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Real Property—Specific Performance—Interest of Tenant by Curtesy Initiate

Has a tenant by the curtesy initiate sufficient interest in the wife's land to support an action for specific performance, so far as his interest is concerned, under a contract of sale signed by said tenant and his wife, where the wife's privy examination is not taken? The Supreme Court of North Carolina thinks so.¹

By constitutional² and statutory³ provisions North Carolina has stripped the husband's curtesy right of its ordinary common law attributes.⁴ Birth of issue alive capable of inheriting no longer gives the husband a present estate in the wife's land.⁵ From the date of marriage he has the right of joint occupancy⁶ with the wife, and upon birth of issue becomes a tenant by the curtesy initiate, conferring the privileges of joint occupancy with the wife, of serving as a tales juror,⁷ and the possibility of gaining a freehold estate for life if the wife predecease him, dying intestate,⁸ and he has not forfeited his right.⁹ He has no vested interest¹⁰ in the wife's realty, no present estate, and although the principal case terms it a "valuable interest"¹¹ others have held it to merely constitute a veto

¹ Colwell v. O'Brien, 198 N. C. 228, 151 S. E. 190 (1930), dismissing a petition to rehear from 196 N. C. 508, 146 S. E. 142 (1929).

² N. C. Const. Art. X, §6.

³ N. C. Cons. Stat. Ann. (1919) §2510.

⁴ Thompson v. Wiggins, 109 N. C. 108, 14 S. E. 301 (1891), holding that a tenant by the curtesy initiate could not maintain an action for rents due on his wife's real estate, since the wife was the real party in interest.

⁵ Thompson v. Wiggins, *supra* note 4.

⁶ Walker v. Long, 109 N. C. 510, 14 S. E. 299 (1891) (that wife may sue alone in action involving her real property); Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988 (1918); Jones v. Coffey, 109 N. C. 515, 14 S. E. 84 (1891).

⁷ Thompson v. Wiggins, *supra* note 4; N. C. Cons. Stat. Ann. (1919) §2519; Hodgin v. R. R., 143 N. C. 92, 55 S. E. 413 (1906); Jackson v. Beard, 162 N. C. 105, 78 S. E. 6 (1913). But see Sipe v. Herman, 161 N. C. 107, 76 S. E. 556 (1912).

⁸ Freeman v. Lide, 176 N. C. 434, 75 S. E. 936 (1918); Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510 (1909); Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127 (1900).

⁹ N. C. Cons. Stat. Ann. (1919) §§2519, 2522 (divorce a vinculo and felonious slaying), 2524 (husband's living in adultery, etc., or divorce a mensa at wife's suit), 2516 (release).

¹⁰ Kilpatrick v. Kilpatrick, *supra* note 6; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655 (1903) (not such a vested interest as to prevent abolishment by subsequent laws—a mere expectancy or possibility of future acquisition is not a vested right). Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165 (1907) (husband's attempted redemption of wife's land sold for taxes ineffective since he had no interest therein).

¹¹ Colwell v. O'Brien, *supra* note 1.

power,¹² the right "to come home,"¹³ the right of ingress and egress to the dwelling and society of the wife, with a "possibility of inheritance."¹⁴ However, the present court does not feel that determination of the precise interest involved is necessary.¹⁵

The principal case presents for the first time in North Carolina¹⁶ the question of whether the husband's modern-day estate by the curtesy initiate is of a sufficiently tangible nature to carry a monetary value so far as third parties are concerned. The answer of the North Carolina court not only establishes such monetary value, but sees in it sufficient tangibility to permit of specific performance. Which presents the question of the rights of the wife in the face of such a decree of specific performance.

Through the conveyance decreed by the court the purchaser succeeds to whatever rights the husband may ever have as tenant by the curtesy consummate—and by it the husband renders ineffective any subsequent jointure in his wife's deed to the property in question, so far as his interest therein is concerned. Hence, any subsequent purchaser from the wife, although the husband join in the deed, takes subject to the outstanding rights of the holder of the husband's deed to his curtesy right, should the wife die intestate before the husband. This prevents the wife's disposal of her property at full market value, since her purchaser faces the possibility of an intervening estate for the life of the surviving husband. Such impairment of the wife's estate constitutes a cloud on title,¹⁷ and although placed there by judicial decree, such decree was aimed at the husband and should not be allowed to prejudice the rights of the wife in contravention of her constitutional privileges.¹⁸

¹² Dissenting opinion of Clark, C. J., in *Jackson v. Beard*, 162 N. C. 105, 111, 78 S. E. 6 (1913); *Kilpatrick v. Kilpatrick*, *supra* note 6.

¹³ *Manning v. Manning*, 79 N. C. 293 (1878); *State v. Jones*, 132 N. C. 1043, 43 S. E. 939 (1903), refusing to allow trespass by wife against husband for coming on her lands against her orders, since such would constitute judicial separation by the criminal action of trespass. Clark, C. J., dissents, and would have allowed trespass.

