New Jersey Court of Errors and Appeals.

Between
WILLIAM O. CAMPBELL,
Complainant-Appellee,
and
CHARLES C. WEBER, ANNIE A. WEBER, ET AL.,
Defendants.
ANNIE A. WEBER,
Defendant-Appellant.

On Bill, etc., and Petition of Appeal.

STIPULATION AS TO STATE OF THE CASE.

(Filed January 22, 1912.)

It is hereby stipulated and agreed in conformity with rule 19 of the Court of Errors and Appeals that the following may and shall be taken as the abridgement of the state of the case in the above entitled cause and may be taken in lieu thereof.

That on the 9th day of July, nineteen hundred and ten, the complainant, William O. Campbell, through his solicitor, filed his bill in the Court of Chancery of the State of New Jersey, in which he set forth the recovery of a judgment by him against Charles C. Weber in the Supreme Court of the State of New York on the 19th day of November, nineteen hundred and nine, and entry of final judgment thereon on the 3rd day of December, nineteen hundred and nine. That on November 20, 1909, the said Charles C. Weber (his wife joining in the deed), through an intermediary transferred the land and premises described in the bill of complaint to his wife, Annie A. Weber. That thereafter final judgment was entered in the New Jersey Supreme Court based on the New York judgment, which judgment in New Jersey was entered by default. The prayer of the bill was, that the deeds from Weber and wife to his intermediary, and from the intermediary to Annie A. Weber, should be set aside as null and void

and for nothing holden, and that the lien of the judgment of the complainant should be permitted to attach to said property.

The defendant through his solicitor, on the 10th day of September, nineteen hundred and ten, filed an answer in said cause together with a cross-bill. The latter was on motion stricken out and the case was heard on bill, answer, replication and proofs. At the hearing, the complainant having proved his formal case, the proffered defense of the defendants was overruled and a decree advised by the Vice Chancellor, hearing the case for the Chancellor, in favor of the complainant. On the hearing counsel for the defendants formally moved that the inchoate dower right of Annie A. Weber should be excepted from the operation of the decree, as it was not subject to the lien of the judgment. This question was reserved by the Vice Chancellor and authorities submitted thereon, upon consideration of which the Court filed an opinion which is hereto annexed and advised a decree which is also hereto annexed.

It is further stipulated and agreed that the only question at issue on this appeal is whether or not that portion of the decree which directs that the lands and premises in question should be sold "free and discharged of the inchoate right of dower of the defendant Annie A. Weber," is erroneous.

It is further stipulated and agreed that in addition to this stipulation, the only papers to be printed are: (1) the opinion of the Vice Chancellor which was filed on the first day of December, nineteen hundred and eleven; (2) the final decree entered thereon bearing date the first date of December, nineteen hundred and eleven, and filed in the Court of Chancery on the second day of December, nineteen hundred and eleven; (3) the notice of appeal; (4) the petition of appeal; and (5) the answer to the petition of appeal.

Dated January 20, 1912.

EDWIN C. MCKEAG,
Solicitor for Appellant.
GEO. S. SILZER,
Solicitor for Appellee.

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM O. CAMPBELL,
Complainant,
and
CHARLES C. WEBER, ET AL.,
Deefndants.
} On Bill, &c.

10

OPINION.

(Filed December 4, 1911.)

When a husband conveys land to his wife through an intermediary and the wife joins in the deed to the intermediary and thus releases her inchoate right to dower, if the conveyances be set aside as fraudulent in favor of a creditor, the subsequent sale of the premises to make the creditor's claim will be free from the estates granted and conveyed, including the inchoate right of dower. *Belford v. Crane,* 16 *N. J. Eq.* (1 *C. E. Gr.*) 265, 273, distinguished. 20

On final hearing on pleadings and proofs.

Mr. John A. Coan, for complainants.

Mr. Edwin C. McKeag, for defendants.

WALKER, V. C.:—This was a suit in aid of a judgment creditor to set aside fraudulent conveyances, which issue was determined in favor of the creditor, and the question reserved upon the hearing as to whether the wife of the defendant, Weber, was entitled to have an inchoate right of dower saved and protected to her. 30

From the cases of *Den v. Johnson,* 18 *N. J. L.* (3 *Harr.*) 87, 97; *Frey v. Boylan,* 23 *N. J. Eq.* (8 *C. E. Gr.*) 90; *Boorum v. Tucker,* 51 *N. J. Eq.* (6 *Dick.*) 135, 147; *Goodhart v. Goodhart,* 63 *N. J. Eq.* (18 *Dick.*) 746; *Dowe's case,* 68 *N. J. Eq.* (2 *Robb.*) 11, 16, it appears

that the wife's right of dower was extinguished when she joined her husband in the conveyance to the intermediary who conveyed to her, and, being once extinguished, cannot be revived. Her present estate in the lands in question is one of fee arising under the conveyance to her by the person who became the conduit of title, and this estate must be swept away from her because it rests upon the conveyances made to defraud the complainant, a creditor; so much, at least, as is necessary, must be swept away, but the balance, if any, will be hers, as the conveyances are good inter parties, and she will be entitled to any surplus that may arise upon the sale.

