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## Tenant by Curtesy--Acts 1921--Construction

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## STUDENT NOTES AND RECENT CASES.

TENANT BY CURTESY--ACTS 1921--CONSTRUCTION.—At common law four things were necessary to make a man tenant by curtesy, namely, marriage, seisin of the wife, issue born alive, and death of the wife.<sup>1</sup> In *Breeding v. Davis*<sup>2</sup> the court in defining curtesy says: "Curtesy is the estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was *seized in possession* in fee simple, or in tail during their coverture, provided they have had issue born alive which might have been capable of inheriting the estate." It was not necessary at common law that the wife be seized of the land at the time of her death. It sufficed that she was seized at any time during coverture,<sup>3</sup> but must have been actually seized.<sup>4</sup> While actual seisin of the wife during coverture was all that was required the practical result at common law was that the husband had curtesy only in land of which the wife died seized. She could not convey her property except by fine and recovery, and the husband had to be made a party, and if so, curtesy was barred.<sup>5</sup> Upon marriage at common law and before birth of issue the husband was entitled as a martial right to the use, profits, control and management of the wife's freehold (except her equitable separate estate) but held it only in right of his wife and jointly with her and was said to be seized of a freehold *jure uxoris*.<sup>6</sup> The birth of issue gave to him an estate known as curtesy *initiate*, a vested life estate, in the whole of the wife's estate, and was such an estate as could be sold for his debts and could be barred by an enfeoffment made by him while his wife was living.<sup>7</sup> Curtesy initiate, by implication,

<sup>1</sup> *Winkler v. Winkler, Ex'r*, 18 W. Va. 455 (1881); *Breeding v. Davis*, 77 Va. 646 (1883); *Porter v. Porter*, 27 Gratt. 599 (Va. 1876); See Co. Lit. 29a-30-33b.; 2 BL. COM. 126, *et seq.*; 4 KENT. COM. 30, 14 ed.

<sup>2</sup> *Breeding v. Davis, supra*, note 1.

<sup>3</sup> *Comer v. Chamberlain*, 6 Allen 166, 170 (Mass. 1863); *Hunter v. Whitworth*, 9 Ala. 965 (1846); See 1 MINOR ON REAL PROP. § 234 (1908). There are *dicta* to the contrary. See *Winkler, v. Winkler, supra*, note 1.

<sup>4</sup> *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38 (U. S. 1843); *Muse v. Fiedenwald*, 77 Va. 57 (1883); *Carpenter v. Garrett*, 75 Va. 129 (1880); *Bragg v. Wiseman*, 65 W. Va. 330, 47 S. E. 90 (1904); *Fulton v. Johnson*, 24 W. Va. 95 (1884).

<sup>5</sup> See 1 MINOR, REAL PROP. § 236.

<sup>6</sup> *Ibid* § 243.

<sup>7</sup> *Cole v. Van Riper*, 44 Ill. 58 (1867); *Bozarth v. Largent*, 128 Ill. 95 (1889); 142 Ill. 388 (1892). See KENT'S COM. 130; BISH. ON LAW OF MAR. WOMEN 529, 531.

was abolished by the Married Women's Acts<sup>8</sup> but they did not abolish curtesy consummate.<sup>9</sup> The husband's right is regulated by the law as it exists at the time of the wife's death rather than at the time of the marriage,<sup>10</sup> and if he has any interest at all now during the life of the wife it is at most a contingent interest, contingent upon the husband surviving the wife,<sup>11</sup> and during coverture the husband has no interest in the separate estate of the wife.<sup>12</sup>

The first legislative enactment we had on the question of curtesy is found in section 15, chapter 65, Code of 1868, which was amended by section 2, chapter 207, Acts of 1872-3, making the husband's curtesy one-third of the wife's estate, unless he was entitled to the whole thereof under the statute of descent which at that time did not place the husband in such a remote position as at present. The court in construing these acts in *Winkler v. Winkler*,<sup>13</sup> held that the acts were declaratory of the common law and did not dispense with the birth of issue, but in the amendment of 1882 birth of issue was expressly dispensed with.<sup>14</sup> Section 15 of chapter 73, Acts of 1921, amending section 15 of chapter 65 of the Code is as follows:

