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Ann H. Phillips

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Deeds—Married Women—Husband's Joinder

In the recent case of *Cruthis v. Steele*[1] a wife attemped to convey to the children of her first marriage, a tract of land which she had held as tenant by the entirety with her deceased first husband. She was not joined in the deed by her second husband. The instrument, dated in 1916 and duly recorded, was under seal and purported to convey the tract for one dollar, love and affection, subject to the grantor's life estate. The second husband predeceased her in 1949. The grantor died intestate survived by children of both marriages. The children of the second marriage brought a special proceeding for the sale of the land for partition. The defendants, the daughter of the first marriage and the heirs at law of the deceased son of the first marriage, contended that the plaintiffs were in privity with the grantor and were bound by her deed through estoppel or otherwise. The court held that since the wife was not joined by her husband in the deed, the deed was void, and since there was no consideration for this deed it could not be enforced as a valid contract to convey.

In North Carolina any conveyance by a married woman of her real property without the written assent of her husband is void.[2] Since in this state the common law disabilities of a married woman to contract, with certain exceptions, have been removed,[3] she is bound by an estoppel the same as any other person,[4] but a deed which is invalid for failure to comply with some constitutional or statutory

[1] 259 N.C. 701, 131 S.E.2d 344 (1963).

[2] Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 344 (1963); Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944). N.C. CONST. art. X, § 6 provides: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, 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." The language of the implementing statute, N.C. GEN. STAT. § 52-1 (1950), is identical. Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904) held that the requirement that she have the written assent of her husband applied only to real property. The court in Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953), construed N.C. CONST. art. X, § 6 to require the consent of the husband only when a conveyance is executed by a married woman to a person other than her husband. N.C. GEN. STAT. § 39-13.3(d) (Supp. 1961) provides that the wife may convey directly to her husband without his joinder in the deed, subject to the provisions of N.C. GEN. STAT. § 52-12 (1950).

[3] N.C. GEN. STAT. § 52-2 (1950).

[4] Tripp v. Langston, 218 N.C. 295, 10 S.E.2d 916 (1940).

provision is null and void in contemplation of law and does not operate as an estoppel during coverture.[5]

North Carolina has held in a number of cases[6] that a married woman who conveys her realty without the written assent of her husband may not after his death recover the land or defeat the title of her grantee, or those in privity with him, on the ground that the deed was void for lack of assent of her husband at the time of the execution. The court has held in these cases that the invalid deed will be construed as a contract to convey, and specific performance accordingly required.[7] In each case where the court found that there was a contract to convey, the original deed was supported by a valuable consideration.[8] It would appear then from the decision in *Cruthis* that had the purported conveyance of the wife been supported by a valuable consideration, the court would have required specific performance.[9]

[5] Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944); Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923); Wallin v. Rice, 170 N.C. 417, 87 S.E. 239 (1915); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902).

[6] Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917); Robinson v. Daughtry, 171 N.C. 200, 88 S.E. 252 (1916); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Blacknall v. Parish, 59 N.C. 70 (1860).

[7] Harrell v. Powell, 251 N.C. 636, 112 S.E.2d 81 (1960); Mills v. Tabor, 182 N.C. 722, 109 S.E. 850 (1921); Sills v. Bethea, 178 N.C. 315, 100 S.E. 593 (1919).

[8] See cases cited note 7 *supra*.

[9] A promise founded on natural love and affection, according to the great weight of authority is gratuitous and unenforceable. See, *e.g.*, Stewart v. Damron, 63 Ariz. 158, 160 P.2d 321 (1945); Stabler v. Ramsay, 30 Del. Ch. 439, 62 A.2d 464 (1948); Wright v. Polk Gen. Hosp., Inc., 95 Ga. App. 821, 99 S.E.2d 162 (1957); Exum v. Lynch, 188 N.C. 392, 125 S.E. 15 (1924). According to a few decisions, however, love and affection growing out of the relationship of parent and child are sufficient consideration to uphold the contract. Dawley v. Dawley's Estate, 60 Colo. 73, 152 Pac. 1171 (1915); Arnold v. Arnold's Ex'x, 314 Ky. 734, 237 S.W.2d 58 (1951); Doty v. Dickey, 29 Ky. L. Rep. 900, 96 S.W. 544 (1906). In Puterbaugh v. Puterbaugh, 131 Ind. 288, 30 N.E. 519 (1892), the court held that the fact that affection formed an element of consideration in an agreement by an uncle to make a deed of land to his nephew who had lived with him for twenty-four years would not impair the force of the contract to convey land. However, the nephew had fully performed his part of the contract by moving onto the land and giving his time and labor in improving it.

