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Charles K. Burdick

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ESTATES BY THE MARITAL RIGHT AND BY THE CURTESY IN MISSOURI.

I.

ESTATES BY THE MARITAL RIGHT.

By the common law, if a woman married, seised of a freehold estate in land, or became seised of such an estate after marriage, her husband also, by the marital right, became immediately seised of an estate in the land.¹ Although certain characteristics of the estate *jure mariti* are well established, it has nevertheless seemed to be one of the difficult problems of the law to define its nature.²

It is said that in pleading in an action based upon the husband's estate *jure mariti* he should allege "that the plaintiff and Joanna his wife, in right of the said Joanna, were seised in their demesne as of fee, of and in the said demised premises."³ But this clearly does not mean that the husband acquired an estate in fee in the property previously held in fee by his wife, for if so he could convey the whole fee if his estate was several; or he could convey a fee simple estate to an undivided half, if his estate was joint or in common with his wife; or he could at least take all by survivorship, in case his wife predeceased him, if he and his wife held by entireties; but in *Robertson v. Norris*⁴ it was laid down that "He [the husband] has not, however, any greater interest than during the joint lives of himself and his wife."⁵

1. Co. Litt. 273 b. 325 b, 351 a; Williams on Real Property (17th ed.) 353.

2. The learned author of Bishop on the Law of Married Women concludes a chapter on this subject in these words (§ 579): "Thus is closed one of the most difficult chapters which it has ever fallen to the lot of the author to write on any legal subject."

3. *Polyblank v. Hawkins* (1780) 1 Doug. 329.

4. (1848) 11 Q. B. 916, 918.

5. The authorities are unanimously in accord with the statement quoted in the text. See Bishop on the Law of Married Women, § 529, and cases cited; Goodeve's Law of Real Property (4th ed.) 122; Reeves, Real Property, § 525.

The authorities make very clear certain characteristics of the husband's estate *jure mariti*. For instance, they show that the husband was solely entitled to possession, and consequently to the rents and profits;⁶ that he could bring an action alone for the disturbance of his possession or his present enjoyment;⁷ that he alone could convey an estate for the period of coverture to the whole of the lands in which he had an estate *jure mariti*;⁸ and that the whole interest in the lands during coverture was liable for his debts.⁹ On the other hand divorce *a vinculo* divested the husband of all interest in his wife's lands.¹⁰ We see, then, that the husband's estate has all of the earmarks of a separate estate, vested in him for the period of coverture, and extends to all lands in which the wife has any kind of a legal estate of freehold, not in remainder or reversion.¹¹ Because of the period of its duration it was classed as a freehold estate.¹²

But, although the husband's estate *jure mariti* was recognized as a separate estate of freehold, he was said not to be seised in his own right but in the right of his wife, which not only had to be pleaded,¹³ but caused the husband's estate to terminate by forfeiture if the wife was convicted of treason or of felony,¹⁴ and necessitated homage to be done by husband

6. Reeves, Real Property, § 525; Washburn on Real Property (6th ed.) § 520; *Bledsoe v. Simms* (1873) 53 Mo. 305, 308; *Barker v. Root* (1813) 10 Mass. 260; *Van Note v. Downey* (1860) 28 N. J. L. 219.

7. Kent's Comm. (11th ed.) 131; Bishop on the Law of Married Women, § 578; *Evans v. Kunze* (1895) 128 Mo. 670.

8. Co. Lit. 326 a, n (2); Reeves, Real Property, § 525; *Robertson v. Norris* (1848) 11 Q. B. 916; *Payne v. Parker* (1833) 10 Me. 178; *Van Note v. Downey* (1860) 28 N. J. L. 219; *Beal v. Harmon* (1866) 38 Mo. 435; *Wilson v. Albert* (1886) 89 Mo. 537; *Bryan v. Wear & Hickman* (1835) 4 Mo. 106.

9. Kent's Comm. (11th ed.) 131; *Bede v. Knowles* (1858) 45 Me. 479; *Montgomery v. Tate* (1859) 12 Ind. 615; *Ellenmann v. Thompson* (1847) 10 Mo. 587; *Schneider v. Staihr* (1855) 20 Mo. 269, 272; *Hall v. French* (1901) 165 Mo. 430.

10. *Burt v. Hurlburt* (1844) 16 Vt. 292; *Oldham v. Henderson* (1837) 5 Dana 254; *Barker v. Root* (1813) 10 Mass. 260.

11. Washburn on Real Property, § 521; Bishop on the Law of Married Women, §§ 531 to 535; Reeves, Real Property, § 525; *Valle v. Obenhouse* (1876) 62 Mo. 81, 94.

12. Co. Lit. 351 a; Reeves, Real Property, § 525; *Payne v. Parker* (1833) 10 Me. 178; *Van Note v. Downey* (1860) 28 N. J. L. 219.

13. *Polyblank v. Hawkins*, note 3, *supra*.

14. Co. Lit. 351 a; Washburn on Real Property, § 521.

and wife together, she having the fee and he being seised in her right.¹⁵ This curious conception of the nature of the husband's seisin led to doubt as to the nature of the wife's estate—should it be considered as in the nature of a reversion, or should she be considered as seised through her husband of an estate in possession? This question arose for the most part in the enforcement of statutes of limitations. If the married woman had an estate in possession, then a right of action accrued to her as soon as a third party entered into wrongful possession, and the rules of the statute applied from that time; but if the married woman had only an estate in reversion then no right of action accrued to her until the termination of coverture, and the rules of the statute applied only from that time.

