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ORPHANS' COURT of the COUNTY OF MORRIS

In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Morris, Deciding and Holding that the Widow of George Tonkin, deceased, is Entitled to Dower and Commissioners will be Appointed in the Matter of the Estate of George Tonkin, Deceased.

STIPULATION OF FACTS

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It is hereby stipulated and agreed as follows:

1. That Nancy Tonkin, the widow of said George Tonkin, deceased, did not, in writing express her dissent to receive lands or real estate, if any devised to her by the Will of said George Tonkin, deceased, and file the same with the Surrogate of the County of Morris, wherein she resides, and in which the land or real estate of decedent are situate, within six months after the probate of the said Will.

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2 That the lands and real estate in which she now claims dower are situate in the said County of Morris.

3. That decedent left no real estate not specifically mentioned in the Will.

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4. That on September 17, 1926, William A. Dolan, of Dolan & Dolan, Proctors for the Appellants, appeared in the Morris County Orphans' Court and objected to the entry of a decree on the grounds set forth in the notice of appeal filed in the above-entitled matter on October 6, 1926.

5. That on October 6, 1926, notice of appeal, a copy of which is attached hereto, was filed in said Morris County Orphans' Court, and it is agreed that said notice of appeal be added to the trans-

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cript of the record sent up to the New Jersey Prerogative Court.

6. It is hereby further stipulated and agreed that this stipulation be filed in the Orphans' Court of the County of Morris and that it become a part of the record in the said Orphans' Court of the County of Morris and that it be added to the transcript of the record sent up to the New Jersey Prerogative Court. Dated,

10 DOLAN & DOLAN,  
Proctors for and of Counsel with Appellants.  
KING & VOGT,  
Proctors of Nancy Tonkin.

MORRIS COUNTY ORPHANS' COURT

20 In the Matter of the Estate of George Tonkin, deceased. On Application of Nancy Tonkin for Assignment of Her Dower. } On Petition of Appeal. NOTICE OF APPEAL

30 Lillian Hoffman and Mabel Best, two of the heirs and devisees of George Tonkin, deceased, hereby appeal to the Surrogate General from the appointment of commissioners, proceedings, judgment and decree confirming the report of the commissioners entered herein on Friday, the seventeenth day of September, 1926, by which decree a certain portion of the Estate of George Tonkin, deceased, was set off to Nancy Tonkin.

The causes of complaint are:

40 1. That Nancy Tonkin, the widow of the said

George Tonkin, deceased, did not in writing express her dissent to receive lands or real estate devised to her by the will of the said George Tonkin, deceased, and file the same with the Surrogate of the County of Morris wherein she resides, and in which the lands or real estate of decedent are situate, within six months after the probate of said will.

2. That the appointment of commissioners to assign dower was improper and illegal.

3. That the assignment of dower to the said Nancy Tonkin by Commissioners appointed therefor by the Orphans' Court of Morris County was unjust and unfair. 10

AND TAKE NOTICE, that the said Lillie Hoffman and Mabel Best will apply to the Surrogate General at the next stated term to be holden for a review of the proceedings, judgment and decree complained of for such relief therein as shall be just.

Dated October 5, 1926. 20  
Newton, New Jersey.  
DOLAN & DOLAN,  
Proctors for Appellants.

TRANSCRIPT

(A)

Will of George Tonkin, Deceased  
In the Name of God, Amen: 30

I, George Tonkin of the Borough of Rockaway, in the County of Morris and State of New Jersey, being of sound and disposing mind and memory, do make, publish, and declare my last will and testament in manner following:—

FIRST: I direct my executor, hereinafter named, to pay my just debts and funeral expenses as soon as it may be reasonable and convenient after my decease.

SECOND: I give to my wife, Nancy Tonkin, the 40

household furniture belonging to me, and used by my said wife and me, also all articles of personal adornment, and one thousand dollars in cash, and half interest in automobile.

10 THIRD: I give, devise and bequeath to my son, George F. Tonkin, to him, his heirs and assigns my share in the real estate now occupied by Tonkin & Hoffman as a store building, also my share in the business of Tonkin & Hoffman, including stocks of goods, book accounts and everything in connection with the said business in which I may have any interest.

FOURTH: I give, devise and bequeath to my daughter, Lillian Hoffman, the double house and lot, situate on White Meadow Avenue, known as the homestead to her, her heirs and assigns.

20 FIFTH: I give, devise and bequeath to my daughter, Mabel Best, the house and lot on White Meadow Avenue, in which the said Mabel Best and family are now living, and in which my wife and I also live, to her, her heirs and assigns. This bequest is made subject to the condition that my said wife, Nancy Tonkin, shall have the use of two rooms, to be used by her as her home, during the term of her natural life, if she so long remains my widow. Half interest in automobile is given to Mabel Best.

SIXTH: I give to my granddaughter, Laura Swayze, and to my grandson, Edward Davey, five hundred dollars, each.

30 SEVENTH: I give, devise and bequeath to my daughter, the said Mabel Best, my share in the double house and lot, owned by me and Leonard Hoffman, situate on Hibernia Avenue, in the Borough of Rockaway, to her, her heirs and assigns.

40 EIGHTH: All the rest and residue of my property real and personal, I give to my wife, the said Nancy Tonkin, my son, the said George F. Tonkin, and my two daughters, the said Lillie Hoffman and Mabel Best, to be divided equally among them, share and share alike.

NINTH: I appoint my brother, John Tonkin, to be the executor of this my last will and testament, and direct that no bond be required of him for the faithful performance of this work, hereby revoking all former wills by me made.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this seventeenth day of September, 1920.

George Tonkin (seal)

Signed, acknowledged and declared by the said George Tonkin as and for his last will and testament, in the presence of us, who were both present at the same time, who, at his request, in his presence, and in the presence of each other have hereunto subscribed our names as witnesses.

Edwin J. Matthews, Rockaway, New Jersey.  
T. Gordon Hoagland, Rockaway, New Jersey.

(B)

NOTICE

TO LILLIE HOFFMAN, MABEL BEST, AND GEORGE F. TONKIN, DEVISEES OF GEORGE TONKIN, DECEASED, OR WHOM IT MAY CONCERN:

YOU ARE HEREBY NOTIFIED, that application will be made to the ORPHANS' COURT, to be held at Morristown, in and for the County of Morris, on Friday, the 26th day of June, 1925, at the hour of ten o'clock in the forenoon for the appointment of Commissioners, to assign to me, NANCY TONKIN, widow of GEORGE TONKIN, late of the Borough of Rockaway, deceased, my dower in the lands and

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real estate whereof he died seized, situate in the county aforesaid.

Dated June 4th, 1925.

NANCY TONKIN  
BY KING & VOGT  
Her Proctors.

(C)

AFFIDAVIT

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STATE OF NEW JERSEY }  
COUNTY OF MORRIS } ss:

THOMAS J. HANNON, of full age, being duly sworn according to law, upon his oath deposes and says, that on Friday June 5th, 1925, he served a copy of the annexed notice upon George F. Tonkin, Lillie Hoffman, and Mabel Best, personally, by reading the same to them, handing a copy thereof to each of them and advising them of the contents.