In Stanback v. Citizens' Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929), the court said that the recited consideration of one dollar and the grantor's love and affection for her nephew "is not 'valuable,' that is, not 'founded in motives of justice'; but it is 'good'—founded on a motive of generosity and therefore merely voluntary or gratuitous and without valuable consideration." *Id.* at 294, 148 S.E. at 314. The court further said that the recital of the inconsequential sum of one dollar was a mere matter of customary form. *Ibid.*

The court has said in *Sills v. Bethea,*[10] wherein the wife brought suit to recover property after her husband's death, that although the deed of a married woman was invalid to pass title without the written assent of her husband, it was a good and sufficient contract to convey. The court pointed out that during the husband's lifetime the contract could be enforced only by an action for damages[11] because the husband could not be compelled to give his written assent, but after the husband's death and the removal of the restrictions of coverture there was no obstacle to the requirement that she comply with her contract by specific performance. Therefore, on breach of her contract to convey her land, she is liable for damages and sale under execution of her land to satisfy the judgment;[12] or if her husband has predeceased her, specific performance to convey may be enforced against her.[13] Thus, by indirection the alienation of her land without the consent of her husband may be accomplished.

The one remaining disability growing out of the marital unity of husband and wife seems to be that a married woman cannot convey her realty without the written assent of her husband. She may acquire and hold any kind of property and without any restriction whatever, dispose of her personalty;[14] contract freely except as to her realty between herself and her husband;[15] draw checks;[16] make

[10] 178 N.C. 315, 100 S.E. 593 (1919).

[11] See, *e.g.,* Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915).

[12] Miles v. Walker, 179 N.C. 479, 102 S.E. 884 (1920); Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917); Thrash v. Ould, 172 N.C. 728, 90 S.E. 915 (1916); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 756 (1914). The court said in Thrash v. Ould, *supra* at 731, 90 S.E. at 916, "[I]t is no longer an open question, but is settled, that a married woman is liable upon her contracts, . . . and that under execution issued upon said judgment her property, real and personal, can be sold to the same extent as if she had remained single, though the debt has not been charged thereon by her."

[13] Harrell v. Powell, 251 N.C. 636, 112 S.E.2d 81 (1960); Sills v. Bethea, 178 N.C. 315, 100 S.E. 593 (1919).

[14] N.C. GEN. STAT. § 52-1 (1950); Rea v. Rea, 156 N.C. 529, 72 S.E. 873 (1911); Ball v. Paquin, 140 N.C. 83, 52 S.E. 410 (1905); Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904).

[15] N.C. GEN. STAT. § 52-2 (1950) provides: "Subject to the provisions of § 52-12, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the Constitution, and the execution of the same

a will[17] and her husband has no right to dissent therefrom;[18] insure her husband's life;[19] her earnings are her own property;[20] she may sue alone for any damages for personal injuries or other tort sustained by her and such recovery is her own property;[21] she is liable for her antenuptial debts, contracts and torts;[22] she is liable for her torts and for costs or fines incurred in any criminal proceeding against her;[23] and she may sue her husband both in contract and in tort.[24] Assuming the husband gives his written consent to the sale of her land, the money derived therefrom immediately becomes personalty, and under the constitution and implementing statute, the wife's sole and separate property, free from the control and debts of her husband.[25]

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acknowledged or proven as required by law." This section was held constitutional as valid exercise of legislative power in Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915).

[16] N.C. GEN. STAT. § 52-3 (1950).