Belford v. Crane, 16 *N. J. Eq.* (1 *C. E. Gr.*) 265, is not in conflict with the cases above cited, as I view it. In Belford v. Crane, Chancellor Green, at p. 273, remarked, that the land there in question had been purchased with the money of the husband and that there was a resulting trust in his favor. The title was in the wife, and he further observed that as no actual fraud was imputed to her, her interest in the property, as against the husband's creditors, would be secured to her to the extent of the value of her dower, the same as though title had been vested in the husband. Thus it appears that in Belford v. Crane the wife had never extinguished her inchoate right of dower by deed of release, but that, on the contrary, she had taken the legal title to the premises in trust for her husband, and, upon its being held that the property was his in equity the wife's inchoate right of dower was also held to exist. However, if there be any conflict between Belford v. Crane and the other cases referred to, as all of them except Den v. Johnson are later cases in this court, they must govern my decision.

A decree will be advised for the sale of the defendant's lands free from the estates granted and conveyed by Weber and wife to the latter through the intervention of the intermediary, including the inchoate right of dower claimed by the wife.

FINAL DECREE.

(Filed December 2, 1911.)

This cause coming on to be heard in the presence of John A. Coan, of counsel for the complainant, and Edwin C. McKeag, solicitor and of counsel with the defendants, Charles C. Weber and Annie A. Weber, and Emma C. Brennan, and the Court having heard the proofs offered on the part of the complainant, and being of the opinion that the proffered defense on the part of the defendant constitutes no bar to the relief asked for by the complainant; whereupon and upon reading the said bill and the proofs in the cause, and it appearing to the Chancellor that the several deeds of conveyance in the said bill mentioned and described, for the lands and premises therein set forth, were made and executed with the intent to defraud the complainant as a creditor of the defendant, Charles C. Weber, and that the said complainant is entitled to the relief prayed for in his said bill of complaint;

It is thereupon, on this first day of December, nineteen hundred and eleven, on motion of John A. Coan, of counsel with the complainant, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of this Court, does hereby order, adjudge and decree, that the said deeds of conveyance in said bill mentioned and described, for the tracts of land respectively therein set forth, that is to say, the deed of conveyance made by defendants, Charles C. Weber and Annie A. Weber, his wife, to the defendant, Emma C. Brennan, bearing date the 20th day of November, nineteen hundred and nine, and recorded in Book 443 of Deeds for said Middlesex County, page 74; also the deed of conveyance made by the said Emma C. Brennan to the said Annie A. Weber, bearing date the same day and year last aforesaid, and recorded in Book 443 of deeds for said county, page 78, be set aside, annulled and made void as against the judgment of the said complainant in said bill set forth and described; and that the defendants do pay the costs of the complainant in this cause to be taxed, and that the com-

plainant have execution therefor according to the course and practice of this Court.

And it is further ordered, that unless the defendant shall, within ten days after service upon them of a copy of this decree and of the taxed bill of costs, pay to the complainant or to his solicitor the amount due to him upon his judgment in this cause referred to, and the taxed costs of this suit, the Sheriff of the said County of Middlesex, to whom was directed and delivered the writ of *fiere facias de bonis et terris,* issued out of the Supreme Court of New Jersey, at the suit of the said complainant against the said Charles C. Weber, and in said bill mentioned and set forth, do proceed to sell the said tracts of land and premises, free, clear and discharged of and from the said deeds of conveyance and the estates therein and thereby granted, and of and from all claims of the said Charles C. Weber, Annie A. Weber (including the inchoate right of dower claimed by her), and Emma C. Brennan, thereunder or by virtue thereof.

MAHLON PITNEY, C.

Respectfully advised.

E. R. WALKER, V. C.

NOTICE OF APPEAL.

(Filed December 11, 1911.)

The defendant Annie A. Weber hereby appeals from so much of the final decree made in this Court in the above stated cause, as declares that the said tracts of land and premises mentioned in the deeds named in said decree shall be sold free, clear and discharged of the inchoate right of dower of the defendant Annie A. Weber, to the Court of Errors and Appeals in the last resort in all causes.

Dated December 9, 1911.

EDWIN C. MCKEAG,
Solicitor and of Counsel with defendant,
Annie A. Weber.

I conceive that there is good cause for appeal in the above stated cause.

EDWIN C. MCKEAG,
Of Counsel with defendant, Annie A. Weber.

N. J. COURT OF ERRORS & APPEALS.

Between
WILLIAM O. CAMPBELL,
Respondent,
and
CHARLES C. WEBER, ANNIE A. WEBER, ET AL.
ANNIE A. WEBER,
Sole Appellant.
} On Bill, &c.

PETITION OF APPEAL.

(Filed December 28, 1911.)

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:

The petition of Annie A. Weber, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Mahlon Pitney, Chancellor of the State of New Jersey, bearing date the first day of December, nineteen hundred and eleven, and filed in the said Court of Chancery on the second day of December, nineteen hundred and eleven, in a cause wherein the above named William O. Campbell was complainant, and the above named Charles C. Weber and Annie A. Weber and Emma C. Brennan were defendants, in this respect, to wit, that the said decree adjudges that the said tracts of land and premises mentioned and described in the deeds named in said decree shall be sold free, clear and discharged of the claim of inchoate right of dower of the defendant, Annie A. Weber. And your petitioner appeals from that part of the said decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous, for that the said tracts of land and premises mentioned and described in the deeds named in said decree ought not to be sold free, clear and discharged of the claim of inchoate right of dower of your peti-

tioner, the said Annie A. Weber, and for that the aforesaid part of said decree of the said Court of Chancery is contrary to law and in violation of the rights of the appellant in the premises. Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

EDWIN C. MCKEAG,
Solicitor and of Counsel with appellant,
Annie A. Weber.