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THOMAS J. HANNON.

SUBSCRIBED AND SWORN  
TO BEFORE ME THIS  
9th day of June, 1925.

C. STANLEY SMITH,  
Master in Chancery of  
New Jersey.

30 Filed June 26, 1925.

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(D)

MORRIS COUNTY ORPHANS' COURT.

IN THE MATTER OF }  
THE ESTATE OF } PETITION FOR AP-  
GEORGE TONKIN, DE- } POINTMENT OF COM-  
CEASED. } MISSION.

TO HON. C. FRANKLIN WILSON, JUDGE OF  
THE ORPHANS' COURT OF THE COUNTY OF  
MORRIS:

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The petition of NANCY TONKIN, of the County of Morris aforesaid, respectfully shows:

1. That she is the widow of George Tonkin, late of said county, who died seized of land and real estate, situate in the county aforesaid, in which your petitioner is entitled to dower.

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2. That said lands and real estate are more particularly described as follows:

All those certain tracts or parcels of land and premises, situate in the Township of Rockaway, County of Morris and State of New Jersey:

FIRST TRACT: Being part of a lot of land conveyed by Charles A. McCarthy and Laura J., his wife to said John Date by deed 23d day of March, 1868, recorded in Morris County record of deeds, in Book G-7 178, and in said deed particularly described.

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The part of said lot hereby intended to be conveyed being bounded as follows to wit: BEGINNING at a stake set in the first line of said whole lot eighty feet distant from the second corner of said whole lot and running thence (1) north seven degrees thirty minutes west eighty feet to the second corner of said whole lot, thence (2) north seventy-eight and one

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half degrees east one chain and sixty three links to a stake in line with a stone fence being the third corner of said whole lot, thence (3) south seven and one half degrees east eighty feet to a stake set for a corner of this lot in the third line of said whole lot and thence (4) south seventy eight and one half degrees west one chain and sixty three links to the place of BEGINNING. CONTAINING twenty hundredths of an acre more or less.

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BEING the same lands and premises as conveyed by John Date and wife to George Tonkin, by deed dated April 23, 1869, recorded in the Morris County Clerk's Office, in Book N-7 Page 582.

SECOND TRACT: BEING part of the lot conveyed to John Date by Charles A. McCarty and wife by deed dated March 23rd, 1868 and recorded in the Morris County Clerk's Office in Book G-27 of deeds, pages 178 &c.

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BEGINNING at a point in the first line of the whole lot ninety five feet from the second corner thereof being the BEGINNING corner of the lot conveyed by said parties of the first part to JOHN TONKIN by deed dated April 1st, 1871, and recorded in Morris County Clerk's Office in Book B-8 of deeds Page 34 &c., and running thence (1) along the first line of John Tonkin's lot north seventy eight degrees thirty minutes east one chain and sixty three links to a corner in the third line of the whole tract, thence (2) along said third line north seven degrees thirty minutes west fifteen feet to the fourth corner of a lot conveyed by said parties of the first part to George Tonkin's by deed dated April 23, 1869, and recorded in the Morris County Clerk's Office in Book N-7 of deeds page 582 &c., thence (3) along the fourth line of said lot south seventy eight and one half de-

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grees west one chain and sixty three links to the beginning corner of said George Tonkin's lot in the first line of the whole lot, thence (4) along the said first line of the whole lot south seven and one half degrees east fifteen feet to the place of BEGINNING. CONTAINING three and one half hundredths of an acre of land be the same more or less.

BEING the same lands and premises conveyed by John Date and wife to George Tonkin by deed dated July 1, 1871, recorded in the Morris County Clerk's Office in Book B-8, Page 539.

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Together with certain other lands and premises in the County of Morris and State of New Jersey, owned by said George Tonkin, during his lifetime, which from the records in the Morris County Clerk's Office, was not conveyed by him during his lifetime, but were still owned by him at his death.

3. That your petitioner has caused twenty days previous notice in writing of, this application to be served on Lillie Hoffman, Mabel Best and George F. Tonkin, devisees of George Tonkin, deceased, who are all the persons known to her to be interested.

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Your petitioner therefore prays that three discreet and disinterested freeholders may be appointed by the Court, to assign your petitioner her dower in said lands and real estate, according to the statute in such case made and provided.

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Dated June 22nd, 1925.

NANCY TONKIN,  
Petitioner.

STATE OF NEW JERSEY }  
COUNTY OF MORRIS } ss:

NANCY TONKIN, of full age, being duly sworn, upon her oath according to law, deposes and says,

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that she is the petitioner named in the foregoing petition, and that the facts, matters and things set forth in the foregoing petition are true.

SUBSCRIBED AND SWORN

to before me this twenty-fourth day of June, 1925.

(Seal) HAROLD S. MATTHEWS,  
Notary Public.

10 Filed June 26, 1925.

NANCY TONKIN

(E)

MORRIS COUNTY ORPHANS' COURT.

20 IN THE MATTER OF }  
THE ESTATE OF } On Petition &c.,  
GEORGE TONKIN, de- } CONCLUSIONS  
ceased. }

While the question presented is not without difficulty in solving yet this Court will decide and hold the widow entitled to dower, and Commissioners will be appointed.

30 Wilson, J.

(F)

CERTIFICATE

40 STATE OF NEW JERSEY  
MORRIS COUNTY SURROGATE'S OFFICE  
MORRIS COUNTY, ss. I, WILLIAM H. TMOP-  
SON, Surrogate of the said county and clerk of the  
Orphans' Court thereof, the same being a Court of

Record, do hereby certify that I have compared the foregoing copies of the Last Will and Testament, of George Tonkin, late of the County of Morris and State of New Jersey, deceased, together with the notice of application for the Appointment of Commissioners, Petition for Appointment of Commissioners and Conclusions in re the Estate of George Tonkin, deceased, with the original records thereof, now remaining in my office, and have found the same to be true copies therefrom.

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IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office this Twenty-second day of September, A. D. nineteen hundred and twenty-five.

(SEAL) WILLIAM H. THOMPSON,  
Surrogate, etc.

By HARRY R. SHUPE,  
Deputy Surrogate.

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MORRIS COUNTY ORPHANS' COURT.

IN THE MATTER OF }  
THE ESTATE OF }  
GEORGE TONKIN, DE- } DECREE CONFIRM-  
CEASED, ON APPLI- } ING COMMISSIONERS'  
CATION OF NANCY } REPORT  
TONKIN FOR ASSIGN- }  
MENT OF HER DOW- }  
ER }

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The commissioners appointed by this court in the above matter, having made and filed their report of all their proceedings, with the distances and courses of the lands assigned and allotted by them to Nancy Tonkin, the widow, the same being inspected by the court, and no person objecting thereto:

It is on this 17th day of September, 1926, ORDER- 40

ED, ADJUDGED AND DECREED that the proceedings and report of the said commissioners be and the same hereby are in all things approved and confirmed by this court and that they be recorded by the Surrogate, pursuant to the statute in such case made and provided.

