[HIGH COURT OF AUSTRALIA.]

MARSHALL AND OTHERS . . . . APPELLANTS,
DEFENDANTS,

AND

SMITH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY.

August 8, 9, 12, 13.

Barton, Isaacs and Higgins JJ.

Consolidation of Statutes—Construction—Repeal of enactment modifying common law—Revival of previously existing law—Intention of legislature—Dower—Nature of right—Conveyancing and Law of Property (Supplemental) Act (N.S.W.) 1901 (*No.* 37 *of* 1901), *sec.* 10.

Sec. 10 of the *Conveyancing and Law of Property (Supplemental) Act* 1901, by repealing the Act 7 Wm. IV., No. 8, so far as it adopted the Imperial *Dower Act* 3 & 4 Wm. IV., c. 105, did not revive the original common law as to a wife's right of dower out of lands alienated by her husband during his lifetime.

The repeal of an enactment altering the common law does not necessarily revive the common law that was displaced by the repealed enactment; it merely raises a presumption that such a revival was intended. If the repealing enactment is a consolidation, and it appears from it, or from other enactments that may properly be read with it, that the legislature intended to leave the law as it stood at the time when the repealing enactment was passed, the presumption as to revival of the common law is rebutted.

The *Wills, Probate, and Administration Act* 1898, which consolidated the *Probate Acts* of 1890 and 1893, by express words, as to lands devised and as to lands undevised, and by necessary implication as to lands alienated, destroyed the right of dower, and removed the basis upon which that right was founded, and thereby rendered unnecessary the previously existing Statutes on the subject, including 7 Wm. IV., No. 8; and, therefore, any presumption that the legislature, by repealing without re-enacting the latter Act in the Act of 1901, intended to revive the common law that had been displaced by it was negatived.

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Nature of the right of dower, and history of the legislation on the subject in New South Wales, discussed.

Principles of construction of consolidating Statutes considered.

Decision of *Walker* J., *Smith* v. *Marshall*, (1906) 6 S.R. (N.S.W.), 480, affirmed.

APPEAL from a decision of *Walker* J. on a vendor and purchaser summons.

The facts sufficiently appear in the judgments hereunder.

Loxton (*Parker* with him), for the appellants. Before 3 & 4 Wm. IV., c. 105, which was adopted here by 7 Wm. IV., No. 8, a married woman had at common law a right to dower out of three different classes of property which her husband had had in possession; (1) lands which he had conveyed away by deed *inter vivos*; (2) lands which he had devised by will; (3) lands as to which he died intestate. 3 & 4 Wm. IV. c. 105, restricted the right to the extent that a conveyance by the owner in fee simple prevailed over the right of a widow to dower in the absence of any declaration against dower, and a testator could by a mere devise bar the widow's right: secs. 4, 6. The Act 7 Wm. IV., No. 8 was repealed by sec. 10 of the *Conveyancing and Law of Property* (*Supplemental*) *Act* 1901. That Act, though it purports to be a consolidating Act, goes further than consolidation. It repeals without re-enacting certain old Statutes including that now in question. The Act deals with various subjects, but the repealing section, sec. 10, is the only one referring to dower, and it contains no positive enactment except a saving clause. The result of the repeal is that the common law, which had been destroyed or displaced by 3 & 4 Wm. IV. c. 105, is revived, except so far as Statutes later than that have by incorporating its provisions confirmed its effect. The rule was stated by Lord *Tenterden* C.J. in *Surtees* v. *Ellison* (1), that "when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature." That was in reference to the effect upon previous Statute law, but there is no reason why the same principle should

(1) 9 B. & C., 750, at p. 752.

not apply to the case of the common law. [He referred also to *Fuller* v. *Redman* (1); *Parker* v. *Talbot* (2); *Palmer* v. *Moore* (3); *Kay* v. *Goodwin* (4); *Steavenson* v. *Oliver* (5); *Te Kloot* v. *Te Kloot* (6)]. This rule has been practically destroyed in England by the *Interpretation Act*, 52 & 53 Vict. c. 63, sec. 38, but in the New South Wales *Interpretation Act*, No. 4 of 1897, sec. 8, which deals with the effect of the repeal of a Statute upon earlier Statutes which the repealed Statute had repealed, there is no reference to the effect of the repeal of a Statute upon the common law affected by the repealed Statute. No argument can be based upon any presumed intention on the part of the legislature to consolidate, because the No. 37 of 1901 is not a consolidating Act as regards dower. The object of the proviso was to preserve those rights which had been acquired, whether contingent or vested, under 3 & 4 Wm. IV. c. 105. That Act not only restricted the common law right, it gave a statutory right. Even if the Act is treated as a consolidation, it must be dealt with as it stands, and effect given to its plain meaning: *Nolan* v. *Clifford* (7); *Reg.* v. *White* (8); *Williams* v. *Permanent Trustee Company of New South Wales Ltd.* (9). There is nothing in the Statutes since 7 Wm. IV., No. 8 which preserves the effect of that Act upon the right to dower out of lands alienated by the husband during his lifetime. All those Statutes, whether they incorporate the provisions of 3 & 4 Wm. IV., c. 105, or extend their operation, or make substituted provisions, deal only with the case of dower out of lands devised by will or as to which the husband dies intestate. [He referred to 14 Vict. No. 27, sec. 1; 22 Vict. No. 1, sec. 22; 26 Vict. No. 20 (*Lang's Act*); *Probate Act*, 54 Vict. No. 25, secs. 15, 25, 32, 33; *Probate Act*, 56 Vict. No. 30; *Wills, Probate and Administration Act*, No. 13 of 1898, sec. 52.] This case must be dealt with as if the restriction on the right of dower of lands alienated by deed *inter vivos* had never existed. The lands became subject to dower, contingently upon their being so alienated, immediately upon the marriage. The

(1) 26 Beav., 600.
(2) (1905) 2 Ch., 643.
(3) 9 B. & C., 754 (*n*).
(4) 6 Bing., 576, at p. 582.
(5) 8 M. & W., 234, at p. 241.
(6) 10 N.S.W. W.N., 213.
(7) 1 C.L.R., 429, at p. 447.
(8) 20 N.S.W. L.R., 12.
(9) (1906) A.C., 249.

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lands were so alienated and the right of dower in the wives is still outstanding. The *Dower Abolition Act* 1906 supports this view because it recognizes that there was a necessity for a general destructive section.

Langer Owen K.C. and *Maughan*, for the respondent. The Act No. 37 of 1901 was plainly intended to, and in fact did, get rid of so much of the *Dower Act* as was obsolete. Notwithstanding intermediate legislation the old Act still applied to certain married women, and sec. 10 got rid finally of the provisions under which they acquired rights and preserved their rights. The preservation of their rights removed the only possible reason for keeping the old Act in force. In construing an Act repealing other Acts which alter the common law, the rule to be applied is not so wide as stated in *Surtees* v. *Ellsion* (1). It is subject to the qualification that nothing contrary to the intention to revive the previously existing law appears either in the Act itself or the course of legislation on the subject. The repeal raises a presumption, but that may be rebutted. It is always a question of the intention of the legislature: *Tattle* v. *Grimwood* (2); *Mount* v. *Taylor* (3); *Maxwell on Interpretation of Statutes*, 4th ed., p. 622; *Weedon* v. *Davidson* (4); *Salmon* v. *Duncombe* (5). Looking at the Act itself, the fact that it purports to be merely a consolidation tends to weaken the presumption as to revival of the common law. The words of the proviso clearly suggest that the legislature did not contemplate the revival of any rights. If there is any doubt as to the intention of the legislature the absurdity or injustice of the consequences of one construction should cause the Court to look for another which would avoid those consequences. The appellants' contention would result in the anomaly of maintaining in force the rights of dower in certain estates and not in others, though the same considerations as regards expediency apply to both. A consolidating enactment should be construed in the same sense as the Acts which it consolidated: *Mitchell* v. *Simpson* (6). It should be approached

