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INTERPRETATION AND RE-INTERPRETATION OF A CLAUSE: MAGNA CARTA AND THE WIDOW'S QUARANTINE

Janet Loengard*

Looking in pre-modern English legal records for examples of the widow's quarantine and the writ *de quarantina habenda*¹ that protected it is a little like looking for the abominable snowman; many people swear it exists, although no one has seen it for certain. But in the case of the elusive action, there are just enough sightings to enable one to say positively that it was there. Over the centuries, quarantine did leave a trail. This Paper follows it on two sides of an ocean, because quarantine provides a rather good example of how a provision of Magna Carta was understood or interpreted by courts—and societies—with differing attitudes to land, heirs, and women.

The widow's quarantine of course has nothing to do with disease; it was designed for the protection of the woman who had just lost her husband and who faced imminent eviction from her home by an unsympathetic heir or lord. The author of the treatise called *Britton* described the situation with brutal reality: “[I]t is improper that such wives should be thrust out of doors with their husbands' bodies, without having a place to lodge in”² The remedy for that had its inception in Magna Carta and, unlike the provisions in the same chapter guaranteeing dower and maritagium and inheritance, here a new right is set out; the Charter of 1225 Chapter 7 reads:

[A]nd let her remain in the chief messuage of her said husband for forty days after the death of her said husband, within which [time] her dower shall be assigned to her, unless it shall have been first assigned, or unless that house is a castle; and if she shall leave the castle, immediately let there be provided for her a suitable house in which she is able to live properly until her dower is assigned to her according to what has been said; and in the meantime let her have her reasonable estovers of common [*de communi*].³

That is her right of quarantine. The penalty for its violation was set out in 1236, in the first chapter of the Statute of Merton: a widow who could not have dower or

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¹ *Quarantine* is spelled *quarentina* in the manuscript Registers of Writs and abridgements. I have adopted the modern spelling throughout except within direct quotations.

² 2 BRITTON 246 (Francis Morgan Nichols ed. & trans., 1983).

³ MAGNA CARTA (1225) ch. 7, in J. C. HOLT, MAGNA CARTA 420, 422 (with introduction by George Garnett & John Hudson, 3d ed. 2015).

quarantine without plea and who succeeded in her suit was to have damages to the value of her dower from the time of the husband's death to the date she recovered it.⁴ The language is obviously primarily concerned with dower and somewhat less useful to the woman who just wanted to get back into a house.

The writ to achieve that was eventually the action brought by the writ *de quarantina habenda*. It is not in the earliest Registers of Writs and in only one of those I have seen from the earlier fourteenth century, but it appears in some, not all, in the fifteenth century and it is in the printed Registers.⁵ Its wording recites the language of Magna Carta although there is no mention of a substitute house and, significantly, the phrase on estovers reads not "*de communi*" but "*de bonis eorundem*" of their goods, as if to dispel any misunderstanding of "common."⁶ It goes on to recite that immediately after the husband's death the defendant forcibly ejected the plaintiff woman from the chief messuage which was not a castle, nor was her dower assigned, nor did he allow her to take possession [*percipere*] of estovers, to her serious and not small damage and against the tenor of the aforesaid charter. The sheriff to whom the writ is addressed is ordered to call the parties before him, hear their accounts [*rationibus*] there and then, and do the said widow full and swift justice according to the tenets of the said charter.⁷

⁴ 20 Hen. III, c. 1, in 1 STATUTES OF THE REALM 1. But Cambridge University Library [hereinafter CUL] MS Ee. 5. 22, fol. 53 explains that if she was holding in quarantine, the widow would not recover damages until after the forty days—presumably meaning that she could not sue for dower within that period—because the law did not require the heir to endow her *within* the forty days if she was seized of her quarantine. The implication is that he could safely wait until the fortieth day to assign dower. CUL MS Ee. 5 22, fol. 53, reprinted in 71 SELDEN SOCIETY, READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY xciii (Samuel E. Thorne ed., 1954).

⁵ The writ is not in British Library [hereinafter BL] Lansdowne MS 471/37 (1307–27), BL Additional MS 38821 (c. 1289/90), BL Lansdowne MS 575/16 (14th C), BL Lansdowne MS 564/5 (13th–14th C), BL Lansdowne MS 467/38 (14th C), BL Lansdowne MS 652/75 (14th C), BL Lansdowne MS 476/46 (14th C), BL Additional MS 25237 (14th C), Harvard Law School [hereinafter HLS] MS 61 (1375–1425), HLS MS 24 (c. 1275), or Middle Temple MS 74 (undated). BL Harley MS 858 is listed as early fourteenth century and has two Registers. The writ is not in the first but is in the second. However, in addition to the second Register the volume sets out various statutes including the limitation of the county electorate to the 40-shilling freeholder, 8 Henry VI, c. 7 (1430), 2 STATUTES OF THE REALM 243, so the volume may have been supplemented over a period of time. *De quarantina habenda* appears in the fourteenth-century manuscript HLS MS 166, dated at c. 1350. It is found in the fifteenth century Registers in BL Stowe MS 409, BL Additional MS 19558, and BL Additional MS 25028 but not in BL Stowe MS 410, or BL Additional MS 34901. Printed Registers have a marginal note: *Quod mulier habeat quarantinam suam et rationabile estoveriam suam de communi. Magna Carta c. vii, Merton ca. 1 cum pena.*

⁶ I.e., to rule out an interpretation that what was involved was the simple right to take firewood for household use, common of estovers.

⁷ ANTHONY FITZHERBERT, LA NOUVELLE NATURA BREVIVM 161v–162 (London, 1581) [hereinafter FNB].

The statute seems quite clear, but the implementation of it was not. The wording of the writ is open to interpretation: What conditions had to be met before a woman could claim quarantine? What might she do to lose it? What is a chief message? What is a castle? What is a house in which the widow can live decently?⁸ What does estovers cover? Some of the questions had definite answers. First, since quarantine is based on dower, the basic requirements for dower had to be met: a woman had to have been lawfully married to the deceased and he, in turn, had to have been seised of property with which to endow her.⁹ But unlike dower, since the reference is to his chief message, only property of which a husband was seised at the time of his death would be eligible for quarantine. In an adaptation of Merton's decree awarding damages, the rule in quarantine was held to be that a successful widow plaintiff was put in place for as many of the forty days as were left and received damages for the days during which she was ousted.¹⁰ If the forty days were over, she could still sue for damages for the days during which she was ejected.¹¹ Those are the easy questions. Others, less clear, could be settled only by litigation. And there is almost no recorded litigation. I have never seen an action commenced by the writ *de quarantina habenda*. There is not quite a handful of cases involving or even mentioning quarantine: one in the Year Books; one, and two fragments, in the nominate reports; and only one I know of in the plea rolls I have examined.

There are various possible reasons for the silence. One of course might be that the whole idea of quarantine was from the start not accepted and was quietly ignored. That is unlikely, since those few cases do exist and masses of fifteenth- and sixteenth-century commentary assume quarantine's existence. Nor have I seen any objection to the principle involved; the Fine Rolls of Henry III show that even the king granted manors to widows to live in until their dower was assigned, although

⁸ The Latin word is *honeste*, decently. One sixteenth-century text explains that the word refers to the house, not the woman because "it is immaterial if she keeps bawdery." *Gray's Inn MS 25, fols. 27–28*, in 132 SELDEN SOCIETY, SELECTED READINGS AND COMMENTARIES ON MAGNA CARTA 65, 70 (John Baker ed., 2015) [hereinafter SELECTED READINGS].

⁹ *Id.* at 68.

¹⁰ *Id.* at 68–70.

