DOWER UNDER CONVEYANCES TO USES.

The desire of dealers in real estate and of others who are the victims of domestic infelicity to acquire, hold and convey lands without asking their wives to join in order to bar dower, has reagitated a good deal of the ancient learning concerning uses, and what at this date ought to be nothing more than an interesting field for research by persons studying the history of the law of real property, has become an irritating and unsatisfactory branch of modern conveyancing. It may surprise a good many who do not dabble in such problems to know that there are numerous subdivisions and other parcels of land which have been conveyed to uses with a power of appointment in favour of the *cestui que use* so that the donee of the power may appoint in fee simple free from dower. Until a few years ago this topic—as well as the learning on the subject of uses—lay dormant in our law so far as reported cases went, but recently a series of decisions handed down by single judges revived the discussion of conveyances to uses and some of them created consternation amongst conveyancers. Then came the Judgments of Mr. Justice Logie and the Appellate Division in *re Hazell*,[1] which collect and consider the earlier decisions, and conveyancers who had passed titles depending upon these powers of appointment hoped that they could "sleep o' nights" without uneasy dreams of widows claiming dower from their clients.

A disquieting feature of the judgment of the Appellate Division is the suggestion that *Re Hazell* was a feigned issue and not an actual controversy calling for settlement by the Court; but it may be pointed out that both Mr. Justice Logie and the Appellate Division gave judgment solemnly upon the point, the Counsel engaged were all men of standing at the bar, and if there had been any serious doubt about the *bona fides* of the issue submitted the Court has means of making itself acquainted with the facts. The writer can only recall one instance within his own knowledge of such a thing being done in Ontario and that was thirty years ago when a solicitor, since dead, attempted, with the co-operation of another member of the bar, to anticipate the interpretation of a will by submitting a somewhat similar set of words for the opinion of the Court. The attempt lamentably failed.

[1] (1925) 57 O.L.R. 166 and 290.

The mere fact that parties submit an actual case to the Court by agreement is not censurable even though they may all hope for a certain result, provided they fairly lay before the Court such opposing views as the tribunal ought to weigh in coming to a conclusion. In *Powell* v. *Kempton Park*,[2] a shareholder in a Race Course Company brought action to have it declared that betting there was illegal, the law having been left in an unsettled condition and, as said by Lord James of Hereford (page 190), "probably the plaintiff will regard with satisfaction his want of success in the action;" but Counsel for the plaintiff (Mr. Asquith as he was then) told the Court that it was a friendly action but argued fairly and fully the points in favour of illegality and the Court scouted the idea that there was any collusion between the parties. The writer knows nothing whatever about *Re Hazell*, but even though it was a "friendly motion," if the facts really existed and if all arguments were put fairly before the Court, the view of the House of Lords would seem to apply equally to the decision in our Appellate Division.

It appears, however, that *Re Hazell* is not to go unchallenged; for in a lengthy article by Mr. A. D. Armour, in 3 Can. Bar Rev. 593, the subject is reviewed at considerable length and doubt is thrown upon the correctness of the reasoning in that case even though it may have to be regarded as "a binding authority as to facts which may be brought within the decision."

As the conveyancer's concern centres chiefly about the question, What is the law? rather than the problem of what it ought to be, and as the decision of the Appellate Court is the law until reversed; it may be convenient to enquire first what that case decides and afterwards to venture upon a respectful examination of its soundness.

There were a number of conveyances under consideration in that case, the first being a grant to Marshall, a married man, "to and for the uses hereinafter declared," with habendum "unto the grantee to and for such uses as he shall by deed, mortgage, will or other instrument in writing appoint, and in default of and until such appointment or in so far as such appointment shall not extend unto the grantee, his heirs and assigns for ever." To stop at this point it may be observed that it was conceded by Counsel, as Mr. A. D. Armour also concedes, that if the grant had been made to A. to such uses as Marshall should appoint and in default of appointment to the use of Marshall an appointment of the use by Marshall would effectually vest the use in Marshall's appointee free from any inchoate right of dower in favour of Mrs. Marshall and that the

[2] (1899) A.C. 143.

Statute of Uses would pass the seizin to the appointee free from such dower. The difficulty, if it existed, was whether the seizin could be conveyed direct to Marshall and at the same time by the same instrument a power of appointment to uses be conferred upon him so that he could appoint to the use of another and so that the seizin would pass to his appointee free from dower. Both Mr. Justice Logie and the Appellate Court decided, the latter without hesitation, that it made no difference whether the conveyance to uses was made direct to the donee of the power or whether it was made to some one else to such uses as the donee of the power might appoint. The Court held upon the authorities which it cited that the power and the seizin might subsist together in the same person and that the power might be as effectually exercised where the grantee to uses was also the donee of the power as where the grantee to uses and the donee of the power were separate persons. The case under review presented different aspects of this subject which it is not necessary for this purpose, to discuss; but the decision whether right or wrong is as above stated and until reversed by some higher Court, conveyancers will in the future be quite justified in passing titles depending upon such powers of appointment, just as they have accepted them for many years past.

