to rest his bones until the final judgment day, provided he will undertake certain steps to bring it under the hand of the law.

That part of the Revised Statutes known as the Code of Civil Procedure in section 1395 provides what must be done to exempt certain designated lands from sale by virtue of an execution, for their use as a family or private burying ground.

1st. A portion of it must have been actually used for that purpose.

2nd. It must not exceed in extent one fourth of an acre.

3rd. It must not contain, at the time of its designation or at any time afterwards, any building or structure, except vaults or other places of deposits for the dead or mortuary monuments.

Therefore if such a parcel of land be designated according to the law as expressed in the following section (1396), that part of his estate liable for debts will be curtailed just so much.

HOMESTEAD.

But there is a far more important exemption, in this state as in most others, brought about by the creation of what is known as a "Homestead estate". In a general way this may be said to be an interest in land, usually a life interest, that is by statute made exempt from levy and sale under execution
or other process when once laid claim to by the proper parties. What this estate is in New York and to whom it belongs is found in the Code of Civil Procedure (I397ff.)

If the decedent was a householder having a family, or a married woman, the right to this exemption accrues as soon as the property to be exempted has been properly designated. This may be done (1) either by expressly stating in the conveyance of the designated property that it is designed to be held as a homestead, or (2) by a notice containing a full description of the property stating for what purpose it is designed to be held, subscribed by the owner, proved and certified as if a deed and recorded in the County Clerk's office in a book kept for the purpose, known as the "homestead exemption book."

If the decedent be a man, it continues for the benefit of the widow and surviving children, until the majority of the youngest surviving child and until the death of the widow.

If the decedent was a woman, it continues for the benefit of her surviving children, until the majority of the youngest surviving child.

Having shown to whom the exemption belongs, it remains but to show what the extent of the exemption is. There must be a lot of land with one or more buildings thereon, which
must be used as a residence by the owner in fee, (though the suspension of occupation for a period not exceeding one year, which occurs in consequence of injury to or destruction of the dwelling house upon the premises, will not destroy the exemption) and shall not exceed one thousand dollars in value in order to be exempt from sale by virtue of an execution. It is not exempt from liability for debts created before April 30, 1850, nor those wholly contracted before the designation of the property as such an estate, or for the purchase money thereof, or from sale for the nonpayment of taxes or assessments.

So therefore if the decedent has been a householder or married woman, has none of the above liabilities and has properly designated property worth one thousand dollars, has made it his residence until death and left a wife or children, then the creditors will again have their chances lessened by the exemption of this property from liability to satisfy their claims. The creation of this estate was not to defraud creditors or protect debtors merely for their own benefit, but to secure to the members of the family a home beyond the reach of creditors, thereby to prevent if possible the necessity of their becoming public burdens.
PENSIONS.

A similar exemption to this and for the same purpose, is that made for the protection of pensions (Civil Code 1393). On its face this would not seem to exempt lands that were purchased with such pension monies but the case of Yates County National Bank vs. Carpenter 119 N.Y. 550 holds that the provision should be liberally construed, so that "where the receipts of a pension can be directly traced to the purchase of the property, necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of the statute".

CHARGES.

And a decedent’s property may be subject to still one more exemption, as where he leaves a will wherein certain of his property is devised expressly charged with the payment of his debts and funeral expenses. (Civil Code 2749) Yet here the debts are ultimately paid, and the only benefit derived is that a decedent may provide for the disposition of his property according to his own wishes and still satisfy his creditors.

GENERAL DISPOSITION.

Subject to the exemptions heretofore mentioned, the decedent’s estates of inheritance, both legal and equitable, (Civil
Code 1473 are liable for the satisfaction of his debts. This is by statutory enactment (Civil Code 2749) if not by the Common law as it was adopted in this state. The proceedings being wholly statutory are technical and complex, and the circumstances under which they may become necessary are immemorable. But there are certain general rules of order that apply to all cases.

At any time within three years after letters testamentary were first duly granted within the state upon the estate of a decedent, his personal representatives or creditors may present to the Surrogate Court from which the letters were issued, a written petition, duly verified, praying for a decree directing the disposition of the decedent's real property or so much thereof as is necessary for the payment of the debts.

The petition must set forth a general description of the debts; of a general description of the real property; the names of husband or wife and of all heirs and devisees or those who claim under them; and the amount of personal property which has come into the executor's or administrator's hands, and the application thereof. (Civil Code 2752)

Whereupon, the Surrogate must issue a citation to all the parties interested, and upon the return of the citation proceed to hear the allegations and proofs of the parties. If it then
then appears that the proceedings have been according to law, that the claims presented are the debts of the decedent or reasonable charges against the estate which are not secured by mortgage or expressly charged by will upon certain of decedents property, or that all the personal property of the decedent which could have been applied to the payment of his debts & has been so applied, and that it is insufficient for the payment of the same, then the decree directing the disposition of the property will be granted.

But what particular parcels are to be disposed of and the manner of disposition is yet to be determined. To this end three appraisers are appointed by the Surrogate, who examine and appraise each parcel and stating its value and rental value. Thereupon he determines whether the decree shall direct the mortgagin, leasing or sale of the property. The manner in which these acts are done is explicitly defined in the subsequent sections of this act (2766 ff.) It is within the discretion of the Surrogate not only to say what disposition of the property shall be made but likewise what parcels shall be disposed of and the order of their disposition, unless the decedent left a will effectually devising part or all of his real property. In which case, the several distinct classes of parcels must be disposed of in the following
ing order.

1st. The property which descended to the heirs and has not been sold by them.

2nd. Property so descended which has been sold.

3rd. Property which has been devised and has not been sold by the devisee.

4th. Property so devised which has been sold.

Such is a general outline of the administration of real property so far as its disposition for the payment of decedents’ debts are is concerned. Such will be the general course. His real property will take after his personality has been exhausted and debts still remain unpaid. If he should have made a will therein directing that his debts be first paid, the law has preceded him and demanded it. But he may by will change the course of administration to this extent, if he requests that his realty be first used for the payment of his debts and fully or partially exhausted before the personality shall be used for their payment. His right to do this is unquestioned. Nevertheless he can not direct the estate of certain other of its incidents known as dower and curtesy and it will be the province of the next two chapters to discuss these subjects.
It is not only impossible for a decedent to have cut off his wife's interest in his real property without her consent, (I R.S.742§16) but the courts themselves are without the power to so administer his property, even in the payment of his debts, as to deprive her of the estate of dower. The claims of creditors are always subservient to those of a wife legally entitled to dower (Higbie vs. Westlake 14 N.Y.281).