10 AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the commissioners be allowed the following sums, Alfred Elmer Mills, Twenty-five Dollars and Edwin J. Matthews and Morford B. Strait, Fifteen Dollars each, as and for their charges in this matter.

C. F. Wilson,  
JUDGE &c.

MORRIS COUNTY ORPHANS' COURT.

20 In the Matter of the Estate of George Tonkin, deceased, On Application of Nancy Tonkin for Assignment of Her Dower. }  
On Petition of Appeal.  
NOTICE OF APPEAL

30 Lillie Hoffman and Mabel Best, two of the heirs and devisees of George Tonkin, deceased, hereby appeal to the Surrogate General from the appointment of commissioners, proceedings, judgment and decree confirming the report of the commissioners entered herein on Friday, the seventeenth day of September, 1926, by which decree a certain portion of the Estate of George Tonkin, deceased, was set off to Nancy Tonkin.

The causes of complaint are:

40 1. That Nancy Tonkin, the widow of the said

George Tonkin, deceased, did not in writing express her dissent to receive lands or real estate devised to her by the will of the said George Tonkin, deceased, and file the same with the Surrogate of the County of Morris wherein she resides, and in which the lands or real estate of decedent are situate, within six months after the probate of said will.

2. That the appointment of commissioners to assign dower was improper and illegal.

3. That the assignment of dower to the said Nancy Tonkin by commissioners appointed therefor by the Orphans' Court of Morris County was unjust and unfair. 10

AND TAKE NOTICE, that the said Lillie Hoffman and Mabel Best will apply to the Surrogate General at the next stated term to be holden for a review of the proceedings, judgment and decree complained of for such relief therein as shall be just.

Dated October 5, 1926.

Newton, New Jersey. 20  
Proctors for Appellants.

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NEW JERSEY PREROGATIVE COURT

In the Matter of the Appeal from the Decree Assigning Dower to Nancy Tonkin, widow of George Tonkin, deceased. )  
 On Petition of Appeal. )  
 PETITION OF )  
 APPEAL. )

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TO THE ORDINARY OF THE STATE OF NEW JERSEY:

The petition of Lillie Hoffman and Mabel Best of the Borough of Rockaway, in the County of Morris and State of New Jersey, respectfully shows that:

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1. Petitioners are two of the next of kin and devisees of George Tonkin, deceased, late of the County of Morris and State of New Jersey.

2. On February 5, 1924, the Surrogate of the County of Morris and State of New Jersey, duly admitted to probate the will of George Tonkin, deceased, late of the Borough of Rockaway, in the County of Morris and State of New Jersey.

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3. On June 26, 1925, Nancy Tonkin, widow of the said George Tonkin, deceased, made application to the Surrogate of the County of Morris for the appointment of commissioners to apportion her dower.

4. In compliance therewith, the Court did appoint commissioners who proceeded to set off the dower of the said George Tonkin, deceased.

5. On September 17, 1926, by decree of the Orphans' Court, certain lands were set off to Nancy Tonkin as and for her dower.

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6. Your petitioners complain and allege that the whole and every part of said appointment of commissioners proceedings, judgment and decree con-

firmed report of commissioners was erroneous, improper and illegal.

7. Your petitioners also complain and allege that the assignment by the commissioners of a portion of the Estate to the said Nancy Tonkin, widow, was unjust and unfair.

Your petitioners therefore pray that the aforesaid appointment of commissioners, proceedings, Judgment and decree made by the Orphans' Court in the above entitled matter be reserved by this Court.

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DOLAN & DOLAN,  
Proctors for and of Counsel with Appellants.

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SURROGATE GENERAL'S COURT.

IN THE MATTER OF  
 THE ESTATE OF  
 GEORGE TONKIN, DE-  
 CEASED, ON APPLI-  
 CATION OF NANCY  
 TONKIN, FOR AS-  
 SIGNMENT OF HER  
 DOWER.

On Appeal &c.  
 ORDER OF REFER-  
 ENCE.

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This matter being opened to the Court by Dolan and Dolan, Proctors for and of Counsel with Appellants, and King and Vogt, Proctors for and of Counsel with Appellee, and upon reading the consent hereto attached:

It is thereupon on this 14th day of February, 1927, ORDERED that the above stated cause be referred to Honorable J. F. Fielder, one of the Vice-Ordinaries of this Court to hear the same for the Ordinary, and to report thereon to him and advise what order or decree should be made therein.

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We consent to the making of the above order.  
 E. R. WALKER  
 Ordinary.

DOLAN & DOLAN,  
 Proctors for and of Counsel  
 with Appellants.

KING & VOGT  
 Proctors for and of Counsel  
 with Appellee.

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NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF  
 THE APPEAL FROM  
 THE DECREE OF THE  
 ORPHANS' COURT OF  
 THE COUNTY OF  
 MORRIS, DECIDING  
 AND HOLDING THAT  
 THE WIDOW OF  
 GEORGE TONKIN, DE-  
 CEASED, IS ENTITLED  
 TO DOWER  
 AND COMMISSIONERS  
 WILL BE APPOINTED  
 IN THE MATTER OF  
 THE ESTATE OF  
 GEORGE TONKIN, DE-  
 CEASED.

On Petition of Appeal  
 NOTICE OF TIME AND  
 PLACE OF HEARING.

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TO MESSRS. DOLAN & DOLAN, PROCTORS  
 FOR APPELLANTS:

TAKE NOTICE, that Vice-Ordinary, HON. JAMES F. FIELDER, has designated May 16th, 1927, at ten o'clock in the forenoon, at the Chancery Chambers, 1 Exchange Place, Jersey City, New Jersey, as the time and place for hearing in this matter, at which time, the record, stipulation of facts and briefs of appellants and appellee are to be filed, but no testimony is to be taken or oral argument made.

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KING & VOGT,  
 PROCTORS FOR APPELLEE.

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(NOT TO BE PUBLISHED IN ANY REPORT)

June 20, 1927.  
New Jersey Prerogative Court.  
3141.

10	In the Matter of the Appeal from the Decree assigning Dower to Nancy Tonkin, widow of George Tonkin, deceased	}	ON APPEAL.  CONCLUSIONS.
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Messrse. Dolan & Dolan, proctors for Lillie Hoffman, et al., appellants.  
Messrs. King & Vogt, proctors for Nancy Tonkin, appellee.

20 FIELDER, V. O.:

George Tonkin died January 20, 1924; leaving a will admitted to probate by the Surrogate of Morris County. He left him surviving his widow, Nancy Tonkin, who, on or about June 26, 1925, filed her petition with the Orphans Court of said county, wherein she alleged that she was entitled to dower in the lands whereof the testator died seized and praying for the appointment of commissioners to assign dower to her. A hearing was had and on May 28, 1926, an order was entered decreeing that "the widow in this matter is entitled to dower and that commissioners be appointed to apportion the same." On June 4, 1926, a further order was entered appointing commissioners, which order appears to be dated June 4, 1925, but counsel agree that "1925" is a clerical error for "1926." The commissioners filed their report, wherein they set forth that they had admeasured and set off to the widow one-third of the lands whereof the testator died

seized, particularly describing the lands, or portions thereof, set off to the widow and on September 17, 1926, a decree was entered that the proceedings and report of the commissioners be in all things approved and confirmed.