(1) 9 B. & C., 750.
(2) 3 Bing., 493, at p. 496.
(3) L.R. 3 C.P., 645.
(4) 4 C.L.R., 895.
(5) 11 App. Cas., 627.
(6) 25 Q.B.D., 183.

with the view that there was no intention to alter the law. The course of legislation between 7 Wm. IV. No. 8 and the Act of 1901 resulted in destroying the right of dower in all except certain instances which are not material to this case. Act 3 & 4 Wm. IV. c. 105 left only estates tail and intestate lands subject to dower. 14 Vict. No. 27 further limited the right of dower by providing that a dowress must be in the Colony to the knowledge of the purchaser. 22 Vict. No. 21, sec. 22, gave a wife power to bar dower by deed. *Lang's Act* (26 Vict. No. 20) provided that intestate lands pass as chattels real to the legal personal representative, and gave the widow no greater right than she would have had from her dower: *Plomley* v. *Shepherd* (1). Then the *Probate Act* (54 Vict. No. 25), secs. 32, 33, took away the right of dower as to all real estate, with the possible exception of estates tail. 56 Vict. No. 20, left the law in the same state. The *Wills, Probate and Administration Act* 1898 consolidated prior enactments, and made a statutory provision for the widow out of her deceased husband's estate where he dies intestate. Dower and the foundation of it were thus altogether removed. Then does the Act of 1901, a consolidating Act, undo the work of the legislature in the most important particular, by reviving dower as to lands alienated *inter vivos*? The Court will lean against a construction which would restore what had always been the greatest obstacle to completing titles, and, in construing the Act which is alleged to have that effect, will look at the course of legislation on the subject: *In re Budgett*; *Cooper* v. *Adams* (2); *Reg.* v. *White* (3). Dower was based upon the necessity or expediency of providing for a widow and younger children when the husband had failed to do so. Under the old law they would have derived no benefit from the intestate lands of the husband but for dower, as the heir took everything. It was dependent upon the law of primogeniture. [They referred to *Macqueen, Husband and Wife*, 4th ed., pp. 130, 136; *Bac. Abr.*, 7th ed., vol. II., p. 710; *Blac. Comm.*, 15th ed., vol. II., p. 131; *Tudor's Real Property Cases*, 4th ed., p. 112; *Burton, Real Property*, 5th ed., p. 140; *Steph. Comm.*, 8th ed., vol. I., Bk. II.,

(1) (1891) A.C., 244.
(2) (1894) 2 Ch., 557.
(3) 20 N.S.W. L.R., 12, at p. 17.

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p. 273; *Cole on Ejectment* (1857), pp. 61, 62; *Doe* v. *Nutt* (1); Co. Litt., sec. 53].

[ISAACS J. referred to *Doe* v. *Gwinnell* (2); Co. Litt., sec. 36; *Vernon's Case* (3); *Carson's Real Property Statutes*, p. 363; *Spyer* v. *Hyatt* (4); *Doe* v. *King* (5); *Randall* v. *Kreiger* (6); *Conant* v. *Little* (7).]

The Acts consolidated in the *Wills, Probate and Administration Act* 1898, made what must have been considered adequate provision for the widow and children. Dower could only come out of land to which the widows' children could succeed by inheritance. That no longer had any meaning. A new method of succession was introduced. Since the manifest intention of the legislature was to get rid of dower for all time, the repeal of a Statute which had become useless should not be construed as reviving the old law. [They referred to *Gwynne* v. *Drewitt* (8).]

[BARTON J. referred to *Wigram* v. *Fryer* (9).]

In any case the *Dower Abolition Act* 1906, sec. 2, has abolished all dower. Sec. 3, which saves "any rights the subject of proceedings in any Court of law or equity pending," does not apply in favour of the appellants here. The widows' rights have gone, as they had not taken any proceedings to assert their rights when the Act was passed. Their rights are not the subject of this litigation.

Loxton, in reply. The *Dower Abolition Act* 1906 should not be construed so as to divest existing or vested rights unless that intention is clearly expressed: *Maxwell, Interpretation of Statutes*, 4th ed., p. 333; *Marsh* v. *Higgins* (10).

[ISAACS J. referred to *Colonial Sugar Refining Co.* v. *Irving* (11).]

The proviso in sec. 3 of the Act of 1906 should be liberally construed so as to protect all rights that could possibly be included in it. "Any rights" includes any interest known to the law dependent upon the right of dower. Although the right of dower is not consummated nor the portion identified until the

(1) 2 C. & P., 430.
(2) 1 Q.B., 682.
(3) 4 Rep., 1.
(4) 20 Beav., 621.
(5) 6 Exch., 791.
(6) 23 Wall.,137, at p. 148.
(7) 1 Pickering (Mass.), 189.
(8) (1894) 2 Ch., 616.
(9) 36 Ch. D., 87.
(10) 19 L.J.C.P., 297.
(11) (1906) A.C., 360.

death of the husband, the title relates back to the seisin and the marriage, and it is then presumed that there was always something subtracted from the ownership: *Kruse's Digest*, vol. I., p. 166, par. 32. It was to give the husband power of disposition over that fractional interest that 5 & 6 Wm. IV. was passed. Before the Act of 1906 was passed, assuming that the Act of 1901 had revived dower to the extent contended for, the fee was made up of the husband's interest and the wife's interest. The wife's was a proprietary interest resembling a contingent remainder, and was therefore a "right," within the meaning of sec. 3 of the Act of 1906. That section protects, not only the rights of the widow, but those of any person claiming through her. The appellants' right was to rescind the contract upon the failure of the vendor to comply with the requisition, and that right was the "subject of proceedings" when the Act was passed. [He referred to *Equity Act*, No. 24 of 1901, Sched. 4, par. 6.]

Dower was not dependent upon the law of primogeniture. It existed before the establishment of the feudal system in England, and was finally settled as a rule of law apart altogether from primogeniture in 1217 A.D., by a Charter of Henry III. It applied in coparcenary and in gavelkind. [He referred to *Macqueen on Husband and Wife*, 4th ed., pp. 130-136; *Blac. Comm.*, vol. II., p. 128.] It was not a charge upon the land, but an interest in it, and in no way depended upon her husband's having made no provision for his wife, or upon his having freehold lands at his death. It grew before 1217 A.D. from a limited provision at marriage to a right to one third of all lands held by the husband at any time of his married life: *Blac. Comm.*, vol. II., p. 132. *Lang's Act* (26 Vict. No. 20), only purported to alter the law of succession as to intestate lands, but it in no way affected lands alienated *inter vivos*. The Probate Acts merely continued the effect of *Lang's Act*. The Act of 1898 has only two prohibitive sections, secs. 52 and 53, and they refer only to intestate estates. The rest of the Act, being affirmative, should be read consistently with the common law: *Garnett* v. *Bradley* (1). A reinstatement of dower was in accordance with the trend of legislation towards increasing indulgence to the widow.

(1) 3 App. Cas., 944.

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[He referred also to *Macqueen, Husband and Wife*, 2nd ed., p. 176; *Bac. Abr.*, vol. II., p. 742; *Blac. Comm.*, vol. II., p. 134; *Mitchell* v. *Hannell* (1).]

Cur. adv. vult.

The following judgments were read.