Dower is to be defined as "that provision which the law makes for a widow out of the lands or tenements of her husband". (Schouler Dom. Rel. §213) Its origin is obscure and is universally conceded to be of great antiquity, so ancient that neither Coke or Blackstone could trace it to its source. It has always been a part of the Common law and has now been incorporated into statute in this state though abolished in some others. (I R.S.740§1) This provides that a widow shall be endowed of all the lands whereof her husband was seized of an estate of inheritance at any time during marriage. (Schiffer vs. Pruden 64 N.Y.47)

WHO MAY HAVE DOWER IN NEW YORK.

The requisites for the consummation of a title of dower are marriage, seizin of the husband, in law or in fact, and his death. (Park on Dower 37, -Schiffer vs. Pruden supra, Denton vs. Nanny 8 Barb.613.)
MARRIAGE

There must be a lawful marriage but it is sufficient if it be only voidable and not void, unless it be dissolved during the lifetime of the husband. (Brower vs. Bowers I Abb.Ct. App. Dec. 214-Griffin vs. Banks 24 How. Pr. 213) For the law treats such a marriage as good for every purpose as if it contained no infirmity, until set aside by verdict or decree. When the marriage is declared void, the law treats it as void ab initio and the woman is not entitled to any dower whatever. But if the husband and wife are simply separated by divorce a mensa et thoro, the wife does not lose her dower, nor on the other hand is she entitled to recover it during the lifetime of her husband. (Tiedman on R.P. 81 - Bishop on Marriage, Sep. & Divorce 1678 - Day vs. West 2 Edw. Ch. 592) Nor does she lose dower in her husband's lands where divorce a vinculo has been granted to her because of the husband's adultery (N.Y. 95 - Duer 102 753) except in those lands acquired by him subsequent to the divorce. But by statute (I R.S. 741 3) it is provided that she lose her dower if divorce is granted to the husband because of her misconduct. And it is held that the only misconduct which will bar her dower is adultery; and a verdict of adultery and decree of divorce must have been granted: the forfeiture of dower not being a consequence of the offence merely but of the judgment founded thereon. (Schiffer vs.}
Pruden, supra- Pitts vs, Pitts 52 N.Y.593- VanCleef vs, Burns
I33 N.Y.540-So that the admission of her adultery whether
made in court or not is insufficient to bar her dower.

But when the marriage is void ab initio-not voidable merely-
dower never attaches: so when a woman marries a man already
married or divorced and not entitled to marry, she gets no
dower. (Price vs. Price I24 N.Y.589-Ogden vs, Cropsey II N.Y.228-
Spicer vs, Spicer I6 Abe. Pr.N.S.II2) nor does the man's
divorced wife if the the divorce was for her adultery.

SEIZIN.

There must be seizin of the husband in law or in fact (for
possession is not necessary) McIntyre vs, Costello 47 Hun 289-
Phelps vs, Phelps I43 N.Y.197. This will be discussed in
connection with the kind of property in which dower exists.

DEATH OF THE HUSBAND.

The husband must die. At Common law the physical death of
the husband was essential to complete a dower title and with-
out doubt it is now necessary in this state. The Penal Code
§ 703 declares that a person sentenced to imprisonment for
life shall be deemed civilly dead, and in section 299 declares
that the marriage of the spouse of such a person thereafter
shall not be bigamous. But it would seem that this fiction of
civil death is now applied only to the criminal side and that
civil matters remain undisturbed by the fiction that the owner is dead. For the will of a person so civilly dead was held not admissible to probate, as the word "decedent" as used in sections 2655-63 of the Code of Civil Procedure was intended to be understood and applied in the ordinary sense of the term as signifying one who has actually died. (In Re Zeph 50 Hun 523) And Avery vs. Everett 110 N.Y. 317 held that section 708 of the Penal Code was declaratory of and restored the common law, going no further. By the rule of the common law civil death did not operate as a divestiture of the estate of the convicted person. It would therefore seem that such a widow is not entitled to dower until the physical death of her husband.

Until his death this right of dower is said to be inchoate. But we shall not concern ourselves with the nature of dower at this stage, for the husband is already dead and the right has become consummated.

In what property.

It will be noticed from the statute that dower extends "to all lands whereof the husband was seized at any time during marriage". This would cover all lands that he had disposed of before death; but it is not with these that we are concerned. So that our present topic is confined to the
effect of the wife's present right upon lands of which the husband died seized of an estate of inheritance only.

The question as to what property is subject to dower is, in a general way easily disposed of. First, all such estates as are free from incumbrance; second, those incumbered. UNINCUMBERED ESTATES.

These may be held by him solely or as tenant in common. (Smith vs. Smith 3 Lans. 313; Wilkinson vs. Parish 3 Paige 653; Totten vs. Stuyvesant 3 Ev. Ch. 500; Church vs. Church 3 Sandf. Ch. 434; Ford vs. Knapp 102 N.Y. 135; Jourdan vs. Haran 117 N.Y. 626) but they must be estates in fee simple or in fee qualified by condition, limitation or conditional limitation.

As to those in fee simple she will have a life estate but her estate in those qualified is subject to be determined by the termination of the estate of which her husband was seized, for she takes no better estate than he had—with one exception:

If the estate be determinable under a power of appointment, dower ceases if the power is exercised, otherwise not. (Hawley vs. James 5 Paige 318) If the estate be conditional and be determined by entry for forfeiture upon breach of condition, dower is destroyed. (Green vs. Reynolds 54 State Reg. 846; Beardsley vs. Beardsley 5 Barb. 324; Milledge vs. Lamor 4 Desau 637). If the estate be determinable under collateral
limitations, dower is determined when the limiting event happens. [Moriarta vs. McRae 15 Hun 504] But whether an estate determinable under a conditional limitation or by executory devise continues subject to dower after it is determined, is disputed though the weight of opinion seems to be that it does. So a devisee, subject to an executor's power of sale, has a vested estate of which on his death after the testator's death and before the exercise of a power of sale; and his widow is entitled to dower; and on a subsequent exercise of the power of sale, the widow is entitled to share in the distribution of the proceeds. [Simpson's Estate 15 Abb. Pr. N. S. 230]

Estates tail were formerly subject to dower but they have been abolished in New York or other provision made for them in case of valid limitations. [R.S. 724 3] so that the question as to dower in these estates does not arise in this state. But if the decedent's property be situated outside of New York, it may attach as all states have not abolished estates tail. [Hutchin's Williams R.P. I21]

But the widow is not always obliged to take dower out of these lands already mentioned of which her husband died seized if they have been exchanged or received in exchange for other lands during marriage. [R.S. 740 3] "If a husband seized of an estate of inheritance in lands, exchanges them for
other lands, his widow shall not have dower in them both, but shall make her election to be endowed of the lands given, or of those taken in exchange; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange, within one year after the death of her husband, she shall be deemed to have elected to take her dower out of the lands received in exchange. This choice came up in the case of Wilcox vs. Randal 7 Barb. 633.