¹¹ See the "ordinary gloss," CUL MS Hh. 2.6, fol. 9, collated with University College Oxford MS 163, unfoliated; Bodleian Library MS Rawlinson C.294, fols. 3–4; CUL MS Ee. 5.22, fols. 26v–28; CUL MS Ii. 5.43, fols. 29–30v, fol. 10 [hereinafter CUL MS Hh. 2.6], tr. *The Fifteenth Century 'Ordinary Gloss'*, in SELECTED READINGS, *supra* note 8, at 21, 24; see also Northwestern University Law School Newcastle MS, fols. 10v– 11v, 10v, tr. *Probably Lincoln's Inn, c. 1455/60*, in SELECTED READINGS, *supra* note 8, at 30, 30–31; HLS MS 13, at 395–402, 396, tr. *Probably Lincoln's Inn, c. 1491/1508*, in SELECTED READINGS, *supra* note 8, at 44, 45–46; BL MS Hargrave 87, fols. 208v–215v, 209, collated with HLS MS 88, fols. 8v–13 [hereinafter BL MS Hargrave 87], tr. *Humphrey Hervy, Inner Temple, c. 1480/1500*, in SELECTED READINGS, *supra* note 8, at 49, 50; Gray's Inn MS 25, fols. 27–28, tr. *From the Chaloner Manuscript, Gray's Inn, c. 1520*, in SELECTED READINGS, *supra* note 8, at 65, 66. I am grateful to Professor Baker for permitting me to see the text before the volume was issued.

without reference to Magna Carta.¹² A second reason could be that almost no women ever brought the action. This may be the opinion of Sir John Baker; in the introduction to his edition of *Selected Readings and Commentaries on Magna Carta*, he noted finding numerous comments on quarantine, adding that it was “a subject less visible in the year books because the legal remedy was impractical and rarely if ever used.”¹³ A third reason, based on the non-appearance of *de quarantina habenda* in so many early Registers, might be that at least until the middle of the fourteenth century the writ, and therefore the action, was not widely known if they were known at all. Moreover, at roughly that time dower began to be replaced by the jointure, the estate set aside by the bridegroom’s family for the support of the bride should she become a widow; when a woman had a jointure, there was of course no need for dower and with certain exceptions she could not claim both.¹⁴ But there is another, simpler explanation for the silence. The writ is viscontiel and it was apparently non-returnable. Such writs stayed with the sheriff, who might need them if he was called to explain his handling of a matter. What he, or his heirs, did with them was their concern. Moreover, he acted alone; in the *Nouvelle Natura Brevium*, Anthony Fitzherbert explained that the sheriff was not to wait until the county court was held—which might be a matter of weeks—because the writ was a commission to him.¹⁵ Rather, he was to immediately make process against the defendant, within two or three days, and thereupon to proceed as justices do in a commission of oyer

¹² E.g., “[o]rder to the sheriff of Yorkshire to permit Margaret [widow] of Gilbert of Ayton, to stay in the houses [sic] of the same Gilbert until her dower is assigned from the same land either by the king or by another who will have custody of his land [;]” note that “[t]he king has granted the manor of Iver with appurtenances to Ada, [widow] of John son of Robert, until a certain dower has been assigned to her from the lands formerly of the same John.” 3 CALENDAR OF FINE ROLLS OF THE REIGN OF HENRY III 36, 390 (Paul Dryburgh & Beth Hartland eds., 2009). Several later writers declared that the king was not bound to give quarantine and there could be no suit for it against him. HLS MS 13, at 395; BL MS Hargrave 87 fol. 209v, in SELECTED READINGS, *supra* note 8, at 45, 50.

¹³ SELECTED READINGS, *supra* note 8, at lxix. One manuscript suggests trespass as an alternative action: “The law is the same of the dower or inheritance, that she shall hold on in the chief house, if it is not a castle, and have her quarantine And if the heir ousts her she shall have an action of trespass against the heir,” Library of Congress [hereinafter LC] MS 139, at 3–8, 3 collated with a second version, *id.* at 209–14, in SELECTED READINGS, *supra* note 8, at 33, 34. Trespass, brought in the central courts and resulting in an award of damages, would be useful only after the forty days were over, as in the case of Matilda de Kelkfeld, *infra* note 17.

¹⁴ 27 Hen. VIII, c. 10 (1535–36), 3 STATUTES OF THE REALM 540–41.

¹⁵ FNB, *supra* note 7, at 161. So far as I know, only seven counties have any county court material extant and much of it is fragmentary. I have found no evidence of *de quarantina habenda* in those I have seen. For discussion of the courts see ROBERT C. PALMER, THE COUNTY COURTS OF MEDIEVAL ENGLAND (1982). Professor Palmer has confirmed in conversation that he has not seen a suit for quarantine in county court records. There is no relevant material in The National Archives [hereinafter TNA] C255/5/1, a unique file which includes existing writs to sheriffs and bailiffs ordering justice to be done, 1265–1307. Many refer to matters heard without writ in county court but there is a variety of cases: debt, nuisance, and others.

and terminer.¹⁶ In other words, the only time quarantine would appear in the existing records would be if litigation concerning or based on it went to another court.

Those cases and fragments did appear. The first is a King's Bench case from Michaelmas Term 1290.¹⁷ Matilda de Kelkfeld, widow of Henry, claimed that despite the provisions in Magna Carta, which she spelled out in full, one Steven le Tygler and five or six other men (the number varies in subsequent entries) had violently, *vi et armis*, ejected her from her late husband's chief messuage within forty days of his death, although no dower had been assigned.¹⁸ Moreover, they had taken and carried away her animals and other goods and chattels found there, whereby she had suffered damages of a hundred shillings.¹⁹ She did not, and could not, sue to be put back into the messuage because the forty days would have been long over and in any event she could not at any time have brought an action for quarantine in King's Bench.²⁰ Matilda sued in trespass.²¹ It is not clear whether her estimate of damages was based solely on the loss of goods rather than on her ouster, or whether both were included in the computation.²² There is no demand for dower—that would have required a different writ—and no statement as to whether her dower was ever assigned. But the plea roll record recites the exact Magna Carta language on quarantine as the justification for her occupation of the chief messuage.²³ Steven le Tygler denied force and arms, and explained that the late Henry had left an underage son and that his overlord had put Steven into custody of both the heir and his land.²⁴ Matilda quite properly simply reiterated her statement because Steven, like the heir, would have taken subject to her right.²⁵ It is unknown if she was successful; both parties asked for a jury but after multiple adjournments over four terms the matter disappears from the records.²⁶ It is unreported elsewhere. But, significantly, the gravamen of her claim was not challenged; Magna Carta had conferred a right, she fell within its protection, and the suit was based on its violation.

¹⁶ FNB, *supra* note 7, at 162.

¹⁷ TNA KB27/125 fol. 18. All plea rolls cited have been viewed on the online database *Anglo-American Legal Tradition*, maintained by Professor Robert C. Palmer at the O'Quinn Law Library of The University of Houston Law Center, at <http://aalt.law.uh.edu> [<http://perma.cc/C64Z-M3VR>]; fol. 18 is IMG 7837. I was alerted to Matilda de Kelkfeld by Dr. Paul Brand's mentioning in his 2015 Selden Society lecture on Magna Carta that there was a case in 1290 concerning quarantine.

¹⁸ TNA KB27/125 fol. 18.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See LC MS 139, at 3, tr. *Probably Lincoln's Inn, c. 1460*, in *SELECTED READINGS*, *supra* note 8, at 33, 34.

²³ TNA KB27/125 fol. 18.

²⁴ *Id.*

²⁵ *Id.*

²⁶ TNA KB27/126 fol. 14, KB27/127 fol. 182v, KB27/129 fol. 6; KB27/130 fol. 8v.

The best-known case dates from exactly a hundred and fifty years later, Michaelmas Term 19 Henry VI,²⁷ and it demonstrates an exceptionally narrow judicial interpretation of the apparently straightforward language of the statute, reflecting how changing views of legal rights affected a particular provision. Courts generally looked with some favor on dower—widows won a large proportion of their suits—but apparently the same benevolent attitude did not extend to quarantine. There is no suggestion in this case that the judges were following precedent, no comment referring to earlier decisions; from the wording of the report, their decision rested on their own independent conclusions.²⁸ The case turns on the meaning, in the context of Magna Carta Chapter 7, of the word *estovers*. It is true that Magna Carta granted the widow *estovers de communi*, of common, and the writ *de quarantina habenda* speaks of *estovers de bonis eorundem*, of their goods.²⁹ But by the fifteenth century, the doctrine that married women had and could have no personal property had taken hold. There could be no common goods; all goods were the husband's.³⁰ The holding relies on that premise. This was a suit brought in Common Pleas by a writ of debt against an unnamed widow as executrix of her husband.³¹ Her attorney was none other than Serjeant John Fortescue, who pleaded that she was the wife and executrix of deceased, remained in his house after his death, and ate and drank of *his* goods until she was endowed.³² Richard Newton, the chief justice, interrupted: the widow could not administer an estate by consuming it.³³ A husband was not bound to find a living for his wife after his death.³⁴ Moreover, it was added by the clerk of Common Pleas, Magna Carta says a woman shall have reasonable *estovers*, not that she should have her living from them; Justice Fulthorp chimed in to illustrate that by saying that she could not slay an ox and live on it.³⁵ The case is reported

²⁷ It is expressly cited as authority in CUL MS Ee. 6. 1, fol. 3; BL MS Hargrave 87, fol. 209; and BL MS Additional 25232, fols. 27–31, fol. 29v (where it appears to be referred to as a statute). For the above and their translations, see SELECTED READINGS, *supra* note 8, at 27, 27; *Humphrey Hervy, Inner Temple, c. 1480/1500*, in SELECTED READINGS, *supra* note 8, at 49, 50; SELECTED READINGS, *supra* note 8, at 83, 88.

²⁸ Year Book [hereinafter YB] Mich. 19 Hen. VI, fols. 14v–15r, pl. 34.

²⁹ See Gray's Inn MS 25, fols. 27–28, tr. *From the Chaloner Manuscript, Gray's Inn, c. 1520*, in SELECTED READINGS, *supra* note 8, at 65, 66.

