In Chancery of New Jersey.

BETWEEN

CATHARINE KIRTLAND, wife of JOHN KIRTLAND, who sues by JOHN N. WHITING, her next friend,

Complainant,

AND

JOHN KIRTLAND, LUCY KIRTLAND, Administratrix of GEORGE W. KIRTLAND, deceased, WILLIAM S. WHEELER, DUFF GREEN, STEPHEN W. WHITNEY, JARED T. KIRTLAND and CORTLANDT PARKER,

Defendants.

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To the Hon. THEODORE RUNYON, *Chancellor of the State of New Jersey:*

Humbly complaining, shows unto your Honor, your oratrix, Catharine Kirtland, wife of John Kirtland, of the township of East Orange, in the county of Essex, and State of New Jersey, who sues by her next friend, John N. Whiting—

That said John Kirtland was of the age of 68 years, on the 13th day of October last, and that your oratrix, Catharine Kirtland, was of the age of 56 years on the 29th day of May last, and that your oratrix intermarried with said John Kirtland, on the 13th day of September, 1836. 20

That on or about the 12th day of October, 1849, one Cyrus Baldwin and Elizabeth C., his wife, made and executed a certain deed of conveyance and delivered the same to the said John Kirtland, and thereby conveyed to the said John Kirtland, for the consideration of $1,000, therein expressed, the premises hereinafter described, situate in the then township of Orange, and now in township of East Orange. Beginning at northwesterly corner of land of John Munn, Jr., on the east side of road leading from Orange to Bloomfield, from thence running along said Munn's line south 50 degrees 30 minutes, east 16 chains 86 links, to land of David R. Winans; thence along the same and along land of Amos Baldwin, north 45 degrees 15 minutes, east 4 chains 66 links, to land of Thomas W. 30

Munn; thence along the same north 58 degrees 25 minutes, west 17 chains 24 links, to the aforesaid road; thence along the same south 44 degrees 45 minutes, west 2 chains 26½ links to the beginning; containing 6 acres more or less.

Which said deed of conveyance having been first duly acknowledged before Philip Kingsley, a Master in Chancery, was recorded in the office of the Register of Essex county, in Book E, 7, of Deeds, on pages 439 and 440; by means of which said deed of conveyance said John Kirtland became seized in fee simple of the premises hereinbefore described, subject to an inchoate right of dower of your oratrix, Catharine Kirtland.

That on the 1st day of July, 1856, the said John Kirtland made and executed to one George W. Kirtland, his brother, without the joinder of your oratrix, Catharine Kirtland, his certain indenture of mortgage, wherein and whereby he did grant, bargain, sell, alien, release, convey and confirm unto the said George W. Kirtland, the premises aforesaid, with the appurtenances; provided, however, that if the said John Kirtland should well and truly pay, or cause to be paid unto the said George W. Kirtland, his executors, administrators or assigns, the sum of money mentioned in the condition of a certain promissory note for $4,000, signed by said John Kirtland, payable 4 years after date to the said George W. Kirtland, or order, with interest semi-annually at 7 per cent. for value received, then the said indenture should cease and be void; which said indenture of mortgage having been first duly acknowledged before Lucius D. Tompkins, a Commissioner of the State of New Jersey, was on the 20th day of October, 1857, received in the office of the Register of Essex county, and duly registered in Book R, 3, of Mortgages, on pages 35 and 36.

That afterwards, on the 23d day of November, 1864, the said John Kirtland was still seized in fee of the above described land and premises, subject to the lien of the aforesaid mortgage, and to the inchoateright of dower in said land of your oratrix, Catharine Kirtland; and being so seized, in order to secure the payment to your oratrix, the said Catharine Kirtland, of the sum of $6,000, and to one Jared T. Kirtland, a minor, son of your oratrix and of said John Kirtland, of the sum of $1,500, money of the said Catharine and Jared T. Kirtland, theretofore had and received by the said John Kirtland and his son George Kirtland, composing the firm of Kirtland & Company, executed and delivered to one George W. Kirtland, as trustee for said Catharine and Jared T. Kirtland, without the joinder of your oratrix, Catharine Kirtland, a certain indenture

of mortgage, bearing date the same day and year last aforesaid, whereby the said John Kirtland did grant, bargain, sell, alien, release, convey and confirm unto the said George W. Kirtland, and to his successors and assigns forever, all the tract of land and premises hereinabove described, with the appurtenances; provided always, and the said indenture of mortgage, and the estate and interest thereby created, were upon this condition, that if the said John Kirtland, his heirs, executors or administrators should well and truly pay or cause to be paid unto the said George W. Kirtland, his executors, adminis- 10 trators or assigns, the said sum of $7,500, in 5 years from the date hereof, with interest thereon, payable on the first day of December, in each and every year, according to the condition of a bond or obligation of even date with said mortgage, then, and from thenceforth, the said indenture of mortgage should cease, determine and be absolutely void; which said indenture of mortgage, having been first duly acknowledged, was, on the 25th day of November, 1864, recorded in the office of the Register of Essex county, in Book K, 4, of Mortgages, on pages 544, 545, 546 and 547.

That afterwards, on or about the 13th day of February, 1865, said 20 George W. Kirtland recovered a judgment against the said George Kirtland and John Kirtland, in the Circuit Court, holden at Newark, in and for the county of Essex, for the sum of $16,714.45, or some other sum, as by the record of said Circuit Court, to which your oratrix begs leave to refer, will more fully appear, by virtue whereof the said George W. Kirtland, during his life, and his administratrix hereinafter mentioned, since his death, claimed or may claim to have some lien upon the said premises, or some part thereof, or upon the fund hereinafter mentioned; but your oratrix charges that said judgment, if a lien upon said premises and fund, or either of them, is subordinate to the 30 rights therein of your oratrix, Catharine Kirtland, as dowress. And your oratrix charges that the principal sum due on said judgment has been reduced since the rendition of said judgment, by about the sum of $5,000.

That afterwards, on or about the 16th day of December, 1869, certain parties, named William S. Wheeler and Duff Green, recovered a judgment against the said George Kirtland and John Kirtland, in the Supreme Court of the State of New Jersey, in the sum of $68,246.09, or some other sum, by virtue of which said judgment the said William S. Wheeler and Duff Green claim or may claim to have 40 some lien upon the said premises above described, or some part thereof, or upon the fund hereinafter mentioned; but your oratrix

charges that said judgment, if a lien upon said premises and fund, either of them, is subordinate to the rights of your oratrix, Catharine Kirtland, as dowress.