October 6, 1926, notice of appeal was filed in the Orphans Court by certain heirs and devisees of the testator, wherein it is stated that an appeal is taken "from the appointment of commissioners, proceedings, judgment and decree confirming the report entered September 17, 1926, by which a certain portion of the estate of George Tonkin was set off to Nancy Tonkin" and the grounds of appeal are stated to be (1) that the widow did not file her dissent in writing to receive lands devised to her by the will; (2) that the appointment of commissioners was improper and illegal; (3) that the assignment of dower by the commissioners was unjust and unfair. The petition of appeal filed in this court alleges that the whole and every part of the appointment of commissioners, proceedings, judgment and decree of the Orphans Court confirming the report of the commissioners was erroneous, improper and illegal and that the assignment by the commissioners of a portion of the said estate to said widow was unjust and unfair and the appellants pray "that the aforesaid appointment of commissioners, proceedings, judgment and decree - - - - be reversed."

The disputed question in the court below was, and the question which the appellants desire to have considered here is, whether the widow is entitled to dower in the lands of her deceased husband in view of a devise to her in his will and her failure to file a dissent to receive such devise in satisfaction of dower.

The appellee claims that this question cannot be considered now because it was adjudged by an order of the Orphans Court entered May 28, 1926, that the widow is entitled to dower and that no appeal was taken from that order; that the appeal here is

from the appointment of commissioners made by order of June 4, 1926, also from the proceedings under that order and from the decree entered September 17, 1926, confirming the commissioners' report. I am unwilling to take such a narrow and technical view of this appeal. The proceedings for assignment of dower were initiated under the Dower Act (Comp. Stat. 2049, Sec. 17, et seq.) and the appeal is taken pursuant to Section 20 of that act and not under the act (Comp. Stat. 3889, Sec. 204) regulating appeal generally from Orphans Court decrees. Section 20 of the Dower Act provides that any heir who shall conceive himself aggrieved by the proceedings, judgment or decree, may, within twenty days after the final judgment or decree, give notice in writing of the causes of complaint and of his intention to appeal to the surrogate general, who shall review the proceedings, judgment or decree complained of and do therein what shall be just. The object of the petition filed in the Orphans Court was to have dower assigned to the widow and the order of May 28, 1926, was but a step in the proceedings; it was not the final judgment or decree sought by the petition. The final judgment or decree was the order of September 17, 1926, confirming the commissioners' report and within twenty days after the entry of that order the appellants gave notice of their causes of complaint by filing a notice of appeal and thereby it became the duty of this court to review the entire proceedings and to "do therein what shall be just." One of the causes of complaint set out in the notice of appeal is that the appointment of Commissioners was improper and illegal, which seems to me to be a sufficient reason for setting aside the entire proceedings, if it shall appear that the very foundation of the proceedings, namely the widow's claim to a right of dower, is unsound. I shall therefore, determine this appeal upon my view of the substantial question involved.

By his will the testator devised all his real property consisting of four separate parcels of land with store and dwellings thereon, to a son and two daughters absolutely, the devise to his daughter, Mabel Best, of a house and lot, containing the following clause: "This bequest is made subject to the condition that my said wife, Nancy Tonkin, shall have the use of two rooms, to be used by her as her home, during the term of her natural life, if she so long remains my widow." By a residuary clause the testator gave and devised to his wife, his son and his two daughters, all the residue of his personal and real estate equally, but by stipulation filed in this cause, it is conceded that the testator died seized of no real property other than that specifically devised to his son and two daughters. No other provision of the will, except perhaps bequests to his widow to be hereafter mentioned, bears on the question now under consideration. The widow filed no dissent to accept the provisions of the will in her favor in satisfaction of her dower and the appellants contend that under Section 16 of the Dower Act she is not entitled to dower in the lands specifically devised by the will. So much of that section as is pertinent reads as follows: "That if a husband shall devise to his wife by a will - - - any lands or real estate for her life or otherwise and without expressing whether such devise to her is intended to be in lieu or bar of dower, or not - - - - then the said wife - - - - shall not be entitled to dower in any lands or real estate devised by her said husband, unless she shall, in writing, express her dissent to receive the lands or real estate so devised to her in satisfaction and bar of her right of dower in the other lands and real estate devised in and by the said will - - - - and then and in that case she shall be considered as renouncing the benefit of the said devise to her."

In the absence of express words in a will excluding the widow from dower in lands devised to

others, the intention to bar her must be free from doubt (Stark v. Hunton, 1 N. J. Equity, 216; Freeland v. Mandeville, 28 N. J. Equity, 559) and in ascertaining a testator's intention as to whether a provision he has made for his widow was intended to bar her dower, it should be considered whether the allowance of dower will disturb or be inconsistent with any provision of the will (Moore v. Moore, 84 N. J. Equity, 39; affirmed 85 N. J. Equity, 150).

10 The Will disposes of four parcels of improved real estate in which the widow was by law entitled to dower, but in which the sole interest given to her is the use of two rooms in one dwelling, so long as she remain a widow. The will gives her also the testator's household furniture, articles of personal adornment, \$1,000 in cash, a half interest in an automobile and a one-fourth interest in the residue of the personal estate. The record sent up shows an inventory filed in the Surrogate's office of the testator's personal estate, amounting to \$9,890.95. Considering the probable size of the testator's estate, it would seem the meagre provision made for the widow could not have been intended by the testator to be in lieu of her dower rights in his real property. To allow her dower will not disturb or be inconsistent with any provision of the will; his devisees can take what he devised to them subject to dower. Had the testator made no provision for his widow, or had she filed her dissent, or had he died intestate, his devisees or his heirs would take subject to dower. But further, it will be observed that testator made no devise whatever to his widow. He devised a house and lot to his daughter in fee simple, with a condition attached thereto that his widow should have the use of two rooms therein. The statute invoked to bar the widow's dower is in derogation of her rights and should be strictly construed. To divest her of dower there must be a devise to her of a legal estate in lands and where the devise is to another as a sort of trustee for the widow, the statute

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does not apply and the widow is not put to an election (Van Arsdale v. Van Arsdale, 26 N. J. Law, 404; Hill v. Hill, 62 N. J. Law 442).

The further cause of complaint set out in the notice and petition of appeal, that the assignment of dower by the commissioners was unjust and unfair, was not argued by counsel and I find nothing in the record to justify setting aside the report and order confirming, for that reason.

The appeal will be dismissed.

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NEW JERSEY PREROGATIVE COURT  
3141.