BARTON J. This appeal arises out of a contract made in December 1905 in which the respondent was the vendor and the appellants were the purchasers of a piece of land. In the course of the title it appeared that J. E. Holdsworth and L. J. Holdsworth, being in 1902 seized of this land as tenants in common in fee simple, the one of them (J. E. Holdsworth) had in August of that year conveyed his moiety to the other of them in fee, and he in turn had in March 1904 conveyed the whole to the respondent in fee. In August 1902 both the Holdsworths were married men, and their wives still live. The respondent in March 1904 had, and he still has, a wife living. Among the purchaser's requisitions upon the abstract of title there were two, Nos. 17 and 18, which are the subject of the originating summons instituting the proceedings below. They are as follow :—

"17. Dower in the wives of J. E. Holdsworth and L. J. Holdsworth is outstanding, and must be released by proper assurance prior to completion ;

"18. Vendor's wife being entitled to dower in the property sold must join in conveyance to my clients and acknowledge same in the usual way."

In answer to these requisitions the existence of any right of dower was denied on the part of the vendor (respondent), on the ground that all of the parties named had been married since 1st January 1837. The requisitions were insisted on, and after correspondence the respondent as plaintiff brought the matter into suit by an originating summons (3rd May 1906) claiming against the appellants as defendants two declarations: (1) That the wives of the Holdsworths and of the plaintiff were not entitled to dower; (2) That the requisitions had been sufficiently answered and a good title shown.

(1) 7 N.S.W. L.R. Eq., 53.

On 3rd September 1906 *Walker* J. granted the respondent the declarations sought, with costs.

The purchasers now appeal to this Court on the ground that the common law right to dower, as it existed before the passing of the *Dower Act* (3 & 4 Wm. IV. c. 105, adopted in New South Wales by 7 Wm. IV. No. 8) had been revived by the effect of the *Conveyancing and Law of Property (Supplemental) Act* 1901, the 10th section of which repeals the *Dower Act*, and therefore that a widow is entitled to dower in respect of land in New South Wales of which her husband was seised in fee simple at any time during the coverture, albeit he has alienated it *inter vivos* or devised it by will.

It is conceded that nothing has been done by any of these wives in bar of her dower.

At common law, "Dower is an estate *for life*, which the law gives the widow in the third part of the lands and tenements of which the husband was *solely seised, at any time during the coverture*, of an estate *in fee or in tail, in possession*, and to which estate in the lands and tenements *the issue of such widow might, by possibility*, have inherited:" *Watkins, Conveyancing*, 9th ed. (1833), p. 85, citing 2 *Bl. Comm.*, 129, *Litt.* b. 1, c. 5, and the *Comment*; and referring to 2 *Bac. Abr.*, 9 *Vin. Ab.*, and 3 *Comyn's Dig.*, tit. "Dower." In *Macqueen's Law of Husband and Wife*, 4th ed., p. 130, it is said that "The custom of primogeniture, by which land on the father's death goes exclusively to the eldest son, was qualified, from the earliest times, by allowing a third to the widow for life, not only to support herself, but also for the nurture, maintenance and education of the younger children. This was called her dower."

The following incidents of the common law of dower are material to the present inquiry. As dower was claimable at the husband's death out of those lands only, of which he was at death or had been during the coverture actually seised and in possession, equity did not allow the widow to claim dower out of a trust estate. For the same reason, she could not have it out of even a legal estate where the husband, though he had a right of entry or action, had not recovered possession. On the other hand, if the husband was at marriage, or afterwards became, seised in fee or

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in tail in possession, her contingent right attached, and could not afterwards be defeated by him by direct alienation or by his will, but vested on his death. Now the *Dower Act* of 1833, taking effect here in 1837, directly reversed the common law in these three respects. It gave the widow a right of dower out of equitable estates (sec. 2), and out of lands of which the husband had a right of entry, though he had not recovered possession (sec. 3); and it abolished the right of dower in respect of lands which the husband had "absolutely disposed of in his lifetime, or by his will" (sec. 4). The Act altered the common law in several other important particulars, as to which we need not trouble ourselves in the present case, except that it is well to mention that the barring of dower was facilitated by several provisions (see secs. 6, 7 and 9); that two special kinds of dower—*ad ostium ecclesiæ* and *ex assensu patris*—were entirely abolished (sec. 13), but will come to life again if the appellant succeeds in this appeal: and that the Statute by silence left dower in estates tail unimpaired, though one effect of sec. 2 was to extend the right to equitable entails.

Upon the passage of the *Dower Act*, therefore, dower of alienated or devised lands was swept away, and the right remained or attached in the following cases and no others:—(1) lands in which the husband at his death intestate had at law or in equity the beneficial estate in fee simple, including lands in which he had a right of entry or action; (2) lands in which the husband at his death had a beneficial legal or equitable estate in tail or of which he had at marriage or afterwards a legal estate in tail, including lands in which, not being in possession, he had a right of entry or action. For the right of dower in entailed lands was not attacked by this Act, and remained as at common law except so far as sec. 2 extended it to equitable estates tail.

The next Statute of New South Wales which affected dower was 14 Vict. No. 27, which enacted that no claim of dower should be maintainable against a purchaser for value unless the claimant had resided in that Colony with the owner, as his wife, before the sale, or unless the purchaser had notice, before or at the time of sale, of the fact of the marriage. This Statute was included with the *Dower Act* in the repeal of 1901. So was a

section—the 22nd—of the *Titles to Land Act* 1858, (22 Vict. No. 1), which enacted that where a married man had conveyed or mortgaged any land or thereafter did so, a deed duly executed and acknowledged by his wife should operate to bar her contingent right to dower, even though the husband were not a party to the deed. Then came the abolition of the law of primogeniture. In 1863 was passed the *Real Estates of Intestates Distribution Act* of 1862, (26 Vict. No. 20), commonly known as "*Lang's Act.*" Under it, all land which up to its passage would on the death of the owner intestate pass to his heir-at-law was thenceforth to "pass to and become vested in his personal representative" as if it had been "chattel real property" (sec. 1). Lands held in trust or by way of mortgage passing under the Act, were to be subject to the same trusts and equities as would have affected them if they had descended to the heir, and "all other lands so passing were to be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application for payment of debts or otherwise." There was a proviso that nothing in the Act should "give to any husband on the death of the wife *intestate* any greater interest *in the real estate* of his wife, or in the produce thereof upon sale, than a tenancy for life by the curtesy, nor to any widow a greater interest *in the real estate* of her husband on his death *intestate* than the rights she would otherwise have had as doweress thereon." There was a further proviso that in case of the sale of any such real estate by virtue of the Act, the Court or Judge should provide by order for securing out of the produce of the sale such payments as should be equivalent to the right of the husband or wife as tenant by the curtesy or dowress (sec. 2). Provision was made for directions by the Court as to letting and management until sale, time and mode of sale, maintenance and advancement of infants interested (sec. 3), for partition orders (sec. 4), and for the making of rules by the Court (sec. 5). The effect of the Act was not to convert realty into personalty, but to alter the succession of real property on intestacy by substituting the next of kin for the heir at law. Where a married woman took realty as next of kin of an intestate, and died intestate, the real estate descended to her next of kin,

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and not to her husband *jure mariti*, his interest being limited by the first proviso to sec. 2: *Mitchell* v. *Hannell* (1). The right of the widow to dower was limited to a life interest in one-third of the real estate or in its proceeds if sold: *In re Murphy* (2). The legislature, in its subsequent enactments on the subject, may be taken to have had these decisions in mind.