That on or about the 30th day of May, 1870, "The Essex Public Road Board," a Board of Commissioners incorporated by the Legislature of the State of New Jersey, for the purpose of laying out, constructing, appropriating, improving and maintaining free carriage roads in the county of Essex, did, in the exercise of the authority
10 vested in them by law, locate and adopt the lines of a projected avenue in said county, known as Park avenue, in such manner as to include within said lines a portion of the premises hereinbefore described; which portion of said premises so included within the lines of said projected avenue is bounded and described as follows: being two and eighteen one-hundredths of an acre, commencing at the intersection of the newly adopted north line of Park avenue and the west line of Daniel S. Baldwin's land, and running westerly along said newly adopted line 595 feet to land of Anna Kirtland; thence westerly along said line 524 feet to the east side of Prospect street;
20 thence southerly along said street 40 feet to the newly adopted south line of Park avenue; thence easterly along said line 1,110 feet to land of the estate of Nathaniel Baldwin, deceased; thence northerly along the line of said land and land of Daniel S. Baldwin, 100 feet 6 inches to place of beginning.

That such proceedings were had by "The Essex Public Road Board," that the premises so included within the lines of said projected avenue, and hereinbefore described, were taken and condemned by said Road Board for the purposes of said avenue, under the authority vested in them by law, and that said avenue was opened
30 upon the lines which had been located and adopted as aforesaid, and became and now remains a public highway over and across the premises herein last above described, by means whereof the owner or owners of said land so condemned and taken for public use, became entitled under the provisions of the Act constituting the Essex Public Road Board, and the supplements thereto, to compensation for the damages resulting from such condemnation.

That on the 12th day of August, 1870, Charles W. Harrison, Thomas R. Williams, Townsend Dusenbury, A. D. Traphagen and William Bush, appraisers appointed under said Act and the supple-
40 ments thereto, to make a fair, just and impartial appraisement of the damages sustained by the owners of any lands and real estate or buildings to whom compensation was to be paid as provided in said

Acts, submitted to The Essex Public Road Board their report or statement in writing of their proceedings and adjudication as such appraisers; wherein and whereby they did, among other things, report that they had adjudicated and awarded to said John Kirtland, as and for the damages sustained by him by reason of the taking and condemnation of said last described premises for the uses of said Park avenue, the sum of $15,000; which said report or statement in writing was on said 12th day of September, adopted, ratified and confirmed by The Essex Public Road Board, and was on the 16th 10 day of said September filed in the office of the Register of Essex county; and that the said sum of $15,000 became due and payable under the provisions of said acts, at the expiration of six months from the time when said award was adopted, ratified and confirmed by said Road Board, to-wit: upon the 12th day of March, 1871.

That on the 10th day of October, 1870, the said William S. Wheeler and Duff Green caused to be served upon The Essex Public Road Board a written communication, stating in substance that litigation was pending in respect to the premises hereinbefore first described, and notifying said Road Board not to pay to said John 20 Kirtland the amount of said award of $15,000. And your oratrix shows that at the time of the making of said award, and for a long time subsequent thereto, suits were pending in the Court of Chancery of New Jersey, and upon appeal from the decree of the said Court of Chancery, in the Court of Errors and Appeals of New Jersey, to which said John Kirtland, and Catharine Kirtland, George W. Kirtland, George Kirtland, William S. Wheeler, Duff Green and others, were parties, and in which the validity of said two mortgages and of the said judgment in favor of said George W. Kirtland was brought in question. That it was in and by the judgment and de- 30 cree of said Courts of Chancery and of Errors and Appeals, among other things adjudged and determined, that said indenture of mortgage for $4,000, made by said John Kirtland to the said George W. Kirtland, was a good and valid subsisting lien upon the premises herein first described, and that all sums due thereon, or on a certain promissory note secured thereby, were entitled to be first paid out of said premises; that said mortgage for $7,500, given by said John Kirtland to said George W. Kirtland, as trustee for your said oratrix, Catharine Kirtland, and said Jared T. Kirtland, was good and valid to secure the sum of $1,500, with interest, to said Jared T. Kirtland, as 40 mentioned in the bond to secure which said mortgage last aforesaid was given to that extent, and was entitled to be secondly paid out

of said premises, and that said mortgage last aforesaid conveyed an estate only for the life of the said George W. Kirtland; that the judgment of the said George W. Kirtland against said John Kirtland and George Kirtland, was the next lien upon the said premises, but for an amount less than that named therein, and entitled to be next paid out of the said premises, and that the judgment of the said William S. Wheeler and Duff Green was entitled to be next paid, as by the record of the judgments and decrees in said suits, to which
10 your oratrix begs leave to refer, will more fully appear.

That said sum of $15,000, was by said John Kirtland, and with the consent of your oratrix, Catharine Kirtland, suffered to remain and did remain in the hands of said Road Board in trust for and for the use of all the parties in interest from the said 12th day of March, 1871, until the 15th day of September, 1873, or thereabouts. That on the 10th day of October, 1872, the said George W. Kirtland departed this life, and that letters of administration of his estate were duly issued to one Lucy Kirtland. That on the 22d day of July, 1873, or thereabouts, the said first above described premises, or so much thereof as
20 had not been condemned as aforesaid, were duly sold by Frederick W. Ricord, late Sheriff of said county of Essex, under and by virtue of a writ of fieri facias de bonis et terris, issued out of and under the seal of said Essex Circuit Court, directed to said Sheriff, commanding him to make of the goods, chattels and real estate of the said George Kirtland and John Kirtland, the amount due upon the said judgment obtained by said George W. Kirtland against said George Kirtland and John Kirtland; and that at said sale the said premises were purchased by one Stephen W. Whitney, who was the highest bidder therefor, for the amount then due upon the said judg-
30 ment, or some other sum, by reason whereof said Stephen W. Whitney lays some claim to said fund; but your oratrix alleges that if said Stephen W. Whitney acquired by said sale any claim to said fund, it is subsequent and subordinate to the claim of your oratrix thereto as dowress.