[17] N.C. GEN. STAT. § 52-8 (Supp. 1961) provides: "Every married woman 21 years of age or over has power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills."

[18] N.C. GEN. STAT. § 30-1 (Supp. 1961) accorded to husband and wife reciprocal rights of dissent to the will of the other, but Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), denied this right to the husband by its ruling that such provision is an unconstitutional abridgement of a wife's right to make a will of her property as provided in N.C. CONST. art. X, § 6, and the implementing statute N.C. GEN. STAT. § 52-1 (1950), "as if she were unmarried." However, the wife retains her right to dissent from her husband's will of his separate property. See 41 N.C.L. REV. 311 (1963) and 1963 DUKE L.J. 161.

[19] N.C. GEN. STAT. § 52-9 (1950) provides: "Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture."

[20] N.C. GEN. STAT. § 52-10 (1950).

[21] *Ibid.* Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945) (husband's common law right of action transferred to wife); Croom v. Goldsboro Lumber Co., 182 N.C. 217, 108 S.E. 735 (1921) (separate earnings belong to her; may sue alone to recover); Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E. 602 (1919) (joinder of husband unnecessary).

[22] N.C. GEN. STAT. § 52-14 (1950).

[23] N.C. GEN. STAT. § 52-15 (1950) (abolishing common law liability of husband for tort of wife).

[24] N.C. GEN. STAT. § 52-10.1 (Supp. 1961). *In re* Will of Witherington, 186 N.C. 152, 119 S.E. 11 (1923) held that a married woman has the fullest power to bring actions in all cases, even against her husband. Crowell v. Crowell, 181 N.C. 66, 106 S.E. 149 (1921) held that a wife's right to sue her husband extended to tort actions.

[25] N.C. CONST. art. X, § 6; N.C. GEN. STAT. § 52-1 (1950); Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904).

The requirement that she be joined by her husband in her deed is not immune to legislative alteration. This is shown by statutes making the wife a free trader and dispensing with the necessity of joinder of the husband in cases of certain leases of her realty, legal separation, abandonment by the husband, and his insanity, all of which have been upheld as valid legislative limitations on art. X, section 6.[26]

The husband's veto power over his wife's conveyance of her real property by his failure or refusal to join in her conveyance is at most an anomalous nuisance impeding freedom of conveyance of real property.[27] The requirement that a husband join in his wife's conveyance is a relic of feudalism[28] and has long been abolished in England and in nearly all the states.[29] Prior to 1945, a separate

[26] Keys v. Tuten, 199 N.C. 368, 154 S.E. 631 (1930); Lancaster v. Lancaster, 178 N.C. 22, 100 S.E. 120 (1919); Bachelor v. Norris, 166 N.C. 506, 82 S.E. 839 (1914); Vaniford v. Humphrey, 139 N.C. 65, 51 S.E. 893 (1905); Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904); Finger v. Hunter, 130 N.C. 529, 41 S.E. 890 (1902); Hall v. Walker, 118 N.C. 377, 24 S.E. 6 (1896); N.C. GEN. STAT. §§ 52-4 to -6 (1950). These legislative limitations have been restated and otherwise implemented by N.C. GEN. STAT. §§ 52-1 to -3, -7, -8 (1950). See Bolich, *Election, Dissent and Renunciation,* 39 N.C.L. REV. 17, 28 (1960).

In 1955 N.C. CONST. art. X, § 6 was amended by providing as follows: "Every married woman may exercise powers of attorney conferred upon her by her husband, including the power to execute and acknowledge deeds to property *owned by her* or by herself and her husband or by her husband." (Emphasis added.)

[27] The rule that the husband must join in order to validate her deed makes it hazardous for a grantee to accept a title which has been conveyed by a woman since he may be buying a lawsuit and he may lose the property, but as previously noted he may still have his action for damages. In Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944) (4-3 decision), a woman signed a deed without disclosing the fact that six days prior thereto she had gone into another state and remarried the husband from whom she had been divorced. Later she was allowed to recover the property on the ground that she had not been joined by her husband.