"If a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy *in the one-third thereof*. An estate by the curtesy in the lands of which a married woman may hereafter die seized, shall exist and be held by the husband therein, whether they had issue born alive during coverture or not, *in the same manner and under the same right a widow would be entitled to dower.*"<sup>15</sup>

Under this statute must the wife *die seized* or will seisin of the wife of an estate or inheritance *during coverture* be sufficient to give the husband curtesy? In other words, are the life estates of dower and curtesy governed by the same principles of law since the passage of this act? Is curtesy now an *inchoate* right the same as dower and an encumbrance upon the separate estate of the wife? In the former statute<sup>16</sup> you have the words "die seized" appearing in two instances as in the amendment, and also in all former legislation. These words compel us to inquire into the

<sup>8</sup> 17 C. J. 416; *Winkler v. Winkler*, *supra*, note 1; *Alderson v. Alderson*, 46 W. Va. 242 (1889); *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405 (1902); *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 499 (1917).

<sup>9</sup> *Wyatt v. Smith*, 25 W. Va. 813 (1885).

<sup>10</sup> *Alderson v. Alderson*, *supra*, note 8.

<sup>11</sup> *Hartigan v. Hartigan*, 65 W. Va. 471, 475, 64 S. E. 726 (1908).

<sup>12</sup> *Hudkins v. Crim*, 64 W. Va. 225, 233 (1908).

<sup>13</sup> *Supra*, note 1.

<sup>14</sup> See ACTS 1882, c. 86 § 15.

<sup>15</sup> The words italicized are the changes made from former statute.

<sup>16</sup> W. VA. CODE § 3663 (1913).

“mystery of seisin” to see how they have been construed. In *Lull v. Davis*,<sup>17</sup> the court said that seisin in fee may include possession; that it is of two kinds, seisin in deed, or as Lord Coke terms it a natural seisin, and seisin in law, or a civil seisin; that seisin in deed, or natural seisin is actual possession of a freehold, where seisin in law, or a civil seisin, is a legal right to such possession. Lord Coke says that *seisin in law* arises only in the single instance of an heir acquiring land by descent from an ancestor and is confined to the period between the ancestor’s death and the time the heir actually enters upon the land himself or by his agent or tenant. He gives an example of an heiress who marries and dies before any entry and says that her husband is not tenant by curtesy in this instance. The daughter was only *seized in law* and not in deed.<sup>18</sup> Minor says that the term “seised” signifies “possessed of a freehold,” and “seisin” the “possession of a freehold;” that seisin is only applied to a freehold estate, and that there could be only one seisin at a time of a single tract of land; that there are two kinds of seisin, namely, in deed and in law. He says that seisin in deed, as it related to corporeal property, signified, at common law the *pedis positio*, that is the actual possession of the immediate freehold, not necessarily the actual possession of the land itself for that might be in the hands of a tenant for years or at will.<sup>19</sup> In *Green v. Lites*<sup>20</sup> the court says: “Seisin was formerly understood to be a corporeal investiture by actual livery of seisin, and passed away when written muniments of title came to be used. The delivery of a deed where there is no *adverse possession* or *claimant* has been generally regarded as a sufficient seisin on th ground that possession follows the title.” In *Carpenter v. Garrett*,<sup>21</sup> the court defines seisin thus: “Seisin in fact or in deed, or as Lord Coke calls it, actual seisin, means possession of the freehold by the *pedis positio* of one’s self, or one’s tenant or agent, or by construction of law, or in case of a commonwealth grant, a conveyance under the *statute of uses*, or doubtless of grants or devises, where there is no actual adverse occupancy. Seisin in law is a right to the possession of the freehold where there is no *adverse occupancy*, such as exists in the heir after descent of land upon him before actual entry by himself or agent.” *Seisin in law* does not mean constructive possession but the right of immediate entry.<sup>22</sup> The

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<sup>17</sup> 1 Mich. 77, 81.