ANSWER TO PETITION OF APPEAL.

(Filed January 20, 1912.)

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was on the first day of December last past, made, and on the second day of December last past entered in the Court of Chancery, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

GEO. S. SILZER,
Solicitor for Respondent.

Press of J. Heidingsfeld, New Brunswick, N. J.

New Jersey Court of Errors and Appeals.

Between
WILLIAM O. CAMPBELL,
Complainant-Appellee,
and
CHARLES C. WEBER, ANNIE A. WEBER, et al.,
Defendants.
ANNIE A. WEBER,
Defendant-Appellant.

On Bill, etc.
On Appeal.

Brief for Appellant.

STATEMENT OF FACTS.

The only question arising on this appeal relates solely to the dower of the appellant, Mrs. Annie A. Weber, wife of the defendant, Charles C. Weber, and does not arise on the pleadings. The question of dower was formally raised at the hearing in the court below, and was reserved for an opinion. The bill was filed in the first instance as a creditor's bill to set aside a conveyance made by the defendant Charles C. Weber to his wife Annie A Weber, through an intermediary. The wife joined with her husband to the intermediary who in turn reconveyed to the wife. At the hearing the court decided to set aside the conveyance from Charles C. Weber to his wife through the intermediary reserving the question of dower for further consideration. In filing its opinion the court disposed of the dower rights of Mrs. Weber adversely in the following language.

> "When a husband conveys land to his wife through an intermediary and the wife joins in the deed to the intermediary and thus releases her inchoate right of dower, if the conveyance be set aside as fraudulent in favor of a creditor, the sub-

> sequent sale of the premises to make the creditor's claim will be free from the estates granted and conveyed, including the inchoate right of dower. Belford v. Crane, 16 N. J. Eq. 273, distinguished."

The final decree therefore provided that the lands and premises described in the deeds of conveyance named in the bill of complaint, should be sold "free, clear and discharged of and from all claims of the said Charles C. Weber, Annie A. Weber (including the inchoate right of dower claimed by her), and Emma C. Brennan, thereunder or by virtue thereof." The defendant Annie A. Weber alone appeals from this decree. Her notice and petition of appeal raises only one question relating to the correctness of the ruling of the court below as to her dower rights in the premises in question.

I.

THE LAW IN NEW JERSEY IS NOT SETTLED AS TO THE STATUS OF THE WIFE'S DOWER WHERE THE HUSBAND'S DEED IN WHICH SHE HAS JOINED HAS BEEN SET ASIDE AT THE SUIT OF A CREDITOR.

The precise question has never been passed upon by the Court of Errors and Appeals. Such cases as touch upon this point in New Jersey are to be found in the opinion of the court below, and they indicate to some degree that the dower is destroyed the moment the wife joins with her husband, and is not restored when the husband's deed is set aside. But in all of these cases, the main issue arose on other points, and the discussion of dower was only incidental. In none of them are the authorities examined and repudiated. The entire trend of authority in all other jurisdictions where the question arose as the main issue, is squarely in favor of the wife, and restores her dower without exception, upon the setting aside of the husband's conveyance at the suit of a judgment creditor. An examination of the New Jersey cases cited in the opinion

below would naturally precede the examination of cases from other jurisdictions.

The earliest case is *Den v. Johnson,* 18 *N. J. L.* 87. This case perhaps more than any other has tended to create a feeling that the dower is destroyed. Here the main issue was whether a wife's testimony was competent to impeach her husband's deed as fraudulent. The question was one entirely of evidence. What was said as to dower was only incidental and collateral, and even on this point, the language of the court is capable of liberal interpretation. Thus on page 90, Judge Dayton said:

> "The object of her evidence was to show that the deed to Johnson was without consideration, and therefore void as against creditors, not as against the grantors; as to them it was valid in any event, and her dower was unquestionably gone."

That is to say, the dower was gone as to the grantors, and the deed is entirely valid. But this does not warrant the supposition that when the deed is set aside, the dower is still gone, and incapable of being *restored.* At any rate there is no examination of authorities and no full discussion of principles. Certainly whatever is said as to dower in this case must be treated as dicta, when the main issue relates to the competency of the wife as a witness, and not to the point arising in the case at bar.

The next case is *Frey v. Boylan,* 23 *N. J. Eq.* 90. This was not a creditor's bill, and no conveyance was set aside. The question as to whether the dower might or might not be *restored* did not arise, and could not arise, because there was no deed to be set aside. The bill was for specific performance. Hence the language used is entirely correct when the court said that a married woman by joining with her husband, extinguished and barred her right to dower. This always happens in all cases where the wife joins, but this case cannot be cited for anything more than for this bare proposition. Dower is always barred in this manner, but the case goes no farther, and does

not hold negatively that dower cannot be restored when the husband's deed is set aside at the suit of a judgment creditor. The case is not in point.

Boorum v. Tucker, 51 *N. J. Eq.* 135, was a bill in foreclosure. The mortgage was for purchase money, and naturally took precedence over the wife's dower. The rights of a judgment creditor were not involved. The husband's deed was not set aside. Hence the question of *restoring* dower could not arise. The court however, did touch upon the subject collaterally, and in expressing a view contrary to the restoration of dower, it nevertheless said on page 147 of the opinion, that the cases in which the point arose were principally creditor's bills, and that "the creditor should not be permitted to both approbate and reprobate, and hold the conveyance valid as to the wife's dower and void against his judgment." This is certainly logical. But the case itself being in foreclosure does not authoritatively settle the point raised on this appeal.