The earliest case on this subject seems to be *Melvin v. Proprietors of Locks and Canals*,¹⁶ where it is said in part:¹⁷

"* * * It seems unnecessary to refer to any further authorities on this point; for I apprehend that it is quite clear, that the husband cannot be seised in fee of his wife's lands, unless she also is seised; that he acquires no seisin in fee by the marriage; for he, at most acquires only a freehold estate, and unless the wife continues seised, the fee would be in abeyance. The husband has a life estate and the wife has an estate in fee, and by consolidating the two estates, both, in legal contemplation, are considered as seised of the whole estate.

"The next question to be considered is, whether Melvin the elder and his wife were disseised by the entry of Kittredge in 1796, and we think it very clear, that they were. They were actually ousted and divested of their seisin and possession, and the seisin and possession of Kittredge were substituted therefor; and this unquestionably amounted to a disseisin of both, as both at the time of the entry were seised. * * *

"We think it equally clear, that a right of entry thereupon accrued to both the husband and the wife. * * *"

The court therefore, held that the rules of the Massachusetts statute of limitations applied from the time when Kittredge entered, and by those rules Mrs. Melvin's right of action was barred before her death, so that the demandant, who claimed as Mrs. Melvin's heir, had no right of action.

The position taken in the case just cited was approved a few years later in *dicta* in a Maine case,¹⁸ and in a New Hamp-

15. Co. Lit. 66 a, 66 b and 67 a.

16. (1834) 16 Pick. 161.

17. *Ibid.* 166 and 167.

18. *Mellus v. Snowman* (1842) 21 Me. 201, 205.

shire case,¹⁹ where, however, the question was not involved. A few years later still the same result was reached by the Tennessee court²⁰ without any reference to the earlier Massachusetts case. In 1872 the Supreme Court of Georgia took the same position²¹ as that taken by the courts of Massachusetts and Tennessee, that court declaring:²² "The mistake of the plaintiff in error is in this assumption that, under the law as it then existed the wife had a *separate estate* in the land, independent of the marital rights of her husband, against which the statute of limitations did not run during her coverture."²³

In *Lessee of Thompson's Heir v. Green*²⁴ the Supreme Court of Ohio took a view of the nature of the wife's estate very different from that taken in the group of cases just discussed. Speaking of the husband's estate *jure mariti* the court said:²⁵ "It arose by operation of law as an incident to the marriage, and carved out of the estate of the wife a freehold interest in favor of the husband, leaving in her, or her heirs, only the reversion to be enjoyed after the termination of the life estate." A federal court²⁶ reached the same conclusion, saying that, "the wife * * * since her marriage * * * has only held an estate in remainder in the property," and concluding that, "The statute of limitations does not affect the right of a party entitled to the estate in remainder during the continuance of the particular estate or freehold."²⁷

In Missouri this question arose first in *Valle v. Obenhouse*.²⁸ In that case the majority of the court, speaking through Napton

19. *Foster v. Marshall* (1851) 22 N. H. 491, 494.

20. *Guion v. Anderson* (1847) 8 Humph. 298. And to the same effect is *Murdock v. Johnson* (Tenn., 1870) 7 Cald. 605; and see *Coe v. Walcottville Mfg. Co.* (1868) 35 Conn. 175.

21. *Shipp v. Wingfield* (1872) 46 Ga. 593.

22. *Ibid.* 599.

23. But this result in that state rested upon its peculiar doctrine that the husband became vested with the absolute title to the wife's realty just as he did to her personalty. See *Prescott & Pace v. Jones & Peary* (1859) 29 Ga. 58; *Cain v. Furlow* (1873) 47 Ga. 674.

24. (1854) 4 Ohio St. 216.

25. *Ibid.* 223.

26. The Federal Court for the Ninth Circuit in *Stubblefield v. Menzies* (1882) 11 Fed. 268, 272.

27. The Supreme Court of the United States seems to have been of the same opinion in *Gregg v. Tesson* (1861) 1 Black 150, 154.

28. (1876) 62 Mo. 81.

J., held that a married woman had an estate in possession, notwithstanding the husband's estate *jure mariti*, or his estate by the curtesy initiate,²⁹ and that the rules of the statute of limitations applied to her right of action from the time of the disseisor's entry into wrongful possession. Hough, J., entered a strong and able dissent, in the course of which he said:³⁰ "He [the husband] is sole seised of an estate during coverture in right of his wife. When his interest is said to be in right of his wife it is intended simply to mark the derivation, as well as the extent, of his interest, but it does not amount to an assertion that such interest is to be shared with anyone, or that it is a joint interest." That case, however, was expressly overruled in the case of *Dyer v. Wittler*,³¹ Sherwood, J., alone dissenting, and the position taken by Hough, J., in his dissent in *Valle v. Obenhause* was approved. To be sure in *Dyer v. Wittler* the husband had an estate by the curtesy initiate, and that case might therefore be said not to necessarily overrule *Valle v. Obenhause* as an authority where the husband has only an estate *jure mariti*. However, the case of *Dyer v. Wittler* has been interpreted by the Supreme Court of Missouri as overruling *Valle v. Obenhause* with regard to its conclusion where the husband has an estate *jure mariti*, as well as where he has an estate by the curtesy initiate.³² Furthermore, the position of the Supreme Court of Missouri was made perfectly clear on the subject under discussion in the case of *Vanata v. Johnson*,³³ where this paragraph appears:

"The interest the plaintiff claims was devolved upon her in 1868 immediately upon the death of her father. At that time she was a married woman. Thereupon the husband became instantly vested with the exclusive right to the possession of the wife's interest, and the right to sue for it and enjoy it as long as his wife lived and he continued to be her husband. The wife had no right to sue for the possession, and for this reason her cause of action did not accrue and the statute of limitations did not begin to run against her until her husband's death. The statute of limitations, however, would run against the right of possession of the husband. This right of the husband arose from the marital relation, and

29. Which will be discussed later.

30. 62 Mo. 98.