<sup>18</sup> Co. LIT. 29a.

<sup>19</sup> 1 MINOR, REAL PROP. §§ 140, 141; MINOR, INSTS. 122, 123.

<sup>20</sup> 8 Cranch 229, 3 L. Ed. 545 (U. S. 1814).

<sup>21</sup> 75 Va. 134.

<sup>22</sup> See WASH. REAL PROP. § 1953, 6th ed.

court in *Pratt v. Teffet*,<sup>23</sup> in construing a statute,<sup>24</sup> held, that a wife was not entitled to dower in land in which her husband had conveyed by deed without his wife joining therein three years before his death which occurred in New York; that *in like manner etc.*, referred to the manner of assigning the dower and not to the estate of dower, and that it was the clear intention of the legislature to bar a non-resident wife of dower in lands of which her husband died without actual seisin.<sup>25</sup> In *Pinkham v. Grear*<sup>26</sup> in construing the statute of February 3, 1789, section 4, giving the judge jurisdiction to assign dower out of lands of which the husband *died seized*, it was held that the husband must have actual seisin in order to give such court jurisdiction. In *Fish v. Eastman*,<sup>27</sup> in construing the same statute the court said that where a husband does not *die seized and possessed* of the land on assignment of dower to his widow by the judge of the probate is void. In *Putney v. Vitnon*,<sup>28</sup> in construing a statute similar to the New Hampshire one it was held that a non-resident is not entitled to dower if her husband was not *actually seized*; that the statute should be so construed as to mean that the seisin of the husband should be actual; that is, possession by himself, his tenant, or his agent; that the words "die seized" are broad enough to mean one who is in actual possession. The words "die seized" under section 15, chapter 65 of Code received their first construction in the case of *Fulton v. Johnson*<sup>29</sup> in which the court held that they meant *seisin in fact*, and that the wife must have actual possession at the time of her death. This case has been followed and quoted in several cases since then.<sup>30</sup> If the wife owns wild lands not adversely held the husband has curtesy on the theory of constructive seisin.<sup>31</sup> This holding seems to be right since *statute of uses*, and is in accord with *Green v. Littr*, *supra*, and is seisin in fact. The same is true where the wife has legal title and there is one in possession whose possession in law is deemed the possession of the wife. In such cases curtesy

<sup>23</sup> 14 Mich. 191 (1866).

<sup>24</sup> See REV. STAT., MICH. c. 66 § 21 (1846), which in part is as follows: ". . . any woman, residing out of the state, shall be entitled to dower of the lands of her deceased husband, lying in this state of which her husband *die seized*, and same may be assigned to her, or recovered by her *in like manner* as if she and her husband had been residents within the state at the time of his death."

<sup>25</sup> *Ligare v. Semple*, 32 Mich. 438 (1875).

<sup>26</sup> 3 N. H. 163 (1825).

<sup>27</sup> 5 N. H. 240 (1830).

<sup>28</sup> 145 Mich. 219, 108 N. W. 655 (1906).

<sup>29</sup> 24 W. Va. 95 (1884).

<sup>30</sup> *Selm v. O'Grady*, 42 W. Va. 77 (1896); *Ceell v. Clark*, 44 W. Va. 659, 689 (1898); *Bragg v. Wiseman*, 55 W. Va. 330, 333 (1904); *Calvert v. Murphy*, 73 W. Va. 731, 734 (1904).