That on or about the 15th day of September, 1873, the said fund held by The Essex Public Road Board in trust for and for the use of all the parties in interest, amounted in the hands of said Road Board, both principal and interest after all deductions, to the sum of $15,695.50, or thereabouts, and that on or about the said 15th day of
40 September, the said Road Board, in pursuance of some arrangement to which your oratrix, Catharine Kirtland, was not a party, paid to Cortlandt Parker, Esq., a Solicitor of this Honorable Court, as at-

torney for the parties in interest, or some of them, the said sum of $15,695.50, or some other sum, (being the amount of the said fund then remaining in the hands of the said Road Board, both principal and interest after all deductions,) in trust for and for the use of all the parties in interest, and that said sum is now in the hands of the said Cortlandt Parker, Esq., invested and drawing interest for the benefit of whom it may concern.

That immediately upon the making and ratification of said award, the said sum of $15,000 in the hands of the said Road Board, 10 became by operation of law the property of the person or persons who at the time of the condemnation of said lands were seized of the legal title thereto, subject in equity to be appropriated towards the payment of incumbrances on the premises condemned as aforesaid, and to the extinguishment of the estate of your oratrix therein as dowress, according to the priorities thereof, and secondarily to the compensation of the owner or owners of said legal title for damages sustained by such condemnation. That at the time of the condemnation of the premises herein last above described, your oratrix, Catharine Kirtland, as the wife of said John Kirtland, was the owner 20 of an inchoate right of dower therein, and had as such dowress an estate in or encumbrance on said premises prior to any estate or encumbrance created by the mortgages and judgments aforesaid, or any of them or otherwise, and that the said fund was subject in the hands of said Road and Board, and is subject in the hands of said Cortlandt Parker, Esquire, to said claim of your oratrix as dowress as to a claim prior to all others; and that your oratrix is entitled to have the value of her said dower right computed and allowed as a first claim on said fund, and paid to her out of the same, or to have the one-third part of the fund in the hands of said Cortlandt Parker, 30 Esquire, paid into court to abide the decease of said John Kirtland, to the end that in case your said oratrix shall survive her said husband, the rents, issues and profits thereof may be paid to your oratrix as dowress.

In tender consideration whereof, and for as much as your oratrix, the said Catharine Kirtland, has not a complete and safe remedy in the premises at and by the strict rules of the Common Law.

To the end, therefore, that the said John Kirtland, Lucy Kirtland, administratrix of said Geo. W. Kirtland, deceased, Jared T. Kirtland (who is a minor over the age of 14 years), William S. Wheeler, Duff 40 Green, Stephen W. Whitney and Cortlandt Parker, may upon their several and respective corporal oaths, full, true and perfect answers

make to all and singular the said premises as fully and particularly as if the same were here again repeated, and they were to be particularly interrogated according to their respective knowledge, information, remembrance and belief, and that the value of the dower right of the said Catharine Kirtland may be computed, and the claim of your oratrix for the amount so ascertained decreed to be a prior lien on said fund, and that said amount may be first paid to the said Catharine Kirtland, out of said fund, or that the one-third part of said fund
10 may be paid into court as aforesaid, and that afterwards the claims arising by reason of said mortgages and judgments, if any there be, may be decreed to be paid out of said fund, according to their respective priorities. And that in the meantime the said Cortlandt Parker, Esquire, may be enjoined and restrained from disturbing said fund, or making any payment out of the same, except by the decree of of this Honorable Court, and that your oratrix, the said Catharine Kirtland, may have such other and further relief as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto
20 your oratrix, not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said Cortlandt Parker, Esquire, restraining him from disturbing said fund, or making any payment out of the same, except by the direction of your Honor, but also the State's writ of subpœna to be directed to the said John Kirtland, Lucy Kirtland, administratrix of the said Geo. W. Kirtland, deceased, William S. Wheeler, Duff Green, Stephen W. Whitney, Jared T. Kirtland and Cortlandt Parker, Esquire, commanding them, and each of them, under a certain penalty therein to be expressed, personally to be and appear
30 before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to and abide by such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

FREDERIC ADAMS,

Solicitor and of Counsel with Complainants.

New Jersey, ss:

Catharine Kirtland being duly sworn, on her oath says that she is the complainant herein, and the wife of John Kirtland above mentioned; that she has read the foregoing bill of complaint, and that the
40 allegations therein contained, so far as they relate to the acts of depo-

On filing this bill an injunction was obtained and served upon the defendant, Cortlandt Parker, enjoining him from disturbing the said fund; which injunction was afterwards modified as appears by the final decree.

nents, are true, and so far as they relate to the acts of others, she believes them to be true ; and deponent further says that she was born on the 29th day of May, 1818, and was of the age of 56 years on the 29th day of May last ; and that the said John Kirtland was of the age of 68 years on the 13th day of October last ; that on the 13th day of September, 1836, deponent and her said husband, John Kirtland, intermarried ; that on or about the 12th day of October, 1849, the said John Kirtland became seized in fee simple of the lands and premises (then in the township of Orange, and now in the township of East 10 Orange), in said bill of complaint first mentioned, and that the title of the said John Kirtland in and to said lands has not been divested, except by condemnation, mortgages and Sheriff's sale in said bill mentioned ; and deponent says that she was not a party to either of said mortgages, and was not a defendant in the judgment under which said sale was made, and that she has never parted with her interest as dowress in said land or any part thereof, or in the fund in the said bill mentioned.

CATHARINE KIRTLAND.

Subscribed and sworn to, this 1st day of June, A. D. 1874, before me, } 20

W. Freeman, *Master in Chancery.*

IN CHANCERY OF NEW JERSEY.

The joint and several answers of William S. Wheeler, Duff Green and Stephen W. Whitney, to the bill of complaint of Catharine Kirtland, wife of John Kirtland, who sues by her next friend, John N. Whiting.

These defendants now, and at all times hereafter, saving and reserving to themselves all and all manner of benefit and advantage of errors, uncertainties and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as they are advised it is material to make answer unto, jointly and severally answering say:

That they have no personal knowledge, information or belief, except from the said bill of complaint, as to the ages of the said John and Catharine Kirtland, nor as to the date of their intermarriage, and leave the complainant to prove the same.

These defendants further answering admit that on or about the 12th day of October, 1849, one Cyrus Baldwin, and Elizabeth C., his wife, conveyed to said John Kirtland the premises described in the said bill, amounting to six acres more or less; whereby the said John Kirtland became seized in fee simple, subject to an inchoate right of dower of his wife, the said complainant.

These defendants admit that on the first day of July, 1856, the said John Kirtland, without the joinder of the said complainant, made his mortgage for $4,000 on the said premises, as stated in the bill.