³⁰ For a later statement of the rule, see *id.*: “Of common: namely of those things which were her husband's.” The manuscript is dated at c. 1520 by Professor Baker. *Id.*

³¹ YB Mich. 19 Hen. VI, fols. 14v–15r, pl. 34.

³² *Id.* She also claimed that she had paid the expenses of her husband's funeral, presumably as partial explanation for the diminished amount left to the heir. *Id.* Bracton speaks to both points: “Expenses in connexion with the funeral ought also to be deducted beforehand. Also the necessary expenses of the wife throughout her quarantine, unless her dower is earlier assigned her.” 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 180 (George E. Woodbine ed., Samuel E. Thorne trans., with notes, 1968) [hereinafter BRACTON].

³³ YB Mich. 19 Hen. VI, fols. 14v–15r, pl. 34.

³⁴ *Id.*

³⁵ *Id.*

in *Statham's Abridgement* and *Fitzherbert's Abridgement* as meaning that a widow could use stuff—Statham's word—that was in the house, such as pots, pans, beef, and bacon, but no more.³⁶ Commentators not only accepted but embroidered on the decision; one wrote gleefully that “she shall not have food . . . or drink from her husband's goods, but only such things as are . . . not wastable,”³⁷ while another forbade the use of food or drink found in the house and the slaying of beasts as a wrong to the executors.³⁸ To be sure, other writers were more moderate. One, in the fifteenth century, would grant “housebote and haybote and all other forms of sustenance, such as slain oxen and sheep”—livestock was still off limits.³⁹ More specifically but along the same lines, another would allow “reasonable sustenance from the movable things which were her husband's at the time of his dying, such as beef, bacon, pots, pans and such like. . . . But she may not slaughter oxen or sheep to eat,” again citing Newton's comments in the Year Book entry.⁴⁰ But when Anthony Fitzherbert duly reported the case in his *Abridgement*, he added, “But suppose that the husband had nothing [in the house] of which she was able to live, then it seems she is able to kill [things].”⁴¹ Even in the more generous interpretations, the basic premise of the husband's ownership was not denied; the question was the effect on it of Magna Carta and *de quarantina habenda*—and, in Fitzherbert's view, necessity.

Edward Coke dissented.⁴² In his comments on Magna Carta in the *Second Institutes*, he identified “reasonable estovers” as sustenance and objected in a note

³⁶ NICHOLAS STATHAM, ABRIDGEMENT OF CASES TO THE END OF HENRY VI (1490) [hereinafter STATHAM'S ABRIDGEMENT], originally unfoliated but shown as fol. 150r in the digitized form, HLS RARE, STC 23238, BEALE R55, online at <http://amesfoundation.law.harvard.edu/digital/Statham/StathamMetadata.html> [<https://perma.cc/6W9G-K3H2>] (follow “Quare non admisit 1–2, Quarentine 1, Quare ejecit infra terminum 1–3” link); see also ANTHONY FITZHERBERT, LA GRAUNDE ABRIDGEMENT fol. 136v (London, 1577) [hereinafter FITZHERBERT'S ABRIDGEMENT] (the marginal note is M.19 H.6.14).

³⁷ CUL MS Hh. 2.6, fol. 9, 10, tr. *The Fifteenth-Century 'Ordinary Gloss,'* in SELECTED READINGS, *supra* note 8, at 21, 24.

³⁸ See a commentary from around 1570, BL MS Additional 25232, fols. 27–31, tr. *Probably c. 1570*, in SELECTED READINGS, *supra* note 8, at 83, 87–88:

But she may not have food or drink which is found in the house, and she may not slay the beasts or sheep which were her husband's, for that is a wrong to the executors. . . . [S]he may take the use and occupation of the utensils and estovers for her fuel, without destruction, by the words of the statute.

Id. (citing YB Mich. 19 Hen. VI, fol. 14, pl. 34).

³⁹ HLS MS 13, at 17–18, tr. *Fifteenth Century*, in SELECTED READINGS, *supra* note 8, at 42, 44.

⁴⁰ BL MS Hargrave 87, fol. 209, tr. *Humphrey Hervy, Inner Temple, c. 1480/1500*, in SELECTED READINGS, *supra* note 8, at 49, 50 (citing YB Mich. 18 Hen. VI). He did grant the widow grain to make bread and ale. *Id.*

⁴¹ “semble si fuit tuer.” FITZHERBERT'S ABRIDGEMENT, *supra* note 36, at 136v.

⁴² EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 17 (London, 1669). There is a marginal note to both YB M. 19 H. 6.14 and Register 175.

that some say “the Widow [can’t] kill . . . the [Oxen] of [her] Husband[] . . . [b]ut the Register [says] *Quod interim habeant rationabilia Estoveria de bonis eorundum maritorum*, which [seems to expound] this Branch.”⁴³ The addition of the word “maritorum,” actually not found in the writ, is at first sight puzzling, but Coke was essentially following his sources: Bracton speaks only of goods *de communi*,⁴⁴ but Britton says the widow shall have proper sustenance (*covenable susteinaunce*) out of the issue of all the lands (*del issue del entier des terres*)⁴⁵ and Fleta speaks in terms of decent necessities (*necessaria honeste*) to be found out of the common inheritance (*de hereditate communi*).⁴⁶

A third case, also in Common Pleas, dates from another hundred-plus years later, in 1552, and takes up yet another issue. *Kettillesby v. Kettillesby* was a suit for dower and Dyer’s report of it⁴⁷ says that in reply the defendant pleaded that after the latest continuance of her suit, the widow had illegally entered one of the manors of her husband, which caused her writ to abate.⁴⁸ In response, the widow argued for quarantine although she is not reported as using the term: she explained that after the death of her husband the heir had entered the manor and he and the widow had lived together on it at the will of the heir and she claimed only at his will.⁴⁹ That was held no plea, since for quarantine one had to show the certain death of the husband and the time of the forty days, and on the court’s advice the plaintiff traversed the entry.⁵⁰ More significantly, the case substantiates the proposition found in the readings that a widow could not leave her husband’s property and return to claim her quarantine in it—presumably since Mrs. Kettillesby is said to have entered the manor she must have first left it. It is another example of interpretation putting obstacles in the path to a successful claim, although here the interpretation is not new; the question had been disputed in the Inns of Court before the Kettillesbys ever came into Common Pleas.⁵¹

⁴³ *Id.*

⁴⁴ BRACTON, *supra* note 32, at 276. Professor Thorne has translated *de communi* as “of the common inheritance.”

⁴⁵ BRITTON, *supra* note 2, at 247.

⁴⁶ 4 FLETA bk. 5 c. 23, at 77, in 99 SELDEN SOCIETY (G. O. Sayles ed. & trans., 1983).

⁴⁷ LES REPORTS . . . DE LEY COLLECT & REPORT PER TRES-REVEREND JUDGE SIR JACQUES DYER 76v (London, 1688) [hereinafter DYER].

⁴⁸ *Id.*

⁴⁹ *Id.* Thomas Carus in his Lecture VIII (Middle Temple, Lent Term 1556) wrote that if a husband had several houses, the wife should have quarantine in the house he lived in at the time of his death “and she shall occupy this in common with the heir.” HLS MS 5054, fols. 80–98v, 92v, tr. *Thomas Carus, Middle Temple, Lent 1556*, in SELECTED READINGS, *supra* note 8, at 71, 75; see also CUL MS Hh.2.6, fol. 9, tr. *The Fifteenth-Century ‘Ordinary Glass,’* in SELECTED READINGS, *supra* note 8, at 21, 22, which speaks of the heir allowing the widow to be “in his house with him, of his free will.”

⁵⁰ DYER, *supra* note 47.

⁵¹ In his Lecture VIII Humphrey Hervy wrote, “In his view a woman may have her quarantine by way of entry, for the statute says *and shall remain in the capital messuage*.” BL MS Hargrave 87, fol. 209v, tr. *Humphrey Hervy, Inner Temple, c. 1480/1500*, in SELECTED READINGS, *supra* note 8, at 49, 50.

There are two, possibly three, other sightings of litigation over quarantine. Dyer notes casually—following a case on a totally different matter—that “another matter was moved, whether a woman living in her husband’s house for her quarantine could defend the possession of it with force etc.”⁵² But there is nothing further. A 1677 edition of the *New Natura Brevium* has a marginal note to the writ *de quarantina habenda*: “Quaere if an Infant may keep the [possession] during the time of Quar[a]ntine by force of the statute of 8 H[enry] 6 [c.] 4 & 5 Ma[ry],” with a citation to Dyer’s comment.⁵³ The statute of 8 Henry VI c. 4 actually deals with the Staple, but 8 Henry VI c. 9 recites and confirms the Ricardian statute of forcible entries.⁵⁴ Finally, quarantine is noted to prove an unrelated point in the 1612 *Case of the Commendams*, which of course has nothing to do with women or dower or *de quarantina habenda*. It was argued that the proposed commendation was temporary, but a commendation ought to be permanent, as *vinculum conjugale* between the rector and his benefice: one may give dower without a deed but for no less than life and a jointure cannot be made for the life of another.⁵⁵ Then the report reads, “Dyer 76[] in case of Quar[a]ntine the [w]ife must not depart from the [h]ouse upon her [h]usband’s [d]eath, and return when she will for the rest of her [d]ays.”⁵⁶ Again, there is no further comment.