31. (1886) 89 Mo. 81.

32. See *Graham v. Ketchum* (1905) 192 Mo. 15, 28.

33. (1902) 170 Mo. 269, 274.

was not in any sense a right of curtesy, initiate or otherwise, and did not depend upon the birth of a child."³⁴

In 1849 the following statutory provisions were enacted:

"In addition to the property now exempt, by law from levy and sale under execution, the property owned by a woman before marriage, and that which she may acquire after her marriage, by descent, gift, grant, devise, or otherwise, and the use and profits thereof, shall be exempt from all debts and liabilities of her husband, contracted or incurred by him previous to this marriage, or previous to the time the wife came into the possession of such property.

"The property owned by a woman before her marriage, and that which she may acquire after her marriage, by descent, gift, grant or devise, shall be exempt from levy and sale, to pay any debt contracted as security, by her husband at any time, or under any circumstances whatever; and such property shall be exempt from levy and sale for any fine or costs imposed on the husband, in any criminal case."

But these provisions did not affect the husband's right to hold and dispose of his wife's property as at common law,³⁵ nor did it free the property from liability for debts contracted after marriage and after the property was acquired.³⁷

In 1865, by statutory provision,³⁸ all proceeds arising from a married woman's real estate, and all of her husband's interest in such real estate was, during coverture, made "exempt from attachment or levy of execution for the sole debts of her husband;" and it was declared that no conveyance by the husband of any interest in such real estate should be valid, "unless the same be by deed executed by the wife jointly with the husband, and acknowledged by her in the manner now provided by law in the case of the conveyance by husband and wife of the real estate of the wife."³⁹ Although these pro-

34. Where the person in possession holds in privity with, and not adversely to the husband there seems to be no doubt that the statute of limitations will not begin to run as against the wife or her heirs until the termination of the husband's estate. See Case Note, 10 L. R. A. (N. S.) 86, 89; and see *Hall v. French* (1901) 165 Mo. 430.

35. Acts 1849, p. 67, re-enacted in Revised Statutes 1855, p. 754, § § 1 and 3.

36. *Boyce's Admin. v. Cayce* (1852) 17 Mo. 47.

37. *Cunningham v. Gray* (1854) 20 Mo. 171; *Pawley v. Vogel* (1868) 42 Mo. 292, 301. For further comment on this statute see *Phelps v. Tappan* (1852) 18 Mo. 393; *Schneider v. Staihr* (1854) 20 Mo. 269; *Harvey v. Wickham* (1856) 23 Mo. 112; *White v. Dorris* (1864) 35 Mo. 181.

38. General Statutes 1865, Chap. 115, § 14.

39. This proviso is added: "provided, such annual products may be attached or levied upon for any debt or liability of her husband, created

visions imposed for the future sweeping disabilities⁴⁰ upon the husband with regard to his wife's land, it is clear that they did not divest him of his estate in the land—he still had the right to possess the land,⁴¹ and to bring ejectment alone against a disseisor.⁴²

However, in 1889 the estate *jure mariti* was entirely swept away. The Missouri Revised Statutes now provide as follows:⁴³

"Any real estate * * * belonging to any woman at her marriage or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, shall, together with all income, increase and profits thereof, *be and remain her separate property and under her sole control*, and shall not be liable to be taken by any process of law for the debts of her husband."

A woman who has married since 1889, holds all of her real estate, and a woman married before that time, who has acquired real estate since that time, holds the real estate so acquired, free from all of the common law rights which marriage of itself vested in the husband at common law. She is entitled to possession and to the proceeds,⁴⁴ she may sue for injury to the property,⁴⁵ and may convey it alone.⁴⁶ But, of course, estates *jure mariti*, which vested before the statutory provision of 1889 was enacted, were unaffected by that legislation.⁴⁷

for necessities for the wife and family of such husband, and for debts for labor or material furnished upon or for the cultivation or improvement of such real estate."

40. See *Mueller v. Kaessmann* (1884) 84 Mo. 318, 325.

41. *Bledsoe v. Simms* (1873) 53 Mo. 305, 308.

42. *Mueller v. Kaessmann* (1884) 84 Mo. 318; *Vannata v. Johnson* (1902) 170 Mo. 269; *Graham v. Ketchum* (1905) 192 Mo. 15.

43. Revised Statutes 1889, § 6869, now Revised Statutes 1909, § 8309.

44. *Brown v. Brown* (1894) 124 Mo. 79; *Woodward v. Woodward* (1898) 148 Mo. 241.

45. Revised Statutes 1889, § 6869, now Revised Statutes 1909, § 8309; *Baines v. Bullock* (1895) 129 Mo. 117.

46. *Farmer's Exch. B'k. v. Hagelucken* (1901) 165 Mo. 443, overruling *Brown v. Dressler* (1894) 125 Mo. 589; *Kirkpatrick v. Pease* (1906) 202 Mo. 471, 490.

47. *Arnold v. Willis* (1895) 128 Mo. 145.

II

ESTATES BY THE CURTESY.