It was strongly urged for the respondent that this Act abolished curtesy and dower, and substituted different interests for them. Reliance was placed on the passage above cited from *Macqueen*, and it was argued that as dower was an incident of the law of primogeniture, and this Act abolished that law, dower went with it. In the view I take of this case it is not necessary to decide that question, or to say whether the interest of the widow continued to be a right of dower or was changed into a right in the nature of dower. I think subsequent legislation has rendered that question immaterial to the decision of the present controversy. But I should hesitate to say that the alteration of the succession had carried with it the abolition of dower as a necessary consequence. The only necessary effect upon dower of making the lands "disposable for payment of debts" was that the widow's interest should in that case be secured out of the proceeds, and this was expressly provided. If there was no sale she was entitled to her life interest in one-third of the land, not as against the heir, but as against those entitled in distribution, who would take in common until or unless a partition were ordered and made under sec. 4. The scope of this Act was limited to the alteration of the succession to lands held in fee simple by intestates at their death, and to the necessary consequential provisions; and it did not therefore touch the law of dower in cases of wills. For the same reason it is silent as to dower of estates tail, which were not the subject of intestacy, and which, as we have seen, were outside the *Dower Act* and remained subject to dower as part of the common law. The next interposition of the legislature was the *Probate Act* 1890 (No. 25 of 54 Vict.), which, as its title truly sets forth, consolidates and amends the law relating to probate and administration, and to the succession to real estate in cases of intestacy, and provides for

(1) 7 N.S.W. L.R. (Eq.), 53. (2) 6 S.C.R., Eq. (N.S.W.), 63.

the preservation and management of the estates of deceased persons. Among the Statutes which it repeals is *Lang's Act*, but it does not in terms repeal the *Dower Act*, or the two other enactments I have mentioned in connection with it, namely, 14 Vict. No. 27 and the 22nd section of 22 Vict. No. 1. Substitution is made for the provisions of 26 Vict. No. 20 by several sections of the Act of 1890, of which it is necessary here to mention only three. Sec. 32 takes the place of sec. 1 of *Lang's Act*, and substantially re-enacts it. But sec. 33 makes a considerable alteration in the law of 1863. I quote it in full:— "Any husband or wife shall be entitled on the death of the other intestate to the same share in the real or personal estate of the other as a wife is now by law entitled to in the personal estate of an intestate husband predeceasing her" (*i.e.*, one-third if there are children, otherwise one-half), "and no estate by curtesy or right of dower or any equivalent estate shall arise after the passing of this Act out of any real estate. Provided that any husband or widow so entitled to share in real estate shall be bound to accept the value thereof in lieu of partition if so desired by all the persons entitled jointly with him or her." Thus there is no longer any question of dower in intestacies taking place after the passing of the Act of 1890. As to the personalty, the section makes no difference in the wife's position, but as to the realty her interest is greatly enlarged, for she must take a third, and may obtain half, while the interest in the realty she takes is absolute, and not merely for life. The words of this section are large enough to prevent "any estate by the curtesy, right of dower, or any equivalent estate" from arising out of any real estate whatever after the passing of this Act. Whether they have that effect or are restricted by the context so as to operate only in cases of intestacy, it is somewhat difficult to say, but on the whole, perhaps, they must be taken to be so restricted, and at any rate this case may be dealt with as if so much were conceded, especially in view of sec. 52 of the consolidating Act of 1898, to be mentioned presently.

But sec. 19 of this Act is in my view a provision of peculiar importance in relation to the question involved. It runs as follows:—"Subject to the provisions of this Act the

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real estate of every deceased person devising such" (that is, real) "estate by his will shall be held by his executor to whom probate shall have been granted according to the trusts and dispositions of such will." This section in my opinion makes an end of dower out of estates disposed of by will. The executor is to hold the devised estate according to the trusts and dispositions of the will. It cannot be, in face of this, that the widow may claim one-third or any part of it for her life. The executor has the whole in trust for the devisee or devisees. But the importance of the section is not quite realized till we come to consider the consequences of the destruction of dower out of devised as well as intestate estates. Take the case of land alienated by the husband during his life—the only remaining case of the three which arose at common law on the death of the husband. What was the reason why the common law said that the wife could from the moment of widowhood claim dower out of that land? It was this, that, if it remained unalienated, it mattered not to her at the husband's death whether he assumed to devise it or made no will of it. It was part of the provision which the law made for her at his death, so that she might duly maintain herself and the younger children when her lord was no longer alive to safeguard them: a provision which, when the land remained his, became absolutely vested at his death, so that she had only to demand that the heir should assign its metes and bounds, and on his doing that peremptory duty she could enter and hold it to her death. In those days the purchaser could not stand in her way. Why? It was because she could say to him, "You bought this land, out of which I should have had dower from the heir, or if my husband had willed it away, then even against his devisee. If they cannot withstand me, so neither can you." And then he too must have allotted her the third part to hold for her life. That was because, if he had not purchased, she must equally have been endowed by the devisee or the heir. But when the death of the husband ceased to give the widow any dower at all—when the legislature said in 1890, "Will or no will, widows shall have no dower of that which the husband owns," and when they made a substituted provision out of that which the intestate leaves (sec. 33), but none

out of that which he has willed away (sec. 19)—is it easy to suppose that dower out of alienated lands remained when dower out of lands devised or retained was destroyed? How could the widow any longer say to the purchaser, even supposing the *Dower Act* were out of the way, "You owe me dower, because if you had not bought I must have had dower"? If he had not bought she would never have had dower. With what reason could she then tell the purchaser that his purchase of the land gave it to her? When the legislature abolished dower out of lands undevised and with it dower out of lands devised, it abolished the source and root of dower out of lands alienated, and in my judgment it made an end of the thing in 1890 as effectually as if there had been no Act of William IV. When the land ceased to be subject to dower in the hands of either the husband or his heir or his executor, how could dower still hamper it in the hands of him who had acquired it from the husband? This Statute then went right behind the *Dower Act*, and did away with all the common law rights which had led to the legislation of 1837. If it did that, it left the Act of 1837 cumbering the ground. The whole of the old feudal scheme for the protection of the widow has gone, and a new scheme has been fashioned in its place.

In 1893 an Act (No. 30) was passed "to amend the *Probate Act* of 1890, and to give greater facilities for the issue of probate and letters of administration in small estates." After declaring (by sec. 2), in removal of doubts as to the construction of secs. 32 and 33 in the Act of 1890, that, subject to the amending Act, the husband's interest in his intestate wife's estate is limited to that specified in sec. 33, it enacts (sec. 3) that intestate estates not over £500 in net value are, where there is no issue, to pass to the husband or widow absolutely. Sec. 4 provides that where there is no issue, and the estate of the deceased intestate exceeds £500 in value, the husband surviving or the widow is to be entitled absolutely to £500 part thereof, and shall have a charge on the whole estate to that amount; and by sec. 5 the provision for the husband or widow made by the last mentioned section is to be in addition to his or her share of the residue remaining after the payment of the £500 "in the same way as if such residue had been the whole of such intestate's real and personal estate, and

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this Act had not been passed." The Act deals with the realty and the personalty as one estate.