[28] In the absence of a statute permitting a married woman to manage and control her separate estate as if she were a feme sole, she does not have the capacity to convey land unless her husband joins in the convyance. BURBY, REAL PROPERTY § 239 (1953); 5 TIFFANY, REAL PROPERTY § 1359 (3d ed. 1939).

[29] Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915). The requirement of the husband's joinder has been abolished in all states except Alabama, Florida, Indiana, North Carolina, and Pennsylvania. 1 POWELL, REAL PROPERTY § 118 (1949). ALA. CODE tit. 34, § 73 (1959) (husband must join in deed but not in her lease); FLA. STAT. ANN. § 693.01 (1944) (joinder not required by constitution); IND. STAT. ANN. § 38-102 (Burns 1949), "Provided, however, that she shall be bound by estoppel in pais, like any other person." N.C. GEN. STAT. § 52-1 (1950); PA. STAT. ANN. tit. 48, § 64 (1930). As of 1961, a married woman in Texas may elect to have the "sole

and private examination was required for the wife in dealing with her separate property, the court saying that this was "to secure her against coercion and undue influence from him."[30] Now that this protective factor against the influence of the husband in her dealings with third persons has been removed,[31] we are left with his "veto power"[32] over her real property transactions "to afford her his protection against the wiles and insidious arts of others . . . ."[33] The court in *Stallings v. Walker*,[34] explained the requirement that the husband join in his wife's deed more realistically with these words:

> It is true that the husband, under our Constitution, Art. X, sec. 6, has no interest as husband in his wife's property, real or personal. The provision that he must give his written assent to conveyances by her of realty is the sole survival in our Constitution of the ancient idea that a wife must be under the guardianship and control of her husband *and is incompetent to transact business. This requirement in our Constitution is omitted in nearly all other State constitutions.* It is not based upon his having any interest in his wife's land, nor on his having a vested interest therein at her death, for she has full authority to devise the same without his consent and deprive him of any interest . . . .[34a]

Under our law the husband has no right to dissent from his wife's will,[35] although she may dissent from his will.[36] The husband

management, control and disposition of her separate property" and convey it without the joinder of her husband. TEX. CIV. STAT. art. 4614(d) (Vernon Supp. 1962). The desirability of a statute validating deeds by married women is discussed in 12 FLA. L.J. 245 (1938).

[30] Ferguson v. Kinsland, 93 N.C. 337, 339 (1885).

[31] N.C. GEN. STAT. § 47-14.1 (Supp. 1961). This section does not repeal N.C. GEN. STAT. § 52-12 (1950), requiring private examination of the wife when conveying her real property to her husband. Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955).

[32] Stallings v. Walker, 176 N.C. 321, 324, 97 S.E. 25, 26 (1918).

[33] Ferguson v. Kinsland, 93 N.C. 337, 339 (1885).

[34] 176 N.C. 321, 97 S.E. 25 (1918).

[34a] *Id.* at 323-24, 97 S.E. at 26. (Emphasis added.)

[35] See note 18 *supra*. Gomer v. Askew, 242 N.C. 547, 89 S.E.2d 117 (1955). See DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA §§ 18, 48, 158 (1948). The rights of husband and wife to dissent from each others' wills are the same in most states except Florida, Georgia, Missouri and North Carolina. In most jurisdictions the surviving spouse is given by statute full discretionary power to dissent. A few states in addition to North Carolina qualify the right. See KAN. GEN. STAT. ANN. § 59-602(2) (1949); KAN. GEN. STAT. ANN. § 59-603 (Supp. 1961); LA. CIV. CODE art. 2382 (1952); MISS. CODE ANN. §§ 667-70 (1957); N.Y. DECED. EST. LAW § 18; N.C. GEN. STAT. § 30-1 (Supp. 1961).