These defendants admit that on the 23d day of November, 1864, the said John Kirtland, without the joinder of the said complainant, made his mortgage for $7,500 on the said premises, as stated in the bill.

These defendants admit that on the 13th day of February, 1865, one George W. Kirtland recovered a judgment against said John Kirtland and one George Kirtland for $16,714.45, by means whereof the said George W. Kirtland during his life, and his administratrix Lucy Kirtland, since his death, claimed or may claim to have some lien upon the said premises.

These defendants admit that on the 16th day of December, 1869, the said William S. Wheeler and Duff Green recovered a judgment against said John Kirtland and George Kirtland for $68,246.09, by virtue whereof the said Wheeler and Green claim some lien on the

said premises; and caused execution to be issued thereon, and on the 21st day of December, 1869, caused a levy to be made on the said six acres, and then filed a bill in chancery against the said John Kirtland, George Kirtland, George W. Kirtland, Catharine Kirtland, and one Jared T. Kirtland, and among other things asked that the said mortgage for $7,500 be declared fraudulent, and that the said six acres be sold free and clear of all incumbrances and trusts to pay the said judgment of said Wheeler and Green.

These defendants further answering show that the said George W. Kirtland, after the filing of the said bill by the defendants as aforesaid, filed his bill in this court upon his said mortgages of $4,000 and $7,500, and in his said bill claimed also that his said judgment of $16,714.45 should be paid out of the said mortgaged premises prior to the judgment of these defendants, Wheeler and Green; that the said John Kirtland, George Kirtland, George W. Kirtland and Catharine Kirtland answered the said bill of the defendants, Wheeler and Green, and that this defendant, William S. Wheeler, answered the said bill of the said George W. Kirtland.

These defendants admit that on the 30th day of May, 1870, "The Essex Public Road Board" located Park Avenue so as to include $2\frac{18}{100}$ acres of the said premises.

These defendants admit that on the 12th day of August, 1870, there was awarded to the said John Kirtland, as and for the damages sustained in the opening of Park avenue, the sum of $15,000, which award was confirmed on the 12th day of September, 1870, and filed on the 16th day of September, 1870, and said sum of $15,000 became due and payable on the 12th day of March, 1871.

These defendants further answering say that on or about the 1st day of June, 1871, "The Essex Public Road Board" tendered to the said John Kirtland the said award of $15,000; that the said complainant then made no objection to said tender; they insist that the said tender operated in law and in equity as payment thereof, and that the said sum thereupon became the money of the said John Kirtland, and subject in equity as money of the said John Kirtland, to the claims of the defendants Wheeler and Green.

These defendants admit that on the 10th day of October, 1870, the said Wheeler and Green caused to be served upon "The Essex Public Road Board" a written communication, stating in substance that ligitation was pending in respect to the premises hereinbefore first referred to, and notifying said Board not to pay to said John Kirtland the said award of $15,000.

These defendants further answering admit and say that said ligitation in the said suits resulted in a decree of the Court of Errors and Appeals, that said mortgage for $4,000 was good and entitled to be first paid out of said premises; that said mortgage for $7,500 was good to secure the sum of $1,500, and entitled to be secondly paid out of said premises, and that said mortgage of $7,500 conveyed an estate only for the life of the trustee, said George W. Kirtland, as against said judgment of Wheeler and Green; that the said
10 judgment of the said George W. Kirtland was the next lien, but for an amount of $5,000 and interest less than that named therein, and entitled to be next paid out of the said premises; and that the said judgment of said Wheeler and Green was entitled to be next paid out of the said premises, to which said decree the said defendants refer, and pray may be taken as part of this answer.

These defendants admit that the said sum of $15,000 was by said John Kirtland suffered to remain in the hands of said Board from the said 12th day of March, 1871, until the 15th day of September, 1873; but deny that said complainant had anything whatever to do or
20 say, or did or said anything, about the said award prior to July, 1873.

These defendants admit that on the 10th day of October, 1872, the said George W. Kirtland died, and that letters of administration were duly issued to one Lucy Kirtland.

These defendants further answering say that on the 22d day of July, 1873, the said premises, to wit: the entire six acres, were duly sold by Frederick W. Ricord, late Sheriff of Essex county, by virtue of a writ issued on the 13th day of February, 1865, on said judgment of George W. Kirtland, and that at said sale the said premises were purchased by said Stephen W. Whitney for the sum of $26,690,
30 by reason whereof, and under the agreement hereinafter stated, the said Whitney does lay claim to said award of $15,000.

These defendants further answering say that on the 15th day of September, 1873, "The Essex Public Road Board" did pay to one Cortlandt Parker the said award of $15,000, with certain interest thereon, making a total of $17,015.50; that the said Parker did pay to said Board, but without the consent of this defendant Whitney, certain assessments for benefits to said premises by the opening of Park avenue, to wit: the sum of $1,500 less a discount of twelve per cent.; and did invest the residue of said $17,015.50 as stated in
40 said bill.

These defendants say that the said moneys were received from "The Essex Public Road Board" by said Parker, as the attorney of said

Whitney; and to be credited as so much paid by said Whitney to said ex-sheriff Ricord on account of the $26,690, due by said Whitney to said Ricord, and deny that they were received, or that said Parker was authorized to receive them in any other way.

This defendant Whitney avers, and the other defendants believe it true, that prior to and on the 22d day of July, 1873, it was discussed between said Cortlandt Parker, representing and acting as the attorney for those interested in said mortgages for $4,000 and $7,500, said judgment for $16,714.45 and said dower claim of complainant, 10 and said Whitney as attorney and representing said judgment for $68,246.09 how the sale should be made, and how the money in the hands of said Board should be managed, and how the pretended claim set up by the complainant to an inchoate right of dower in this Road money should be managed; this defendant Whitney, as such attorney, denying the validity in law or equity of any such claim, and it was finally agreed between the said Cortlandt Parker acting for Lucy Kirtland, administratrix, John Kirtland, George Kirtland, Catharine Kirtland and Jared T. Kirtland, and the said Stephen W. Whitney acting for Wheeler and Green, and the agreement was 20 reduced to writing, that all the title John Kirtland had on the 13th day of February, 1865, in the entire six acres, should be sold by the sheriff, and the purchaser should take the $15,000 lying in the Road Board, and apply it towards the reduction of the bid for the property; that as to the claim of the present complainant for her inchoate right of dower in the Road money, the said purchaser should pay her the sum to which she should be entitled, if anything, as her dower in the said money; to which said agreement, in the hands and possession of said Parker, this defendant prays leave to refer, and claims the benefit thereof when produced. 30

These defendants further answering deny that the complainant has any inchoate right of dower in said Road money; and especially in any interest which may have accumulated upon said Road money; and insist that in any event, and if she is entitled to such dower, the $15,000 awarded as damages, must be reduced by the $1,500 assessed as benefits to same premises from same Park avenue by same Board, as well as reduced by the other items hereinafter stated.