It will have been observed that none of the above Statutes profess to be mere consolidations. Such a measure, however, is the one we next encounter, No. 13 of 1898, entitled "An Act to consolidate enactments relating to Wills, Probate and Administration." After examination of this Act I am of opinion that it is a consolidation of the several Statutes with which it deals, and that it faithfully reproduces those provisions of the *Probate Act* 1890 and of the Amending Act of 1893 to which I have referred above, and which, *inter alia*, it repeals and re-enacts. I do not forget the wideness of the portion of sec. 33 of the Act of 1890 which finds place as sec. 52 of the Act of 1898. In the latter the words "out of the real estate as to which any person dies intestate" are substituted for the words "out of any real estate" used in the former. I think that their collocation in the Act of 1890, placed as they were in the same section with, and between, passages which could only refer to cases of intestacy, and consequential as they were upon the first of such passages, shows that the draftsman of 1898 has correctly interpreted them. That is to say, the Act of 1898 is not the less a consolidation because of the form of sec. 52, because that section alters nothing. But sec. 47 of the *Wills Probate and Administration Act* is a repetition of the clear intention of the Act of 1890 to do away with the common law right of dower out of devised estates, and, by consequence, out of estates alienated *inter vivos*. There had been no change in this intention in the intervening eight years. In my judgment there was no change afterwards. To ascertain that we must look at the *Conveyancing and Law of Property (Supplemental) Act* 1901 (No. 37), professing to consolidate certain enactments relating to conveyances, assignments and titles to lands. This Statute, taking it apart from sec. 10, the controverted provision, is nothing more than a consolidation of a few enactments—in all some thirteen sections—which were outstanding after the consolidation three years before of the bulk of the Acts dealing with real property law and conveyancing, save that in its early sections it corrects some imperfections in the previous consolidation. Sec. 10, with the Second Schedule,

repeals, but with a proviso, the *Dower Act* of William IV., the Amending Act 14 Vict. No. 27, and the 22nd section of the *Titles to Land Act* 1858 (No. 1 of 22 Vict.). It leaves intact the Acts of 1890 and 1893 and the *Wills Probate and Administration Act* 1898 which consolidated them. The proviso is "that such repeal shall not extend to deprive any woman of any right of dower or in the nature of dower, which she had at the passing of this Act in the estate or effects of her deceased husband nor to any contingent or vested right of dower which, if the said enactments mentioned in the Second Schedule had remained in full force and effect, a woman would now have or would hereafter acquire in the legal or equitable estates tail of her husband, and, notwithstanding such repeal, such rights shall remain in or accrue to her and may be enforced in the same manner, and shall be subject to the like conditions in all respects as if this Part of the Act had not been passed." What "rights of dower or in the nature of dower" were there in 1901 at the commencement of this Act? Apart from dower in estates tail, these seem to me to be only those of women then alive whose rights to dower or in the nature of dower had become vested by the death of a husband at any time between 1837 and 1890. It seems that the draftsman or the legislature preferred to call those which vested between *Lang's Act* and the *Probate Act* "rights in the nature of dower;" but the only distinction between them and those which vested between 1837 and 1863 is that under intestacies after *Lang's Act* the lands might be sold, in which case the widow had a life interest in one-third of the purchase money instead of so much of the land. But all the dower that a woman could gain (apart from the cases next mentioned) was dower in intestate legal estates in fee, and no such dower could arise upon an intestacy occurring by reason of a death after 1890. Then under the second branch of the proviso there were the cases in which, if the Dower Acts had held good, a woman would have in 1901 or would afterwards acquire a right to dower out of the legal or equitable estates tail of her husband. Well, if the Dower Acts had held good she would have retained a right of dower out of equitable as well as legal estates tail, and this the proviso preserves to her. The reference to "contingent" rights

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of dower in this connection (for the expression does not occur in the first branch of the proviso) would serve to include such rights as married women living in 1901, whose husbands were then still alive, would possess, contingently then, but to vest upon the deaths of the husbands.

Neither of these classes includes the ladies whose alleged interests have given rise to the requisitions in this case. And it is at this stage that the appellants' point demands examination. Mr. *Loxton* argues that we must treat the repeal of the *Dower Act* of William IV. as coming within a rule of construction laid down in several cases which he cited, and which in *Surtees* v. *Ellison* (1), is stated thus by Lord *Tenterden* C.J.:—"When an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature." In *Tattle* v. *Grimwood*, *Best* C.J., delivering the judgment of the Court, said (2):—"It is an undoubted rule of law that if an Act of Parliament, which repeals former Statutes, be repealed by an Act which contains nothing in it that manifests the intention of the legislature that the former laws shall continue repealed, the former laws will, by implication, be revived by the repeal of the repealing Statutes." Mr. *Loxton*, citing also *Fuller* v. *Redman* (3), and other cases, says that the proposition laid down by *Best* C.J. applies as well when the first Act, instead of repealing former Statutes, displaces the common law, and that if it be in its turn repealed the common law is revived *pro tanto*. I have no doubt that the two things stand on the same reason, and that the argument is correct with the qualification that the whole matter is one of the intention of Parliament. The presumption arises if the last repealing Act, or other legislation that may properly be read with it, contains nothing from which a contrary intention may justly be inferred. In that case the Act first repealed or the law first displaced will (at common law) be revived. But if the legislation in question—that is, the last repealing Act or any Statute that may properly be read with it

(1) 9 B. & C., 750, at p. 752.
(2) 3 Bing., 493, at p. 496.
(3) 26 Beav., 600.

—does show an intention that the Statute first repealed or the common law first displaced shall continue so repealed or displaced, then he who shows that has rebutted the presumption. So the question is here whether by the repeal of the Act of William IV. the 1901 Act sec. 10 has revived the common law displaced by the repealed Act? *Primâ facie* that was so, and it was for Mr. *Owen* to show it to be otherwise. The question could not have arisen in England since 1889. The *Interpretation Act* of that year provides by sec. 38 (2) (*a*) that where an Act repeals any enactment, then, unless the contrary intention appears, the repeal shall not revive "*anything*" not in force or existing at the time at which such repeal takes effect. In New South Wales the corresponding enactment is sec. 8 of the *Interpretation Act* of 1897. Unfortunately that section has failed to adopt the provision just quoted, though it copies *verbatim* the other paragraphs of the same section. But by sec. 6 the Act of this State provides that—"The repeal of an enactment by which a previous enactment was repealed shall not have the effect of reviving such last-mentioned enactment without express words." Had it been possible when passing the *Interpretation Act* of this State to adopt paragraph 2 (*a*) of sec. 38 of the English Act, the State Parliament would have incorporated a most useful provision with its Statutes, and would have saved all the trouble and expense of the present litigation, for it would have been impossible to raise the argument on which the appellants found their case. But as the *Interpretation Act* of 1897 is a consolidating Statute, and the improvement in question was not part of the previous Statute law of New South Wales, it was scarcely within Judge *Heydon's* commission to place it before Parliament as part of that measure. So we are thrown back upon the common law rule cited for the appellants unless the respondent can show such an intention on the part of Parliament as will take the case out of the rule. And this I think he has done by demonstrating the course of the legislation which I have described and which has intervened between the *Dower Act* and its repeal, so as to establish that the repealing section is a mere rounding off of the process of development which had gradually rendered the *Dower Act* inoperative and a mere piece of useless legislative furniture.

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After the *Probate Act* of 1890, and its consolidation, together with the intervening Amendment Act of 1893, as parts of the *Wills Probate and Administration Act* of 1898, the Acts of William IV. and of 14 Vict., as well as sec. 22 of the Act of 22 Vict., had become unnecessary, and their repeal, with the appropriate saving clause or proviso, does not in my opinion alter the operative law. They were on the Statute book, but very ripe for removal, and as the law before that event was, as nearly as I can ascertain, the present law, I am of opinion that the Act of 1901 merely gave a finishing touch to the work of consolidation in this respect, and that it did not by the repeals in question revive the common law as to dower.

