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POWER OF WIFE TO EXECUTE A DEMISE WITHOUT JOINDER OF HER HUSBAND IN THE LEASE.—The Supreme Court of Appeals of West Virginia, in *Smith v. New Huntington General Hospital*,¹ has recently decided that a married woman, while living with her husband, has power to execute a lease demising her separate real estate without a joinder of her husband in the lease. Although this case decides what previously may have been considered an open question in West Virginia,² it is seemingly based upon the weight of authority in other jurisdictions³ and so might very well be accepted without comment, if it were not for the fact that it suggests, if it does not originate, additional problems and possible inconsistencies in the construction and application of the statutes affecting the rights and remedies of married women in West Virginia. Perhaps the most vital question in this respect involves the effect of the wife's death upon an unexpired term created by her without joinder of her husband, a question necessitating an inquiry into the fundamental nature of the husband's right of curtesy, especially as modified by West Virginia statutes.

It is provided by statute and reiterated by court decisions in West Virginia that a husband becomes vested of curtesy only in

¹99 S. E. 461 (W. Va. 1919).

²Plausible arguments may be opposed to the finding of the principal case. The legislative intent back of our statute, W. VA. CODE, c. 66, §3, requiring the husband to sign the wife's deed conveying her real estate, has been interpreted by our decisions as arising from an assumption that the husband will exercise a beneficent judgment and control over the wife as to the disposition of her property. *Cecil et al. v. Clark et al.*, 44 W. Va. 659, 30 S. E. 216 (1898); *Morgan et al. v. Snodgrass et al.*, 49 W. Va. 387, 38 S. E. 695 (1901). If requirement of the husband's judgment of the transaction and approval is presumed to be advantageous to the wife when she undertakes to "sell and convey" her real estate, why must it be presumed to be inimical when she undertakes to execute a demise? Again, a lease may be construed as coming within the term "sell and convey." One may "sell" a term, and, of course, convey it. In fact, if the term extend beyond a period of five years, in West Virginia it must be conveyed by deed. W. VA. CODE, c. 71, §1. Under the statutes of some states, a lease is construed as a conveyance within the meaning of statutes relating to conveyances by married women. See 13 R. C. L. 1343, and cases cited.

³In some jurisdictions a lease is held not to be a conveyance within the meaning of statutes relating to conveyances by married women. See 13 R. C. L. 1343, and cases cited.

the real estate of which the wife dies seized.⁴ The statute has uniformly been construed, not as merely modifying, but as absolutely abolishing curtesy initiate. The husband is considered not as possessing a right subject to subsequent defeasance upon the happening of a contingency, but as occupying a status by virtue of which he may be entitled to a right upon the happening of a contingency—death of his wife seized of a freehold. Consequently, when the wife undertakes to convey her freehold, if it is necessary for the husband to join in her deed at all, he does so not for the purpose of releasing his inchoate right of curtesy, or his curtesy initiate, something which he does not have, but solely because the statute requires his signature in order to give legal effect to the wife's conveyance.⁵ If circumstances are such that the wife is capable at all of conveying any interest in her land without participation of her husband, she may convey away her property absolutely, thus defeating entirely and irrevocably any possibility of curtesy. For example, if the husband and wife are living separate and apart, although the separation be due solely to her fault, she may nevertheless, by her sole deed, without joinder of her husband, convey away her land so as to deprive him of any possibility that his curtesy may vest. In other words, the status of the parties, the fact that they are living separate and apart, not why they are so living, is the important thing.⁶ This consideration is important only because it determines the wife's ability to transfer her own interest by her conveyance, but not because it in any way establishes a forfeiture of any right belonging to the husband, and as to which he may assert any claim, for no such right exists even during cohabitation.⁷ The necessary conclusion is that, if the wife has power to convey at all, the effect and extent of the conveyance can in no way be modified by a future vesting of the husband's right of curtesy. Since the decision of the principal case, no reason is apparent why the same process of reasoning and the same conditions would not apply in the situation where a wife undertakes to convey a leasehold interest.

It would seem that a wife may, without joinder of her husband

⁴W. VA. CODE, c. 65, §15; *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 443 (1917), and cases cited; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405 (1902). Disseizin of the wife by adverse possession will bar the husband's curtesy, although he be under the disability of insanity during coverture and after death of the wife. *Calvert v. Murphy*, 73 W. Va. 731, 81 S. E. 403 (1914).

⁵See citations in notes 1 and 4, *supra*.

⁶*Spangler v. Vermillion*, note 4, *supra*.

⁷See citations in note 4, *supra*.

in the lease, create a leasehold estate just as free from interruption through vesting of the husband's curtesy right as a freehold conveyed while living separate and apart from her husband. In fact, the fundamental theory upon which the principal case is decided—the absolute right of the wife to the exclusive use and enjoyment of her realty—would seem to demand such a conclusion. The nature of her property might be such as to make it essential to execute a long-term lease in order to get an adequate rent, or possibly in order to lease the property at all. But increasing the length of the term necessarily increases the possibility of the wife's death before the expiration of the term and the consequent vesting of the husband's curtesy interest. If the vesting of such interest were permitted to cut short the term, or in any manner interfere with the enjoyment of it, a prospective lessee might very advisedly hesitate to accept a lease without joinder of the husband, and the result would be to interfere radically with the wife's present use and enjoyment of her property free from control of her husband. The only logical conclusion to be reached is that, as far as the husband's right to possession of the property under his vested right of curtesy is concerned, his right to possession would be in abeyance until the expiration of the term, and he would have to be content with the rent reserved in the lease accruing to his curtesy interest as issuing out of the freehold to which his curtesy had attached.* But this conclusion leads to consequences involving questions of no little difficulty.