INCUMBERED ESTATES.

We will next take up such estates of inheritances as are not free from incumbrances, namely equitable, mortgaged and partnership property.

EQUITABLE.

At Common law the widow was not entitled to dower in lands in which her husband was seized of a mere equitable estate or interest during coverture or at the time of his death. But the legislature of this state and many others has in the Code of Civil Procedure section 1473, adopted the principle of giving to the widow her equitable dower in the descendible equitable interests of her husband of which he dies seized. So in the case of a contract for the purchase of lands, where the husband dies seized of an inheritable interest in the premises, before the conveyance of the legal estate has been
given, the right of the widow to equitable dower therein subject to the lien of the vendor for the unpaid purchase money, is distinctly recognized. (Hawley vs. James, supra-Church vs. Church, supra-Hicks vs. Stebbins 3 Lans. 39- McCaffety vs. Teller 2 Paige 521-Johnson vs. Thomas 2 Paige 377) But this principle extends only to those cases in which the equitable interest of the husband in his trust property continues down to his death so as to be inheritable by his heirs and he must be in a situation at his death to enforce specific performance of the contract or obtain a legal title by a decree in equity.

But the widow is not entitled to dower in lands of which her husband was a mere trustee. (Territt vs. Crombie 6 Lans. 82- Cosler vs. Clark 3 Eqri. Ch. 428-Cooper vs. Whitney 3 Hill 977) He must be beneficially seized of the property in law or in equity. So a transitory seizin for a moment as a mere conduit is not sufficient to give dower. (Tabele vs. Tabele I John. Ch. 45-Cunningham vs. Knight I Barb. 399-Maybury vs. Brien I5 Pet. 21). This leads to the subject of dower in MORTGAGED PROPERTY:

as where ,in the last above situation a husband takes a conveyance in fee and at the same time mortgages the land back to the grantor or to a third person to secure the purchase money, in whole or in part, dower cannot be claimed as
against rights under the mortgage. (Maybury vs. Brien, supra
Kittle vs. VanDyke I Sandf. Ch. 76-Brackett vs. Baum 50 N.Y. 8)

But statutes provide that as against every one but the
mortgagee and those claiming under him, shall have dower in all
lands so purchased during marriage and immediately mortgaged
to pay the purchase money. (I R.S. 741 5) And the same pro-
vision for dower is made in lands mortgaged at any time
before marriage whether for purchase money or not. (Idem, 4-
Stow vs. Swift 15 John. 458) And where in such case "the mort-
gagee or those claiming under him shall after the death of
her husband, caused the mortgaged land to be sold, either under
a power of sale contained in the mortgage, or by virtue of a
decree of a court of equity, and any surplus shall remain
after the payment of the monies due on such mortgage and the
costs and charges of the sale, such widow shall nevertheless be
entitled to the interest or income of the one third part of
such surplus, for her life as her dower. (Idem 6)

The widow is also entitled to dower in an equity of
redemption therein existing at the death of her husband.
(Swaine vs. Perrine 5 John. Ch. 492-Mills vs. VanVoorhis 20 N.Y.
412- Titus vs. Nelson 5 John. 452-) although not at Common law
Maburry vs. Brien, supra; as well where the mortgage was exe-
cuted before the marriage by her husband solely, as after, when
executed
executed jointly as against every person except the mortgagee and those claiming under him. (Bell vs. Mayor 10 Paige 49)

Consequently we may draw three general rules: That the right of dower is subject to the mortgage (1) when the mortgage was given before marriage, (2) when given after marriage for the purchase money of the premises, (3) and when given after marriage and the wife united in the conveyance. In these cases if the land was sold for the satisfaction of the mortgage, she would have dower in the surplus only. (Coles vs. Coles 15 John.319—Titus vs. Titus 5 John. Ch.452—Swaine vs. Perrine, supra) In all other cases she has dower without regard to the mortgage.

PARTNERSHIP ESTATES.

It is now a well settled doctrine in this state that partnership real estate is, so far as the partnership is concerned, to be regarded as personalty until the winding up of the firm business and the adjustment of partnership accounts. But this is the extent of the equitable conversion, and as soon as the partnership business has been settled up, the property is again considered as realty. So estates held by the partnership for partnership purposes are subject to dower although the dower right is subordinate to the demands that may be made by partnership creditors against the partners.
nership. But it is not subordinate to the claims of the partner's individual creditors. (2 Edw. Ch. 28- 5 id. 423- 5 Paige 451 50 N.Y. Super. Ct. 275- 2 Sandif. Ch. 325- 5 id. 669- 10 Misc. 428- 85 Run 482- 2 Barb. Ch. 165- II Barb. 43- 52 id. 349- 47 N.Y. 656- 49 N.Y. 103- 64 N.Y. 471) But in order that the claims of creditors may take precedence of the widow's dower in respect to lands held by two or more persons, the land must be in through partnership property because it is possible for partners to hold as tenants in common if they have expressly agreed that they shall hold their lands in that manner. In which case the widow takes her dower free from the claims of creditors.

(As to what is partnership real estate—see Eng. & Am. Ency. of Law, vol. I7 p. 944—Collumb v. Read, 24 N.Y. 505)

But partners may effect a complete equitable conversion of such property into personalty by agreement to that effect, and thus cut off a widow's dower, but the agreement must be clear and explicit. (Collumb v. Read, supra) In the absence of this agreement however as soon as the purposes of the equitable conversion have been accomplished, the widow is entitled to dower in her husband's share of the property, and if it shall have been sold in the settlement of the partnership, her right attaches to the surplus funds if there be any.

Averill v. Louck 6 Barb 470
HOW BARRED.

It is safe to say that the husband, after he has once become seized of land, cannot of his own act bar the wife's right of dower (I R.S. 742 16) although he may avoid the inconvenience of dower by taking such title in himself that the requisites of dower will not exist. But if love rule the match—not money—the man may persuade his intended wife to make a legal jointure. At Common law no provision or settlement made by a man before his marriage in favor of his future wife, could bar her dower—until the statute of Uses. This statute was recognized in this state as part of the Common law until a special statute was enacted especially providing for both legal and equitable jointure. (I R.S. 741 9-II)

LEGAL JOINTURE.

"Whenever an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone or to any person in trust for such wife alone for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower of such wife in lands of her husband."

Or any pecuniary provision that shall be made for the benefit of the intended wife as above, shall, if assented to, also bar her right of dower.