Goodheart v. Goodheart, 63 *N. J. Eq.* 746, merely affirms the well settled doctrine that a wife by joining with her husband thereby bars her dower absolutely. But nothing is determined in this case as to whether or not such dower is *restored,* when the husband's deed is set aside at the suit of a judgment creditor. The case deals with assignment of dower under a trusteeship, and the decision follows the established rule as to a wife's dower, but it is no authority on the point raised on this appeal where the husband's deed has been set aside.

Dowe's Case, 68 *N. J. Eq.* 11, cited in the opinion below, clearly shows the doubt of the court as to whether dower is barred. It says on page 16 of the opinion, that the question of dower might be raised after the case went back to the master. However the estate involved was only a life estate, and the case is no authority on the point raised on this appeal. It was not a creditor's bill, and the husband's deed was not set aside. Hence the question of *revival* of dower could not possibly arise. The court however has in-

dicated by its opinion written as late as 1904, that the question is still an open one in New Jersey.

We are thus brought to *Belford v. Crane,* 16 *N. J. Eq.* 265. The court below distinguished this case from the one at bar, because the title was in the wife, and she had not joined with her husband. The property was bought with the husband's money, and the court treated it as the husband's, but conceded dower to the wife therein. Thus it said on page 273 of the opinion.

> "No actual fraud is imputed to the wife. Her interest in the property, as against the husband's creditors, will be secured to her to the extent of the value of her dower, in case the title had been vested in the husband, subject however to encumbrances created voluntarily by herself."

In the case at bar, no actual fraud can be imputed to the wife, and it is hard to see how the court can distinguish it from Belford v. Crane, merely because in the one the title was in the husband as a legal estate, and in the other the title was in the wife as an equitable estate, the property in both instances being bought with the husband's money. In neither case can the wife be charged with actual fraud. In Belford v. Crane, the wife could not possibly join with her husband when the title was in herself. Belford v. Crane is the only case in New Jersey where the question of dower arose as one of the main issues. It is not in conflict with the other cases cited, because in those cases the issues arose on entirely different questions, and the remarks of the court on *revival* of dower, when the husband's deed is *not* set aside at the suit of a judgment creditor, are at the most *obiter dicta,* and not at all necessary to the decision of the main issue. Belford v. Crane raises the question of dower as a main issue, and being decided in favor of the wife, seems to be sufficient authority in the case at bar. The court below in the case at bar draws a distinction in that in Belford v. Crane, the wife had not conveyed her dower. Manifestly this was impossible, for she

could not join with her husband, when the title was in herself. To support the decision of the court below in the case at bar, it is necessary to impute actual fraud to the wife. The fraud however on which a creditor's bill depends is entirely presumptive. Even Belford v. Crane however does not raise squarely the question of *restoration* of dower, when the husband's deed in which she has joined, has been set aside at the suit of a judgment creditor. Belford v. Crane does however hold beyond dispute that a wife shall have her dower in an equitable estate belonging to her husband, which has been reached by a judgment creditor of the husband. Hence the law in New Jersey is not at all settled as to the *restoration* of dower in a legal estate belonging to the husband, which has been reached by his judgment creditor, upon the setting aside of his conveyance, in which his wife has joined. But Belford v. Crane is certainly a very strong authority to the affirmative in favor of the wife.

II.

THE TRUE RULE IS THAT DOWER IS REVIVED UPON THE SETTING ASIDE OF THE HUSBAND'S DEED AT THE SUIT OF A JUDGMENT CREDITOR EVEN THOUGH THE WIFE HAS JOINED WITH HER HUSBAND IN THE CONVEYANCE.

This proposition is supported by the authorities in other jurisdictions without exception. The question has arisen repeatedly in many jurisdictions, and has always been decided in favor of the wife by the courts of last resort. Hence it is most desirable that the question should be settled in New Jersey in accordance with the trend of authority in other jurisdictions. The strongest effort is now being made to produce uniformity in both case and statute law, and it would be deplorable if New Jersey should establish on this question of law, a rule so totally at variance with the other states, as that announced in the case at bar by

the court below. This is especially so, in view of the fact that all other jurisdictions where the point has been reviewed, are uniform in their decisions in favor of *reviving* dower upon the setting aside of the husband's deed.

The first case and perhaps the leading case is that of *Malloney v. Horan,* 49 *N. Y.* 111. This case is exactly on all fours with the case at bar. The judgment creditor had succeeded in setting aside the husband's conveyance in which the wife had joined, but the court fully protected her dower. It was contended that the wife by joining in the conveyance "effectually and forever released her dower." But the court held that even though this were true, yet it was not yet determined "that she is debarred of her right, as against one claiming the premises from a source other than 'the husband,' and in hostility to him."

> "The principle which governs is this. The release of an inchoate right of dower which a married woman makes by joining in a conveyance with her husband operates against her only by estoppel. An estoppel must be reciprocal, and binds only in favor of those who are privy thereto. A release of dower can be availed of then, only by one who claims under the very title which was created by the conveyance with which the release is joined. . . . But when a creditor of the husband pursues him to judgment, and attacks as fraudulent and sets aside as void the deed from him, joining in which the wife has released her right of dower, he does not connect himself with the title which that deed had created, and with which the release of dower is connected. He sets up the title of the husband as it existed before the fraudulent conveyance, and stands in hostility to the title which it has given. Not being a party to the release or in privity with it, he may not set it up in bar of dower."