Yet there are those pages and pages of commentary, moots, and readings on quarantine, all under the rubric of Magna Carta Chapter 7. Some offer citation to Year Book cases, *Fitzherbert’s Abridgement*, or treatises such as *Perkins Profitable Book*.⁵⁷ But in none of the cases is quarantine the issue and in fact none of the cases mentions quarantine; they uniformly concern dower. The readers and lecturers have extrapolated their conclusions from the results there. Other texts do not cite any authority. Either they are based on unknown sources or much of what was written is legal fantasy or an exercise in logic, not unlike the speculation of medieval theologians. They are, yet again, elaborate embroideries on the single, apparently definitive, sentence in Magna Carta Chapter 7. What is notable is a tendency to contain quarantine within narrow bounds. Some of the comments are based on the language of the Charter; all the writers agreed that unless a widow was dowable she could not have quarantine, since the Charter says “until her dower is assigned.” The property in which she was to remain had to be one of which she could be endowed; obviously land in which a husband had held only a life estate was not eligible.⁵⁸ It was not a

⁵² DYER, *supra* note 47, at 161. The entry is Easter Term 4 & 5 Phillip and Mary (1558).

⁵³ THE NEW NATURA BREVIUM OF THE MOST REVEREND JUDGE MR. ANTHONY FITZHERBERT 361 (London, 1677) (citing DYER, *supra* note 47, at 161). This is an English translation of FNB, *supra* note 7.

⁵⁴ 5 Ric. II., c. 7, 2 STATUTES OF THE REALM 20 (1381).

⁵⁵ *John Colt and Glover Against the Bishop of Coventry and Lichfield*, in THE REPORTS OF THAT REVEREND AND LEARNED JUDGE . . . SIR HENRY HOBART 140, 153 (5th ed. London, 1724).

⁵⁶ *Id.*

⁵⁷ A PROFITABLE BOOKE OF MASTER JOHN PERKINS (London, 1586).

⁵⁸ BRITTON, *supra* note 2, at 242–43; COKE, *supra* note 42, at 17.

stretch to read Chapter 7 “unless it shall have been first assigned” as referring to dower assigned at the church door or *ex assensu patris*, so that a woman so endowed could not claim quarantine.⁵⁹ (It was, however, a concession—one apparently generally accepted—to allow her to refuse the assignment and take the common law dower, which entitled her to her forty days). Logic supported the general opinion that if a woman remarried within the forty days she lost her quarantine; as Coke put it, “[Widow etc. . . .] Therefore if she marry within the forty dayes, she lose[s] her Quarentine, for [h]er Widowhood is past, and she ha[s] provided for her self, and her Quarentine is appropriate[d] to her Widows estate.”⁶⁰ The explanation of one commentator that the reason for the loss was that “the two of them would spend more estovers than she alone” is less convincing.⁶¹ It was generally said that if a woman sued for a reasonable part of her husband’s goods she lost her quarantine.⁶²

But beyond the agreement on those principles, there were as many questions—and as many opinions—as enthusiastic lawyers could devise. Chapter 7 dictates that the widow shall remain in the chief messuage if it is not a castle.⁶³ What is a castle?

⁵⁹ 9 Hen. III, c. 7; BRITTON, *supra* note 2, at 236.

⁶⁰ COKE, *supra* note 42, at 17.

⁶¹ Gray’s Inn, MS 25, fol. 27v, tr. *From the Chaloner Manuscript, Gray’s Inn, c. 1520*, in SELECTED READINGS, *supra* note 8, at 65, 69. The text of a lecture by Humphrey Hervy reads: “The law [which would grant the widow quarantine] is the same if she marries again before she brings her writ *de quarantina habenda*.” BL MS Hargrave 87 fol. 209, tr. *Humphrey Hervy, Inner Temple, c. 1480/1500*, in SELECTED READINGS, *supra* note 8, at 49, 50. But he does not specify the timing of the suit.

⁶² However, the divergent rules which governed descent of land and disposal of a deceased’s personal property made it reasonable to declare that a writ *de quarantina habenda* could be made out against either the heir or the executors, depending on whether a woman was kept out of the house or denied use of chattels. “This writ may be made out . . . one against the heir and another against executors. Against the heir . . . where the heir keeps her out of the chief house . . . If, however, she cannot have her quarantine from her husband’s chattels, then . . . against the executors, because they have her husband’s goods.” CUL MS Hh. 2.6, fol. 10, tr. *The Fifteenth-Century ‘Ordinary Gloss,’* in SELECTED READINGS, *supra* note 8, at 21, 24. “[F]or the woman shall have no part of any estovers from the heir, inasmuch as he has no estovers . . . and it is the executors who have the stock and stuff . . . Thus the woman shall have her reasonable estovers through the executors.” LC MS 139, at 3, tr. *Probably Lincoln’s Inn, c. 1460*, in SELECTED READINGS, *supra* note 8, at 33, 34. There was some uncertainty about whether there were two distinct writs, but as William Fletewood observed, “But in the Register and in Master Fitzherbert [FNB] I find but one writ . . .” *Extracts from a Treatise on Magna Carta Probably by William Fletewood (c. 1558)*, in SELECTED READINGS, *supra* note 8, at 366, 370 [hereinafter *Fletewood*]. He thought it lay against the heir and included quarantine in both house and chattels, rather than being directed to the executors for the latter, but unless the heir was the executor that would present a problem given the division between descent of real property and division of personalty. “Extracts from a Treatise on Magna Carta, Probably by William Fletewood” (c.1558), CUL MS. Gg. 6.18, fols. 3–41v, 14, tr. *Fletewood, supra*, at 366, 370.

⁶³ Despite the seemingly definitive wording of Chapter 7, either there was some question on the point or else commentators could not resist playing with it. Two manuscripts headed

Is it any defensible house, or perhaps only one built before the limit of legal memory or, if later, by license?⁶⁴ Coke, in his commentary on Magna Carta, was quite certain: “This is intended of a [c]astle, that is Warlike, and maintained for the necessary defence of the Realm, and not for a Castle in name maintained for habitation of the owner.”⁶⁵ What if the husband’s only holding was a castle? In what would appear to be direct contravention of Magna Carta, one fifteenth-century text reads: “If, however, the husband dies seised of a castle only, I conceive that in this case the heir shall not be bound to find the wife her quarantine.”⁶⁶ It was a minority opinion. The author of a text probably from Lincoln’s Inn in the 1450s wrote confidently but confusingly, “*Unless the house is a castle etc.* This shall be understood of a castle where her husband had no other tenements, *quia necessitas non habet legem . . .*”⁶⁷ Thomas Carus’s Lecture 8 in Lent, 1556, included the proposition that “If the husband had no house except a castle, a part of the castle shall be assigned to the wife for her quarantine . . .”⁶⁸ William Fletewood found himself in a quandary when he wrote his later sixteenth-century treatise, but came to the same conclusion: it was not desirable for women to have castles because,

[W]omen are so naturally weak . . . that, not only can they not defend them, they would also be an impediment to the others who must defend them; for the Amazons are all now dead. It is

Incipiunt quaestiones compilate primo de Magna Carta et aliis statutis, CUL MS. LI. 4. 17, fols. 219–20, collated with CUL MS Hh. 2.8, fols. 115–120v, do not mention quarantine by name. But it is clearly the subject of “Question 5[:] May a widow claim to stay in the capital mansion if it is a castle? For the statute says, ‘and if she has left the castle,’ which assumes she leaves willingly. . . . It is said that she may not.” Professors Thorne and Baker date the manuscript to the first two decades of Edward III. SELDEN SOCIETY, 105 READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY cxlv (Samuel E. Thorne and J. H. Baker eds., London, 1990). The four questions there on Chapter 7 are also printed in *From the ‘Quaestiones compilate de Magna Carta et aliis Statutis,’ c. 1340/45*, in SELECTED READINGS, *supra* note 8, at 20, 20–21. A later manuscript, dated 1455/60, uses the same wording in a discussion of dower. Northwestern University Newcastle MS fol. 11, tr. *Probably Lincoln’s Inn, c. 1455/60*, in SELECTED READINGS, *supra* note 8, at 30, 32.