¹⁴ Dissenting opinion of Clark, C. J., in *Jackson v. Beard*, *supra* note 12; *Kilpatrick v. Kilpatrick*, *supra* note 6.

¹⁵ To quote from the decision: "But without regard to the precise interest which a tenant by the curtesy initiate may have. . . ."

¹⁶ No decisions dealing with the same matter have been found in any states under modern statutes similar to those of North Carolina. An analogy to common law curtesy right would not be pertinent.

¹⁷ N. C. Cons. Stat. Ann. (1919) §1743 and annotations, dealing with quieting of titles.

¹⁸ N. C. Const., Art. X, §6.

Nor is there simply a substitution of personalities whereby the wife now has to secure the signature of the husband's purchaser whereas she formerly had to secure her husband's consent. In order for her conveyance to be a deed at all she must have the written assent of her husband.¹⁹ The effect of his joindre is two-fold, to validate her deed²⁰ and to convey his interest.²¹ But all of the consideration moves to the wife.²² Under the circumstances of the principal case, she must not only obtain the written assent of the husband in order to make her deed effective, she must secure the release of her husband's purchaser as well. Thus she is subjected to difficulties forbidden by constitution and statute.

Conceding that the conveyance of the husband would not prevent his joining in his wife's deed insofar as giving his written assent is concerned, such conveyance by the husband would render ineffective any subsequent attempt to transfer his so-called valuable interest in the wife's land. Now the wife is entitled to convey her real estate as she wishes, save that the written assent of the husband must be obtained, and her privy examination taken.²³ However, by the conveyance in question the husband has rendered it impossible for the wife to pass a fee simple to her realty, since the right to the husband's "valuable interest" rests in a third person, the purchaser of the husband. Granting that the husband has conveyed no portion of the wife's title, as such, he has rendered it impossible for her to convey a full title. Hence, in effect, it is the same as conveying an interest of the wife in her land.

By logical application the principal case establishes the right of the husband to convey his curtesy interest as he wills, under form of an ordinary sale. If the estate of the wife be thus subject to impairment by private sale or court decree of specific performance, what is the effect of North Carolina Consolidated Statutes §2510, providing that no real estate of the wife shall be subject to sale or lease by the husband, save with proper consent of the wife, and that no interest of the husband whatever in such property shall be subject to sale to satisfy any execution obtained against him, and that every such sale is null and void? What of North Carolina Const.

¹⁹ N. C. Const., Art. X, §6.

²⁰ N. C. Const., Art. X, §6.

²¹ Jackson v. Beard, *supra* note 12.

²² Manning v. Manning, *supra* note 13; N. C. Cons. Stat. Ann. (1919) §2510; N. C. Const., Art. X, §6.

²³ N. C. Const., Art. X, §6; N. C. Cons. Stat. Ann. (1919) §2510.

Art. X, §6, providing that the wife's real and personal property "shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried?"

WALTER HOYLE.

Taxation—Situs of Contract for Purchase of Federal Property

In *Port Angeles Western Ry. Co. v. Clallam County*,¹ the defendant assessed for taxation the interest of the plaintiff, a Delaware corporation, in a contract for the purchase of an unfinished railroad and certain lands lying in the State of Washington, from the United States. Title was to be retained by the vendor until the full purchase price had been paid and certain improvements made. In a previous case between the same parties it was held that the property itself, the subject matter of the contract, could not be taxed.² The present action was brought under a section of a Washington statute providing that the interest of purchasers under such contracts shall be personal property.³ The court held the assessment valid and refused to enjoin its collection.

While the title to property remains in the United States either for the purpose of securing the purchase price or the performance of precedent conditions, it may not be taxed by the states.⁴ When, however, all that is required of the purchaser under the terms of the contract has been done by him, a tax may be levied by the state even though there has been no formal transfer of legal title.⁵ It is at

¹ 36 F. (2d) 956 (W. D. Wash. 1930).

² *Port Angeles Western Ry. v. Clallam County*, 20 F. (2d) 202 (W. D. Wash. 1927).

³ Laws of Wash. Ex. Sess., c. 130, s. 33.

⁴ *Union Pac. Ry. v. McShane*, 22 Wall. 444, 22 L. ed. 747 (1874); *Kansas Pac. Ry. v. Prescott*, 16 Wall. 603, 21 L. ed. 373 (1872); *Irwin v. Wright*, 258 U. S. 219, 42 Sup. Ct. 293, 66 L. ed. 573 (1921), although as between private parties the vendee may be taxed under such executory contract; *Bowls v. City of Oklahoma City*, 24 Okla. 579, 104 Pac. 902, 24 L. R. A. (N. S.) 1299 (1909), as may a non-resident mortgagee's interest be taxed; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898).

⁵ *State v. Itasca Lumber Co.*, 100 Minn. 355, 111 N. W. 276 (1907). "When the government has no longer any right or interest in the property which would justify it in withholding the patent, and the purchaser is in possession, the latter will be treated as the beneficial owner."