These defendants further answering deny that the complainant has been divested of her right to dower in the six acres, or any portion thereof, whenever the said John Kirtland shall die, but insist that 40 the whole six acres were sold by the sheriff and bought by this defendant Whitney, as of the date of February 13, 1865, and as sub-

ject to the dower claims of complainant in the whole six acres; and that the complainant has full and abundant protection in the $3\frac{82}{100}$ acres unoccupied by Park avenue for any third of the entire six acres which it may ever become necessary to allot to her for dower.

These defendants further answering say that said award of fifteen thousand dollars was not made as representing only the value of $2\frac{18}{100}$ acres, inasmuch as the actual value of this strip containing $2\frac{18}{100}$ acres in fee simple does not exceed $5,000, and its fair and full value is only
10 $3,500; the said strip so occupied by the road consisting of a front of 40 feet on Prospect street, running back nearly at right angles 1,100 feet, and gradually widening to a maximum width of 100 feet at a point 524 feet distant from said Prospect street, so that the complainant is in no event entitled to more than security for one-third of said actual value.

These defendants further answering say that the award of fifteen thousand dollars was made by the said Board as follows: to pay for the usufruct of said $2\frac{18}{100}$ acres; to reimburse this property for the amount of assessments for benefits, to wit: $1,500, to pay for a
20 wall to be built to preserve the house which was left standing within a few feet of a cut 18 feet deep, to wit: about $5,000 to pay for building 1,100 feet fencing on southerly side, and 595 feet on northerly side of Park avenue, and to pay for filling up over 120,000 feet of surface to the grade of Park avenue, besides other items.

These defendants further answering say that the complainant has no vested right in this case, and therefore by the laws of New Jersey can make no claim to any portion of this Road Board money.

These defendants further answering say this injunction was obtained for the purpose of delaying and embarrassing these defendants,
30 and not for the purpose of protecting any rights of complainant, inasmuch as the complainant had, and has, a full protection in the agreement made July 22d, 1873, between this defendant Whitney and the said Parker; and this defendant Stephen W. Whitney here again tenders himself ready to carry out the said agreement, and to pay to the said complainant any sum which it may be determined she is entitled to as her dower in the said Road Board money.

These defendants humbly pray that the injunction on said bill granted may be dissolved, and that they may be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

40 B. WILLIAMSON,

Solicitor and Counsel for Defendants.

State of New Jersey, }
County of Hudson, } ss.

William S. Wheeler and Stephen W. Whitney, defendants in the above answer, named, being each duly sworn say, that the matters and things in said answer contained, so far as they relate to their own acts and deeds respectively, are true, and so far as they relate to the acts and deeds of other persons they believe them to be true.

WILLIAM S. WHEELER, 10
S. W. WHITNEY.

Sworn and subscribed this 8th day of October, A. D. 1874, before me. }
J. F. McGee, M. C. C.

State of New Jersey, }
County of Hudson, } ss.

William S. Wheeler being duly sworn deposes and saith, that Duff Green, a defendant in the above answer, named, resides in the City of Vicksburg and State of Mississippi, and is now there; that 20 deponent is the attorney in fact for said Duff Green and is personally acquainted with all the facts, matter and things stated in the said answer as the acts and deeds of the said Duff Green, and the same are true of his own knowledge; and so far as they relate to the acts and deeds of any other persons he believes them to be true.

WILLIAM S. WHEELER.

Sworn and subscribed this 8th day of October, A. D. 1874, before me, }
J. F. McGee, M. C. C.

[Here follows the ordinary replication.] 30

None of the facts in this case, except the question what the said award of $15,000 represented, are in dispute. In regard to that question, the following evidence was taken at the hearing before the Vice-Chancellor, February 13, 1875.

The defendants, Wheeler, Green and Whitney, introduced one witness, who testified as follows:

My name is Thomas R. Williams; I was one of the "appraisers of damages," for Park avenue. We, the appraisers, awarded John

Kirtland $15,000 for $2\frac{18}{100}$ acres of land, and damages sustained. The land we valued at $4,800. We calculated its value in this way: for the front of 40 feet on Prospect street, running back 300 feet, we allowed $60 a front foot, that is $2,400, and for the remaining back land, in depth 800 feet, and in width 100 feet, we allowed as much more, viz: $2,400, making a total of $4,800.

Then we allowed him for building a wall, to support the house, about $1,000.

10 We allowed him a fair amount for building fences on both sides of Park avenue, some 1,700 feet, and for filling up the back land to the grade of Park avenue—in all, $15,000.

The complainant introduced three witnesses, who testified as follows:

My name is Samuel W. Baldwin; I am a real estate dealer in East Orange; I know the property in question; I value the strip taken for Park avenue as follows:

The front of 40 feet on Prospect street, running back 500 feet, - - - - - - - - -	$7,000
20 The balance of 600 feet, and 100 feet wide, - -	3,000
Making a total of, for the strip taken, - -	$10,000

My name is Elias O. Doremus; I am a real estate dealer in East Orange, and know the property in question; I place fully as high a valuation on the strip as did Mr. Baldwin.

My name is Andrew Anderson; I live in Prospect street, 100 feet north of Park avenue. The valuation made by Baldwin and Doremus, I consider a fair one.

On cross-examination:

He says he values his own property at $150 a front foot on Prospect street, running back 900 feet. He owns a lot 300 feet north of
30 Park avenue on Prospect street, which he has had in the market for for sale at $70 a front foot, running back 900 feet.

CATHARINE KIRTLAND, *vs.* STEPHEN W. WHITNEY, et al.	*Opinion.*

FREDERIC ADAMS, for Complainant.

B. WILLIAMSON, for Defendant.

THE VICE-CHANCELLOR: The complainant is the wife of John Kirtland, to whom she was married in 1836. In her Bill of Complaint she asserts title to and seeks protection for an inchoate right of dower in a fund which has arisen from certain lands belonging to her husband, in East Orange, and condemned by the Essex Public Road Board for the purposes of a public highway, called Park avenue.