So far we have spoken of the estate acquired by the husband in his wife's lands as a result of the marriage alone. But, under the common law, the man who married a woman having estates of inheritance in land, might reasonably hope that his estate *jure mariti* would shortly be enlarged to an estate by the curtesy of England, as a result of the birth of issue.⁴⁸ The origin of the estate by the curtesy and of its name have been variously explained since the appearance⁴⁹ of the Mirror of Justice.⁵⁰ Perhaps the most convincing explanation of the origin of this estate is to be found in a work⁵¹ entitled Effects of Marriage on Property, by C. S. Kenny.⁵² This author believes that the estate by the curtesy grew out of the early practice of giving a *maritagium*—a gift by the woman's friends as a provision for her and her issue. Such gift was usually made at the time of the marriage to the husband and wife jointly, and was conditioned upon their having heirs between them. As the result of such a gift the husband would get a sole estate by survivorship upon his wife's death. If the *maritagium* happened to take the less usual form of a gift to the woman alone and the heirs of her body special or general, it is not surprising that the habit of considering the husband a natural beneficiary of a *maritagium* should have so far prevailed as to give him a life estate, if the condition of an heir's birth were fulfilled. We may believe that this is as far as curtesy had gone in Glanvil's time, for he only alludes to curtesy in connection with the law of *maritagium*.⁵³ However,

48. Bracton 437; Co. Litt. 29a; 2 Blackstone's Comm. 126; Washburn on Real Property, Chap. IX; Williams on Real Property (21st ed.) 307; Reeves, Real Property, Chap. XXX.

49. About 1290, see 7 Selden Society Publications, p. XXIV.

50. Chap. 1, § 3. See Craig's *De Jure Feud.* 312; Co. Litt. 29a; 2 Blackstone's Comm. 126; 2 Pollock & Maitland's History of English Law (2d ed.) 414; 3 Holdsworth's History of English Law 154.

51. Published in 1879, being an essay which obtained the Yorke Prize of the University of Cambridge.

52. Pages 73 to 79.

53. Glanvil VII.

by the time that Bracton wrote, a century later, the right, whatever its origin may have been, had attached to the wife's land in general.⁵⁴ The ancient phrase used to describe the husband's right of which we are now speaking, was "*tenens per legem Angliae*." The earliest use of the modern phrase, of which we have a record, is in the Yearbook of 1302.⁵⁵ where a widower claimed "*fraunclenement par corteysie d'Englistere*." The term has been thought to refer to the kindness of the English law to the widower,⁵⁶ but is more probably derived from the word *curtis*, which meant a court—the term signifying either that the estate was one recognized by the courts of England, or that the estate gave the possessor of it a seat in the manorial court in his own right.⁵⁷ Curtesy was not a general incident of feudal tenure, and there is nothing to point to its existence in Saxon times, but in English, Scotch and Norman feudal law it occupied an important place.⁵⁸

The common law rule is that an estate by the curtesy arises only *if the wife be beneficially seised in deed of an estate of inheritance, and bears a child alive which is capable of inheriting the estate in question*.⁵⁹ Many American jurisdictions, however, allow curtesy if the wife be seised in deed or in law provided there was no adverse possession,⁶⁰ and some even allow it though a third person be holding adversely;⁶¹ but if the wife have only a reversion or remainder after a preceding freehold estate, a husband never has curtesy.⁶² Before the Statute of Uses⁶³ curtesy was not recognized in a mere "use" of lands,⁶⁴

54. Bracton 437.

55. Y. B. 30 Edw. 1, 125.

56. 2 Pollock & Maitland's History of English Law (2d ed.) 414; Reeves, Real Property, § 445.

57. Digby, History of the Law of Real Property (5th ed.) 174; Kenny, Effects of Marriage on Property 74.

58. Kenny, Effect of Marriage on Property 73; and see pp. 74, 75 and 78 for somewhat similar rights embodied in a rule of Constantine, an old German Code, and the *Etablissement de St. Louis*.

59. Co. Litt. 29a to 30 b; Blackstone's Comm. 127, 128; Williams on Real Property (21st ed.) 307, 308.

60. Reeves, Real Property, § 449; *Martin v. Trail* (1897) 142 Mo. 85.

61. Reeves, Real Property, § 449.

62. *Ibid.*

63. 27 Henry VIII., C. 10.

64. Digby, History of Land Law 328; Kenny, Effect of Marriage on Property 82.

but the later chancellors adopted a different rule with regard to trust estates, allowing curtesy in such estates if they were estates of inheritance.⁶⁵ Curtesy has come to be allowed in trust estates even though created for the wife's separate use unless a contrary intent is clearly shown in the settlement,⁶⁶ though the husband's right in such a case would seem to be liable to be defeated by the wife's disposition of the estate.⁶⁷

As has been said, the child must be born alive,⁶⁸ but it is no longer true, as asserted by the early writers,⁶⁹ that the necessary evidence of live birth should consist of a cry heard within four walls.⁷⁰ Also the child must be capable of inheriting the property in question, and, therefore, the birth of a daughter would not give to the husband an estate by the curtesy in property of which his wife was tenant in fee tail male.⁷¹ But the time of the child's birth (as long as it is born before the mother's death) and the length of the child's life have no effect upon the husband's right of curtesy.⁷² The child need not survive its mother, nor need it be born after its mother acquires the property in question, nor need it even be alive at the time that she acquires such property.⁷³

The estate by the curtesy of the husband, after the birth of issue but before the death of the wife, is said to be initiate while it is said to be consummate after the wife's death.⁷⁴

65. Reeves, Real Property, § 450; Kenny, Effect of Marriage on Property 82, 83; *McTigue v. McTigue* (1893) 116 Mo. 138; *Woodward v. Woodward* (1899) 148 Mo. 241.