⁶⁴ Gray’s Inn MS 25, fol. 28; *From the Chalonier Manuscript, Gray’s Inn, c. 1520*, in SELECTED READINGS, *supra* note 8, at 65, 69. Both *Fleta* and *Britton* expand the holdings in which a woman should not have quarantine to include a head [place] of a county or barony. FLETA, *supra* note 46, at 77–79; BRITTON, *supra* note 2, at 246.

⁶⁵ COKE, *supra* note 42, at 17.

⁶⁶ HLS MS 13, at 18, tr. *Fifteenth Century*, in SELECTED READINGS, *supra* note 8, at 42, 44.

⁶⁷ Northwestern University Newcastle MS fol. 10v, tr. *Probably Lincoln’s Inn, c. 1455/60*, in SELECTED READINGS, *supra* note 8, at 30, 31.

⁶⁸ HLS MS 5054, fol. 92v, tr. *Thomas Carus, Middle Temple, Lent 1556*, in SELECTED READINGS, *supra* note 8, at 71, 76. The comment is followed by the more unorthodox “for she may be endowed with part of a castle as well as of a house, if she wishes.” *Id.*

also dangerous for women to be there, lest perhaps they should be enticed by the enemy into betrayal.⁶⁹

There is an example taken from Livy. On the other hand if the husband had no other house “then it is said that she may remain . . . for the statute [Magna Carta] does not provide that she should be without a suitable abode, and necessity is without law.”⁷⁰ What if all the late husband’s holdings are castles? Here a mid-fifteenth century text looks beyond quarantine to a more permanent occupation by the widow and suggests a note of reality: “[I]t is used nowadays that . . . the wife shall have one of them as a benefit of dower,” a clear extrapolation from what the writer sees as current dower practice.⁷¹ Of course, if the husband had neither house nor castle, the heir had no obligation to provide housing for “[t]he statute says . . . *remain in* [her husband’s] *capital messuage*.”⁷²

Could the widow choose the alternative house to be provided for her if the chief messuage was a castle and there were other houses? Does “chief messuage” mean the house the husband was in on the day of his death? “This shall be understood to mean the same house where her husband was on the day of his dying”⁷³ Then what if a husband dies in the house of a stranger, not in one of which he is seised? Humphrey Hervy thought that if a husband had several houses but lived in none of them and died in a stranger’s house, the widow not only got quarantine but got to choose the house she would live in.⁷⁴ Sometimes there is an acknowledgement of unreality: What if a husband has two houses and lives in each for six months of the year? Which is chief or may a widow choose one? William Fletewood considered the problem at length:

But if there are various houses and the husband lived sometimes in one and sometimes in another, the choice is given to the woman. Some, however, do not agree with this, for the statute says *shall be assigned to her* and he who has the assignment ought to have the choice, and if the wife should have the choice she might

⁶⁹ CUL MS Gg. 6. 18, fol. 13v, tr. *Fletewood*, *supra* note 62, at 370.

⁷⁰ *Id.*

⁷¹ Northwestern University MS fol. 10v, tr. *Probably Lincoln’s Inn, c. 1455/60*, in *SELECTED READINGS*, *supra* note 8, at 30, 31.

⁷² HLS MS 13, at 395, tr. *Probably Lincoln’s Inn, c. 1491/1508*, in *SELECTED READINGS*, *supra* note 8, at 44, 45.

⁷³ Northwestern University Newcastle MS fol. 10v, tr. *Probably Lincoln’s Inn, c. 1455/60*, in *SELECTED READINGS*, *supra* note 8, at 30, 30; *see also* Thomas Carus, HLS MS 5054 fol. 92v, tr. *Thomas Carus, Middle Temple, Lent 1556*, in *SELECTED READINGS*, *supra* note 8, at 71, 75. Carus would not give the widow choice if her husband had held several houses. *See id.*

⁷⁴ BL MS Hargrave 87 fol. 209, tr. *Humphrey Hervy, Inner Temple, c. 1480/1500*, in *SELECTED READINGS*, *supra* note 8, at 49, 49.

perhaps take the better, whereas the statute says . . . *a suitable house shall be provided for her*. But these are only fancies.⁷⁵

What if the widow leases the premises to someone else—presumably on a very short-term lease—may the lessee be ejected? Yes, because the privilege is personal to the woman.⁷⁶ It is an endless parade of learning but there is no way to know how much of it, or any of it, has a basis in practice.

Defenses against dower claims were necessarily defenses against quarantine: It was a good plea to show that a woman had not been joined in lawful matrimony to the deceased, or that he was still alive,⁷⁷ or that he had been attainted or outlawed,⁷⁸ or that the woman had eloped from her husband and lived in adultery until her husband died, or that she had withheld charters from the heir or—in the case of a minor—withheld the heir himself from his guardian.⁷⁹ But there were situations where quarantine might be barred even though dower was not, the most important being that the husband had not been seised at the time of his death. Others were that the woman had inherited a house of her own,⁸⁰ that the husband had held no house, although he might have held land,⁸¹ or that there had been a spontaneous abandonment of the quarantine premises.⁸² Still others were more esoteric. In Thomas Carus's

⁷⁵ “Extracts from a Treatise on Magna Carta,” fol. 13v, tr. *Fletewood*, *supra* note 62, at 366, 369. The fifteenth-century HLS MS 13, at 17 comes to the same conclusion: the wife may choose. *Fifteenth-Century*, in SELECTED READINGS, *supra* note 8, at 42, 43.

⁷⁶ Northwestern University Newcastle MS fol. 11v, tr. *Probably Lincoln's Inn, c. 1455/60*, in SELECTED READINGS, *supra* note 8, at 30, 32.

⁷⁷ “[H]e must be dead in fact and not civilly dead, for if he enters into religion before having carnal knowledge she shall not have dower . . .” Gray’s Inn MS 25, fol. 27v, tr. *From the Chaloner Manuscript, Gray's Inn, c. 1520*, in SELECTED READINGS, *supra* note 8, at 65, 68. “If the husband enters into religion, his wife shall never have *quarantina habenda* . . .” BL MS Additional 25232, fol. 30, tr. *Probably c. 1570*, in SELECTED READINGS, *supra* note 8, at 83, 88. The statement is based on a case of 32 Edward I in which a widow was denied dower; there is no mention of quarantine. 31 CHRONICLES AND MEMORIALS OF GREAT BRITAIN AND IRELAND DURING THE MIDDLE AGES [Rolls Series] 166 (Alfred J. Harwood ed., London, 1864); see FITZHERBERT’S ABRIDGEMENT, *supra* note 36, at pl. 136.

⁷⁸ The statute of 1 Edward VI, c. 12 (1547) provided that the wife of a person attainted, convicted, or outlawed for trespass, petty treason, misprision of treason, murder, or any other felony was to be able to demand, have, and enjoy her dower, any statute, usage, or custom to the contrary notwithstanding. 1 Edw. VI, c. 12, 4 STATUTES OF THE REALM (1547).

⁷⁹ “Generally in all cases where the heir may discharge dower, he may discharge the quarantine for the same causes . . .” HLS MS 13, at 396, tr. *Probably Lincoln's Inn, c. 1491/1508*, in SELECTED READINGS, *supra* note 8, at 44, 46.

⁸⁰ BL MS Additional 25232, fol. 29v, tr. *Probably c. 1570*, in SELECTED READINGS, *supra* note 8, at 83, 88. I have not seen this mentioned elsewhere.

⁸¹ HLS MS 13, at 395, tr. *Probably Lincoln's Inn, c. 1491/1508*, in SELECTED READINGS, *supra* note 8, at 44, 45; Gray’s Inn MS 25, fol. 27v, tr. *From the Chaloner Manuscript, Gray's Inn, c. 1520*, in SELECTED READINGS, *supra* note 8, at 65, 69.

⁸² BL MS Additional 25232, fol. 29v, tr. *Probably c. 1570*, in SELECTED READINGS, *supra*

Middle Temple lecture devoted to where a woman could have her quarantine and where not, twelve of his thirty-two examples denied it.⁸³ The lecture makes good reading, but it is difficult to see it as a serious exposition of law as it was practiced. Were there many instances where three women claimed quarantine in the same house at the same time?⁸⁴ Did many situations arise where a man married outside the realm, abandoned his wife, returned to England, married again and died? Or where a man married a woman who immediately became a nun, married again, and died?⁸⁵ One cannot help but wonder the reaction of the young men sitting in the Middle Temple listening to him.

