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Negligence—Last Clear Chance Doctrine—Peculiar Application

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been assigned to a widow, her judgment creditor may institute proceedings to have it assigned, so that her share of the real estate may be set apart and levied upon by him. This statute recognizes the common law rule that a widow's dower, which becomes consummate upon the death of her husband, is a mere chose in action until it is assigned; *Waller v. Mardus*, 29 Mo. 25; *Young v. Thrasher*, 61 Mo. App. 413; *Carey v. West*, 139 Mo. 177; 30 L. R. A. (N. S.) loc. cit. 117, note; and so cannot be levied upon as real estate by a judgment creditor of the widow. This statute affords the creditor an adequate remedy if dower has not been assigned.

However, it seems in this case that the plaintiff had previously caused execution to be issued upon the judgment and the land to be levied upon and sold by the sheriff at judicial sale, and also had received the proceeds of the sale. The court held that the sale of the widow's interest under execution, before dower had been assigned, was void. But it was held that the plaintiff was estopped to deny the validity of the sale which was in fact void because he had accepted the purchase money of said sale and had not offered to put the purchaser in *statu quo*.

The common law rule with regard to the transfer by the widow of her unassigned dower has been changed in Missouri by sec. 316, Rev. Stat. 1919, which authorizes her to convey the dower interest before assignment.

NEGLIGENCE—LAST CLEAR CHANCE DOCTRINE—PECULIAR APPLICATION.

The facts in the case of *Hammack v. Payne, Agent, et al*, 235 S. W. 467 (Mo.), show that while plaintiff was passing over the railroad tracks at a highway crossing between stations of Wyeth and Rea in Andrew County, Missouri, he was struck by a Chicago Great Western Railroad train. His automobile was destroyed and he was seriously injured. He brought action for \$10,000 damages for his injuries. In the lower court judgment was given for the plaintiff but in the Kansas City Court of Appeals the judgment was reversed on the ground that plaintiff was guilty of contributory negligence in not looking both up and down the railroad tracks before driving thereon. As bearing upon this case a part of the opinion of *Kelsay v. Railroad*, 129 Mo. loc. cit. 372, is set out:—"This duty requires him (traveler upon the highway) to look carefully in both directions at a convenient distance from the crossing before venturing upon it, if by looking a train could be seen. He cannot close his eyes and thereby relieve himself of the consequence of his own neglect." Upon this point there seems to be some contrariety of opinion based on the doctrine of the "last clear chance." In the case of *Nicol v. Oregon-Washington Railroad & Nav. Co.* 71 Wash. 409, plaintiff attempted to go over a railroad crossing in an automobile but while upon the track the machine became stalled. Shortly after, said machine was struck by a rail-

road train and destroyed. Plaintiff brought action against the railroad company for damages and recovered. The Court held that the plaintiff's negligence had terminated after his engine had stalled and since the defendant, if he had exercised reasonable care, might have averted the accident, he also was negligent. Thus his act was considered to be the proximate cause of the damage since he had the "last clear chance" of preventing it. A similar view was held in *Green v. Los Angeles Terminal Railroad Co.* 143 Cal. 31, where the doctrine of the "last clear chance" was held to apply, notwithstanding the contributory negligence of the plaintiff; the Court saying, "It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury." Cases in Pennsylvania seem to support the principal case. *Feudale v. Hines*, 271 Pa. 199, a case similar to those above mentioned held that the doctrine of the "last clear chance" did not apply. In Pennsylvania the rule is firmly established that a failure by the driver of a vehicle to stop, look and listen in a substantial manner before crossing railroad tracks is contributory negligence which will be a bar to recovery. *Ihrig v. Erie Railroad Co.* 210 Pa. 98. By a review of other cases it will be seen that as a general rule the doctrine of the "last clear chance" is not applied to cases like the one under consideration but rather the rule that if the defendant has been guilty of contributory negligence he cannot recover. *Norfolk & W. R. Co. v. Wilson*, 90 Va. 263; *O'Brien v. McGlinchy*, 68 Me. 552. The cases in which the "last clear chance" doctrine applies seems to be those in which the negligence of plaintiff has ceased before being injured by defendant, which said injury would not have occurred if defendant had exercised reasonable care upon seeing the plaintiff in a position of danger from which he cannot extricate himself.

POWERS—LIFE TENANT WITH POWER TO SELL AND DISPOSE OF LAND IS NOT ENTITLED TO GIVE IT AWAY.

In *Cook v. Higgins*, 235 S. W. 807, a recent Missouri case, a testator's devise of all his property to his wife with power to sell and dispose of as she saw fit and to execute deeds thereof, with remainders over of any property undisposed of upon her death, was held to create a life estate in the wife with power of sale and disposition; and remainders over at her death as provided in the will. The widow, shortly before her death, conveyed the farm of 150 acres by warranty deed to her nephew in consideration of "one dollar and other good and valuable considerations." The only other consideration shown is an agreement between the widow and the grantee that he would live on the farm and care for her for the rest of her life. This agreement was not carried out by the grantee. The court held that the consideration for the conveyance of the land was insufficient and that the deed to the grantee was not a sale and disposition of the land in accordance with the provisions of