Less than a fortnight after the judgment of *Walker* J., the subject of this appeal, there was passed by the State Parliament the *Dower Abolition Act* of 1906. It provides that no widow shall be entitled, nor after the commencement of the *Probate Act* of 1890 shall any widow be deemed to have been entitled, to dower out of any land or out of any estate or interest in the same. But nothing in the Act is to affect any rights the subject of proceedings in any Court of law or equity pending at the commencement of the Act, or any decision pronounced by a Court of competent jurisdiction before the commencent of the Act. The point was raised on behalf of the respondent that there were no rights in the appellants which came within the protection afforded by this saving clause. A decision on that question is rendered unnecessary by a conclusion in favour of the respondent on the broader aspects of the case, and therefore I propose by such a conclusion to leave the matter in a state more satisfactory to those interested and to the profession. In my opinion *Walker* J. was right in his decision, and this appeal must be dismissed with costs.

ISAACS. J. The question whether the common law of dower still prevailed in New South Wales after the passing of the Act No. 37 of 1901 depends upon two considerations. The first is the effect to be given to sec. 10 of that Act, apart from all other enactments, and the second is the effect of the *Wills Probate and Administration Act* 1898.

As to the 10th section of the *Conveyancing and Law of Property (Supplemental) Act* 1901 itself there is only one possible construction. It provides as follows:—"The enactments in the Second Schedule to this Act are, save as hereinafter mentioned, repealed to the extent expressed in the said Schedule." Then follows a proviso which excepts from the repeal certain rights of dower which do not include the present case. The Second Schedule refers *inter alia* to the Act 7 Wm. IV. No. 8, and the extent of the repeal of this Act is stated to be "so much as adopted the Imperial Act 3 and 4 Wm. IV. c. 105."

The effect of these unambiguous words is that the English *Dower Act* is no longer part of the Statute law of New South Wales, except so far as its provisions are preserved for the cases mentioned in the proviso.

The title of the repealing Act as a consolidation Act cannot modify terms so precise as those of sec. 10. Its effect upon the construction of the Act of 1898 is subsequently referred to.

Nor can the argument of absurdity or suggested injustice avail against plain legislative language. Injustice in such a case is matter for Parliament alone, and as was said by *Jervis* C.J. in *Abley* v. *Dale* (1):—"We assume the functions of legislators when we depart from the ordinary meaning of the precise terms used, merely because we see or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning." Nor again will the history of antecedent legislation modify the construction of the repealing words. If the surviving Statute law does not of itself alter the rule of the common law, it cannot aid the suggested interpretation; if it does provide a different rule, it does so independently, and without affecting the meaning of the section now under consideration.

To refuse therefore to recognize the absolute repeal of the *Dower Act* except as qualified by the proviso itself would be wholly inconsistent with the unequivocal intention of Parliament as stated in the clearest language.

But it does not follow that because the *Dower Act* itself is swept away the common law is re-established. While, on the one hand, there are no words beyond the proviso which save the

(1) 20 L.J.C.P., 233, at p. 235.

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smallest fragment of the *Dower Act*, there is not, on the other hand, any syllable of legislative declaration expressly restoring the common law of dower. The Act is silent on the point, as far as any express provision is concerned, and so the effect has to be determined otherwise. If the common law is revived it is because it springs up again of necessity from the fact of there being no existing Statute law on the subject making a different provision, and not because the repealing Act contains any active restoration of the former law either expressly or by implication.

The question is whether the still subsisting legislation, namely, the *Wills Probate and Administration Act* 1898, expressly or by implication contains anything opposed to the common law rule of dower.

This involves some examination as to the nature of dower. Many authorities have been cited to the Court in connection with this somewhat obscure subject, the history of which reaches back beyond the introduction of the feudal system into England.

Dower is variously described by learned authorities and in language sometimes capable of varying interpretation. The one point of importance to the present case is whether the wife's title to dower can properly be said to accrue in the lifetime of her husband so as then to vest in her a complete right enjoyable on her husband's death, or whether her right becomes complete only at his death.

On the whole, threading one's way through the slightly differing modes of expression of the authorities, it appears that she cannot be properly said to be entitled to dower or to become a dowager until her husband's death, that is, until she is a widow.

Coke upon Littleton, 31a, defines "Dower" as follows:—"Tenant in dower, is, where a man is seised of certain lands or tenements in fee-simple, fee-tail general, or as heir in special tail, and taketh a wife and dieth; *the wife, after the decease of her husband, shall be endowed* of the third part of such lands and tenements as were her husband's at any time during the coverture; to have and to hold to the same wife in severalty by metes and bounds for terms of her life" &c.

In *Comyn's Digest*, vol. 4, p. 50, we find under the word Dower the heading "(A) 10. *When Dower commences*," and then the

learned author says:—"To a title to dower three things are necessary: marriage, seisin, and the death of the husband: Co. L. 31a, 32a."

In *Lampet's Case* (1) it is stated thus:—"When a man seised of lands in fee, or in fee-tail general, takes a wife, to the perfection of the dower two things are requisite, lawful matrimony and the death of her husband: for notwithstanding her husband is seised in fee, and the marriage is lawful, yet she has but a *possibility* of dower till the death of her husband."

The same case goes on to say that the intermarriage and the seisin are the fundamental causes of dower, and the death of the husband but as an execution thereof, but there is further added that it may be said that the title of dower is not consummate till the death of the husband and that peradventure the wife may die before her husband.

Kent in his *Commentaries*, vol. 4, at p. 50, says:—"Dower is a title inchoate and not consummate till the death of the husband; but it is an interest which attaches on the land as soon as there is the concurrence of marriage and seisin."

In *Doe* v. *Gwinnell* Lord *Denman* C.J. says (2):—"The wife's right to dower is doubtless not consummate till the death of her husband." He further says (3):—"By these considerations we are led to conclude that dower attaches on the husband's real property at the period of his death," and again the learned Judge quotes from *Park on Dower* the passage stating that the understanding of the profession was "that the wife shall be endowed of the land as she finds it at the time of her title of dower consummated."

To be endowed is to have dower assigned. On her husband's death, the widow, unless in the meantime she has lost her right by divorce, elopement or other recognized bar, is by common law entitled to have the part of his lands which she is to enjoy assigned by metes and bounds. She needs no conveyance because upon assignment the law itself confers upon her the estate in the lands assigned, not as under the heir but as holding from her deceased husband, and as in continuation of his estate (*Cruise's Digest*, vol. 1, p. 163).

(1) 10 Rep., 46 b., at 49 a.
(2) 1 Q.B., 682, at p. 690.
(3) 1 Q.B., 682, at p. 695.

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Alienation by the husband by deed or will could not at common law extinguish the dower (*Coke upon Littleton*, 32).

The result is that until the husband's death it was impossible to assert any absolute or accrued right to be endowed of any of his lands, but if on his death such a right existed as against him or his heir, supposing the husband to have retained his lands undisposed of and unencumbered, that right could be asserted against any alienee or devisee from him.

In other words, the claim against the alienee or devisee depended on the right against the husband's lands at his death as if he had retained them in full ownership.

If then the *Wills, Probate and Administration Act* 1898 provides as argued for the respondent, that either in the case of testacy or intestacy dower is extinguished as to the lands which were the husband's at the time of his death, it seems to follow as a necessary consequence that land alienated *inter vivos* is not subject to dower claim after the husband's death.

In my opinion the *Wills, Probate and Administration Act* does extinguish dower both in testacy and intestacy. As to intestacy, no doubt can possibly arise because sec. 52 is express on the subject. In the case of testacy, sec. 44 vests in the executor all the real and personal estate of which a person dies seised or possessed of or entitled to in New South Wales; section 46 makes it assets for the payment of all duties and fees and of his debts, and subject to the restriction of section 56, enables the executor for the purposes of administration to sell or mortgage the real estate and convey it to a purchaser or mortgagee "in as full and effectual a manner as the deceased could have done in his lifetime."