66. Reeves, Real Property, § 450, n. 7; Kenny, Effect of Marriage on Property 83; *McBreen v. McBreen* (1900) 154 Mo. 323; *Jamison v. Zausch* (1909) 227 Mo. 406.

67. *Cooper v. Macdonald* (1877) L. R. 7 Ch. Div. 288.

68. *Richter v. Bohnsack* (1898) 144 Mo. 516, 518. This requirement has been done away with in several of our states, Reeves, Real Property, § 455, and was never true in the case of Gavelkind land, Co. Litt. 30a.

69. For attempts to explain this early requirement see Kenny, Effect of Marriage on Property 80 to 82; 2 Pollock & Maitland's History of English Law (3d ed.) 418.

70. Reeves, Real Property, § 455.

71. Co. Litt. 29b.

72. Co. Litt. 29b; Blackstone's Comm. 128; Washburn on Real Property (6th ed.) § 341.

73. *Ibid*; *Donovan & Boyd v. Griffith* (1908) 215 Mo. 149, 162 to 165.

74. Blackstone's Comm. 128; Washburn on Real Property (6th ed.) § 343; Bishop on the Law of Married Women, Chaps XXIII and XXV.

These terms do not indicate any change in the husband's estate or in his right resulting from the wife's death, but are meant to emphasize the fact that the estate by the curtesy is intended to give the husband an interest in the land independent of the wife's life, and that this purpose is not consummated until the wife's death. Since by marriage the husband got complete control of his wife's real estate, he could not, by becoming vested with an estate by the curtesy, get a use of the land which would be any greater in degree, but he did get an estate which was more desirable in respect of its duration, for, while the estate *jure mariti* endured only during coverture, the estate by the curtesy was an estate for the husband's own life.⁷⁵ And in another way the estate by the curtesy, even during its initiate stage when the husband would anyway have had an estate *jure mariti*, was more desirable than the last named estate, for, as we have seen, the husband held his estate *jure mariti*, as the name implied, in his wife's right, while upon birth of issue alive which could inherit, "he ceases to be seised merely in right of his wife, and is henceforth tenant in his own right."⁷⁶ As a result of this difference the husband's estate by the curtesy was not forfeited by his wife's felony, though we have seen that his estate *jure mariti* was so forfeited.⁷⁷ If the estate by the curtesy is a life estate in the husband's own right, then the wife's right in the land must be in the nature of a reversionary interest, to which the rules of statutes of limitations would not apply during the husband's life. Of course those jurisdictions which hold the rules of such statutes inapplicable to the wife when the husband has an estate *jure mariti*⁷⁸ hold

75. Co. Litt. 29a; Williams on Real Property (21st ed.) 307; Reeves, Real Property, § 446. Nevertheless the estate was forfeited by absolute divorce. Reeves, Real Property, § 459; *Schuster v. Schuster* (1887) 93 Mo. 438, *Doyle v. Rolwing* (1901) 165 Mo. 231.

76. Kenny, Effects of Marriage upon Property 73; Bishop on the Law of Married Women, §§ 580 to 584; Reeves, Real Property, § 457. But see *contra* Washburn on Real Property (6th ed.) § 345.

77. Co. Litt. 351a. We are also told that after the birth of issue the husband did homage alone for the land, while before he and his wife were required to do homage jointly. Co. Litt. 66b, 67a. The reason given is, "because he by having of issue is entitled to an estate for term of his own life, *in his own right*, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life"—who did not do homage.

78. See the earlier part of this article.

such rules all the more inapplicable to the wife when the husband has an estate by the curtesy. In Missouri in the case of *Valle v. Obenhause*,⁷⁹ already noticed,⁸⁰ it was declared that, whether a husband has an estate *jure mariti* or an estate by the curtesy, the wife has such an estate in possession as will make the rules of the statute of limitations effective against her in case of an illegal entry by a third person. But this case has subsequently been entirely overruled, both as applied to a situation where the husband has an estate by the curtesy and where he has an estate *jure mariti*.⁸¹

In the case of *Foster v. Marshall*⁸² the court of New Hampshire agreed with the declaration of the Massachusetts court in *Melvin v. Proprietors of Locks and Canals*⁸³ that, where the husband possesses his wife's lands merely by marital right, the wife's estate is still one in possession and not in reversion,⁸⁴ but declared⁸⁵ that,

"The obvious conclusion from these views of the nature of the interest of a tenant by the curtesy initiate is, that such tenant is seised of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending upon the life estate of the husband. The necessary result of this is, that the wife cannot be prejudiced by any neglect of the husband, and of course she may bring her action, or one may be brought by her heirs, at any time within twenty years after the decease of the husband, when his estate by the curtesy, whether initiate, or consummate, ceases, and her right of action or that of her heirs, accrues."

The Supreme Court of Illinois has taken the same view, where the husband has an estate by the curtesy, saying:⁸⁶ "The wife's interest is not a present, but a future estate, dependent upon the death of the husband. * * * The wife's estate is saved from the bar of the statute, but cannot have effect during the coverture." Also in the cases of *Stewart*

79. (1876) 62 Mo. 81.

80. *Supra*, p. 8, *et seq.*

81. *Dyer v. Wittler* (1886) 89 Mo. 81; *Graham v. Ketchum* (1905) 192 Mo. 15, 28; *Vanata v. Johnson* (1902) 170 Mo. 269, 274.