Malloney v. Horan, 49 *N. Y.* 111.
Wyman v. Fox, 59 *Me.* 100.
Robinson v. Bates, 3 *Met.* 40.
Carson v. Murray, 3 *Paige,* 483.
Tompkins v. Fonda, 4 *Paige,* 448.

In *Wyman v. Fox* (supra), the court said:

> "This conveyance was fraudulent. The decree

therefore must be, that the defendants release their interest in the land levied upon, except the dower of Mrs. Wyman, her rights as doweress not being affected. The plaintiff cannot take advantage of her conveyance to Fox, nor is she estopped thereby as against him."

Wyman v. Fox, 59 *Me.* 100.

And in *Robinson v. Bates* (supra), it was held

"We are of opinion that the tenant, having avoided the deed to Jacobs, cannot be allowed to set it up as a bar to the defendant's claim. In Stinson v. Sumner, 9 Mass. 143, it was held that where a wife releases her claim of dower by joining her husband in a conveyance, and the purchaser recovers back the purchase money on account of the grantor's defect of title to the land, the release of the wife thereby becomes inoperative, and does not bar her right of dower after her husband's decease. . . . The tenant has avoided the deed of the husband, and defeated the estate on which the demandant's release of dower was intended to operate. By law therefore, and in justice, she was thereby restored to her former rights."

Robinson v. Bates, 3 *Met.* 40. (44 *Mass*).

Sanford v. Ellithorp, 95 *N. Y.* 51, was another leading case.

"At the time of the execution of the deeds, she was the wife of the grantor; as such she assented to the conveyance and evidenced the same by her acknowledgement in the manner required by law. So long as his deed stood, she was estopped from setting up any right against one claiming under it, but the moment his deed was avoided, she was remitted to her right of dower."

Sanford v. Ellithorp, 95 *N. Y.* 51.

Again in *Elmendorf v. Lockwood,* 57 *N. Y.* 329, the court said:

"The act of setting the husband's conveyance aside on the ground of fraud, made that void from the beginning, so that the wife's release could not be affirmed to be made to a person having an estate in the land. The decisions just referred to all rest upon Pixley v. Bennett (11 Mass.298), where the

sole point was that a wife could not release her dower to a stranger to the title."

Elmendorf v. Lockwood, 57 *N. Y.* 329.

Hinchcliffe v. Shea, 103 *N. Y.* 155 was another important case on the same point. The court said:

> "It is the generally recognized doctrine that when the husband's deed is avoided, or ceases to operate, as when it is set aside at the instance of creditors, or is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may after the death of her husband, recover dower as though she had never joined in the conveyance. . . . . It follows therefore that her act in joining in the conveyance, becomes a nullity whenever the title or interest to which the renunciation is incident, is itself defeated."

Hinchcliff v. Shea, 103 *N. Y.* 155.
Cf. Merchants Bank v. Thompson, 55 *N. Y.* 7.

The same view was held in *Wilkinson v. Paddock,* 57 *Hun.* 191, affirmed in 125 *N. Y.* 748, where the court held in the clearest language, that the dower right of the wife was protected as against creditors of the husband, even though she had joined in his deed, and that it always *revived* when such deed was set aside at the suit of a judgment creditor.

Wilkson v. Paddock, 57 *Hun.* 191.
Cf. also Bonhammon v. Combs, 97 *Mo.* 446.
Cf. also Stinson v. Sumner, 9 *Mass.* 143.
Cf. also Pixley v. Bennett, 11 *Mass.* 298.

Again in an Ohio case, *Ridgway v. Masting,* 23 *Oh. St.* 296, the court held:

> "The title of the plaintiff in error is not derived through the fraudulent vendees. Those fraudulent deeds were declared void, and the plaintiff took title from the husband of the petitioner, leaving her rights in the property to remain in the exact state they would have occupied had the fraudulent conveyance not been made."

Ridgeway v. Masting, 23 *Oh. St.* 296.

In a Maine case, *Richardson v. Wyman,* 62 *Me.* 283, it was said:

"The dower of a surviving wife is not barred by a fraudulent deed in which she releases dower, if the deed is set aside by the judgment of the court at the instance of creditors of the husband. . . . Where a wife joins with her husband in a deed conveying land, and thereby relinquishes dower, and a creditor of the husband afterwards levies an execution upon the land, and during the life of the husband, and recovers it in a real action against the grantee, on the ground that the conveyance was fraudulent and void as against creditors, the wife is restored to her rights, and may recover dower of such creditor or of the assignee."

Richardson v. Wyman, 62 *Me.* 283.

In an Alabama case, the court said:

"It is well settled, we think, that while such an interest may be released by the wife, or conveyed by her, jointly with her husband, it is not assignable by transfer, to a stranger, and such attempted assignment is wholly inoperative as a conveyance."

Johnstone v. Smith, 70 *Ala.* 119.
See also Withaus v. Schack, 105 *N. Y.* 332.
See also Mason v. Mason, 140 *Mass.* 63.
See also Fletcher v. Sheperd, 174 *Ill.* 271.
See also Smith v. Howell, 53 *Ark.* 281.
See also Powell v. Monson, 3 *Mason (U. S.)* 347.