Before the end of the fifteenth century, then, whatever its practical application, quarantine had taken on a theoretical life of its own, removed from and even antithetical to its origin in 1225. I have not seen a text invoking “The Great Charter of the Liberties of England” when Chapter 7 was the topic under discussion; the Charter is consistently referred to as “the statute” and texts sometimes betray a hazy understanding of its background, as in the remark that “This statute, [Chapter 7], and all these statutes in Magna Carta, are in affirmation of the common law.”⁸⁶ Or, on the subject of widows’ not being constrained to marry, “Master Stamford says that this statute of Prerogativa Regis doth but confirm the common law which was before, as appears (he says) by Magna Carta, Chapter 7, which was (he says) made in the time of Henry III.”⁸⁷

It is not an impressive record for an action. But a brighter future lay ahead. British law came to the North American colonies. That meant Magna Carta came to the North American colonies, and quarantine came with it. After the Revolution, quarantine was accepted in a number of states, and in many of them ratified by statute.⁸⁸ Those statutes varied in how closely they adhered to the Charter’s Chapter 7, although all quoted or paraphrased it. In New York, a law of 1787 reads in part

note 8, at 83, 87. This is a statement of the rule that once a widow left the chief message she could not re-enter and claim quarantine in it. See *Kettlesby & Kettlesby*, in DYER, *supra* note 47, at 77.

⁸³ HLS MS 5054, fol. 92v, tr. *Thomas Carus, Middle Temple, Lent 1556*, in SELECTED READINGS, *supra* note 8, at 71, 75–77.

⁸⁴ As if a grandfather, father, and son died in rapid succession, each being seised in turn of the same house and each leaving a wife. HLS MS 13, at 17, tr. *Fifteenth-Century*, in SELECTED READINGS, *supra* note 8, at 42, 43. Three women might claim quarantine in the same house if their late husbands had been tenants in common. HLS MS 5054, fol. 93, tr. *Thomas Carus, Middle Temple, Lent 1556*, in SELECTED READINGS, *supra* note 8, at 71, 77.

⁸⁵ Both situations were proposed. HLS MS 5054, fol. 93, tr. *Thomas Carus, Middle Temple, Lent 1556*, in SELECTED READINGS, *supra* note 8, at 71, 76.

⁸⁶ LC MS 139, at 3, tr. *Probably Lincoln’s Inn, c. 1460*, in SELECTED READINGS, *supra* note 8, at 33, 33.

⁸⁷ BL MS Additional 25352, fol. 30v, tr. *Probably c. 1570*, in SELECTED READINGS, *supra* note 8, at 83, 89.

⁸⁸ See generally P. H. Vartanian, *Widow’s Right of Quarantine*, 126 A.L.R. 796 (1940).

“and she shall tarry in the chief house of her husband forty days after the death of her husband or until her dower be assigned to her”⁸⁹ The next section of the chapter quotes the Statute of Merton Chapter 1 without identifying it: a widow who was deforced of her dower or quarantine and successfully sued for it was entitled to damages from the date of her husband’s death.⁹⁰ The wording “forty days after the death of her husband, or until her dower be assigned”⁹¹ permits an interpretation that only assignment of dower cut short the quarantine, but in 1810 the Supreme Court of New York rejected that view.⁹² In *Jackson ex dem. Clark v. O’Donaghy*,⁹³ it held that the forty-day period was absolute so that the heir could eject the widow once it had passed.⁹⁴

There is some difference between the words of our statute . . . and *magna charta*, (c.7.) from which our statute was taken; but it is a difference, I apprehend, in the words only

. . . .

[If the legislature had intended otherwise] then the limitation . . . to forty days would be useless. The construction, therefore, of our statute and *magna charta* must be the same⁹⁵

The forty-day limit was never disavowed but was, rather, explicitly reinforced and at the same time divorced from assignment of dower. In 1929, New York abolished dower for all marriages after September 1, 1930;⁹⁶ the statute applicable to marriages before that date provides that a widow may remain in the chief house of her husband forty days after his death, whether her dower is assigned to her within that period or not, that she shall not be liable to pay any rent for the same, and that in the meantime she is to have “reasonable sustenance” out of the estate of her husband.⁹⁷

⁸⁹ 1787 N.Y. Laws 51.

⁹⁰ *Id.* at 51–52. The first section closely follows Magna Carta Chapter 7; the second section, while it quotes the Statute of Merton Chapter 1 verbatim, does not refer to that statute by name.

⁹¹ *Id.* at 51.

⁹² *Jackson ex dem. Clark v. O’Donaghy*, 7 Johns. 247 (1810).

⁹³ 7 Johns. 247 (1810).

⁹⁴ *Id.* at 248.

⁹⁵ *Id.*

⁹⁶ 1929 N.Y. Laws 518. Later statutes repeat the language. See N.Y. REAL PROP. LAW § 204 (McKinney 2015). In 1940, in *In re Kelly’s Estate*, the surrogate for King’s County not only quoted *Jackson* with approval but referred to Magna Carta, Glanville, Coke, and Blackstone. 20 N.Y.S. 2d 684, 686–87 (1940). The issue was actually the nature of quarantine, not its length; the surrogate found that it was “in reality, substantially a preface to dower and . . . only a widow who is entitled to the latter may be awarded the former.” *Id.* at 688. New York also adopted a number of English limitations on dower; it was barred for misconduct of a wife resulting in divorce and it required a widow to choose between dower and jointure. N.Y. REAL PROP. LAW §§ 196-A, 197 (McKinney 2014).

⁹⁷ 1787 N.Y. Laws 51.

Other states were more liberal to the widow as Magna Carta interpretation veered from the earlier English texts, even as the Charter's language was quoted or paraphrased in statutes and opinions. Virginia provided that a woman could occupy and continue in her husband's mansion house and she could have a viscontiel writ "in the nature of *de quarentina habenda*," with proceedings and speed as had or might have been used on that writ.⁹⁸ In Pennsylvania, the judges of its Supreme Court were instructed to report to the legislature which British statutes ought to be accepted. They duly declared the statute of 9 Henry III Chapter 7—Magna Carta 1225—to be in force, but only its provision of the new right of quarantine.⁹⁹ There was, after all, no king or lord to be prevented from making a widow pay for her dower or inheritance or marriage portion. There were provisions for quarantine of one kind or another in a number of states, among them Alabama, Illinois, Indiana, Kentucky, Massachusetts, Missouri, New Jersey, and Rhode Island. Nor was this idle fidelity to an abstract notion; widows made vigorous use of the protection offered, leaving a record of often successful litigation. Here I have elected to follow quarantine in one state, New Jersey, whose statutes and court decisions regarding it span more than 200 years with records both complete and accessible.

Quarantine in New Jersey had its origin in common law. The state's first constitution was adopted before it *was* a state, on July 5, 1776, and it provides "[t]hat the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be

⁹⁸ A statute protecting quarantine was passed by the Virginia General Assembly in October 1705: An Act for the distribution of intestate estates declaring widows rights to their deceased husband's estate and for securing orphans estates. 3 HENING STAT. AT LARGE 371, 374. The revised code of 1819 recites An Act to reduce into one all Acts and Parts of Acts relating to Dower, passed December 6, 1792:

[Until] such dower . . . be assigned, it shall be lawful for her to remain and continue in the mansion house, and the messuage or plantation thereto belonging, without being chargeable to pay the heir any rent for the same

And, if she be thereof in the [meantime] deforced, she shall have a [viscontiel] writ, in the nature of a writ *de quarantina habenda* directed to the sheriff; whereupon such proceedings and speed shall be used as hath or might have been used on the said writ of quarantine.

1 REV. CODE 1819, c.107. In 1990, Virginia abolished dower and curtesy but protected the interests of a surviving spouse whose dower or curtesy vested prior to January 1, 1991. The rights of such parties were to be governed by the laws in force before that date: 1990 Va. Acts 1367 (codified at VA. CODE ANN. § 64.2-301 (2012)).

⁹⁹ SAMUEL ROBERTS, A DIGEST OF SELECT BRITISH STATUTES 176 (1817). The chapter is quoted in its entirety with a footnote "'That part only of this statute is in force which provides, that a widow shall tarry in the chief house of her husband forty days after her husband's death, within which days her dower shall be assigned to her.' *Report of the Judges*." *Id.* Common law dower and curtesy have been abolished in Pennsylvania.

altered by a future law of the Legislature”¹⁰⁰ In 1797, the New Jersey Supreme Court decided *Den v. Dodd*,¹⁰¹ upholding quarantine in an action of ejectment. Magna Carta Chapter 7 is referred to as “the law” and the decision cites an English case of 1773, *Goodtitle v. Newman*¹⁰² as authority.¹⁰³ It was a shaky precedent, resting on Justice Gould’s dictum suggesting that a woman could remain beyond forty days until her dower was assigned, and it was criticized strongly by Chancellor Kent as opposed to all English and American authorities—and was later retracted.¹⁰⁴ But in 1799, quarantine got a homegrown statutory basis and the rule in *Den* was substantially adopted. An Act relating to Dower of that year reads: “*And be it enacted*, [t]hat until such dower be [assigned] to her, it [s]hall be lawful for the widow to remain in, and to hold and enjoy the man[s]ion hou[s]e of her hu[s]band, and the me[ss]uage or plantation thereto belonging, without being liable to pay any rent for the [s]ame.”¹⁰⁵

New Jersey revised its statutes over the course of the nineteenth century, but those relating to quarantine remained relatively unchanged and Magna Carta still remained its bedrock. In 1871, the Vice-Chancellor could remark in an opinion that the statute in effect at the time “is but an amplification of [the] provision of Magna Charta, beneficially extending the term of the widow, and expressly declaring that she shall hold the premises free of rent.”¹⁰⁶ Many of the ground rules formulated in English moots and commentaries—perhaps with roots in unreported litigation—still held, beginning with the most essential: where there was no dower there could be no quarantine.¹⁰⁷ The premises subject to quarantine had to have been the mansion house or chief messuage of the husband, possessed or occupied by him at the time of his death.¹⁰⁸ That was the issue in 1897, when Grace Davis, whose dower had not yet been assigned, claimed quarantine in an entire building whose upper floors she occupied but whose lower floors were used as a hardware store and were rented by her husband to a firm in which he was a partner.¹⁰⁹ Were the mercantile premises part of the mansion house of her husband? Were they part of the messuage thereto belonging? For the answer, the Vice Chancellor started with Magna Carta and went

¹⁰⁰ N.J. CONST. (1776) c. 22, http://avalon.law.yale.edu/18th_century/nj15.asp [<http://perma.cc/53UB-AEDT>].