Then as to the soundness of this decision: It is submitted that the authorities cited in the judgments fully justify the result arrived at and if further support is needed, reference may be made to a learned note in Leith's Real Property Statutes (1869), pp. 233 and 234, reproduced by Messrs. Leith and Smith in their second edition of Blackstone (1880), at pp. 152 and 153, where the early cases are reviewed and the same result arrived at. The matter may, however, be approached from another point of view. Conceding that theoretically these decisions are wrong, abstract justice is equally well served whichever result is arrived at. The point is a dry legal technicality only important as furnishing a means of conveying free from dower and perpetuated in Ontario simply because we have never been sufficiently enlightened to follow the example of England and of some of the other Canadian provinces and abolish the inchoate right of dower in lands of which a husband is seized in fee. There is no doubt that originally much might have been said in opposition to the view which has prevailed in Ontario. In all these questions affecting the limitation of the use and the effect of the Statute of Uses upon the seizin there is an immense field for theorizing and such works as Fearne on Contingent Remainders and Sanders on Uses not only display vast learning and research but also provide some

fairly strenuous mental gymnastics for the energetic student. If one cares to examine the effect of debating these topics before our own Courts he cannot do better than read *Thuresson* v. *Thuresson*,[3] where the Court revived and discussed at length the controversy over *scintilla juris* and the effect of a power of appointment to uses, with the result that the very learned judges who heard the case in its various stages differed as widely as conveyancers had done over the same topics seventy-five or one hundred years before. The moral of this is that it does not matter so much which way these abstruse points are determined; the important thing is to settle them so that conveyancers may know how to draw deeds and when to pass titles. As pointed out in *Re Hazell* in appeal, the law was settled in 1822 in *Ray* v. *Pung*,[4] by deciding that the wife of a man seized in fee simple by virtue of the Statute of Uses and being also a donee of a power of appointment was not dowable out of lands which had passed to an appointee under the power prior to the husband's death.

It is quite true that the lands had not been granted direct to the donee of the power but to another to such uses as the donee might appoint and until and in default of such appointment to the use of the donee; but in this case the seizin would be in the donee of the power until appointment by virtue of the Statute of Uses just as though the seizin had been conveyed to him direct. As regards the ultimate destination of the seizin there was no difference in the result either way and while for years there were no decisions upon the point in Ontario it became the practice of conveyancers in this Province to convey direct to the husband to uses and to confer upon him the necessary power of appointment without troubling to interpose any third person as grantee to uses. No doubt this was done relying upon the opinion expressed by Mr. Alexander Leith, Q.C., for years the leading authority upon the law of Real Property in Ontario. In his Real Property Statutes (1869), pp. 233 and 234, he not only reviews the ancient controversy in the note already cited but in the text he states that a common law conveyance to the husband with power of appointment to uses will enable the husband to appoint to another free from dower. This is repeated in Messrs. Leith and Smith's Blackstone, 2nd Edition (1880), pp. 152 and 153, and in Leith's Williams (1881), p. 170. As these text books were the students' and practitioners' real property bible in Ontario for many years it will be readily seen how serious would be a decision contrary to this practice. At the end of Mr. Leith's note appear these words:— "The conveyancer may avoid all question by limiting the estate by

[3] (1899) 30 O.R. 504, (1901) 2 O.L.R. 537.
[4] 5 B. & Ald. 561.

common law conveyance or grant under R. S. O. (1877) c. 98 to some third person in fee to such uses as the purchaser may appoint and in default of and until appointment to the use of the purchaser and his heirs. *It is submitted, however, that this precaution is quite unnecessary.*" Conveyancers have acted upon this statement for half a century and any change of front now would be serious and would serve no useful purpose. *Ex abundanti cautela* the writer has preferred to convey to some third person as suggested in the note; but never with the idea that the other course was wrong.

One is tempted in closing to urge again that the time has come to examine seriously the whole body of our real property law and attempt to put it into a more workable and sensible condition. The English Law of Property Act is now in force there and while it could not be usefully introduced into this province in its present form we might do well to follow the example she has given us of first studying these problems as they affect modern life and then courageously sweeping away all that is archaic and useless. When the writer was a boy he used to hear Sir Adam Wilson, then Chief Justice of the King's Bench Division, say that our real property law was a disgrace and comparatively little has been done since to improve it.

Toronto. SHIRLEY DENISON.