A legal
A legal jointure is such a provision, as under the statute of Uses or other statute, of itself bars dower; while an equitable jointure is such a provision as requires the widow to choose between it and dower. Little difficulty arises as to legal jointure because the wife's assent to the agreement disposes of the perplexing problem as to whether or not the provision is made in lieu of dower. If then the agreement is made according to statute, is made before marriage (Crain vs. Cavana, 36 Barb. 410–Townsend vs. Townsend 2 Sandf. Ch. 711) and to take effect in possession or profit immediately after the death of her husband, to endure at least for her life (McCarte vs. Teller, supra) and expressly made in satisfaction of her whole dower (Swaine vs. Perrine) is a reasonable and competent provision for the wife's livelihood—not a mere nominal provision (Graham vs. Graham 67 Hun 329–428) then her dower right is certainly barred. Such an ante-nuptial contract will always be sustained when fairly made, yet, from the confidential relations of the parties, it will be regarded with the most rigid scrutiny (Pierce vs. Pierce 71 N.Y. 26– and where marriage is the sole consideration, the contract will not be sustained, Graham vs. Graham supra).
EQUITABLE JOINTURE.

The difficulty lies in equitable jointure—not as to the sufficiency of the provision in lieu of dower because the offer of the husband has not yet been accepted—but in determining whether the provision was really made in lieu of dower or in addition thereto. For if it is made in lieu of dower, the widow must elect whether she will accept it or demand her dower; and if in addition thereto, she is not bound to make an election but demand both dower and devise.

The New York statute in reference to equitable jointure I R.S. 741 12-5 says, "If before coverture, but without her assent or if after coverture, lands shall be given or assured for the jointure of a wife or a pecuniary provision be made for her in lieu of dower, she shall make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband but she will not be entitled to both."

Or, if lands be devised to a woman or a pecuniary provision be made for her by will in lieu of dower" she must also make her election. And "where entitled to an election she shall be deemed to have made elected to take such jointure, devise or other pecuniary provision, unless within one year after the death of her husband she shall enter upon the lands to be assigned to her for dower or commence proceedings for
the recovery or assignment thereof."

First, as to the provisions made in lieu of dower by deed. She is then put to her election, and if after the husband's death she accepts such a provision, she bars herself of dower. 2 Edw. Ch. 592- 36 Barb. 410- 2 Sandif. Ch. 711) But if she has received such provisions during his life and spent or wasted it, she may take dower as if it had not been made for husband and wife may not so contract with each other. (Carson vs. Murray, 3 Paige 483-) In order to estop her, it is necessary that she should have enjoyed the provision in part at least after her husband's death. (Townsend vs. Townsend, supra- Jones vs. Powell 6 John. Ch. I94) So a wife has been estopped from demanding dower where, during the life of her husband who was an adjudged lunatic, she has made an agreement with a committee appointed to look after his estate, whereby she was to receive certain pecuniary aid in lieu of dower at once, and she had continued to accept it after her husband's death. Jones vs. Fleming 104 N. Y. 418- Price vs. Price, supra I24 N. Y. 600)

As to the sufficiency of the provision to bar dower where made by deed, the same rules apply here as in the case of testamentary provisions of this nature (see below).

The statute being so clear and explicit as to the necessity of her making an election between dower and these
Provisions by will or deed, we will content ourselves principally in determining what is required to be present in these provisions in order to force her to this election.

It is not—as so often stated—absolutely necessary that the testamentary provision or deed is expressly declared to be in lieu of dower. But the intention of the testator that it was meant to be such, must appear upon the face of the will either expressly or by necessary implication. (Adsit vs. Adsit 2 John, Ch. 448—Jackson vs. Churchill 7 Cowen 287—In Re Smith 1 Misc. 269—Betts vs. Betts 4 Abb. N. C. 317—Smith vs. Kniskern 4 John, Ch. 9—Wood vs. Wood 5 Paige 596—Fuller vs. Yates 3 id. 325—Sandford vs. Jackson 10 id. 266—I Sandf. Ch. 324—Gordon vs. Stephens 2 Hill 46—Tobias vs. Ketchum 32 N. Y. 319)

Asche vs. Asche 113 N. Y. 232) In fact the cases are numerous and uniform in holding that in order to compel the widow to elect between her dower and the provision in her favor contained in the will of her husband, the will must either expressly declare the provisions to be in lieu of dower—or its terms must be such as to show an intention on the part of the testator to exclude that right. *The inquiry’s aid Chancelor Kent in Adsit vs. Adsit, supra* is, whether such an intention in the testator is to be collected by clear and
manifest implication from the provisions of the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will and repugnant to its dispositions or some of them. In fact it must disturb or disappoint the will".

Every provision must satisfy this test. If there be any serious doubt as to whether it was made in lieu of dower or not, the presumption is that it is not in lieu of dower but cumulative and in addition to dower. (Konvalinka vs. Schlegel 104 N.Y. 125; Asche vs. Asche, supra) But the widow on the death of her husband is at once charged with the duty of informing herself whether she must make the election. (Akin vs. Kellogg 119 N.Y. 441) For if the provision proves to have been intended to be in lieu of dower, she is deemed to have accepted it as such, unless within one year she has made the election provided for by statute.

The effect of electing this provision in lieu of dower is to make her a purchaser thereof for valuable consideration. The reason upon which this rule is founded is in Isenhart vs. Brown, 1 Edw. Ch. 4II, stated to be "the price put by the testator himself upon the right of election and which she is at liberty to accept or refuse. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view she becomes the purchaser of the property left
to her by will". If it were a devise her rights are inferior to those of the husband's creditors (Leavenworth vs. Cooney 4 R. Barb. 570—Williamson vs. Williamson 6 Paige 298) though superior to those of other devisees, and will not abate with them (Isenhart vs. Brown, supra).

Because of this, where the whole interest in lands is devised to her by will, the question as to whether she takes in lieu of dower or as dower and devise—one third interest as dower and two thirds in addition thereto, or all in lieu of dower, is of much importance to her if there are creditors. For if she takes all in lieu of dower the creditors may reach all in the satisfaction of their claims—and if she takes part as dower it will be out of their reach. For want of clear expression of his intention that she should take the whole property by virtue of the will and not partly under the title of dower, it would seem that she may elect to take lands so devised to her both under the will and her title of endowment—the latter free from the claims of creditors.

This question arose under somewhat different circumstances in the case of Church vs. Bull 2 Denio 430, where a testator devised all his real and personal estate to his wife during life or so long as she should remain his widow, but he did not state in his will that he intended this provision for
his wife to be in lieu of dower in his real estate after the
determination of such provision by her marriage. The wife
having survived the 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 after she had
married. (see also Lewis vs. Smith II Barb. 152– Sandford vs.
Jackson, supra)

But if the devise was expressly stated to be in lieu of
dower, even though it limited upon widowhood, and she accepted
it, her dower is barred thereby. For some time there was doubt
upon this point but it is now the accepted doctrine that the
provision is sufficient, the limitation is valid and will
operate to bar dower as it was intended to do. Some cases
hold that a devise “durante viduitate” is so far inconsistent
with the enjoyment of dower as to furnish prima facie evi-
dence of an intention to exclude that right. But the New York
courts hold that no such inference is permissible and that
a devise during widowhood does not cut off dower upon
subsequent marriage, unless the testator expressly declares
that the provision is in lieu of dower and she accepts it
as such.