On the 16th of December, 1869, while her husband was seized in fee of the homestead place, of which the two acres and eighteen hundredths taken for the highway were a part, a judgment was recovered against him, which became a lien on the homestead land.

On the 30th of May, 1870, proceedings were instituted by the Road Board for the laying out and opening of the avenue across the homestead, and on the 12th of August, 1870, the sum of $15,000 was awarded to the husband by the five commissioners or appraisers for the damages sustained by him by reason of the taking of the two acres and eighteen hundredths. Their report was ratified by the Road Board on the 16th of September, 1870. The $15,000 became payable March 16, 1871. The sum of $1,500 was afterwards assessed for benefits, and being deducted from the damages, leaves the fund of $13,500 now in controversy.

In consequence of a notice served upon the Road Board, by the judgment creditors, forbidding the payment to John Kirtland, the money remained in the possession of the Board till September 15, 1873, when, by agreement between the parties concerned, it was paid to Cortlandt Parker, Esquire, as custodian, in whose hands a sufficient sum is retained to answer the result of this suit.

On the 22d of July, 1873, the premises originally subject to the lien of the judgment were sold under the judgment by the sheriff of Essex to the defendant, Stephen W. Whitney, and it is not disputed that he is entitled by such sale to take the fund of $13,500, subject only to the right or interest therein of the complainant.

The questions that have been raised are two: *first*—has the complainant an inchoate dower in the fund? and *second*—if she has, what sum in gross should be allowed for it?

I am of opinion that to the first of these questions there should be an affirmative answer; and to the second, that the present value of her right is the sum of $1,030.

The precise legal nature and qualities of the interest which the wife has in the land of her husband while he is living, and which is
10 called her inchoate dower, are said by Scribner, in his Treatise on Dower, vol. II, p. 5, to be difficult to determine. After reviewing the cases and dicta on the subject, he concludes that although an inchoate dower cannot properly be denominated an *estate* in lands, nor indeed a *vested* interest therein, it may nevertheless be fairly deduced from the authorities that it is a substantial right, possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such.—Vol. II, p. 8. The conclusion thus expressed by him has been judicially recognised and sanctioned in this State. It was held by Chancellor Green in Hays *vs.* Whitall,
20 2 Beas. 241, where three mortgages on the land of the husband, executed by him prior to his marriage, were foreclosed after the marriage, that upon a sale of the lands under the foreclosure decree, the surplus, after satisfying the incumbrances, should be brought into court in order that the wife's interest might be properly secured.

The protection extended to the inchoate right of dower is the same in principle as that extended to the widow's vested right. This is shown by the following cases relating to surplus: Matthews *vs.* Duryee, 43 N. Y., 525; Malloney *vs.* Horan, 49 N. Y., 116;
30 Denton *vs.* Nanny, 8 Barb., 629; Vartie *vs.* Underwood, 16 Barb., 561.

It was contended for the defendant, Whitney, that the doctrine of the above cases is not applicable to the one now in hand. I am unable to see any good and substantial reason why it is not. I think there can be no doubt that under the statutory provisions, by virtue of which the land in question was taken, the right of the widow in the land itself was extinguished. The opposite view though suggested was not insisted on for the defendant. By the fourth section of the Act of March 31, 1869, constituting the Road Board, it is
40 enacted that, "Any lands deemed necessary for the laying out of any road may be taken therefor, and damages shall be allowed, and benefits assessed, to and against the persons owning the lands so

taken and benefited respectively." By the fifth section of a supplement of February 16, 1870, the owners of land so taken are entitled to compensation for the use thereof. A condemnation of land, under these provisions, is in substance and effect a total deprivation of the land owner of all the benefits and value of his ownership. It is so regarded by juries in assessing, under the instructions of the court, the damages to be awarded. It is clearly destructive of the wife's right, unless her right be transferred, as in the above-cited cases it is transferred, from the land to the fund. There is nothing in 10 the Act or its supplements to indicate a legislative intent to extinguish her right, and in the absence of such intent, expressed or implied, a right so specially favored by the law will not be presumed to be destroyed, but must be held to attach to the fund into which the land has been changed. No authority has been discovered by the diligence of counsel giving support to the contrary view.

Next, as to the sum in gross to be allowed. Both parties prefer the allowance of a gross sum, rather than the setting aside of one third of the principal, the interest of which shall be taken by the complainant, upon her surviving her husband. The only matter of 20 dispute, affecting the result which I have arrived at in computing, by the request of both parties, the present value of the complainant's right, is that of the amount to be taken as the basis on which the computation is to be made. The defendant insists that it should be less than the sum of $13,500, while the complainant claims that it should be more. As before stated, the sum awarded for damages for the taking of the land was $15,000. How this sum was made up, or what the items of the damages were, the report of the appraisers does not show. The complainant asked a gross sum on the basis of the above total award. I think it clear, however, that the 30 sum of $1,500, afterwards assessed for benefits, should be deducted. Her inchoate dower still remains in that part of the homestead not taken for the road. She must be regarded as retaining her right in the $1,500 in the form of land, and will not be deprived of that right, either by the condemnation by the board or the sale by the sheriff. But the defendant asks a further reduction for the reason sought to be maintained by testimony adduced at the hearing, that a large portion of the sum awarded by the appraisers was not regarded by them as the value of land actually taken, but was awarded as the probable cost of a stone wall, or other improvement, which the owner 40 of the balance of the homestead might find it necessary or expedient to build. One of the appraisers testified at the hearing to the views

which the appraisers entertained upon this point in making up the award. The valuation put by him upon the land actually taken differs widely from the valuation of the complainant's witnesses, and if the testimony on either side be admissible to explain or control the effect of the written report, I am of opinion that upon the case and the proofs as they stand, the reduction asked for by the defendant ought not to be made. He has expended no part of the $13,500 upon the homestead; does not offer to do so, and is not bound in
10 any way to put a dollar of the fund, which he will receive from the award, into the land that remains subject to the inchoate dower of the complainant.

Taking the amount of the fund to be $13,500, the ages of the husband and wife to be as stated in the bill, and admitted at the hearing, and the problem is simply to determine the present value of a survivorship annuity according to the tables. No controversy exists as to the principles or the result of the calculation upon the foregoing data. As before stated, the present value, on the basis of $13,500, is the sum of $1,030.