Sec. 47 is as follows:—"Subject to the provisions of this Part of this Act, the real estate of every such deceased person devising such by his will, shall be held by his executor to whom probate has been granted, or the administrator with the will annexed, according to the trusts and dispositions of such will."

Sec. 48 provides:—"The executor to whom probate has been granted shall have the same rights and be subject to the same duties with respect to the real estate of his testator that executors heretofore have had or been subject to with reference to personal assets."

The sections referred to read in their grammatical and natural sense leave a testator the complete and unfettered power of disposal of all his property. Real and personal estate are placed on the same footing, and personal property was never subject to dower.

In the absence of testamentary disposition the law itself extinguishes dower as to lands of which the husband dies possessed; and it is hard to understand why the legislature should mean to qualify with liability to dower the apparently plenary provisions of the sections quoted. If the husband by his silence may deprive his wife of dower, is his power to do so less because he expressly directs it?

Although, as already pointed out, the title of the Act of 1901 as a consolidating Act cannot restrict the full effect of sec. 10 of that Statute, or the equally precise language of any other Statute, it may, and, in my opinion, does materially assist in the interpretation of the Act of 1898 which contains no inconsistent provision, because it indicates that the legislature thought the state of the law was such as to make the repeal of the *Dower Act* a mere work of legislative symmetry. The sole reason for such an opinion on the part of the legislature was the existence of the Act of 1898 and this is only consistent with its provisions having in regard to this question the full effect of the Act repealed.

I come therefore to the conclusion that the *Wills Probate and Administration Act* 1898 is inconsistent with rights of dower, and that, whether land was alienated *inter vivos* or by will or was retained entirely undisposed of, no claim for dower could be maintained on the death of the proprietor against the executor, administrator or alienee.

It is in this view unnecessary to consider the effect of the Act of 1906 upon the facts of this case.

I agree that the appeal should be dismissed.

HIGGINS J. I am also of opinion that this appeal should be dismissed. The case has taken much longer, probably, than it would have taken if the learned Judge below had not been prevented by his illness from setting forth his reasons. There are really two questions occasioned by the language used in sec. 10

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of the *Conveyancing and Law of Property Act* 1901:—(1) Are the enactments which that section leaves unrepealed sufficient to exclude dower in the case of women married since 1st January 1837, whose husbands convey lands in fee simple? (2) If these enactments are not sufficient, does sec. 10, by repealing the Act 7 Wm. IV. No. 8 (which adopts the English Act 3 & 4 Wm. IV. c. 105), revive the common law as to dower as it existed before that Act?

We are told, though it does not appear in the evidence, that J. E. Holdsworth and L. J. Holdsworth became seised in fee simple as tenants in common in possession of the land in 1883, under a settlement dated 1854-5, and that J. E. Holdsworth, L. J. Holdsworth, and the plaintiff Smith have, or are to be assumed to have, each a wife; that in August 1903 J. E. Holdsworth conveyed his individual moiety to L. J. Holdsworth; and that in March 1904 L. J. Holdsworth conveyed the entirety to Smith. The contract of sale is dated 21st December 1905, and at this time the property was subject to mortgages, as to which we have no particulars. *Walker* J., by his decretal order of 3rd September 1906, has declared, under an originating summons taken out by Smith against the purchasers, "that the respective wives of J. E. Holdsworth and L. J. Holdsworth . . . and of the plaintiff are not, nor is either of them, entitled to dower in the premises, and that the requisitions and objections of the defendants to the title . . have, in so far as they required to be answered, been sufficiently answered by the plaintiff, and that a good title to the premises can be, and has been shown by the plaintiff."

I shall first consider the history of the legislation, as that history is material for the purposes of my opinion. The Act 7 Wm. IV. No. 8 put a woman, if married after 1st January 1837, at the mercy of her husband as to dower out of his fee simple estates. He could dispose of any of such estates during his lifetime; he could give them by will as he pleased (sec. 4 of 3 & 4 Wm. IV. c. 105). After that Act, the only case in which dower could attach to such an estate was the case of a husband's intestacy. The next Act as to dower was the Act 14 Vict. No. 27. By this Act a purchaser or mortgagee was relieved of inquiry, and protected as to possible dower claims, in the case of a wife not resident in New

South Wales, and whose existence was unknown to him; and in any case, the dower has to be reckoned on the basis of excluding any increase of value due to improvements made since the alienation. Then by the Act 22 Vict. No. 1, sec. 22, a wife was enabled to bar dower though her husband did not join in the deed. Next came *Lang's Act* (26 Vict. No. 20) which made provision for the distribution of real estates on intestacy. The basis of the common law of dower was the necessity of provision for the widow. In olden times, there was little property other than land; there was no power to make a will of land till the reign of Henry VIII.; the testator was treated as being under an obligation to provide for his widow out of his land; and his land was treated as subject to provide dower for the widow, to the extent of one third of the land during her life. The heir of the husband, or the purchaser from the husband, took the land subject to the same liability as it was subject to in the hands of the husband. They were in no better position as to the land than the husband; but they were in no worse. If the husband could be relieved of the dower, the heir or purchaser was relieved also. By *Lang's Act* a new kind of provision was made for widows. This Act provided that real estate should not go to the heir, but that all of it should be treated as a chattel real, and be included in the executor's inventory. The effect would have been to give to the widow one third or one half share in the lands, not merely in the profits thereof; but it was provided that nothing was to give to the widow any greater interest, in the case of her husband dying intestate as to real estate, than her rights as dowress. This practically gave to the widow, in the case of intestacy, a statutory right to an equivalent of dower, but took away her dower properly so called. Next came the *Probate Act* of 1890. By this Act (sec. 32), which repealed *Lang's Act*, all real estate of a person dying intestate (in whole or in part) was to be vested in the administrator (or executor) on trust for payment of debts, and subject thereto on trust for the persons who would be entitled to the personal property on intestacy. By sec. 33 a widow was to be interested in her husband's real estate as if it were personalty; "and no estate by curtesy or right of dower or any equivalent estate shall arise after the passing of the Act out of any real estate." These words are unqualified in form. It

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is true that they occur in that part of the Act which chiefly relates to intestacy; but, as I have said, intestacy was the only case in which dower could still, so long as the Act 7 Wm. IV. No. 8 remained in force, attach to estates in fee simple. I am strongly inclined to think that these words were meant to abolish the last vestiges of dower; but there might still lurk some doubt as to dower from estates such as estates tail, which are not subject to wills or to the law as to intestacy. I think that these words meant, at the least, that there should be no dower out of fee simple estates in the case of husbands thereafter dying. The 7 Wm. IV. No. 8 had given the husband power to convey or to devise his lands without regard to his wife; and, as to the remaining case, the case of his intestacy, the wife now got something better than she had had—a share in the corpus, instead of a mere share in the income for her life. I may pass over the *Probate Amendment Act* of 1893, which is immaterial for my purpose, and come to the consolidating Act of 1898—the *Wills Probate and Administration Act* of 1898. This repealed the Act of 1890; but by sec. 44 and following sections it re-enacted its provisions for distribution of real estate. The executor or administrator was to have all the real estate of a testator or intestate vested in him (sec. 44); to pay the debts out of the combined real and personal property (sec. 46); and "subject to the provisions of this Part of the Act" the real estate was to go according to the trusts and dispositions of the will (sec. 47). Secs. 50-52 show precisely the mode of distribution of the real estate, if and so far as there was an intestacy. It is to be distributed in "the following shares only"—following the Statutes of Distributions, with some qualifications. These provisions are exhaustive, and exclude all possible dower out of the husband's real estate, whether he has died testate or intestate (secs. 47, 52). This Act of 1898 has never been repealed. The Act of 1901 does not deal with it at all. If there had never been an Act 7 Wm. IV. No. 8 at all, still dower has by this Act of 1898 been absolutely excluded as to land left by the husband, whether he leaves a will or not. It is urged, however, by the appellants, that, but for the Act 7 Wm. IV. No. 8, dower would, nothwithstanding the Act of 1898, attach to lands which the husband had