As to her election we have already seen that it must
be made within one year after her husband’s death, and unless
she shall have done so, the law chooses for her. The statute
applies whether she knew of the provision in lieu of dower or not, unless in case of fraudulent concealment. (Palmer vs. Voorhis 35 Barb. 479.)

But under certain circumstances she is not bound by her election, for instance, if she made it under the supposition that the estate devised to and accepted by her was free from lien or incumbrance when such is not the fact. Such will be the case whenever the election is made under mistake and in ignorance of the real state of the property, and she will be entitled to relief in equity. (Adsit vs. Adsit, supra)

The rule is the same where by means of fraud a widow is induced to make an election contrary to her true interests and different from what she would otherwise have done.

Or in case part of the provision made by the testator in lieu of dower is declared void, the widow is not bound by a previous election to receive such provisions, though she may accept the residue in lieu of her dower. (Hone vs. VanSchaick 7 Paige 221—Maurice vs. Maurice 1 Kan. 346)
Corresponding to the estate of dower created by operation of law in favor of the wife is the estate for life created by law in favor of the husband known as tenancy by the curtesy. To entitle a husband to this estate the corresponding requisites of dower, namely: legal marriage, seizin and death of the spouse, are necessary. But in addition thereto there must also have been issue born alive capable of inheriting the estate.

The same rules as to the sufficiency of the marriage apply in curtesy as in dower and divorce avinuolo against the husband bars the estate. (Renwick vs. Renwick 10 Paige 420)

The rules as to seizin and the rights thereon attaching are somewhat different. The husband is entitled to curtesy in all estates of inheritance legal and equitable, of which she was seized at her death and were not disposed of by will, with these exceptions. If the estate of the wife be one upon condition or upon limitation the husband's curtesy is defeated. (Washburne R.P. 168-170) But by a refinement of distinction if the estate be upon conditional limitation, the estate still exists un affected by the happening of the contingency by which it was determined. (Hatfield vs. Sneden 54 N.Y. 285- Grant vs. Townsend 2 Hill 554)
There are also exceptions to the rule that the husband is entitled to curtesy in the wife's equitable estates. Tenancy by the curtesy is one of the incidents of a legal estate of inheritance, and in-as-much as the incidents of such an estate depend not upon the intentions of the grantor, but are engrafted upon it by the law, it is beyond the power of a testator in bestowing the legal title to property upon a female devisee to deprive her husband of his curtesy by express restrictions. But it seems that this may be done in the case of the settlement of an equitable interest upon her by special provisions in the instrument. (Adair vs. Lott 3 Hill 182- Dunscomb vs. Dunscomb I John. Ch. 508) Unless such provisions are made however the husband has curtesy in her equitable property.

The principle difference between the two estates of dower and curtesy is that the former is but a life interest in one third of the estates in which the right exists, while curtesy is a life interest in all of such property.

In curtesy as in dower actual death of the spouse is necessary to complete the estate. After the birth of the child the husband's title to the curtesy becomes possible and the curtesy is then inchoate, but after the death of the wife, curtesy becomes complete and is then consummate. But the estate
of curtesy as it exists in New York state, while not expressly abolished, has been seriously modified by statutes known as the "Married Women's Act."

The first Married Women's Act passed in 1848 (L 1848 ch. 200) for the more effectual protection of the property of married women provided that the real and personal property of any female who is married or may hereafter marry should not be subject to the disposal of her husband or liable for his debts but should be her sole and separate property. The next one in the following year (L 1849) gave her sole power of disposition by will or deed.

It was held at first that these statutes entirely abrogated the existence of any prospective tenancy by the curtesy (Billings vs. Baker 28 Barb 343) that in as much as the statute made a married woman's property for her sole and separate use there could be no curtesy initiate, that her estates were in the same condition now as at Common law where she was allowed to hold sole and separate estates, set aside in equity, independent of her husband and free from his right of curtesy; and further, that the legislature so intended.

It was argued by Lamont, J., in Wrinne's case (I Lans. 508, overruled in 2 id. 21) that there was no difference between curtesy initiate and curtesy consummated, because curtesy
initiate could be sold on execution for the husband's debts and the purchaser would hold the estate during the life of the husband though he should survive the wife. And that as he now had no interest in the wife's lands which could be sold, he would not have any upon her death. In the case of Thurber vs. Townsend 22 N.Y. 517, it was contended by the defendant, who held the plaintiff's land under a lease from her husband, that the husband by his marriage and the birth of issue acquired an estate by the curtesy in the land of his wife which could not be destroyed by the legislature through these or any other statutes—But the Court held otherwise and affirmed the decisions abolishing dower.

But this construction of the statute has been overruled by the case of Hatfield vs. Sneden 54 N.Y. 280 and the contrary doctrine established that curtesy does still exist in this state. In as much as the statute deprives the husband of all control over his wife's estate and gives to her the sole power of disposition, the court concedes that the early cases were correct in declaring that the legislature had intended to deprive the husband of curtesy initiate, but whether they intended so or not, such is the fact for by express words they have withdrawn all the incidents of curtesy initiate.
initiate, But to say that the legislature intended to bar the husband of his curtesy where the wife dies intestate and without having conveyed her estate; and that it intended the heirs of the wife should take the estate immediately upon her decease rather than her husband during his life—this would be an unreasonable inference. Such a construction would be in utter disregard of the rule that the Common law is not to be changed by statute any further than a fair construction of the statute requires and that a change or repeal by implication is not favored.

Consequently the statute as now applied affects only such property as the wife has disposed of in her life time by deed or by will. So where a married woman possessed of a separate estate without having made any disposition of it in her life time by deed or by way of testamentary appointment, the title thereto vests in her husband by operation of law without any formalities on his part. But he estate—contingent as it is upon the the intestacy of the wife and her seizin at death in addition to the usual requisites of curtesy—is one of great uncertainty, for it has no existence whatever until these contingencies occur.
In the preceding chapters we have treated of the possible disposition of a deceased person's real property through its administration for the payment of his debts; through the estates of dower and curtesy. These are dispositions made by operation of law and we have yet to treat of its disposition as governed by the individual will of the deceased owner.

The right to dispose of property in this manner was first given by the statute of Wills and is too well known to require any further reference. It is not my purpose to treat of the entire subject of the law of wills, but shall touch merely upon the scope of a will: considering that the testator had testamentary capacity and that he properly executed the will. By statute(I.R.S. 56 I-3) all persons except idiots, persons of unsound mind and infants may devise their real estate by a last will and testament if it be duly executed—and every estate and interest in real property may be so devised—and it is further provided that such devise may be made to every person capable of holding real estate. I shall therefore endeavor to find the limitations to this rule that any competent person may dispose of his real estate to whom and in the manner he pleases, by first treating of
those persons whom he cannot make beneficiaries and second, of those provisions he cannot make because they are illegal or against public policy, irrespective of the capacity of the beneficiaries.