<sup>31</sup> *Selm v. O'Grady*, *supra*, note 30.

attaches;<sup>32</sup> also where wife is cotenant or coparcener, and one of her cotenants or coparceners is in amicable possession of land.<sup>33</sup> Seisin cast upon the wife by the law is sufficient.<sup>34</sup> Judge Brannon in deciding this case (*Bragg v. Wiseman*) said: "The law requires seisin in fact to give curtesy, seisin in law not giving it." He allowed the husband of the heiress in the case curtesy without entry of the wife in her lifetime on the theory that she was seized in fact by virtue of section 1 chapter 78 of Code, allowing the heir to inherit seisin in fact. By this construction of our statute the case is not *contra* to *Coke on Littleton* and *Mercer v. Selden*,<sup>35</sup> requiring seisin in deed or fact of wife for curtesy. In the latter case the court says: "The general rule of law is that there must be an entry during coverture to enable the husband to curtesy." In *Seim v. O'Grady*<sup>36</sup> curtesy was allowed to the husband out of vacant and unoccupied lots or lands which his wife purchased at judicial sale but which she had not entered nor had she secured a deed for them. The land was in constructive possession of the purchaser, and by construction of law such possession amounts to such seisin in fact as will entitle the husband of such purchaser to curtesy. Since the *statute of uses* delivery of a deed gives constructive seisin, and such seisin is generally considered by our courts to be seisin in fact unless there is an adverse occupant or claimant. Since the construction given to section 1, chapter 78, in *Bragg v. Wiseman, supra*, there hardly remains an instance in West Virginia wherein a person can be seized in law, unless a right of entry is considered as such seisin, or possibly the case where the ancestor has died seized in law only. A right of entry at common law was not seisin in law.

In the case of adverse possession it is hard to reconcile the amendment with the words "die seized" in it, with our dower statute so as to put curtesy on the same footing with dower in such a case unless you can by some construction eliminate these words. Previous to this amendment curtesy could be allowed only in lands of which the wife *died seized*,<sup>37</sup> but dower is allowed to the wife in the lands of which her husband was seized *during coverture*.<sup>38</sup> In

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<sup>32</sup> *Hartigan v. Hartigan, supra*, note 11.

<sup>33</sup> *Bragg v. Wiseman, supra*, note 4; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562 (1903).

<sup>34</sup> *Bragg v. Wiseman, supra*, 47 S. E. 90; *Seim v. O'Grady, supra*, note 30, 24 S. E. 994. *Contra*: *Winkler v. Winkler, supra*, note 1; *Mercer v. Selden*, 1 How. 37, 11 L. Ed. 38 (U. S. 1843); See Co. Lit. 29a.

<sup>35</sup> *Supra*, note 34.

<sup>36</sup> *Supra*, note 30.

<sup>37</sup> *Calvert v. Murphy, supra*, note 30.

<sup>38</sup> *Higginbotham v. Cornwall*, 8 Gratt. 83, 56 Am. Dec. 130 (Va. 1851); *Williams v. Williams*, 89 Ky. 381, 12 S. W. 760 (1891).

some jurisdictions the dower statute uses the words "die seized" instead of the words "during coverture" as in our statute, and the courts have uniformly held, under such a statute, that the husband must be seized of his lands at his death to give dower to his wife.<sup>39</sup> Then if adverse possession works a disseisin of the wife and but one person can be seized of land at a time the husband under the Acts of 1921 would not be entitled to curtesy where the wife did not die seized. If there is adverse possession by another, of her lands at the time of her death, she could not die seized according to the construction given to these words at common law and under the cases in West Virginia. It is otherwise as to dower, seisin during coverture being sufficient.<sup>40</sup> When you have words used in statute the meaning of which is well known at common law the words should be given the same sense as at common law,<sup>41</sup> and if they have acquired through judicial interpretation a well understood legislative meaning, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears.<sup>42</sup> If words used in a statute are of known legal import they are to be construed as having been used in their technical sense, or according to their strict acceptation.<sup>43</sup> The words "die seized" have been judicially interpreted from time "whereof the memory of man runneth not to the contrary" to mean that one had possession of the freehold by himself, his agent or tenant. It cannot be successfully argued that the Legislature intended to make the same principles of law govern both dower and curtesy by the qualifying clause in the amendment, "in the same manner and under the same right as a widow would be entitled to dower." The Legislature certainly knew the effect and purport of the words "die seized." It knew how to make a distinction in the use of such words in the dower statute and why should these words be used in the amendment in two places unless it was intended that the husband have curtesy only in lands of which the wife *die actually seized*. The Legislature may have had in mind in the qualifying clause the method of assigning curtesy, that is, the procedural part, since curtesy is one-third the same would have to be laid off and assigned to the husband after the death of the wife the same as dower is assigned. Such a construction was given to a similar pro-

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<sup>39</sup> Putney v. Vinton, *supra*, note 28.