¹⁰¹ 1 Hal. 367 (N.J. 1797).

¹⁰² 3 Wils. 176 (1733).

¹⁰³ *Den* held that a widow in possession of land could not be ousted by the owner of the fee unless her dower was assigned her. *Den*, 1 Hal. 367.

¹⁰⁴ 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *62 (William Kent ed., New York 1857). See the argument for the appellant in *Spinning v. Spinning*, 43 N.J. Eq. 215, 216–234 (1887).

¹⁰⁵ An Act relative to Dower, c. 753, § 2, Acts of the Twenty-Third General Assembly of the State of New-Jersey, Trenton (1799).

¹⁰⁶ *McLaughlin v. McLaughlin*, 22 N.J. Eq. 505, 510 (1871).

¹⁰⁷ *Morgan v. Titus*, 3 N.J. Eq. 201, 204 (N.J. Ch. 1835).

¹⁰⁸ See *Davis v. Lowden*, 38 A. 648, 650 (N.J. Ch. 1897).

¹⁰⁹ *Id.* at 649.

on to *Bouvier's Law Dictionary*, offering a detailed discourse on the meaning of "messuage."¹¹⁰ Was the widow actually in possession of those premises, so that she could be said to remain in them? "The words 'remain in' found in our statute, are taken from Magna Charta, c. 7,—'[e]t maneat in capitali messuagio mariti sui'—and are therefore to be accorded the same meaning as has been given to the same words in that instrument."¹¹¹ To find out what that meaning was, he turned to Coke, various abridgements, and Fitzherbert's *New Natura Brevium*.¹¹² And, unsurprisingly, since none of those authorities contemplated a hardware store lease, he found that the husband had not occupied the lower floors and therefore the widow could not be said to remain in them.¹¹³

But also, many of the long-standing rules were subject to interpretation, and where the earlier English courts had limited the widow's right, the New Jersey courts tended to expand it. Several requirements underwent a transformation. Quarantine was lost by the widow's voluntary departure from the premises, but one could physically leave without legally departing: a widow did not have to personally occupy the mansion house.¹¹⁴ She could rent out part or all of it and collect the rent from her tenant until her dower was assigned.¹¹⁵ In *Craige v. Morris*,¹¹⁶ the widow, whose dower had not yet been assigned, periodically rented out the mansion house; the heir claimed the rent on the grounds that quarantine had been forfeited by her failing to personally occupy the premises.¹¹⁷ The court ruled that she was occupying them, by her tenant.¹¹⁸ Again, in 1895 it was held that a widow entitled to quarantine could rent part of the mansion house, while living in the rest, and keep the rent.¹¹⁹ A 1906 decision went even further.¹²⁰ Edward Augustus rented out part of his dwelling as a store and used the upper story of a small building unconnected to it for his business, renting out the lower story.¹²¹ Mrs. Augustus, his widow, continued to use the property in that way until her death.¹²² It was held that as her dower had not been assigned, there should be no accounting for the rent received during the period of her widowhood; quarantine gave her the right to either rent or occupy personally.¹²³

¹¹⁰ *Id.* at 650–51 (citations omitted).

¹¹¹ *Id.* at 651.

¹¹² *Id.* (citations omitted).

¹¹³ *Id.* at 652–53. The full name of the case, *Grace E. Davis v. John J. Lowden*, as guardian of Lester Roscoe Davis, gives a picture of the circumstances surrounding the dispute.

¹¹⁴ See *Craige v. Morris*, 25 N.J. Eq. 467 (N.J. Ch. 1875).

¹¹⁵ *Id.* at 469.

¹¹⁶ 25 N.J. Eq. 467 (N.J. Ch. 1875).

¹¹⁷ *Id.* at 467–68.

¹¹⁸ *Id.* at 468–69.

¹¹⁹ *Flynn v. O'Malley*, 33 A. 402, 403 (N.J. Ch. 1895).

¹²⁰ *Lloyd v. Turner*, 62 A. 771, 772 (N.J. Ch. 1906).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 771–72.

The issue of the husband's own occupation of the premises, which might have seemed relevant in light of *Davis v. Lowden*, was not addressed.¹²⁴

Another alteration was the allowing of assignment of quarantine. Several cases recognized the principle that dower was assignable in equity,¹²⁵ while two others declared *inter alia* that quarantine was an incident of dower and inseparable from it,¹²⁶ therefore it followed that dower being assignable, quarantine must go with it. The result benefited the assignee in *Moffett v. Trent*.¹²⁷ The plaintiff, Catharine Moffett, held a mortgage on premises occupied by a widow under her right of quarantine, dower having not been assigned.¹²⁸ She was also the grantee of the widow's dower rights.¹²⁹ The issue was whether she was required, before foreclosing on the mortgage, to account for rents received.¹³⁰ The court held that she was not; the widow holding in quarantine would not have had to account and the quarantine was transferred with the dower right.¹³¹ There was no discussion of whether quarantine could be transferred without the widow's transfer of dower.¹³² Finally, in a nod to nineteenth-century realities, in *Spinning v. Spinning*,¹³³ it was held that a woman was not obliged to pay taxes or mortgage interest or to make repairs on property she held as her quarantine—all issues probably not contemplated by either Magna Carta or Coke.¹³⁴ *Spinning* is notable not only for its holding but for the learned journey it provides through the history of quarantine. A lower court held in favor of the widow and one or more of the children appealed.¹³⁵ The appellant's brief takes up eighteen pages and ranges widely attempting to prove that New Jersey quarantine is not common law quarantine; it is a life estate in land and the tenant of a life estate must keep down annual charges.¹³⁶ And even if it is not an estate in land, there is always the Latin maxim—which is not translated—that one who enjoys the benefits ought to bear the burdens. There are citations to Magna Carta Chapter 7, *Coke upon Littleton*, *Bacon's Abridgement*, *Viner's Abridgement*, *Kent's Commentaries*, and miscellaneous English

¹²⁴ *See id.*

¹²⁵ In *Smallwood v. Bilderback*, 16 N.J.L. 497, 506 (1838) the validity of the sale was assumed, with the result that the widow had no right of entry into the premises thereafter. Other states came to similar conclusions about alienability. See *Payne v. Becker*, 87 N.Y. 153 (1881) and the lengthy discussion by the Cuyahoga [Ohio] Common Pleas Court in *Stolz v. Boltz*, 8 Ohio Dec. Reprint 61 (1880).

¹²⁶ *See Spinning v. Spinning*, 43 N.J. Eq. 215 (1887); *Bleecker v. Hennion*, 23 N.J. Eq. 123 (N.J. Ch. 1872).

¹²⁷ 56 A. 1035, 1036 (N.J. Ch. 1904).

¹²⁸ *Id.* at 1035–36.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1036–37.

¹³² *See id.*

¹³³ 43 N.J. Eq. 215 (1887).

¹³⁴ *Id.* at 246–48.

¹³⁵ *Id.* at 217.