The holding of land in this country by aliens has always been looked upon with disfavor. Whether this is the result of race prejudice or whether it is because of certain notions that it would endanger our safety does not affect the situation. But the fact that at common law aliens could take and hold lands by purchase, and that their title so acquired was good as against the state leads me to believe that the latter reason is the cause of the disability. It was held in the case of Wright vs. Saddler 20 N.Y. 320 that this general rule of the common law was not changed by the revised statutes except in the single instance provided in the statute of Wills. This statute provides that every devise to a person who at the time of the death of the testator, shall be an alien not authorized by statute to hold real estate shall be void. The interest so devised shall descend to the heirs of the testator; if there be such heirs competent to take it shall pass under his will to the residuary legatees or devisees therein named; if any there be competent to take such interest:
As to the authorization of aliens to hold such lands, it provided that any alien who has come or may hereafter come into the United States may make a deposition or affirmation in writing before any officer authorized to take the proof of deeds to be recorded, that he is a resident of and always intends to reside in the United States and to become a citizen thereof as soon as he can become naturalized and that he has taken such incipient measures as the laws require to enable him to obtain naturalization. (Laws 1834 ch.272)

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

And by the laws of 1845 ch.115 any alien resident of this state to whom any lands have been or may hereafter be devised before the making and filing of such deposition as heretofore provided may on making and filing such deposition hold the real estate devised to such alien in the same manner and with like effect as if
if such alien at the time of such devise was a citizen of the United States.

And it was further provided that this act should not affect the right of the state to escheat before the filing of such deposition but that all proceedings to recover lands held by a resident alien, by reason of his alienage should be suspended upon his filing the aforementioned deposition.

These are the substantial provisions relating to this subject up to 1893.

It was held in the case of Hall vs. Hall 81 N.Y. 130 that the statute (I R.S. 57 4) changed the Common law in two respects. First, that it deprived an alien devisee of the right to take and hold by devise until he performs certain requirements: Second, it modified the rule that the state might recover lands devised to an alien and hold them against all the world, now making them descendible to the heirs of the testator if there were any competent to take and if there were none, passing them to the testators residuary devisees.

Then in turn it was held that this statute declaring a devise to one who, at the time of the testator's death, was an alien to be void was itself modified by the act of chap. 115 of the laws of 1845 making provisions whereby an alien could take
take lands by devise so that a resident alien devisee of a citizen takes, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator but defeasible by the state until he complies with the conditions as to aliens.

Consequently the situation is that if an alien devisee has not or does not file the deposition required within two years (L.1857 576 I) the devise is void and goes to the heirs— that if he does file the deposition the devise is absolute as against the heirs, but if he fails to become naturalized within six years, the estate may escheat to the state.

There has been one more modification of the statute owing to the verbal construction which was probably not within the intention of the legislature. The statute reads that every devise to a person who "at the time of the testator's death" shall be an alien and has therefore been held not to apply to those who are born aliens after the testators death.

Therefore where a testator devised lands to his daughter for life and to her issue in fee, and she, after his death, married an alien, it was held that this took the estate under the devise as against the testator's heirs at law, subject to the escheat of the government. (Wadsworth v. Murray 16 Barb. 601)
Likewise where a testator devised land for life to a citizen wife of an alien with remainder over to the alien husband for life and remainder to her issue then living and eight alien alien children of the citizen wife were living at her death, four of whom were born after the testator's death; it was held that these last four were not incapacitated from taking the property, though aliens. (Van Cortland vs. Laidley 59 Hun 161)

But the laws of 1893 ch. 207 modifies the entire system as we have traced it. This provides that any person who would otherwise answer to the description of heir or devisee of a person, who at the time of his death, was a citizen of the United States shall be entitled to take property by devise or otherwise as if he were a citizen, notwithstanding that he himself was an alien. There has been no judicial interpretation of this statute or review of its effect upon previous statutes, but it would now seem that both resident and non-resident aliens may now take property by devise from citizens of the United States, although they are still precluded from taking by devise from aliens having real estate here.

Alien women however are not subject to any restrictions whatever as to the taking of lands by devise if they be residents of this state. They are made capable of taking by devise under the will of her husband or any person capable of devising real estate, as if she were a citizen of the
United States and have the same power of disposition thereof.

(11.1845 ch.II5 3

And by a further statute (11.1872 ch.I20 1) the children of a female citizen and an alien may take by devise from their mother, whether living in this or in any other country. And it is held that neither the marriage of a female citizen with an alien husband nor her residence in a foreign country will make her become an alien so as to prevent her taking by devise or her children taking by devise from her. (Schanks vs. Dupont 3 Peters 242; Beck vs. McGillis 9 Barb. 35.

And there is still one other modification of the rule that aliens may not take by devise, as brought about by the treaties of the United States with foreign countries; for every such treaty is superior to the Constitution and laws of any individual state. For instance, under a treaty with Great Britain, 1794, a British subject holding lands within the United States was empowered to devise them to an alien and it was held that this power to devise without restriction necessarily implied a corresponding ability in the devisee to take and hold (Watson vs. Donnelly 28 Barb. 653.)

Not-withstanding these provisions making the alien more or less incapable to receive the legal title to land by devise, the alien may receive the benefit therefrom if it be
made in trust to persons who are citizens, and while the alien receives the income of the lands so devised he takes no legal interest in the lands. So where the will of M. directed her executors to pay to B, an alien, during his life all the income derived from her estates save as specified, with full power to sell and convey the same, a devise to the executors in trust was implied and held valid. (Marx vs. Glynn 88 N.Y. 358)

CORPORATIONS.

Corporations from their very nature can have only such powers and capacities as are granted in their charters or enabling acts. It is therefore impossible for a corporation to take by devise under a will unless it has been granted this power by legislative enactment. The power to "take and hold" lands might well imply the right to take by devise in the absence of further restrictions, but it is distinctly provided that a corporation shall not take by devise unless expressly enabled by its charter or by statutes. (2 R.S. 57 4) In N.Y., this power is found in the general corporation law, section II, which provides that every corporation as such has power "to acquire by grant, gift, purchase, devise and bequest— to hold and dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law"
But where a corporation is organized under a special charter it is controlled by the provisions there and if the power to take by devise is not expressly given, it is not a capable devisee. So a provision in a charter conferring a right to take by "purchase" is held not to include the right to take by devise. (McCartee v. Orphan Asylum 9 Cow. 437) And so of a charter declaring the corporation to be capable of "taking, purchasing, holding and conveying real estate". (Theological Sem. v. Childs 4 Paige 419 — Downing v. Marshall 23 N.Y. 366)

BENEVOLENT ASSOCIATIONS &c.