It is easily to be seen that, by means of a long-term lease coupled with an inadequate rent, a wife may in effect partially deprive a husband of his curtesy. Also, it is conceivable that she might execute a long-term lease and receive all the rent in advance, thus in effect totally depriving her husband of his curtesy. But if such transactions were *bona fide* and consummated by the wife in a conscientious endeavor to avail herself of the use and enjoyment of her property, it is difficult to see, in the light of the decisions already cited, how they can be opposed by any legal objection. The fact that the wife may make, or has made, a bad bargain is legally no concern of the husband's except where she undertakes to "sell and convey" her real estate, when the statute requires the sanction of his signature; and even here, the husband's

*It is so held in Nebraska. *Forbes v. Sweezy*, 8 Nebr. 520, 1 N. W. 571 (1879). But see *Ennis v. Eager*, 152 Mo. App. 493, 133 S. W. 850 (1911).

approval is required for her protection and not for his.⁹ The principal case decides that a demise is not a sale or conveyance within the meaning of the statute. If the husband were allowed to assert that any right of his own had been prejudiced under such circumstances, certainly the reasoning in *Spangler v. Vermillion*, where it is said that a wife may be permitted to desert an innocent husband and so acquire a status enabling her to execute her sole deed depriving her husband absolutely of his curtesy, is at fault.

The situation where the wife executes a conveyance with the fraudulent intent to deprive her husband of his curtesy, as where she would execute a lease to her son with a term longer than the husband's expectancy of life, reserving only a nominal rent, expecting the remainder to vest in the son by inheritance, presents different possibilities. Unquestionably there is fraud here in the abstract. But whether there is legal fraud depends upon the question whether there is any interest in the husband upon which it may operate. There would not be much difficulty in conceiving the existence of legal fraud if the husband could be considered as possessing as much as a vested interest subject to defeasance upon the contingency of a future conveyance.¹⁰ Under such circumstances, since the act causing the defeasance is permeated with fraud, a fraud is committed against the husband's interest before the interest is terminated, or at least the fraud is contemporaneous with the act of defeasance. But we have already seen that, under the West Virginia decisions, prior to the death of the wife, the husband has only a bare possibility of a vested right contingent upon seizin of the wife at her death. In the one case, an existing right is defeated by a contingency; in the other case, there is no right until the happening of the contingency, and the conveyance of the wife precedes the contingency. The question, simplified, is whether a bare possibility can be the subject of fraud. If not, it would seem that no legal objection can be raised to such a conveyance, as, so far, neither the statutes nor the decisions in West Virginia have placed any limitations upon the methods or motives through which the contingency may be destroyed other than those concerned with the bare legal capacity of the wife to execute a conveyance.

In *Spangler v. Vermillion*, the right to attack a sole conveyance of a wife made while living separate and apart from her hus-

⁹See citations in notes 1 and 4, *supra*.

¹⁰*Westerman v. Westerman*, 3 Ohio Dec. 501, 9 AM. LAW REG. (N. S.) 690.

band, on the ground of fraud in effecting a separation for the purpose of making the conveyance, is expressly referred to as an open question. However, in an earlier case,¹¹ it has been held that a conveyance made by a husband and wife in order to prevent an existing judgment from attaching in the future as a lien on the husband's curtesy interest could not be attacked as fraudulent after the death of the wife. This decision is based on the ground that the husband had no interest to which the lien attached at the time of the conveyance, that the conveyance defeated the contingency upon which the curtesy interest otherwise would have vested, and hence that the intent with which the conveyance was made was immaterial. In other words, there could be no fraud in defeating a contingent attachment of the lien, a bare possibility, although evidently the very act by which the contingency was defeated was permeated with an intent which would have been fraudulent if the husband had had a vested interest. If the husband and wife can not be guilty of fraud with reference to third parties in the matter of defeating the possibility of curtesy, on the ground that the husband has no interest which may be the subject of fraud with reference to the husband's creditors, it may very plausibly be argued that, for the same reason, the wife can not be guilty of fraud with reference to the husband. If the wife and husband together can legitimately destroy the contingency upon which the lien would attach, why can not the wife alone, as far as fraud is concerned, destroy the contingency upon which the curtesy would vest? Logically, it would seem that a husband could make no more substantial objection, on the sole ground of fraud, to a conveyance of his wife depriving him of his possibility of curtesy than could a prospective heir make a conveyance executed for the purpose of defeating his inheritance.

—L. C.

APPORTIONMENT OF ROYALTIES ON SUBDIVISION OF PREMISES SUBJECT TO AN OIL AND GAS LEASE UNDER WHICH THERE IS SUBSEQUENT DEVELOPMENT.—In the recent case of *Pittsburgh & West Virginia Gas Co. v. Ankrom et al.*,¹ the Supreme Court of Appeals of West Virginia held that where a tract of land, subject to an

¹¹*Guernsey v. Lazear*, note 4, *supra*.

¹97 S. E. 593 (1918). Judges Poffenbarger and Williams dissented. All the prior cases on this point are cited in the opinions in this case and in the opinion in the Oklahoma case discussed hereafter.