In *Morton v. Noble,* 57 *Ill.* 178, the court said:

"We fully recognize the doctrine that when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, . . . the dower is not barred by the deed."

Morton v. Noble, 57 *Ill.* 178.
Blaine v. Harrison, 11 *Ill.* 384.
Summers v. Babb, 13 *Ill.* 483.

It therefore appears to be the well settled doctrine that the wife's dower is always *restored* whenever the conveyance in which she has joined with her husband, is set aside at the suit of a judgment creditor. This is the settled rule in New York, Massachusetts, Maine, Illinois, Alabama, Ohio, Missoura, Kentucky and Arkansas. No contrary doctrine is set up, except in New Jersey, and there it occurred in cases in which the

main issue rested upon an entirely different point, and the remarks of the court must therefore be largely regarded as *obiter dicta.* Certainly there was no examination of the authorities, no reasoning from principals and no direct repudiation of the rule as laid down elsewhere.

III.

THE RELEASE OF DOWER DEPENDS ENTIRELY ON THE CONVEYANCE OF THE HUSBAND.

This point is fully elaborated in the foregoing cases, and needs only to be emphasized in this connection. If the release of dower is executed by the wife in the same instrument which the husband executes, it ought to stand or fall with the husband's conveyance. Hence if the conveyance of the husband is set aside, or ceases for any reason to operate, and the title of husband passes nothing, the release of dower likewise can pass nothing. The title is placed back in the husband for the purpose of a levy at the hands of the execution creditor. It therefore logically follows that if the release of dower passes nothing to the grantee, the wife cannot be divested of any estate or contingent interest which she may have had theretofore. All this is in sound accord with the proposition that such a deed is good as between the parties thereto, but void as to creditors of the husband. As between the parties, it was the intention to pass the dower, but when this intention is frustrated at the suit of a judgment creditor of the husband, nothing is passed by either husband or wife, and the title is placed back in the husband subject as theretofore to the dower rights of the wife.

> "But when a creditor of the husband pursues him to judgment and attacks as fraudulent and sets aside as void the deed from him, joining in which the wife has released her right of dower, he does not connect himself with the title which that deed has created, and with which the release of dower is connected. He sets up the title of the

husband as it existed before the fraudulent conveyance, and stands in hostility to the title which it has given. Not being a party to the release or in privity with it, he may not set it up in bar of dower."

Malloney v. Horan, 49 *N. Y.* 111.

IV.

THE CREDITOR OUGHT NOT TO HAVE ANY GREATER FUND OUT OF WHICH TO MAKE HIS CLAIM THAN BEFORE.

It is certainly true that the husband's creditor never relied upon the dower interest, and therefore if he succeeds in setting aside the husband's conveyance, in which the wife has joined, he ought not to have any greater estate or interest out of which to make his claim, than he had before the conveyance was made. This conclusion must follow on every ground of justice. The creditor is deprived of no right or remedy which he had prior to the conveyance. He cannot complain if he gets what the husband possessed before and no more. Upon what ground of justice or morality can he seize upon what belongs to the wife, and which never offered him any ground or inducement in extending credit to the husband?

See Hinchcliffe v. Shea, 103 *N. Y.* 155.
Cf. Merchants Bank v. Thompson, 55 *N. Y.* 7.

V.

AN INCHOATE RIGHT OF DOWER IS A PROPERTY RIGHT AND CANNOT BE ARBITRARILY DIVESTED.

The proposition that inchoate dower is a property right is so well settled as to require no citations in support thereof. If it is a property right, it is entitled to all the protection which the constitution affords. It might be contended that the title is not put back in the husband, but remains in the wife in a nugatory form. But this is a contradiction in terms. If it is in the

wife, then it is not set aside, and if it is set aside, it must be placed back in the husband. That it is so regarded as being placed back in the husband, is clear from the set form of the prayer of the bill, that the conveyance in question "may be set aside and for nothing holden." Hence if the title is placed back in the husband, the dower right ought to be protected as a property right, and cannot be reached by the creditor in the absence of privity of contract or estate with the grantee. The creditor certainly cannot claim such privity of estate or contract by or through the husband. Hence the creditor must be remitted to his original rights, and cannot claim a greater extent of remedy than before.

Upon every ground of reason and justice, the wife's dower ought to be protected as against a judgment creditor of the husband. The creditor ought not to have any more property subjected to his judgment, nor a greater extent of remedy than he had before the conveyance was made.

According to the settled line of cases in all other jurisdictions, the question is authoritatively determined in favor of the wife. In those cases dower was the main issue, and the cases themselves were decided in the court of the last resort. In New Jersey, the question has never been determined by the court of last resort, and in none of those cases cited by the court below, was the question raised as a main issue, excepting Belford v. Crane (supra). Hence these cases cannot be regarded as final, especially since no examination whatever was made of the authorities, and not even the slighest discussion was given to the subject in the light of either principle or natural justice. Moreover in view of the settled doctrine in other States, it is most desirable that New Jersey should not stand alone with a doctrine unsupported by either reason or authority. The tendency is to make both laws and decisions uniform in all jurisdictions. It is impossible to see how or why a judgment creditor of the husband should be allowed to seize upon the dower of

a married woman, merely because she has joined with her husband through an intermediary to herself in a conveyance which is afterward set aside at the suit of such creditor, such creditor not having originally relied upon such dower.