In the case of benevolent associations and corporations devises to them have been limited in two ways. First, the general corporation law provides that all such corporations not having a capital stock may take and hold property to the amount of but not exceeding $3000000. The burden of this law has fallen heavily upon the corporation of Cornell University. Property was devised to this corporation by the will of Mrs. Jennie McGraw Fiske which the Court of Appeals held (In Re McGraw 66 N.Y. 166) it was not capable of taking, having already the amount of property which by its charter it was entitled to hold. The second limitation made in partial amendment to the laws of 1848 ch. 319 provides that no person
having a husband, wife, child or parent shall by his or her last will devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one half of his or her estate after the payment of his or her debts—

and such devise shall be valid to the extent of one half and no more. (L.1860 ch.360)

And it was held in McCaffree vs. Orphan Asylum, supra, and in Stephenson vs. Orphan Asylum 92 N.Y.4.3 that the section of the laws of 1848 ch.319 providing that every will containing such bequest or devise shall be executed at least two months before the death of the testator applies to this act, and is not confined to cases where the testator left a wife child, husband or parent.

Then by the laws of 1881ch.641 these acts of 1848 and 1860 are so amended that all devises and bequests to these corporations &c shall be limited to the amount of $200000, as well as not more than one half of testators property. (Wardlow vs. Home for Incurables 4 Dem.473)

But this restriction declaring invalid a devise or bequest to a benevolent corporation made less than two months before the testators death, applies exclusively to corporations formed under the act of 1848, and there is no public policy established
which authorizes the enforcement of that limitation against a foreign corporation which is authorized to take property by devise or bequest free from a similar limitation in the state of its creation. (Hollis vs. Drew Theo. Sem. 95 N.Y. 166) So also foreign corporations may take such property under wills executed by persons domiciled in this state as they are empowered to acquire by the laws of the state of their creation, even though they could not take it if incorporated under the laws of this state. (Riley vs. Biggs 2 Dem. 184)

It would therefore seem that foreign corporations are not controlled by the laws of this state just mentioned but have their capacity fixed entirely by their own charters or enabling acts and the laws of their own state.

In addition to laws empowering all these corporations to take by devise are enabling acts for special kinds of corporations and unincorporated associations.

Attorney's Associations—L.1887 ch.317 7
Society for Prevention of Cruelty to Animals L.1888 c.490 2
Buildings & Loan Ass'n 1881 c.351 10
Church Cemetery Ass'n 1881 c.501 2
Private Cem' Ass'n 1847 c.133 as amended by 1874 c.245
and 1885 c.464

Society for Prevention of Cruelty to Children 1875 c.130 2
SUBSCRIBING WITNESSES.

In this as in nearly all states provisions are made whereby subscribing witnesses are precluded from taking by devise under a will, the execution of which it is their bounden duty to prove. The object of this is to remove all possible chance of the testators being unduly influenced by them in their favor and thereby enabling the probate of an invalid will. So if any beneficial devise be made to a witness of a will and his testimony is necessary for its probation, the devise shall be void so far as he or those claiming under him are concerned and such a witness shall be competent and compellible to testify respecting the execution of such a will as if no such devise had been made.

(I R.C.65 50) In Re Wilson 103 N.Y.376
The devise must be beneficial to him and not simply a trust, he must be a subscribing witness to the will; and such a one as may be compelled to testify to the execution of the will, and though not necessarily a competent witness (5 N.Y. 128) he must be a necessary witness. So if there be three witnesses to the will and one be a devisee, the devise to him will not be void under the statute if jurisdiction can be obtained over the other two, for only two witnesses are necessary to prove a will in this state. Likewise if the witness be a non-resident of the state at the time of the testator's death a devise to him is not void even though he is examined at the probation of the will for he is not a compellible witness. Cornwell vs. Wooley (47 Barb. 327) For the object of the statute is also to secure the benefit of a witness's testimony to the other beneficiaries when it was indispensable and could be compelled.

But while subscribing witnesses have by statute been made incapable devisees, their right to take as heirs has not been abridged and they will inherit their share of the testator's property of which he died intestate. And the same statute that takes away his right to the devise makes him heir of such of testators property as would have descended
to him if the testator had died intestate. (2 R. S. 65 51) and section 1808 of the Code of Civil Procedure provides for an action against the other devisees to recover his share of the property.

The rights of such a witness were brought up for judicial decision in the matter of Orsor v Civ. Pro. Rep. 129 and it was there held that a subscribing witness without whose testimony the will could not have been proved is precluded from taking more than that share of the realty which would have descended to him in case the will had not been established. Citing Sharpstein vs. Tillou 3 Cow 651 &c.

OTHER INCAPABLE DEVICES.

Public policy is sometimes held to incapacitate some persons from becoming beneficiaries. Such was the case of a devise to an Infidel Society (63 Pa. St. 463) and that of a beneficiary who had murdered his testator, a case which has arisen in this state.

Palmer vs. Riggs 115 N.Y. 506. The defendant Palmer murdered his grand-father, who had made a will in his favor, in order to prevent its revocation and to bring himself into immediate possession of the property. An action was brought to cancel the will so far as these devises to Palmer were
concerned and the Court of Appeals did so ameliorate will in effect at least, holding that it was not the intention the legislature to make the general laws of devise or descent operate in favor of one who had murdered his benefactor for this very purpose, and that this as well as all other laws may be controlled in their operation and effect by these fundamental maxims of law, namely: that no one shall be permitted to profit by his own wrong or acquire property by his own crime. The case brought forth a wealth of criticism—favorable and otherwise. (See 2 Univ.L.R. 9 and 28 Am.L.R. 920 for the decision and 34 Cent.L.J. and 39 Cent.L.J. 217 against.) Some declaring that the court had inserted a revocation clause into the statute of Wills; that it had thereby overstepped the bounds of the judiciary by making an exception to the general law of devise, which however just and necessary should be made by the legislature and not by the judiciary. Without doubt this was the effect of the decision but it is also based upon perfectly sound judicial principles. The case was in equity. It is the province of equity to afford a relief where the law is inadequate. It now interferes to prevent a man from profiting by his own wrong. Again it is a rational interpretation of the statute of Wills, in accordance with
which"a thing that is within the intention of the makers of the statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers". That a murderer should have the benefit of the statute was certainly far from the intention of the legislature. So it would seem that the case was properly decided although contrary decisions have been reached in Nebraska (Schellenberger. vs. Ransom 41 Neb. 682) and Ohio-O'Connor vs. Wills; L.T.6 Circuit Ct. of Ohio 357.