10 IN THE MATTER OF  
 THE APPEAL FROM  
 THE DECREE OF THE  
 ORPHANS' COURT OF  
 THE COUNTY OF  
 MORRIS, DECIDING  
 AND HOLDING THAT  
 THE WIDOW OF  
 GEORGE TONKIN, DE-  
 CEASED, IS ENTI-  
 TLED TO DOWER,  
 AND COMMISSIONERS  
 WILL BE APPOINTED  
 IN THE MATTER OF  
 THE ESTATE OF  
 GEORGE TONKIN, DE-  
 CEASED.  
 20

} On Appeal  
 } DECREE

This matter coming on to be heard in the pres-  
 ence of Messrs. Dolan & Dolan, Proctors for the  
 appellants, and Messrs. King & Vogt, Proctors for  
 the respondent, on appeal from the Orphans' Court  
 of Morris County, submitted on the record, stipu-  
 lation of fact and briefs, and it appearing that the  
 appeal should be dismissed for the reasons as set  
 forth in the conclusion filed in this matter:

30 It is on this 19th day of July 1927, ORDERED  
 AND DECREED that the appeal in this matter, be  
 dismissed with costs to be taxed against appellants.

AND IT IS FURTHER ORDERED that appel-  
 lants, Lillie Hoffman and Mabel Best, pay to the  
 respondent, Nancy Tonkin, or to King & Vogt, her  
 proctors, a counsel fee of One Hundred Dollars, to  
 be taxed and paid with the costs, and that in default

of such payment, execution issue therefor.

Respectfully advised  
 E. R. WALKER  
 ORDINARY.

James F. Fielder  
 VICE ORDINARY.

This decree approved as to form  
 DOLAN & DOLAN  
 PROCTORS OF APPELLANTS. 10  
 Filed, July 19, 1927.

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF  
 THE APPEAL FROM  
 THE DECREE OF THE  
 ORPHANS' COURT OF  
 THE COUNTY OF  
 MORRIS, DECIDING  
 AND HOLDING THAT  
 THE WIDOW OF  
 GEORGE TONKIN, DE-  
 CEASED, IS ENTI-  
 TLED TO DOWER  
 AND COMMISSIONERS  
 WILL BE APPOINTED  
 IN THE MATTER OF  
 THE ESTATE OF  
 GEORGE TONKIN, DE-  
 CEASED.  
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} On Appeal.  
 } NOTICE OF APPEAL.  
 } 30

Appellants, Lillie Hoffman and Mabel Best, here-  
 by appeal from the final decree made in the above  
 entitled cause on the nineteenth day of July, 1927,  
 and from the whole and every part thereof, to the 40

NEW JERSEY COURT OF ERRORS AND APPEALS

IN THE MATTER OF THE APPEAL FROM THE DECREE OF THE ORPHANS' COURT OF THE COUNTY OF MORRIS, DECIDING AND HOLDING THAT THE WIDOW OF GEORGE TONKIN, DECEASED, IS ENTITLED TO DOWER, AND COMMISSIONERS WILL BE APPOINTED IN THE MATTER OF THE ESTATE OF GEORGE TONKIN, DECEASED.

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On Appeal from the Prerogative Court.

ANSWER TO PETITION OF APPEAL

The answer of NANCY TONKIN, the appellee herein to the petition of appeal of Lillie Hoffman and Mabel Best, the appellants.

This appellee not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was on July 19th, 1927, made and entered in the Prerogative Court of New Jersey, in the above entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and she prays that

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the same may be affirmed with costs to be taxed in favor of this appellee.

KING & VOGT, Solicitors for and of Counsel with Appellee.

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NEW JERSEY COURT OF ERRORS AND APPEALS

IN THE MATTER OF THE APPEAL FROM THE DECREE OF THE ORPHANS' COURT OF THE COUNTY OF MORRIS, DECIDING AND HOLDING THAT THE WIDOW OF GEORGE TONKIN, DECEASED, IS ENTITLED TO DOWER AND COMMISSIONERS WILL BE APPOINTED IN THE MATTER OF THE ESTATE OF GEORGE TONKIN, DECEASED.	On Appeal from the Prerogative Court.	10
	BRIEF OF APPELLANTS.	20

FACTS

This matter is before the Court on Appeal from a decree by the Ordinary confirming a decree made and entered in the Morris County Orphans' Court on September 17, 1926, confirming the report of commissioners apportioning dower and assigning dower to the widow of George Tonkin, deceased. 30

George Tonkin died January 20, 1924, leaving a will duly admitted to probate by the Surrogate of Morris County on February 5, 1924. The said George Tonkin left him surviving his widow, Nancy Tonkin, and three children, namely: George Tonkin, Lillie Hoffman and Mabel Best.

More than one year after the probate of said will and on June 26, 1925, Nancy Tonkin, widow, filed her petition with the Orphans' Court of said County, wherein she alleged she was entitled to dower 40

in the lands whereof the testator died seized, and prayed for appointment of commissioners to assign dower to her. This petition was resisted on the ground that the widow had filed no dissent to accept the provisions of the will in her favor in satisfaction of her dower, and by virtue of Section 16 of the Dower Act she is not entitled to dower in the lands specifically devised in the will.

10 By the second item of the will of the testator he gave to his wife all articles of personal adornment, One Thousand Dollars in cash and one-half interest in an automobile. By the third item of the will he gave to his son, George F. Tonkin, his heirs and assigns, certain real estate. By the fourth item of the will he gave to his daughter, Lillie Hoffman, certain real estate; and by the fifth item of the will he gave to his daughter, Mabel Best, and her heirs, the house and lot on White Meadow Avenue, and provided that this bequest be made subject to the condition that "my said wife, Nancy Tonkin, shall have the use of two rooms to be used by her as her home during the term of her natural life as she so long remains my widow." By the eighth item of the will he gave all the residue of his estate to his widow and three children to be divided equally between them.

The will of the testator specifically mentioned all the real estate of which the decedent died seized.

30 An appeal was duly taken under Section 20 of the Dower Act, and a decree dismissing the appeal was duly entered. The appellants appeal from this decree on the sole ground that the widow, Nancy Tonkin, is barred from her right of dower because she did not dissent either in the manner or time required by the Statute.

POINT 1

40 The matters in difference in this appeal are limited and governed by the provisions of the statute

concerning dower, and especially Section 16 of Compiled Statutes, at page 2048, which provides as follows:

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

The question is limited in its scope as to:  
First: did the testator devise to his wife any lands or real estate for her life or otherwise?  
Second: did the widow, surviving, express her dissent to receive the lands and real estate so devised to her by filing the same in writing with the Surrogate, where she resides, within six months after probate of said will?

(A)

THERE WAS SUCH A DEVISE OF LANDS AND REAL ESTATE AS TO BAR THE WIDOW, NANCY TONKIN, FROM HER DOWER, UNLESS SHE EXPRESSED HER DISSSENT WITHIN THE

## TIME LIMITED BY THE STATUTE.

The provisions of the will of George Tonkin are:

10 "SECOND: I give to my wife, Nancy Tonkin, the household furniture belonging to me, and used by my said wife and me, also all articles of personal adornment, and one thousand dollars in cash, and half interest in automobile.

20 FIFTH: I give, devise and bequeath to my daughter, Mabel Best, the house and lot on White Meadow Avenue, in which the said Mabel Best and family are now living, and in which my wife and I also live, to her, her heirs and assigns. This bequest is made subject to the condition that my said wife, Nancy Tonkin, shall have the use of two rooms, to be used by her as her home, during the term of her natural life, if she so long remains my widow. Half interest in automobile is given to Mabel Best."