[36] "Under the statute in effect and operative as to persons dying prior to

has a veto power over the conveyances of his wife of her separate realty although he has no interest therein. The wife has no similar veto power over the conveyances of her husband of his separate realty except that without her joinder it remains subject to the elective life estate.[37] His separate deed is valid while her separate deed is invalid. Thus the right of husband and wife to transfer their respective separate property is unequal. It would seem that public policy would be better served if the legal rights of the husband and wife in each other's property were the same. This would involve an amendment to our constitution which would empower the General Assembly to eliminate the distinction in treatment of the property rights of husband and wife as now found in the law and give the General Assembly the power to make their rights equal. By equalizing their rights, the husband could dissent from his wife's will under the same provisions as provided for the wife's dissent under the Intestate Succession Act.[38] Instead of the husband's joinder in his wife's deed being a condition precedent to its validity, his joinder would only signify a release of his power of election.[39] In this manner neither spouse could pauperize or leave the other destitute on society.

In the principal case the husband had no interest in the land, yet his failure to join in her deed defeated the obvious intent of the grantor that her children by her first marriage have the property which had belonged to their father and to her as tenants by the entirety and which had come to her as survivor. This requirement of assent seems to be anachronistic and paradoxical in view of the removal of practically all of the legalistic common law disabilities imposed upon a married woman, and, at best, seems to burden the

July 1, 1960, the effect of a dissent was to give the widow the same rights and estates in real and personal property of her husband as if he had died intestate, i.e., dower, year's allowance, and intestate share." Bolich, *supra* note 36, at 32. N.C. GEN. STAT. §§ 28-149, 29-1(8), 30-2 to -5, -15 (1950). Cheshire v. Drewry, 213 N.C. 450, 197 S.E. 1 (1938). DOUGLAS, *op. cit. supra* note 46, §§ 18, 48(c). The 1959 Session of the General Assembly abolished dower and curtesy. N.C. GEN. STAT. § 29-4 (Supp. 1961). Under the new act the right to dissent is confined to situations where she receives less than a certain minimum share as defined therein. N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961).

[37] N.C. GEN. STAT. § 29-30 (Supp. 1961) (election to take life interest in lieu of intestate share).

[38] N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961), as amended N.C. GEN. STAT. § 30-1(a) (Supp. 1961).

[39] N.C. GEN. STAT. § 29-30 (Supp. 1961).

transfer of realty without providing any substantial benefits to either spouse. The remedy for this situation calls for an amendment to the present constitution, which, with respect to this requirement, seems both illogical and outmoded.

ANN H. PHILLIPS

Federal Jurisdiction—Three Judge Courts—Abstention—Appellate Jurisdiction

Idlewild Bon Voyage Liquor Corp. v. Epstein[1] makes two significant decisions dealing with the jurisdiction of three judge courts and appeal from a district court's denial to convene such a court. The result is to simplify and clarify this area of federal jurisdiction.

A novel feature of our judicial system, the three judge federal court is an important buffer in the conflict of state and federal law. A three judge court is properly convened when petitioner seeks to enjoin the enforcement of a state or federal statute as being unconstitutional.[2] If the case is proper the district judge certifies the case to the chief judge of the circuit, who convenes the special court. The full court includes in its three members one circuit judge and the district judge before whom the case is pending.[3] Appeal lies directly to the Supreme Court.[4]

The three judge court was created by Congress in response to public demand. *Ex Parte Young*[5] held that a single federal district judge could enjoin a state official from enforcing an unconstitutional

[1] 370 U.S. 713 (1962) (per curiam).

[2] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U.S.C. § 2281 (1958). 28 U.S.C. § 2282 (1958) applies the same rule to federal statutes. 28 U.S.C. § 2284 (1958) outlines the composition and procedure of the three judge court. Other actions requiring a three judge court are cases seeking to set aside an order of the Interstate Commerce Commission, 28 U.S.C. § 2325 (1950) and to enjoin a violation of the Sherman Antitrust Act in which an expediting certificate has been filed by the U.S. Attorney General, 63 Stat. 107 (1949), 15 U.S.C. § 28 (1958).

[3] 28 U.S.C. § 2284(1) (1958).

[4] 28 U.S.C. § 1253 (1958). Direct appeal is allowed because of the dignity of the special court and the cases are generally of extreme importance. See 47 GEO. L.J. 161, 169 (1958).

[5] 209 U.S. 123 (1908).