¹³⁶ *Id.* at 216–34.

and American cases.¹³⁷ But then the argument gets far less theoretical: “[o]ught the heir pay for the use his stepmother, perhaps, makes of the gas, fire and police protection, school facilities & [] furnished by the public authorities? . . . Or, if [the widow] pay same and then receive credit . . . the estate of the heir is . . . impaired.”¹³⁸ And the argument concludes with a flourish: “It is no hardship on widows. They can quit the homestead at any time, and at any time apply for assignment of dower.”¹³⁹

The attorney for Mrs. Spinning needed only seven pages and used less learning, but he also invoked Magna Carta, Coke, and the *Natura Brevium*, together with an assortment of cases from various jurisdictions.¹⁴⁰ The burden of his argument was that quarantine was a privilege, simply a right incident to dower unassigned, not a tenancy, let alone a life estate.¹⁴¹ In support of the position, he cited *Kettlesby v. Kettlesby* for the proposition that in claiming quarantine a widow must show the date of death of her husband and the forty days thereafter, although his point is not entirely clear.¹⁴² Not to be outdone in learning, in his opinion Justice Scudder began by noting the historic derivation of New Jersey’s law in order to determine the widow’s interest, citing English authorities.¹⁴³ He rejected the Latin maxim, accepted that quarantine was a privilege, and concluded that it was misleading to construe statutory rights by terms of law conformed to rules of the common law—although he cited with approval the comment in *McLaughlin v. McLaughlin* that the statute was “but an amplification of the provision of [Magna Carta].”¹⁴⁴ Then finally he, too, descended to the practical: if the home was all that was left to the widow, the burden of paying taxes and making repairs might be a loss rather than a benefit to her, which was not the purpose of the Act.¹⁴⁵

All this was in the nineteenth century, so much of whose practice was swept away in the twentieth by revised statutes and codes. One major change in New Jersey came about in 1929, when a provision in the Revised Statutes extended quarantine

¹³⁷ *Id.* (citations omitted).

¹³⁸ *Id.* at 233.

¹³⁹ *Id.* at 234.

¹⁴⁰ *Id.* at 234–43 (citations omitted).

¹⁴¹ *Id.* at 236.

¹⁴² *Id.* at 238 (citing *Kettlesby v. Kettlesby*, *supra* note 47, at 76).

¹⁴³ *Id.* at 243–48 (citations omitted).

¹⁴⁴ *Id.* at 246 (quoting *McLaughlin v. McLaughlin*, 22 N.J. Eq. 505, 510 (1871)).

¹⁴⁵ *Id.* 246–47. The widow was, however, liable to pay water charges as they were personal expenses rather than a lien and charge on the estate. *Id.* at 248. In *In re Flasch*, 143 A.2d 208 (N.J. Super. Ct. App. Div. 1958), the estate of a widower who died without claiming his right of curtesy was denied reimbursement for payments of mortgage principal and interest, taxes, and insurance premiums on premises that descended from his first wife to his minor children and in which he lived with them. *Flasch*, 143 A.2d at 208–14. It was argued that, not having been allotted curtesy, he held in quarantine under the 1929 statute. *See id.* at 220. The court denied the claim; it was a breach of his fiduciary duty to the children not to apply for assignment of curtesy, as that would have made him a life tenant as such liable for the payments. *Id.* at 223–24. It further assumed the payments were gifts to the children. *Id.*

to widowers; a widower was entitled to quarantine until his curtesy was assigned, on the same terms that a widow was until assignment of dower.¹⁴⁶ In 1941, the rule stated in *Craige v. Morris* and *Lloyd v. Turner* that there was a right to rent out the homestead was cited, this time in favor of a widower.¹⁴⁷ Little else appeared altered. *Woolf v. Woolf*¹⁴⁸ was decided in 1950. Carroll Woolf had lived in a house in Matawan until his second marriage; thereafter, though occasionally staying in the house, he moved into his new wife's apartment until his death nine months later.¹⁴⁹ At that time, his sons moved into the Matawan house, but did not assign dower to the widow.¹⁵⁰ She claimed quarantine and a lower court allowed the rental value of the premises from the date of her husband's death until admeasurement of her dower, in satisfaction of her right of quarantine.¹⁵¹ The Superior Court Appellate Division upheld the decision, holding that the house continued to be decedent's mansion house and that case law confirmed that a widow did not have to personally occupy it.¹⁵² There is reference to Magna Carta, Coke, and the Statute of 1799, substantially unchanged by subsequent revisions.¹⁵³ Noting that at common law the widow had her writ *de quarantina habenda* against an heir who put her out without assigning dower, the court ruled that "[t]he continuation of the widow's right of quarantine [was] the penalty the statute impose[d] on the heirs who do not assign her dower."¹⁵⁴ Nor was the case unique; in 1953, in *Bruten v. Miller*,¹⁵⁵ one of the plaintiff's claims was to dower. There is no mention in the opinion of a claim to quarantine, but the court introduced it, quoting the applicable statute.¹⁵⁶ It went on to cite *Woolf* for the proposition that personal occupation of a mansion house was not essential to the right and then discussed liability for taxes, encumbrances, repairs, and insurance, citing cases ranging from 1887 to 1948 which held that all were the heirs' responsibility.¹⁵⁷ The plaintiff was awarded reimbursement for payments she had made which should have been made by the heirs, but not, however, for sums paid for improvements to the property.¹⁵⁸

¹⁴⁶ N.J. STAT. ANN. § 3A:35-4 (West 1929). "Until dower or curtesy is assigned, the widow or widower may remain in, hold and enjoy the mansion house of his or her spouse and the message and plantation belonging thereto, without being liable to pay rent therefor." *Id.*

¹⁴⁷ *Alt v. Kwiatek*, 17 A.2d 161, 164 (N.J. Ch. 1941). The court was unsure whether "mansion house" meant the entire building owned by the late Mrs. Alt or only the apartment within it that she lived in—a circumstance surely not contemplated in 1225. *Id.* The court cited the holdings in *Davis v. Lowden* and *Lloyd v. Turner* in support of its uncertainty. *Id.* (citations omitted).

¹⁴⁸ 77 A.2d 475 (N.J. Super. Ct. App. Div. 1950).

¹⁴⁹ *Id.* at 476.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 477 (citations omitted).

¹⁵³ *Id.* at 476 (citations omitted).

¹⁵⁴ *Id.* at 477.

¹⁵⁵ 101 A.2d 24 (N.J. Super. Ct. Ch. Div. 1953).

¹⁵⁶ *Id.* at 26 (quoting N.J. STAT. ANN. § 3A:35-4 (West 1929)).

¹⁵⁷ *Id.* (citing *Woolf v. Woolf*, 77 A.2d 475 (N.J. Super. Ct. App. Div. 1950)).

¹⁵⁸ *Id.* (citing *Spinning v. Spinning*, 43 N.J. Eq. 215 (1887); *Bahr v. Cooper*, 58 A.2d 604

In 1980, New Jersey by statute abolished dower for any marriage occurring after May 28th of that year.¹⁵⁹ However, the right of quarantine remained protected, presumably referring to situations where dower or curtesy could still be claimed. In 1984, Janet Del Guercio, who had been married in 1969, left her husband and instituted a suit for divorce; he died before he was served with process and she sued for dower and quarantine.¹⁶⁰ In *In Re Del Guercio Estate*,¹⁶¹ the court held that she was indeed entitled to dower, which was to be admeasured.¹⁶² But, it went on, “it is clear that from the time of Magna Carta an essential element of quarantine was that the widow should not be deprived” of the house in which she had lived at her husband’s death.¹⁶³ Janet Del Guercio had not occupied the house at that time and she was not entitled to quarantine.¹⁶⁴ Presumably the court felt that this was one voluntary departure which could not fit into any expanded definition of “occupy.”¹⁶⁵

In the first years of the twenty-first century, the New Jersey legislature repealed many sections of the law which dealt with married women, on the ground that they were no longer needed and were demeaning.¹⁶⁶ It also revised Title 3-A dealing with Administration of Estates. But New Jersey Revised Statutes section 3A:35-4 (2015), saved from repeal more than once, continues to be in effect.¹⁶⁷ It reads:

Until dower or curtesy is assigned, the widow or widower may remain in, hold and enjoy the mansion house of his or her spouse and the messuage and plantation belonging thereto, without being liable to pay rent therefor.

After assignment of dower or curtesy, the rights confirmed in and granted to the widow or widower by this section shall cease.¹⁶⁸

It is a statutory right, but its language is familiar. At least for the moment, a descendant of Magna Carta Chapter 7 is alive and well and living in New Jersey.

(N.J. Ch. 1948); *Alt v. Kwiatek*, 17 A.2d 161 (N.J. Ch. 1941); *Tarrant v. Carrig*, 133 A. 552 (N.J. Ch. 1926); *Lloyd v. Turner*, 62 A. 771 (N.J. Ch. 1906)).

¹⁵⁹ N.J. STAT. ANN. § 3B:28-2 (West 1980).

¹⁶⁰ *In re Del Guercio Estate*, 501 A.2d 1072, 1073 (N.J. Super. Ct. Law Div. 1985).

¹⁶¹ 501 A.2d 1072 (N.J. Super. Ct. Law Div. 1985).

¹⁶² *Id.* at 1074.

¹⁶³ *Id.* (citing *Davis v. Lowden*, 38 A. 648, 651 (N.J. Ch. 1897)).

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See* N.J. STAT. ANN. §§ 37:2-8, 15 (repealed 2011).

¹⁶⁷ *See* N.J. STAT. ANN. § 3A:35-4 (West 2015).

¹⁶⁸ *Id.*