30 By the fifth item of the will the testator devised the house and lot on White Meadow Avenue to his daughter, Mabel Best, but made it subject to a life estate in Nancy Tonkin. While the testator did not use the words "I give and devise to my wife," nevertheless he stated,—“my said wife, Nancy Tonkin, shall have the use of two rooms, to be used by her, &c.” This constitutes a devise of the use of two rooms to Nancy Tonkin.

In the case of *White v. White*, reported in 16 New Jersey Law Reports, pages 202, &c., Justice Ford considered a will having similar provisions. In that will the testator provided as follows:

40 "I give and bequeath to my beloved wife,

Eleanor White, all the property that she had or brought with her when I married her, and I further order that she shall have one room in my dwelling house, and a comfortable maintenance out of my real estate, during her natural life or widowhood. And I give and bequeath unto my two sons, Richard White and Peter White, all my lands and buildings, to be equally divided between them in quantity and quality; and I further order that my son, Richard White, shall have my wagon and horses, 10 and I also give to my son, Peter White, my other wagon, and one yoke of oxen, yoke or yokes."

20 The appellants desire to call the court's attention to the fact that the testator did not use the word "devise" in this provision, but,— "I further order that she shall have one room in my dwelling house." This provision was made a part of the bequest of the whole property to two others, and is, in this respect, exactly similar to the case at hand. As stated by Justice Ford such a provision is a devise of real estate from which the demandant did not dissent either in the manner or within the time required by statute. Her right of dower is, therefore, necessarily barred by law.

30 "It is not necessary for a will to expressly declare that a devise to the wife shall be in lieu of dower, if the intention appear therein, that it is to be so, and that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them.

"A plea that a devise to the wife was intended to be in lieu of dower is good on demurrer, without stating that it was so expressed in the will.

40 "A room in a house is part of the real estate,

for recovering possession of which, ejectment is a legal remedy.

"A plea that demandant agreed to release her dower is bad on demurrer. So is also a plea that she did release it without averment of its being by deed or making profert.

10 "So is a plea that demandant released her dower in a part of a farm to one tenant in common virtute cujus the share of the other tenant is released from her claim to dower."

STARK, ET ALS. vs. HUNTER, ET ALS. N. J.  
EQUITY REPORTS 1, PAGE 216

"The intent of the act is, that the widow not be entitled to dower in any lands devised by will, where, under the same will, she took an interest in land or real estate as devisee."

20 MOORE vs. GORDON ET ALS. ATL. 95, PAGE 983 &c.

Wills — Election — Dower — Interest —  
Waiver — Refusal to Receive Devise.

30 "A testator devised to his wife and two children the use of the house in which he resided until the same was sold. He directed that on the sale, the proceeds should be invested by his executors in another residence for the use of his wife and children during the widowhood of the wife. On her death or remarriage or her refusal or failure to reside in the premises he directed the executors to sell. In a subsequent clause of his will he devised the residue of his estate, real and personal, to his executors in trust, among other purposes to sell the residence and until such sale to pay the taxes, assessments and water rents and to keep the premises in repair. Held that there was a devise of lands or real estate to the widow, and

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that her failure to express her dissent to receive the same barred her dower by virtue of section 16 of the Dower Act (2 Compiled Statutes, 1910, page 2048)"

(Ed. Note for other cases see Wills Cent. Dig. 2018 — 2033 — 2060; Dec. Dig. 782-795.)

The manifest intention of the testator was that the gifts expressed in the will were in lieu of dower, because the testator gave to the widow not only bequests of personal property and a portion of the residue of the estate, but also the use of two rooms in the dwelling house. **The claim for dower by the widow, at this time is so inconsistent with the devise of a part of the house that it must defeat its own purpose,** for it is impossible to have the use of two rooms in the dwelling house, and at the same time have dower in those same rooms.

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(B)

20 Having devised an interest in real estate to the widow, and the widow failing to file her dissent within six months, or the time limited by the statute, the widow is now barred from dower in the lands.

The value of the estate granted to the widow by the will is not pertinent to the issue involved. In this case the sole question is whether or not an estate was devised to the widow and whether she filed her dissent within the time limited by the statute.

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The learned Vice-Chancellor turns the decision against appellants by holding: "To divest her of dower there must be a devise to her of a legal estate in lands and where the devise is to another as a sort of trustee for the widow, the statute does not apply and the widow is not put to an election."

To sustain this conclusion, the learned Vice Chan-

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cellor cites Van Arsdale v. Van Arsdale, 26 N. J. L., 404, and Hill v. Hill, 62 N. J. L. 442. But these cases must be distinguished from the case at bar. Van Arsdale v. Van Arsdale held that "A devise of the **use of a house in another state**, during life, will not bar dower or put the widow to her election." Because, of course, she was entitled to dower in his real property in this state. And Hill v. Hill holds, "A husband's will which devised and bequeaths real and personal property, not directly to his widow, but to an executor in trust, to be invested on bond and mortgage, and the interest to be paid to her for her natural life or during her widowhood, containing a clause expressing that the bequest is hereby made "to be by her received in lieu of her dower in my estate," does not fall under the operation of this section; and her right to elect to take under such will is neither controlled nor affected by the statute." Of course, because this was a bequest of Personal property, and not a devise of real estate. The facts in these cases are entirely different from those in the case at bar.

Furthermore, Colgate v. Colgate, 23 E. 372, holds that, "If the provisions in the will are inconsistent with her right of dower, the widow is put to her election." And Morgan v. Titus, 3 E. 201, and White v. White, 16 L. 202, holds that "A devise of the use and enjoyment of certain rooms in a house," is inconsistent with her right of dower.

But, the Court of Errors and Appeals, in the latest, and ruling, decision in the matter, Moore v. Gordon, 95 Atl. 983, holds:

"The statute was passed in 1820 for the purpose, as Chancellor Vroom said in Stark v. Hunton, 1 N. J. Eq. 216, at pages 227, 228, of establishing a plain rule, simple in its terms, and definite in its results, to do away with the difficulties in the construction of wills and in ascertaining and settling the rights of parties, where the widow claimed as devisee and doweress.

"The question is **not the value of the devise to the widow**, whether greater or less than the value of her dower, since she is left free to take the dower if she prefers. The important object to be accomplished by the act was to make certain the title of other devisees **after the lapse of the six months allowed the widow to exercise her choice**. In White v. White, 16 N. J. Law, 202, 31 Am. Dec. 232, the devise of one room in a house (or the use of one room, for the report in this respect is uncertain) was held to bar the widow's dower in a hundred acres of land. Tested by these rules, which have been established for so many years in the Court of Chancery and the Supreme Court, we think the provision in the third clause of the will amounted to a devise of lands or real estate. If it stood alone, there could be no doubt on this score . . . . ."