82. (1851) 22 N. H. 491.

83. (1834) 16 Pick. 161, *supra*, p. 7.

84. *Foster v. Marshall* (1851) 22 N. H. 491, 494.

85. *Ibid.* 493.

86. *Shortall v. Hinckley* (1863) 31 Ill. 219, 228; and see *Dawson v. Edwards* (1901) 189 Ill. 60.

v. *Ross*⁸⁷ and *Matlock v. Stearns*⁸⁸ the husband, who has an estate by the curtesy, is said to have an estate in his own right, while the wife has merely a reversionary interest, although the application of the statute of limitations was not there under discussion.⁸⁹

In the case of *Melvin v. Proprietors of Locks & Canals*,⁹⁰ quoted from in an earlier part of this article,⁹¹ the court actually discusses the effect which *marriage* has upon a woman's estate in realty. But, in fact, it appeared in that case that children had been born, and the husband, therefore, had an estate by the curtesy, and the next year the same court, in speaking of that case, said: "It has already been decided, in one of the causes involving questions upon this same title, that where there is a tenant by the curtesy initiate, a disseisin affects the right of the wife as well as that of the husband * * *." The Tennessee court seems to be committed to the same position,⁹² but upon this clearly erroneous ground, that, "during the existence of the coverture he [the husband] is not tenant by the curtesy, and cannot be, unless he survive his wife; and, therefore, has no particular interest or estate, separate from the fee simple estate in his wife. If there be a disseisin during the coverture, it is a disseisin of the entire joint estate * * *."⁹³

It needs no extended citation of authority to show that, if a tenant by the marital right may possess the land, and take its rents and profits, and may convey an estate in it during coverture, and may sue for injury to it, and if such estate is liable for his debts,⁹⁴ such rights and liabilities must all the more attach by the common law to the estate by the curtesy, just as they would to any ordinary life estate.⁹⁵

87. (1874) 50 Miss. 776.

88. (1837) 9 Vt. 326.

89. And see in this connection *Jackson v. Johnson* (N. Y., 1825) 5 Cow. 74; *Wass v. Bucknam* (1854) 38 Me. 356, 360; *Jones v. Coffey* (1891) 109 N. C. 515.

90. (1834) 16 Pick. 161.

91. *Supra*, p. 7.

92. *Guion v. Anderson* (1847) 8 Humph. 298; *Weisinger v. Murphy* (1859) 2 Head 674.

93. *Weisinger v. Murphy* (1859) 2 Head 674, 676.

94. *Supra*, p. 6.

95. 1 Bright's Husband & Wife 151, where it is said that, "Upon the whole, whatever a mere tenant for life may do, either as to passing or

We have seen that the statutes of 1849 and 1865, though imposing certain disabilities upon the husband, did not destroy his estate *jure mariti*.⁹⁶ Then, of course, we should expect to find, as we do,⁹⁷ that the husband's estate by the curtesy was still recognized after the passage of those statutes. But we have also seen that the statute of 1889 swept away the estate *jure mariti*. What was its effect upon the estate by the curtesy? In *Woodward v. Woodward*⁹⁸ it appeared that plaintiff, a married woman, had purchased land in 1891 with her own money. She brought this equitable action against her husband and his tenant in possession of the land to restrain them from using the land, and for the purpose of being put into possession of the land herself. The court concluded:⁹⁹

"If we are not by judicial construction to emasculate and nullify this plain statute [Revised Statutes 1889, § 6869], it unquestionably means that the wife alone has the right to the rents, issues and products of her land, and her husband has no right to interfere with or withhold them.

"This construction does not necessarily conflict with the right of curtesy, further than it does in separate equitable estates in simply denying the husband the possession and profits during coverture, but it does conflict with the right of a tenant by the curtesy initiate to that extent."

In *McBreen v. McBreen*¹⁰⁰ the question was whether a widower could claim curtesy as against his wife's heirs in land purchased by her in 1891, before which date he and his wife had entered into a separation agreement, by which, among other things, each party absolved the other from all obligations as husband and wife, both parties having lived up to this agreement until the wife's death. The court, without noticing the statute of 1889, dealt with the case on the theory that the estate of curtesy still existed in Missouri, but held that the

charging his interest, so also may a tenant by the curtesy;" Reeves, Real Property, § 457; Bishop on the Law of Married Women, § 511; Williams on Real Property (21st ed.) 308; Washburn on Real Property (6th ed.) § § 347, 353; Spencer, Law of Domestic Relations, § 195.

96. *Supra*, pp. 10 and 11.

97. For example see *Tremmel v. Kleiboldt* (1881) 75 Mo. 255; *RoBards v. Murphy* (1895) 64 Mo. App. 90; *Soltan v. Soltan* (1887) 93 Mo. 307.

98. (1898) 148 Mo. 241.

99. *Ibid.* 248.

100. (1899) 154 Mo. 323.

executed agreement could be pleaded by the wife's heirs as a complete equitable estoppel to the husband's claim to curtesy.

Two years later the Supreme Court of Missouri in *Farmers Exchange Bank v. Hagenluken*,¹⁰¹ in deciding that a married woman could convey her land without her husband joining her in the conveyance, said: "The statute [Revised Statutes 1889, § 6869] was designed to confer on a married woman the *legal estate* in her land in as full and complete manner and degree, as if she were a *feme sole*." And the court quoted with approval the following language from an Illinois case,¹⁰² in which the Illinois court was discussing a statute similar to that now in force in Missouri: "So far as the statute goes, her disability and her husband's marital rights are alike swept away."¹⁰³ It is self-evident that there can be no curtesy in the land of a *feme sole*, and that, if all of a husband's marital rights are swept away, his estate by the curtesy must be gone.