sold and conveyed during his life. There is certainly no express exclusion of dower as to such lands. But the argument seems to me to involve a misconception of the nature of dower. Dower was a provision for the wife to which the land of the husband was subject, in the hands of the husband (contingently during his life), and in the hands of the heir or devisee or purchaser (actually after the husband's death). It was like a charge on the land as against the husband—an interest which attaches to the land as soon as there was the concurrence of marriage and seisin, and whoever took the land from the husband, or from his heir or devisee, took it subject to the same charge. The husband, in effect, could not give to the purchaser more than he had. But if the land was not subject to dower in the hands of the husband, or his representatives—his heirs—or in the hands of his devisees, it could not be subject to dower in the hands of a purchaser from the husband. If it was not liable to dower in the hands of the husband or of volunteers claiming under him, it was not liable to dower in the hands of those claiming under him by virtue of valuable consideration. In New South Wales the charge has gone as against the husband; and it cannot remain as against those claiming for value under him. For these reasons I am strongly inclined to think that, even without the aid of Act 7 Wm. IV. No. 8, the right of dower at common law has gone in New South Wales by virtue of other enactments.

But even if it should be thought that the Acts left unrepealed by 7 Wm. IV. No. 8 are not sufficient to exclude dower from fee simple estates, where the estates have been conveyed or mortgaged by the husband, I am of opinion that, according to the proper view of the Act of 1901, it does not revive the common law as to dower. It is true that the New South Wales legislature—unfortunately, as I think—has not, in its *Interpretation Act* 1897 followed the British legislature with regard to the repeal of Acts which have repealed the common law. Sec. 6 says: "The repeal of an enactment by which a previous enactment was repealed shall not have the effect of reviving such last-mentioned enactment without express words"; but this section does not apply to the repeal of an enactment by which the previous *common law* was repealed (contrast English Act 52 & 53 Vict. c. 63,

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sec. 38). Therefore, we are constrained by the authorities to treat the repeal of the Act 7 Wm. IV. No. 8 as *primâ facie* involving the revival of the old common law as to dower as it theretofore existed. But this rule as to the revival of the common law is not absolute ; like almost all, if not all, rules as to Statutes, it is a qualified rule, a rule of presumption (*Tattle* v. *Grimwood* (1); *Mount* v. *Taylor* (2)); and, in my opinion, the presumption is here rebutted. I gather from the repealing Act of 1901, its nature, its place in the legislation of New South Wales, and its construction and consequences, an intention that the law as it existed at the time of the repealing Act should be consolidated, and continue as it then was—in short, an intention that the common law as it existed before the Act 7 Wm. IV. No. 8 should not be revived.

For, in the first place, the *Conveyancing and Property Act* of 1901 purports to be, according to its title, a mere consolidating Act—one of a large number of consolidating Acts passed about 1901. There has not been pointed out to us one single instance in which this Act makes in any point, other than that in debate, any change in the existing law. The presumption as to ordinary Acts of Parliament—that the legislature does not intend any alteration of the law beyond what it declares either in express terms or by unmistakeable implication—applies with double force to a consolidating Act such as this is—"An Act to consolidate certain enactments relating to conveyances assignments and titles to land." Of course, the words of consolidating Acts are to be interpreted in the same way as any other Acts. But this is not a question as to the interpretation of words. The words of sec. 10 are perfectly clear—they repeal 7 Wm. IV. No. 8. The question is as to certain alleged incidental consequences of the repeal. It is urged that by virtue of the repeal the common law is to be deemed to have been revived. The answer is that, as the Act of 1901 is merely intended to consolidate existing law, there is, to say the least, a strong presumption against such a change as the revival of the common law would involve. In the next place, this very sec. 10 contains a proviso which shows the scrupulous anxiety of the draftsman not to depart in the slightest degree

(1) 3 Bing., 493, at p. 496. (2) L.R. 3 C.P., 645.

from the existing law. For it saves the rights (if any), contingent or vested, of women to dower out of estates tail, although such rights must be rare and insignificant. The legislation since 7 Wm. IV. No. 8 had not expressly touched, and might be so construed as not to touch, estates tail; and therefore the draftsman provided that the dower rights, if any, in respect of estates tail, should remain intact. Moreover, the proviso by its very form—saving certain rights of dower from being possibly interfered with by the previous part of the section—indicates that that previous part of the section was not regarded as conferring, but as possibly taking away, dower rights. If dower rights at common law were being revived, one would expect also a proviso protecting from dower claims those persons who have purchased or taken mortgages of land before 1901, on the faith of the law then existing under 7 Wm. IV. No. 8. The present mortgagees belong, I presume, to this class of persons. It may be that such a purchaser or mortgagee is protected by the general words of sec. 8 of the *Interpretation Act* of 1897; but the same general words would also equally protect those dower rights which the proviso does specifically protect; and my point is that the proviso throws light on the previous part of the section, showing an intention not to revive the common law dower, but to take away an old Act regulating dower as subsequent legislation rendered it unnecessary—in fact, to take down an old fence when a new fence has been substituted. There are divers other considerations tending to make the revival of the common law of dower inconceivable with this section. All the considerations point to the conclusion which a broad survey of the trend and policy of New South Wales legislation confirms—a continuous trend and policy in the direction of cutting down of dower rights, of substituting therefor other and ampler rights for married women, of simplifying titles and facilitating the transfer of and dealings with land—that by merely repealing this Act 7 Wm. IV. No. 8, while leaving the *Wills Probate and Administration Act* of 1898 standing, the legislature had no intention to reverse its long continued policy, or to revive a system which had practically become obsolete and unfitted to modern conditions.

I think it my duty to add that I have assumed throughout that

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the existing mortgages were made after the marriages referred to. If they were made before marriage, of course the widow would not be dowable out of the equity of redemption, under the common law as it existed before the Act 7 Wm. IV. No. 8 : *Dixon* v. *Saville* (1). I think it only fair to deal with the matter on the lines which both parties desire; although it is to be regretted that the facts were not stated more fully in the affidavit.

Appeal dismissed, with costs.

Solicitor, for the appellants, *A. Muddle.*

Solicitors, for the respondent, *McLachlan & Murray.*

C. A. W.

Cons *C B (No1), In the matter of* [1982] VR 657 Appl *Moule* v *Moule* (1911) 13 CLR 267

[HIGH COURT OF AUSTRALIA.]

GOLDSMITH AND ANOTHER . . . APPELLANTS; DEFENDANTS,

AND

SANDS . . . . . RESPONDENT. PROSECUTOR.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *September* 18, 24, 27.

Griffith C.J., Barton, O'Connor and Higgins JJ.

Infant, custody of—Parent and child—Child in custody of others—Habeas corpus—Right of father—Abdication—Welfare of child.

The father of a child five months old, her mother being dead, gave her into the custody of her maternal grandparents, and left her in their custody until she was nine years old, and by certain acts the father, in the opinion of the

(1) 1 Bro. C.C., 326.