20 I will advise a decree accordingly.

IN CHANCERY OF NEW JERSEY.

BETWEEN CATHARINE KIRTLAND, wife of JOHN KIRTLAND, who sues by JOHN N. WHITING, her next friend, *Complainant*, AND JOHN KIRTLAND and others, *Defendants*.	*On Bill for Relief.*

This cause coming on to be heard before the Honorable Amzi Dodd, Vice-Chancellor, on Saturday, the 13th day of February, A. D. 1875, upon pleadings and proofs in the presence of Frederic Adams, solicitor and of counsel for the complainant, and of Benjamin Williamson, solicitor and of counsel for the defendants, William S. Wheeler, Duff Green and Stephen W. Whitney; and the pleadings having been read and the proofs and arguments of counsel on both sides having been heard and considered; and it appearing that the bill herein is filed to establish the claim of said complainant by way of dower against a certain trust fund in the hands of Cortlandt Parker, Esquire, one of the defendants, which fund amounted, both principal and interest, at the time of filing the bill, to more than $15,000. And it further appearing that the said defendants, William S. Wheeler, Duff Green and Stephen W. Whitney, by their consent in writing, dated September 18, A. D. 1874, agreed that in case the said Catharine Kirtland should elect to accept a gross sum in lieu of dower in said fund, the Vice-Chancellor should proceed to ascertain a maximum gross sum, together with an amount sufficient to secure the interest thereon, and that said sum so ascertained, should remain in the hands of said Cortlandt Parker, Esquire, to abide the event of this suit.

And the said John N. Whiting, by whom the said complainant sues, having likewise consented to the same in writing.

And it further appearing that the said complainant did on September 18, A. D. 1874, elect in writing to accept a gross sum in lieu of her said dower, and did request the Vice-Chancellor to compute and ascertain the amount thereof, together with an amount sufficient to secure the interest thereon.

And said consents and election in writing having been duly filed

in the office of the Clerk of this Court, on September 24th, A. D. 1874.

And said Vice-Chancellor having on September 23d, A. D. 1874, ascertained the sum of $1,400 to be the maximum amount to which the said complainant would be entitled as a gross sum in lieu of her dower, provided she should be entitled to have her dower out of said fund.

And the injunction heretofore granted herein restraining said Cort-
10 landt Parker, Esquire, from paying out any portion of said trust fund in his hands, having been thereupon so far modified as to refer only to the sum of $1,400 of said fund, and having been dissolved as to the residue.

And it being admitted that the said John Kirtland and Catharine Kirtland were married as in complainant's bill alleged, and are of the ages therein stated.

And the court being of opinion that said fund, to the extent of $13,500 thereof, was subject to the claim of the complainant by way of dower, and that the complainant is entitled to be paid out of
20 said sum of $1,400 a gross sum calculated upon the basis of $13,500.

And the Vice-Chancellor having computed the actual value of complainant's said right of dower in said fund of $13,500 to amount to the gross sum of $1,030, at the date of this decree. It is, on this 30th day of June, in the year of our Lord 1875, by Theodore Runyon, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor does hereby order, adjudge and decree that said Cortlandt Parker, Esquire, do within twelve days from the service upon him of a certified copy of this decree, pay
30 to the said complainant, or to her solicitor, out of said sum of $1,400 remaining in his hands, the said sum of $1,030.

I respectfully advise his Honor, the Chancellor, to sign the above decree.

AMZI DODD.

JUNE 30, 1875.

COURT OF ERRORS AND APPEALS.

WILLIAM S. WHEELER, DUFF GREEN and STEFHEN W. WHITNEY, *Appellants*, AND CATHARINE KIRTLAND, wife of JOHN KIRTLAND, who sues by her next friend, JOHN N. WHITING, *Appellee*.	*On Bill and Petition of Appeal.*

To the Honorable, the Court of Errors and Appeals in the last resort in all causes: 10

The humble petition of Williaim S. Wheeler, Duff Green and Stephen W. Whitney, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery, by the Honorable Theodore Runyon, Chancellor, bearing date the 30th day of June, 1875, in a certain cause wherein the said Catharine Kirtland was complainant, and the said William S. Wheeler, Duff Green, Stephen W. Whitney, with John Kirtland, Lucy Kirtland, administratrix of George W. Kirtland, deceased, Jared T. Kirtland and Cortlandt Parker were defendants in this respect, to wit: that it is decreed that the fund in the hands of Cortlandt Parker, to the extent of $13,500 thereof, is subject of the claim of the complainant by way of dower, and that the complainant is entitled to be paid a gross sum calculated upon the basis of $13,500, and that the said Cortlandt Parker do pay to said Catharine Kirtland the sum of $1,030, in lieu of her dower out of a certain trust fund in the hands of said Cortlandt Parker. 20

And your petitioners humbly appeal from the said decree of the Chancellor, on the ground that the same is erroneous. 30

Your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside and for nothing holden; and that your petitioners may have such relief in the premises as to this Court shall seem meet.

Dated the thirteenth (13) day of July, one thousand eight hundred and seventy-five.

B. WILLIAMSON,
Solicitor and Counsel of Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

WILLIAM S. WHEELER, and others,

Appellants,

And

CATHARINE KIRTLAND, wife of John Kirtland, who sues by JOHN N. WHITING,

Appellee.

POINTS OF APPELLANTS.

1.—Where lands are taken for *public use*, the wife cannot set up her inchoate right of dower, and have it set off out of the amount of appraisement.

2.—She has no such right in the land which is subject to condemnation under the statute in question, and no part of the $15,000 represents her inchoate right in the land.

3.—It is the *use* of the land that is condemned and valued—the title of the husband, or any *right* of the wife, is not otherwise extinguished or affected.

4.—The adoption of the principle contended for would lead to a law suit between husband and wife in every case of like appraisement.

5.—If the wife cannot enjoin the payment of the money to the husband, in order to have her right ascertained and protected, neither can she when a judgment creditor stands in place of her husband.

6.—If she is entitled to have her right ascertained and secured, it is only in the part of the fund which represents the *value of the land*—not in that part of it awarded for damages to other land by the taking.

The following cases are relied upon :

4th Selden, p. 110, Moore vs. Mayor, &c., New York.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

WILLIAM S. WHEELER, DUFF GREEN, and STEPHEN W. WHITNEY,

Appellants,

AND

CATHARINE KIRTLAND, wife of JOHN KIRTLAND, who sues by JOHN N. WHITING, her next friend,

Appellee.