IMPOTENT PROVISIONS.

The New York law as to perpetuities is a system widely differing from the Common law and few of the Common law principles apply in its operation. It aims directly at the suspension of the power of alienation. It does not incapacitate a testator from tying up the property for a certain time so that there will be no person in being who can convey an absolute fee, but it does fix the time for the possible suspension of this power and this is for the term of two lives in being at the creation of the estate with but one exception (2 R.S. 723) Every other future estate shall be void. If successive life estates are devised with the remainder in fee, all the life estates subsequent to the two persons first entitled thereto shall be void and the remainder take effect as if no other life estates had been created.

(See I R.S. 722-7 and Am. & Eng. Ency. L. Vol. 18 p. 370.)
CONDITIONAL PROVISIONS.

Testamentary gifts may be given upon condition as well as absolutely but not always with the same force and effect. Sometimes the gift will be entirely destroyed because of the condition and sometimes the condition will be set aside and the estate given absolutely. This is due to the difference in the kind of condition. If the estate was one upon condition precedent and the condition is held to be invalid, the estate would fail just as though the condition were valid but had been broken or never fulfilled. (Martin vs. Ballou, 13 Barb. 119 II Hun 161-3 John. Ch. 521) But if the estate was one upon condition subsequent and the condition was declared invalid the effect would be to destroy the right of reverter merely and thus give the devisee an absolute estate. (9 Paige 534-61 How 377-3 Dem. 108)

Keeping this in mind, the application of the several decisions as to what are valid conditions to any conditional gift by devise will solve almost any particular case. They are to be applied strictly in case of conditions precedent but liberally in case of conditions subsequent. (Schouler on wills sec. 599)

In general, conditions that are absurd, illegal or im-
possible either in their creation or under existing circumstances are void. They may be declared void when clearly repugnant to the gift to which they are annexed. As where the testator, after devising the fee, attempts to make some restraint incompatible with full right of dominion, as to order it to be cultivated in some particular manner or rented forever at a certain rent.

ALIENATION.

One of the most common conditions is declared void is that in restraint of alienation which is held to be repugnant to the fee. (See Perpetuities, Van Rensselaer vs. Ball 19 N.Y.100- Oxley vs. Lane 35 N.Y.346) Although partial restraints are allowed, Jackson vs. Schut 18 John.184 and life estates may be burdened with full restrictions.

MARRIAGE.

Not much less common appear those made in restraint of marriage. There is much difference of opinion as to these, but in general I think we can deduce certain general rules.

AS TO UNQUALIFIED RESTRAINTS.

Where the restraint is unqualified the condition is void. (Schemerhorn vs. Myers I Denio 448- Depuyster vs. Michael 6 N.Y.467) This has always been so in the ecclesiastical courts and has now become general.
But where a person has once been married, public policy considers the state protected from degeneration, so a condition that a widow shall not remarry is, in modern times, universally upheld as valid, and the same as to a widower. (Chopin vs Marvin 12 Wend. 535)

QUALIFIED RESTRAINTS

However are not looked upon with the same severity. (Plumb vs Tobbs 41 N.Y. 442; Hogan vs. Curtin 125 N.Y. 506; Graham vs Graham 125 N.Y. 506) Consequently a condition that the beneficiary not marry without the consent of a specified person; or to marry or not marry an individual or one class of individuals; or to marry or not marry with prescribed ceremonies, or under any fair and reasonable restrictions as to time, place, age and other circumstances.

But when a condition demands the dissolution of a marriage or that the parties live apart it is held to be a flagrant violation of public policy. (O'Brien vs. Barkley 60 N.Y. St. 520-54 Hun 552)

CONDITION: NOT TO CONTEST THE WILL;

Gifts of real estate upon condition not to contest the will are looked upon with disfavor in this state, although they are to a limited extent deemed valid. (Bryant vs. Thompson
But in this state it is held that a bona fide inquiry whether a will was procured through fraud or undue influence will not be stifled by any prohibition contained in the instrument itself and would not work a forfeiture. (Jackson vs. Westervelt 61 How. 390)

PROVISIONS BARRING DOWER AND CURTESY.

We have already shown how the husband is powerless to cut off his wife's right of dower in his real estate and explained just what provisions he may make as to dower, in addition and in lieu thereof. And we have shown how the wife is empowered to cut off her husband's curtesy by disposing of her property by will or deed and the Common law rule thereby changed—although the Common law rule as to provisions cutting off dower has not been changed.
CHAPTER 5

DESCENT.

To give the manner of disposition of a person's real property when he left no will whatever would necessarily be nothing more than a mere copy of the statute of descent and a recitation of the few cases that have arisen thereunder. (I R.S.751-5) & cases) The statute is so explicit that the only difficulty that can possibly arise is in the application of the rule where the circumstances are complicated; and to speculate upon what complications might arise would be more than useless.

For our purpose let it suffice that the real estate of every person who shall die intestate shall descend first to his lineal descendants, 2nd. to his father, 3rd. to his mother and 4th. to collateral relatives, subject to certain rules and regulations. It is therefore seen that the statute applies to all estates of which the testator has not effectually disposed by will or otherwise—where his will is declared invalid as well as where he made no will—where he was partially intestate as well as wholly so, whether because of lapse, illegality or non-existence of a devise of such property.

So in the case of all provisions which in the preceding chapters we have shown to be invalid, the property so
attempted to be provided for, would be governed by these rules. And the same is true where the beneficiaries are incapable of accepting the provisions and the devises have thereupon lapsed.

But the statute of Descent by its own terms shall in no way affect the estates of the husband as tenant by the curtesy or of the widow as tenant in dower, nor does it give precedence to the heirs over the creditors.

But in the case of the former estates, viz., dower and curtesy, estates which are temporary in their nature being but life estates, the statute does apply when they have been determined in all cases where the testator has not provided for the fee, in which these estates exist. And the same is true of all remainders for which the testator has failed to effectually provide.
CONCLUSION.

In conclusion, therefore, I have attempted to show what disposition of a person's real property might ensue under the most ordinary circumstances; have omitted entirely the manner of its disposition, the rules of administration according to which the property is sold and contented myself with simply showing under what circumstances it may be sold; the proceeding by which dower and curtesy is assigned and have shown when dower and curtesy attaches; the proceedings by which devises are maintained and destroyed, showing only when they may be maintained and may be destroyed.

In general we have found that death at most only robs the quondam owner of his estate and sets in motion laws for its just and equitable distribution among the living: first recognizing the rights of the husband and wife as against the world; then remembering the creditors as having the next best claim to share in the proceeds of their debtors estates; acknowledging then the right of the testator to control its distribution to a limited extent, it gives force to the written expression of his wishes; finally as a last resort, distributing it according to fixed rules among the relatives of the deceased who are most liable to be the objects of his bounty.
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