But the next case on the subject takes a different view from that expressed in the case last cited. In *Myers v. Hansbrough*¹⁰⁴ it appeared that defendant was a public administrator and had taken possession under order of the probate court of real estate left by a married woman for the purpose of collecting the rents for the payment of debts. Part of the land in question was acquired by the deceased after 1889. Plaintiff claimed that he was entitled to possession of such land by virtue of his estate by the curtesy. Here it was necessary to decide whether the statute had left the husband any present interest in the the wife's real estate during her life, for if it had left him such an interest that interest could not be subjected to liability for his wife's debts. The court's opinion is shown by the following quotations:¹⁰⁵

101. (1901) 165 Mo. 443, overruling *Brown v. Dressler* (1894) 125 Mo. 589. For previous discussion of these cases see *supra*, p. 11 and note 46.

102. *Cookson v. Toale* (1871) 59 Ill. 515.

103. In *Kirkpatrick v. Pease* (1906) 202 Mo. 471, 490, the court said: "A married woman, as our statutes now run, is clothed with the right to sell lands held by her in her own separate right as her own separate property (*Farmers Exchange Bank v. Hageluben*, 165 Mo. 443; R. S. 1899, secs. 4335, 4340). She may make a deed thereto as a *feme sole*; hence she may give authority to an agent to contract a sale, and it follows that she may ratify the act of her agent."

104. (1906) 202 Mo. 495.

105. *Ibid.*, pp. 500 and 502.

"The husband is thereby [i. e. by Revised Statutes 1889, § 6869] deprived of his common law right to the possession of his wife's land during coverture, and to that extent, his curtesy initiate is impaired, but it is not destroyed and upon the death of the wife it becomes consummate."

* * *

"The particular title by which the plaintiff claims right to the possession of this land was never in his wife, it is an interest cut out of her title, subtracted from it, not by her leave or license, but by the arbitrary force of the law. It is an interest that could not be taken from the husband either at the will or sufferance of the wife. If a creditor of hers, after the estate by the curtesy initiate had vested in the husband, had obtained judgment against her and sold the land in her lifetime, the purchaser at the sheriff's sale would have obtained what was hers, which under the statute, included possession during her life, but the creditor, would not by such sale acquire what was not hers, what was beyond the reach of her will or sufferance. The estate by the curtesy in the husband is of the same nature, though differing in extent and depending on some different conditions, as the right of the wife to dower; doubtless the General Assembly could make both subject to the payment of debts, but it has not done so. When the General Assembly conferred on a married woman the power to make a will devising her lands, as if apprehensive that that power might seem to imply that she could by her will deprive her husband of his estate by the curtesy, it was expressly provided that the devise should not have that effect. (Sec. 4603, R. S. 1899)"

The court in reaching the conclusion above set forth relied very largely upon the fact that curtesy was recognized before the statute in the wife's equitable estate, although expressed in the deed to be to her sole use and benefit. But, if the law with regard to equitable estates held by a wife to her own use is to be relied upon in determining the husband's right of curtesy in his wife's legal separate estate, it would lead to a conclusion exactly opposite to that reached in the case of *Myers v. Hansbrough*, from which we have just quoted. In *Cooper v. Macdonald*¹⁰⁶ the question was whether a widower could claim curtesy in property in which his wife had had an equitable estate to her own use, but which she had devised by her will to a third person. Jessel, M. R., in the course of his judgment said:¹⁰⁷ "The wife's property would descend to her eldest son, subject to the husband's estate; there equity followed the law; but then came the separate use of the wife, which engrafted something on the equitable estate; it took away from the husband the right to receive the income during the coverture, or, as it was called, the equitable estate during the

106. (1877) L. R. 7 Ch. D. 288.

107. *Ibid.* 296.

coverture; it gave the wife the absolute ownership during the coverture, and if the separate use attached also to the capital, it gave her the right of disposing of it either by deed or will irrespective of the husband." And again:¹⁰⁸ "The separate use * * * entirely destroys the notion of the husband having any interest in it as against her disposition." Upon appeal, James, L. J., said:¹⁰⁹ "If she had made no disposition of it the estate by curtesy would have attached for the benefit of the husband. We have nothing to do with that; the only question before us is whether she had obtained an absolute right of devising it by will, and I think she had obtained that right."

The English Married Women's Property Act, 1882, provides, in section 1, subsection 1, that "a married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." In determining the effect of this act on the husband's estate of curtesy the court, in the case of *Hope v. Hope*,¹¹⁰ relied largely upon the case of *Cooper v. Macdonald*, just discussed. After quoting extensively from that case, the court said:¹¹¹ "*Mutatis mutandis*, those words seem to apply to the Act of 1882. The object of the Legislature in that Act was similar to the object of the Courts of Equity in dealing with property settled to the separate use of a married woman." In conclusion the court said:¹¹² "As regards the acquiring, holding and disposing of property, there is indication of an intention to interfere with the husband's rights, and full effect must be given to it; but, as regards the devolution of property on an intestacy, I can find no indication of an intention to exclude the husband." So, under the statute in New York,¹¹³

108. *Ibid.* 293.

109. *Ibid.* 300, Baggalay, L. J., and Thesiger, L. J., concurring.

110. (1892) 2 Ch. 336.