THE FACTS.

July 1 Mortgage for $4,000, John Kirtland to George W. Kirtland, without the joinder of Catharine Kirtland.

Nov. 23. Trust mortgage of life-estate for $7,500, John Kirtland to George W. Kirtland, without the joinder of Catharine Kirtland—($6,000 for Catharine, wife of John, and $1,500 for Jared T., son of John.)

Feb. 13.] Confessed judgment $16,714.45, John and George Kirtland to George W. Kirtland. Execution and levy upon above mortgaged property.

Dec. 16. Judgment $68,246.09, Wheeler and Green against John and George Kirtland. Execution and levy upon above mortgaged property.

Dec. Wheeler and Green filed bill in Chancery questioning the $7,500 trust mortgage of November 23d, 1864, and claiming the satisfaction of their judgment and execution out of the property.

Feb. George W. Kirtland filed his bill in Chancery :

1st. To foreclose his mortgage of July 1, 1856.

2d. To reform, so as to convey the fee instead of the life-estate, and to foreclose his trust mortgage of November 23d, 1864.

3d. To have satisfied his confessed judgment of February 13th, 1865.

Sept. 12. Essex Public Road Board appropriated $2\frac{18}{100}$ acres of the property and awarded $15,000 damages to the owner.

Oct. 10.] Wheeler and Green notified Road Board not to pay said award to John Kirtland.

June 1. Said award was tendered to John Kirtland by Road Board, to enable them to take possession.

Jan. 10. George W. Kirtland died.

1873. July 14. Said suits in Chancery and Court of Appeals decided, and priorities of liens settled, viz:

1st. To pay $4,000 mortgage.

2d. To reform and pay $7,500 trust mortgage, except as against Wheeler and Green—but as against Wheeler and Green the mortgage was invalid as to Catharine's $6,000, and only valid as life estate as to Jared T.'s $1,500.

3d. To pay $16,714.45 judgment except as against Wheeler and Green—but as against Wheeler and Green the judgment was reduced to $11,714.45.

4th. To pay $68,246.09 judgment of Wheeler and Green.

1873. July 22. Whole six acres, including the $2\frac{18}{100}$ occupied by Park Avenue, were sold by ex-sheriff Ricord, under execution issued February 13th, 1865, on judgment confessed to George W. Kirtland, and were purchased by Stephen W. Whitney for $26,690; the purchaser agreeing with Cortlandt Parker, attorney for administratrix of George W. Kirtland, deceased, John Kirtland, and Catharine Kirtland, to pay Catharine Kirtland for any dower in the Road award which she might be entitled to under the circumstances.

1874. June 2. Bill filed in Chancery by Catharine Kirtland, by John N. Whiting, her next friend, and Frederic Adams, her solicitor, and injunction obtained tieing up some $16,000 to secure said dower claim, and preventing the delivery of Ricord deed.

1874. Sept. 23. Injunction on argument modified so as to tie up only $1,400.

1875. Feb. 13. Cause heard by Vice-Chancellor Amzi Dodd.

1875. June 30. Decree that Catharine Kirtland was entitled to $1,030.

None of the facts are in dispute except the question, what does the award of $15,000 represent?

Catharine Kirtland introduced three witnesses (who had had no connection with the Road Board), who testified that the $2\frac{18}{100}$ acres taken by the Road Board were worth $10,000.

The appellants insisted $3,500 to $5,000 represented the land, and introduced one of the "appraisers" of the said Board, who testified that the appraisers had actually valued the land at $4,800.

The appellants insist the land represented - -	$4,800
The answer sets up and it is admitted that the assessments for benefits represent - - -	1.500
That the cost of a wall " - - -	1,000
The 1,700 feet fencing " - - - -	1,700
The 120,000 square feet filling " - - - -	6,000
	$15,000

The Vice-Chancellor decided that the award of $15,000 must be reduced by the amount allowed for assessments, to wit: $1,500; but that Catharine was entitled to her thirds in the balance.

The appellants insist that the wife, having no *vested* right, cannot interfere between the Road Board and her husband, and prevent his receiving the money. That if she could have interfered, the proper time was March 12, 1871, when the award became payable; or June 1, 1871, when the award was tendered to the husband. She never notified the Road Board of any claim; she never interfered until after the decree of the Court of Appeals of July 14, 1873, had reduced the amount of the liens prior to the lien of Wheeler and Green to the extent of over $20,000. So long as the liens represented by George W. Kirtland were to get everything it was all right, and Catharine made no claim upon the fund.

The tender of the award to John Kirtland, June 1, 1871, operated as payment, and after that date the award was held by Road Board as bailee, and subject in equity, as money of John Kirtland, as fully as though in his actual possession, to all claims against him.

See ~~argument~~ agree as alleged in answer, page 13.

As the Legislature enacted that payment should be made to the *owner*, can any Court divert the money and pay it, or any portion of it, to a wife for an inchoate right of dower?

The Board required the receipt of John Kirtland alone, and that receipt would have been a complete discharge. Suppose during the next ten years, during the life time of John Kirtland, the road is abandoned, does not the owner re-occupy it? Would not Catharine, when she became a widow, get her thirds in the *very land?* To-day

the fee in the $2\frac{18}{100}$ acres occupied by the road, is in Stephen W. Whitney, subject to Catharine Kirtland's inchoate dower. He can deed it at his pleasure, but only subject to that right.

If the Court hold that the wife can interfere, then we must deal with the question—what did the award of $15,000 represent, and to what sum is she entitled?

A street is opened, and B. is damaged $6,000 by having his house undermined, though not one foot of his land is taken for occupation. The award of $6,000 represents the cost of a wall. The wife interferes, and carries off her third, and B. is thus deprived of the means awarded him to build the wall.

Take the present case. Suppose Catharine now takes her third, and the owner, at his sole charge, builds the wall and the fences, and does the filling, and ten years hence John dies; Catharine then comes forward and gets her third a second time after having been awarded part of it out of this money.

The appellants proved that the "appraisers" estimated the value of the $2\frac{18}{100}$ acres to be occupied at $4,800. It is but right that should this Court hold that the wife is entitled to have her inchoate dower in this sum, that she should execute a deed of release to Stephen W. Whitney for the strip of land for which she is to be paid.