<sup>40</sup> W. VA. CODE c. 65, § 1.

<sup>41</sup> Wallace v. Tallafirro, 2 Call 447, 462 (Va. 1800).

<sup>42</sup> Daniel v. Silms, 49 W. Va. 554, 39 S. E. (1901); Norfolk, etc., R. Co. v. Prindle, 82 Va. 122, 130, (1886).

<sup>43</sup> Price v. Harrison, 31 Gratt. 114, 118 (Va. 1878).

vision in *Pratt v. Teffet*.<sup>44</sup> If our theory of the construction of the amendment is correct then the only effect of the amendment on the estate of curtesy is to change the husband's estate from a life estate in the whole of the lands of which the wife die seized to one-third thereof, making curtesy synonymous with dower only as to the quantity of the estate to be enjoyed by the husband and not to be governed by the laws of dower in attaching.

—J. R. D.

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NUISANCES—PERMANENT AND TEMPORARY.—The determination of the question as to what nuisances are permanent and what ones temporary, or merely "continuing" is one of importance.<sup>1</sup> If a nuisance is permanent, the statute of limitations begins to run from the time the plaintiff first suffers damage, and the lapse of the statutory period thereafter forever bars an action. A prescriptive right to continue the nuisance is thereby acquired.<sup>2</sup> If a nuisance is temporary, its continuance is looked upon as constituting a tort separate and distinct from its creation so that, in legal contemplation, a new tort begins each week or month.<sup>3</sup> Likewise, the satisfaction of a judgment, in the case of a permanent nuisance, includes both retrospective and prospective damages as measured by the diminution in value of the premises injuriously affected, and thereby purchases a license to continue the nuisance over the plaintiff's land.<sup>4</sup> A subsequent suit for damages, as well as equitable relief by way of injunction, is thereby barred.<sup>5</sup> In the case of a temporary nuisance the plaintiff cannot recover damages in excess of his injury up to the time of his suit. Thereafter, he may either pester the defendant with successive suits for damages, or ask for an injunction to abate the nuisance, or both.<sup>6</sup> A review of many cases and approved text writers shows that there is practical unanimity as to what constitutes a permanent nuisance.<sup>7</sup> The difficulty

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<sup>44</sup> *Supra*, note 23.

<sup>1</sup> *Bartlett v. Grasselli Chemical Co.*, (W. Va. 1923) 115 S. E. 451.

<sup>2</sup> *Cass v. Penn Co.*, 159 Pa. St. 273, 28 Atl. 161 (1893); *Baldwin v. Oskaloosa Gaslight Co.*, 57 Ia. 51, 10 N. W. 317 (1881).

<sup>3</sup> *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800 (1898); *August v. Marks* 124 Ga. 365, 52 S. E. 539 (1905).

<sup>4</sup> *Guinn et al. v. Ohio River R. Co.*, 46 W. Va. 151, 33 S. E. 87 (1899); *Hargreaves v. Kimberly*, 26 W. Va. 787, 799 (1885).

<sup>5</sup> *Consolidated Home Supply etc. Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. 582 (1894); *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 33 S. E. 87 (1899).

<sup>6</sup> *Hargreaves v. Kimberly*, 26 W. Va. 787 (1885).

<sup>7</sup> WOOD, NUISANCES, § 869; JOYCE, NUISANCES, §495; SEDGWICK, DAMAGES, § 95; SUTHERLAND, DAMAGES, § 1046.