For these reasons and upon the authorities above cited, it is submitted that the decree of the court below should be reversed in so far as it directs the premises in question to be sold free, clear and discharged of the inchoate dower right of the appellant, Mrs. Annie A. Weber.

March term, 1912.

EDWIN C. McKEAG,
Solicitor and of counsel with the appellant,
Mrs. Annie A. Weber.

Press of J. Heidingsfeld, New Brunswick, N. J.

New Jersey Court of Errors and Appeals.

Between
WILLIAM O. CAMPBELL,
Appellee,
and
CHARLES C. WEBER AND ANNIE A. WEBER, ET AL.,
Defendants,
and
ANNIE A. WEBER,
Appellant.
} On Bill.

BRIEF

of

George S. Silzer and John A. Coan,

On Behalf of Appellee.

I.

STATEMENT OF FACTS.

William O. Campbell, the complainant below, recovered a verdict in the Supreme Court of New York, Kings County, against Charles C. Weber, on the nineteenth day of November, nineteen hundred and nine.

Final judgment was entered thereon on the third day of December, nineteen hundred and nine. On May 18, 1910, suit was instituted in the New Jersey Supreme Court on the New York judgment, and on the 15th day of June, 1910, judgment by default was entered in said suit against Charles C. Weber for the sum of $1,214.48. At the time judgment was directed in New York Weber

was the owner of certain land in the borough of Metuchen, Middlesex County, this State.

On the 20th day of November, 1909, the day after the direction of verdict in the New York courts, he conveyed this property, through an intermediary, to Annie A. Weber, his wife. On July 9, 1910, a bill was filed in the Court of Chancery in this State, setting out the facts and praying that the deed from Weber and his wife to the intermediary and from the intermediary to Annie A. Weber be set aside as fraudulent, and that the lien of the complainant's judgment be permitted to attach to the property conveyed by Weber to his wife. The defendant filed an answer and cross bill and the cross bill having been stricken out by the Court of Chancery as being without equity the case proceeded to hearing on bill, answer, replication and proofs. The Court of Chancery found in favor of the complainant and entered a decree, copy of which is set forth on page 5 of the printed book. Before signing the decree the Vice Chancellor reserved the question as to whether or not the decree should except and save the inchoate dower right of Annie A. Weber in the property. Authorities were submitted by both sides and the Court filed an opinion which is printed on page 3 of the printed book. From so much of the opinion as directs the lands and premises be sold free and discharged of the inchoate right of dower of the defendant, Annie A. Weber, she appeals to this Court.

II.

THERE IS NO INCHOATE DOWER TO BE SAVED.

The legal title to the premises at the time the bill was filed and at the time the decree was entered was in the wife. Whatever inchoate dower she had was barred when the wife joined with the husband in the deed of conveyance to Emma C. Brennan, the intermediary.

> "The wife bars dower by joining with her husband in a conveyance."
>
> *Goodheart v. Goodheart,* 63 *N. J. Eq.* 746.

The effect of the decree of the Court of Chancery is not to place the title back in Weber again, but simply to permit the lien of Campbell to attach to the land and premises. "The transfer is valid as between the parties."

Doughty v. Miller, 15 *N. J. Eq.* 529 and the other cases cited in 3 N. J. Digest Column 6804.

Therefore the fee of the property, even after the operation of the decree of the Court of Chancery will remain in Mrs. Weber. It would be most extraordinary if it were true that one and the same person could hold a fee in a property and the inchoate right of dower in the same property in which she holds the fee.

There being therefore no inchoate right of dower to be saved existing in the wife, the decree of the Court of Chancery is manifestly correct.

III.

DOWER IS NOT REVIVED IN NEW JERSEY ON SETTING ASIDE THE HUSBAND'S DEED AT THE SUIT OF A JUDGMENT CREDITOR.

We have direct authority in New Jersey that where a conveyance executed by the husband and wife is fraudulent the dower of the surviving wife is not to be restored.

Stewart v. Johnson, 18 *N. J. Law,* page 87.

The reason for such a decision is set out by the Court in the head note, that the deed is valid as between the parties and void as to the creditors. That the practice in other jurisdictions may be to restore dower when a fraudulent conveyance is set aside does not militate against the New Jersey doctrine because of the fact that in New Jersey the deeds are not declared void but are only set aside for the purpose of permitting a judgment to attach. In other jurisdictions the deeds were

declared absolutely void and of no effect even as between the parties.

> "Where the deed is set aside and there is no estate left in the grantee on which the relinquishment of dower can operate, the dower is restored."
>
> 10 *Amer. & Eng. Ency. of Law,* page 214.

This then is the principle which distinguishes the situation in New Jersey from other states in which the dower is held to be restored. In New Jersey there is an estate left in the grantee on which the relinquishment of the dower can operate.

In the present case even after the judgment is satisfied the fee of the property is left in Mrs. Weber. The legal title to the property is not taken from her by the enforcement of the Chancery decree. There is, therefore, that estate left in her on which the relinquishment of her dower can operate. "The deed of conveyance in which the wife joins is operative as the release of her dower only to the extent of the validity of the grant of her husband's lands therein made, and therefore if for any reason such deed or conveyance fails her right of dower remains unaffected subject to the possible exception where a defeasible title is conveyed and such title is lost solely by neglect or fault of the grantee. If the conveyance becomes inoperative by reason of an outstanding superior title the right to dower remains barred.