The widow in the case at bar, **had she made her election not to take under the will**, would have had dower in the real estate of testator; but she took the household furniture, articles of personal adornment, \$1,000 in cash, the automobile, her one-fourth interest in the residue of the personal estate, and the rooms in the house, according to the provisions of the will; she did not express her dissent in writing, renouncing the benefits of the will—she claims those benefits, and now also claims her dower in the real estate which was devised to the children of the testator. But, according to Moore v. Gordon, supra, after the lapse of the six months allowed the widow to exercise her choice, the title of the other devisees in the real estate was certain. It was established—and she had no dower right in it.

The appellants, therefore, insist that the decree of the Orphans' Court and the decree in the Prerogative Court affirming the same, should be reversed.

Respectfully submitted,  
DOLAN & DOLAN,  
Proctors of Appellants.

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**New Jersey Court of Errors and Appeals.**

IN THE MATTER OF THE APPEAL FROM  
THE DECREE OF THE ORPHANS' COURT  
OF THE COUNTY OF MORRIS, DECIDING  
AND HOLDING THAT THE WIDOW OF  
GEORGE TONKIN, DECEASED, IS EN-  
TITLED TO DOWER AND COMMISSIONERS  
WILL BE APPOINTED IN THE MATTER  
OF THE ESTATE OF GEORGE TONKIN,  
DECEASED.

On Appeal from the  
Prerogative Court.

**BRIEF OF NANCY TONKIN, THE  
WIDOW, RESPONDENT.**

**Facts.**

This matter comes before the court on appeal from a decree of the Prerogative Court.

George Tonkin died January 20, 1924, leaving a Will admitted to probate by the Surrogate of Morris County. He left him surviving, his widow, Nancy Tonkin, the respondent, and George F. Tonkin, his son, and Lillie Hoffman and Mabel Best, the appellants, his two daughters. By the first item of his Will, he ordered debts paid. By the second item, he gave to his wife all articles of personal adornment; \$1,000. in cash and one-half interest in his automobile. By the third item, he gave his son, George F. Tonkin, and his heirs, decedent's share in the real estate occupied by Tonkin & Hoffman, as a store, and his interest in the business. By the fourth item, he gave to his daughter, Lillie Hoffman and her heirs, the double house and

lot on White Meadow Avenue. By the fifth item, he gave to his daughter Mabel Best, and her heirs, the house and lot on White Meadow Avenue,

“subject to the condition that my said wife, Nancy Tonkin shall have the use of two rooms by her as her home during the term of her natural life if she so long remains my widow”.

Said two rooms have never been used by the widow or any agreement or arrangement reached concerning them. By the sixth item, he made personal bequests to grandchildren. By the seventh item, he gave to his daughter, Mabel Best and her heirs, testator's share in the double house and lot on Hibernia Avenue. By the eighth item, he gave all the residue of his estate to the widow and his three children equally. By the ninth item, he appointed an Executor.

It is agreed that the Will mentions in its specific items all the real estate of which decedent died seized, so that the eighth item, being the residuary clause, passed nothing under the Will.

It is agreed that no dissent in writing, was filed by the widow within six months after probate of the Will.

On June 26th, 1925, respondent filed her petition with the Orphans' Court of Morris County, alleging that she was entitled to dower in the lands whereof the testator died seized, and praying for the appointment of commissioners to assign dower. A hearing was had, and on May 28th, 1926, a decree entered in said Orphans' Court, decreeing that

“the widow in this matter is entitled to dower and that commissioners be appointed to apportion the same”.

On June 4th, 1926, a further order was entered appointing commissioners. Appellants in this case, took an appeal to the Prerogative Court from the decree of the Orphans' Court, that the widow was entitled to dower and commissioners would be ap-

pointed. By decree of the Prerogative Court, dated June 7th, 1926, that appeal was dismissed. On September 17th, 1926, an order confirming the report of commissioners was entered in the Orphans' Court, and on October 6th, 1926, notice of appeal was filed by appellants.

By a decree of the Prerogative Court, dated July 19th, 1927, said appeal was dismissed, from which decree the appellants have appealed to this court.

### Questions Involved.

The questions involved are:

1. Is the widow entitled to dower?
2. Was the appeal to the Prerogative Court taken within the time prescribed by the statute?

### ARGUMENT.

#### I.

**The widow is entitled to dower in the real estate whereof her husband died seized.**

Appellants rely upon Section 16 of the Dower Act, 2 Compiled Statutes (1910), page 2048, as a bar to the widow's dower in this case.

That provision acts as a bar and puts the widow to her election only where testator

“devised to his wife by a Will duly executed to pass real estate, any lands or real estate for her life or otherwise”.

The cases in this state are uniform in holding that a widow's dower is not barred because of a testamentary disposition in her favor, unless it clearly, manifestly and unequivocally appears from the

Will that the testamentary provision was intended as a substitute for the legal one. The statute invoked to bar widow's dower is in derogation of her rights and is strictly construed and the intention that the devise is in lieu of dower is implied only if the claim will disturb or be inconsistent with any provision of the Will.

In *Stark vs. Hunton*, 1 N. J. Eq. 216, at page 224, the court said the two questions that present themselves are:

"Did the testator intend the devise to be in lieu of dower and did the widow accept of the devise \* \* \* I think it may be laid down as a set rule at the present day that expressed words of exclusion are not necessary in a Will in order to bar dower. It is sufficient if there be a manifest and unequivocal intention. This intention must be so plain as to admit of no reasonable doubt. If it be doubtful or ambiguous, the legal right of the widow will prevail.

Where there are no express words of exclusion as in the case now before the court, the intention of the testator is to be gathered from circumstances. No general rule can be adopted which will properly or safely apply to the great variety of cases that are from time to time, occurring in the community. That which approaches nearest to such rule, is the principle already adverted to that the intention must be so plain as not to admit a reasonable doubt. The claim of dower must be inconsistent with the Will or so repugnant to its provisions as to disturb or defeat them."

The provisions of the Will must manifest a clear and unequivocal intention on the part of the testator to bar his wife's dower where it is not expressly stated to be in lieu of dower.

*Brokaw vs. Brokaw*, 41 N. J. Eq. 304, at page 308.

*Colgate vs. Colgate*, 23 N. J. Eq. 372.

*Stewart vs. Stewart*, 31 N. J. Eq. 398, at page 408.

In *VanArsdale vs. VanArsdale*, 26 N. J. L. 404, at page 410, the court said:

"To bar the wife's dower, the statute requires that the devise should be to the wife herself. The statute is in derogation of the widow's right of dower, a right always favored in law and should therefore be strictly construed."

and at page 411, the court said:

"The statute is designed to furnish a mere rule of interpretation. It determines in given cases the intent of the testator."

In *Freeland vs. Mandeville*, 28 N. J. Eq. 559, at page 656, the court said:

"Our statute it may be remarked however, has received a strict construction citing (*VanArsdale vs. VanArsdale*) and the rule of construction laid down by Chancellor Vroom is no less stringent and exacting in favor of the widow than that laid down in the English cases. Here as there, the question is merely as to the intention of the testator."