"It is in recognition of the principle above stated that where a conveyance or a deed executed by the husband and wife is set aside as fraudulent as to the husband's creditors the wife's dower in the land is restored. *This rule does not apply however where creditors do not impeach the conveyance, since it is valid as between the parties."* 14 Cyc. 959.

Stewart v. Johnson, 18 *N. J. Law,* 87.

This is the situation then in New Jersey. The cred-

itor, in this case Campbell, does not impeach the conveyance as between the parties.

He simply seeks to have the lien of his judgment attach to the property in Mrs. Weber's hands. Therein lies the distinction between the case cited in the appellant's brief and the case at bar. If the practice in New Jersey were the same as in the States cited by counsel there might be some reason in his argument and his appeal for uniform judicial decisions. But unless the practice and principles be uniform there is no consistency in having uniform conclusions. All the authorities are uniform in holding that the dower is restored only when the instrument in which she joins and by which she—releases her dower is inoperative as a conveyance.

> "But the instrument in which she joins must be operative as a conveyance."

If it be void for the want of a seal, or for the insanity of her husband, or is set aside as in fraud of creditors there is no estate in the grantee in which the relinguishment of dower can operate.

> *Washburn on Real Property, Sec.* 426, *Vol.* 1 *p.* 214. *6th Ed.*

But in New Jersey the deed is not void, but only voidable to a limited extent, and at the suit of a creditor. As between the parties it is valid and the husband, but no act of his can set it aside.

> *Doughty vs. Miller* 15 *N. J. Eq.* 529, and cases cited in 3 N. J. Digest Column 6804.

The deed being valid as between the parties is operative as a conveyance. It conveys to the grantee an estate upon which a relinquishment of dower can operate. In the case at bar the deed from Weber and his wife to Emma C. Brennan conveyed an estate on which the relinquishment of dower could operate. So did the deed from Emma C. Brennan to Annie A. Weber. The Court of Chancery does not render void or inef-

fective either of those deeds, but only permits the lien of Compbell's judgment to attach. Mrs. Weber released her dower and joined in the deed of conveyance to Emma C. Brennan It will take the affirmative action of the Court to restore it to her. In doing equity the Court cannot restore dower which she conveyed away in assisting her husband to defraud his creditors.

The Court could set aside both the conveyance and restore the legal title to Weber where it was originally, but in so doing the Court would be restoring to Mrs. Weber that which she has not at this time; that which she released by her own solemn act; and that which she conveyed away that she might assist in a legal fraud. Even if there was no actual fraud she is presumed to have known that there was legal fraud and that the consequence of such legal fraud was the defeat of her husband's creditors. In fact it was to defeat the claim of Campbell as a creditor of her husband that she conveyed away her dower. Is she now not estopped by her own deed by which she released her dower from claiming that which she released. To put the parties back in the positions in which they originally stood before the fraudulent conveyances would be to place a premium on fraud and give to those guilty of the fraud an undue advantage. Parties in litigation could then at will convey their property in fraud of the creditors, and if successful defeat an innocent creditor, and if unsuccessful remain as well off as before the fraud. They would suffer no penalty whatever for the fraudulent conduct. The well established equitable practice has been that those guilty of fraud, whether actual or legal, must bear the consequences of their own acts.

The Court will permit the wife in this case to retain the fee.

She surely cannot retain dower while she has a fee. The enforcement of the decree entered in the Court of Chancery will not deprive the wife of any constitutional right because at the present time she has no dower in the premises and when she took a fee she took it sub-

ject to her husband's creditors and in order to get that estate released her dower.

If there was no actual fraud, the parties had a perfect right to make conveyances which would transfer the title of the premises from Weber to his wife (subject to the creditor's claim.)

There is no reason why the title should be put back in the husband. It should remain where it is.

Equity demands two things: *First,* that the creditors' judgment be satisfied; and *Second,* that the wife retain her property.

This is accomplished by the decree made.

Why should the deeds be set aside, the property restored to the husband, the judgment satisfied, and the property remaining be again conveyed to the wife; when the same thing is accomplished by retaining the title in the wife and satisfying the judgment as the decree provides?

And as before stated, if the title is in the wife and remains there, she certainly cannot take the incongruous position of claiming to own the fee to have dower, in the same premises, at the same time.

The Court does not pretend to and should not put the parties back where they stood before the fraudulent conveyances were made.

Before the conveyances, the creditor, had a right to a lien on the husband's property, for his judgment, subject to the wife's dower. Being in that position, the wife made conveyances releasing her dower and taking the fee (subject always to the lien). She was willing to release her dower to get something better—namely the fee.

She cannot complain of her choice. If the husband desired to get the fee back and give her only dower he could not have the deed set aside.

How could the Court take the wife's fee from her, there is no fraud as to that, the only fraud is as to the creditor.

Suppose the property, if sold, would satisfy the judgment, and leave as a surplus, a sum for the wife,

larger than she would get, if she only had a dower right. Would the Court in such a case have a right to say that all the conveyances should be set aside, and the parties restored to their original status so the wife may have a reduced sum as dower, and the husband what is over as owner of the fee?

Why should he have anything He intended his wife to have the fee.

Why should the wife have the right to speculate, and say "I will take dower" if that is largest, or I will take the fee if that is largest?" She made her choice by joining in the conveyances, and must abide by the choice.

It is therefore respectfully submitted that since there is no dower at the present time and the procedure in New Jersey has been not to revest the wife with that from which she has parted the decree of the Court of Chancery should be affirmed.

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