In *Moore vs. Moore*, 84 N. J. Eq. 39, at page 44, the court said:

"Whether a widow can accept provisions for her benefit in her husband's Will and also her dower in his real estate, is determined by the intention of the testator which is ascertained in the usual way by reading the Will from four corners and considering all its provisions in the light of the circumstances and conditions which surrounded and necessarily influenced the testator in forming his testamentary purposes and in using language directing the carrying out of those purposes."

and at page 45, the court said:

"In ascertaining the testator's intention, it is of prime importance to ascertain whether

the allowance of dower to the widow will disturb all or be inconsistent with any of the provisions of the Will."

Appellants rely upon *White vs. White*, 16 N. J. L., page 202. It will be noted in that case that testator returned to his widow all the property which she had or brought with her when he married her, and further provided that she should have a comfortable maintenance out of his real estate during her life or widowhood, in addition to one room in his dwelling. In that case, at page 211, the court says, speaking of modern decisions in reference to this matter:

"They hold that the Will of a man is his intention and whenever that intention manifestly appears, though not directly expressed in words, it shall prevail; therefore that a devise may be averred to be in lieu of dower without being so expressed in the Will, if the testator manifestly intended it to be so."

The case also cites and approves the case in 4 Kent's Com. 56, where he interprets with more clearness the general rule thus:

"That a testamentary provision must be declared in expressed terms to be in lieu of dower or that intention must be deduced by clear and manifest implication from the Will founded on the fact that the claim of dower would be inconsistent with the Will or so repugnant to its provisions as to disturb or defeat them."

The case also cites with approval *Stark vs. Hunton*, *supra*, and at page 211, the court said:

"He (testator) has provided for her a comfortable maintenance and has made it a charge upon his whole real estate, so that it goes with the estate as a burthen into the hands of his two sons, Richard and Peter, the devisees; they are to furnish the maintenance and in consideration of it they are to have the whole estate.

Now if the widow takes one third of it for her dower and they obtain only two-thirds of it during her lifetime, it wholly deranges the testator's settlement, which was that they should have the whole estate and be liable in respect of it for the whole of her maintenance."

It clearly appears that *White vs. White* was decided by the court upon the clear intention of the testator as it was deduced from the Will and the circumstances of the testator, the court in that case finding that the use of the room together with a comfortable maintenance as a charge on the whole of testator's real estate, evinced an intention that the provision was to be in lieu of dower. In the instant case, there is no such provision in favor of the widow, the devise to the appellant Mabel Best, being "subject to the condition" that the widow was to have the use of two rooms.

Appellants also rely upon *Moore vs. Gordon*, 95 Atl., page 983. That case restates the law and was decided upon the question of the intention of the testator as gathered and deduced from the terms of the Will and the surrounding circumstances of that case.

As stated in the conclusions of the Vice-Ordinary in this case, below:

"The will disposes of four parcels of improved real estate in which the widow was by law entitled to dower, but in which the sole interest given to her is the use of two rooms in one dwelling, so long as she remains a widow. The will gives her also the testator's household furniture, articles of personal adornment, \$1,000. in cash, a half interest in an automobile and a one-fourth interest in the residue of the personal estate. The record sent up shows an inventory filed in the Surrogate's office of the testator's personal estate, amounting to \$9,890.95. Considering the probable size of the testator's estate, it would seem the meagre provision made for the widow could not have been intended by the testator to be in lieu of

her dower rights in his real property. To allow her dower will not disturb or be inconsistent with any provision of the will; his devisees can take what he devised to them subject to dower. Had the testator made no provision for his widow, or had she filed her dissent, or had he died intestate, his devisees or his heirs would take subject to dower. But further it will be observed that testator made no devise whatever to his widow. He devised a house and lot to his daughter in fee simple, with a condition attached thereto that his widow should have the use of two rooms therein. The statute invoked to bar the widow's dower is in derogation of her rights and should be strictly construed. To divest her of dower there must be a devise to her of a legal estate in lands and where the devise is to another as a sort of trustee for the widow, the statute does not apply and the widow is not put to an election (*VanArsdale v. VanArsdale*, 26 N. J. Law, 404; *Hill v. Hill*, 62 N. J. Law, 442)."

## II.

**The appeal to the Prerogative Court to review the decree of the Orphans' Court, that widow was entitled to dower was not taken within the time prescribed by the statute.**

The decree of the Orphans' Court that the widow was entitled to dower was entered May 28th, 1926. The appeal from that decree to the Prerogative Court in the instant case, was filed October 6, 1926.

The appeal was presented to the Prerogative Court, for review, by virtue of Section 20, page 2050, Compiled Statutes (1910), which provides

"that it shall be lawful for any widow, heir or heirs, guardian of any minor child, or any purchaser who shall conceive himself or her-

self aggrieved by the proceedings, judgment or decree under this act, of any Orphans' Court, at any time within twenty days after final judgment or decree, to give notice in writing of the causes of complaint, and of his or her intention to apply to the Surrogate General at the next stated term, to be holden after such notice for relief, who shall review the proceedings, judgment or decree complained of, and do therein what shall be just".

The applicants' right to review the proceedings is clearly set forth in the statute in this matter, and unless they have complied strictly with its terms, they are not entitled to have the proceedings reviewed by this court.

The statute provides that notice in writing of the cause of complaint must be given "at any time within twenty days after final judgment or decree".

The final judgment or decree referred to in the statute, is such a judgment or decree from which an appeal can be taken.

See *Handord vs. Duchastel*, 87 L. 205, at 208;

*Defiance Fruit Co. vs. Fox*, 76 L. 482, at 488;

*Knight vs. Cape May Sand Co.*, 83 L. 597, at 600;

*Karst vs. Black Diamond Range Co.*, 82 Eq. 231, at 233 (decree company insolvent held final adjudication of cause).

In *State vs. Wood*, 23 L. 560, at 561, the court said

"The term final as applied to a judgment or judicial award has a technical, fixed and appropriate meaning. It denotes the essential character not the mere consequence of the order. It is used in contradiction to 'interlocutory'."

See also *Woodruff vs. Chapin*, 23 L. 555, at 559.

The appeal was not taken within twenty days from the entry of the decree of May 28th, 1926, that "the widow in this matter is entitled to dower and that commissioners be appointed to apportion the same", and appellants' right to review the matters therein adjudicated was lost.

### **Conclusion.**

Section 16 of the Dower Act is a rule of interpretation to determine in a given case the intent of the testator. It is in derogation of the widow's right and is to be strictly construed. To bar the widow's dower the provisions of the Will must show a clear and unequivocal intention on the part of the testator so to do, which intention must be so plain as not to admit a reasonable doubt. The widow is entitled to dower unless the claim to it is inconsistent with the Will or so repugnant to its provisions as to disturb or defeat them. Applying these tests to the instant case, we respectfully submit that the respondent is entitled to dower in testator's real estate and was not required to elect. We further respectfully submit that the appeal not having been taken to the Prerogative Court, within the twenty days required by the statute from the entry of the decree, that respondent was entitled to dower, that the right to review the decree was lost.

KING & VOGT,  
Attorneys and of Counsel for Respondent.