111. *Ibid.* 341.

112. *Ibid.* 342.

113. Domestic Relations Law, § § 50 and 51.

which is similar to the English statute, it is held¹¹⁴ that "a husband's right as tenant by the curtesy initiate, * * * consists simply of a status which is never a vested right," and that "While merely initiate, it is not an estate, but a simple possibility or expectancy like that of an heir apparent." This is the result reached under the Married Women's Legislation in many of our states.¹¹⁵

It may be argued, however, that the Missouri statute does not expressly say, as does the English act, that "a married woman shall * * * be capable of * * * disposing * * * of any real * * * property * * * in the same manner as if she were a *feme sole*." But that argument would seem to be answered by the interpretation put upon the Missouri statute in *Farmers Exchange Bank v. Hageluken*,¹¹⁶ a case determining a married woman's right to dispose of her separate real estate, where the court said: "The statute was designed to confer on a married woman the legal estate in her land in as full and complete manner and degree, as if she were a *feme sole*."

On the other hand, the argument advanced in *Myers v. Hansbrough* in support of the decision there reached, based upon the statute dealing with the wife's right to will her property, is certainly not conclusive. The statute reads as follows:¹¹⁷ "Any married or unmarried woman, of eighteen years of age

114. *Albany Co. Savings Bank v. McCarty* (1896) 149 N. Y. 71, 85; and see *Hatfield v. Sneed* (1873) 54 N. Y. 280, 287.

115. Reeves, *Real Property*, § 460; Spencer, *Law of Domestic Relations*, § 200; 1 Washburn, *Real Property* (6th ed.) § 354 note. Of course in many states the estate by the curtesy has been expressly abolished. See Reeves *Real Property*, § 460; 1 Washburn, *Real Property* (6th ed.) § 354 note.

116. Discussed *supra*, p. 19.

117. Revised Statutes 1909, § 536. The original statute on the subject is General Statutes 1865, Chap. 115, § 13, as follows: "Any married woman may devise, by her last will and testament, her lands, tenements, or any descendible interest therein, provided that the same does not affect the estate of her husband therein by the curtesy." In 1877 the statute was so revised as to give a married woman the right also to bequeath personal property. Laws of 1877, p. 262. In the revision of 1879 this statute was made to apply to married or unmarried women, and for the original *proviso* as to curtesy the present clause—"subject to rights of the husband, if any, to his curtesy therein"—was substituted. The section remained unchanged by subsequent revisions. Revised Statutes 1889, § 8869; Revised Statutes 1899, § 4603.

and upwards, of sound mind, may devise her land, tenements or any descendible interest therein, * * * by her last will and testament, subject to the rights of the husband, *if any*, to his curtesy therein." The statute in terms leaves undecided the question when the husband has a right of curtesy, but says merely that if such right is vested in the husband the wife's privilege of devising is subject to this vested right. There would be nothing anomalous in this section's standing side by side with a section abolishing curtesy in whole as a vested estate, for such abolition could only prevent future vesting of such estates, but could have no effect upon estates already vested, to which would still apply the last clause of the section with regard to the wife's right to devise real property.

In *Donovan and Boyd v. Griffith*¹¹⁸ there was no question as to the right of a husband in his wife's land during her life, but it was held that upon her death intestate without leaving debts he was entitled to curtesy in the lands in which she had an equitable estate.

In *Register v. Elder*¹¹⁹ it appeared that land had been devised to trustees in 1903 to the separate use of a married woman with a clearly expressed provision that if the wife predeceased her husband, the land was then to go to her children absolutely. It was held that this plainly showed an intention to preclude the husband from curtesy, and that this intention should be given effect. Of course by implication the case recognizes the husband's curtesy in the ordinary case where his wife predeceases him, intestate, possessed of legal or equitable estates of inheritance.

About the same time the St. Louis Court of Appeals, in determining that a wife who owns real estate worth \$5,000, should not, in her suit for divorce, be allowed alimony *pendente lite*, or attorney's fees, said:¹²⁰

"Touching the suggestion that the residence property owned by the wife is not available as funds to support her and compensate her counsel, it may be said that, if she owns the legal title thereto, she is entirely com-

118. (1908) 215 Mo. 149, 162.

119. (1910) 231 Mo. 321.

120. *Rulledge v. Rulledge* (1909) 119 S. W. 489, 491.

petent to convey or mortgage it to another, subject of course, to the husband's right of curtesy. At any rate the proposition that she may either convey or mortgage real property, the legal title to which resides in her, without joining her husband, is abundantly established in this state."

In the statement that the wife's conveyance would be "subject, of course, to the husband's right of curtesy," the case agrees with *Myers v. Hansbrough*.¹²¹

In the case of *Ennis v. Eager*¹²² the Kansas City Court of Appeals, in attempting to follow *Myers v. Hansbrough*,¹²³ reached a result which is curiously erroneous. The defendant, a married woman, employed the plaintiff as agent to procure a lessee for her land, and the plaintiff produced to the defendant a prospective lessee, able and willing to lease the property upon the terms and conditions imposed by the defendant, but she failed to obtain the signature of her husband to the lease, wherefore the proposed lessee refused to take the lease. The plaintiff sued to recover his commission. The court said in part:¹²⁴

"* * * It has been decided * * * that a married woman may convey or encumber her separate real property without her husband joining therein. (*Farmer's Exchange Bank v. Hageluken*, 165 Mo. 443; *Kirkpatrick v. Pease*, 202 Mo. 471.) * * *"

"Notwithstanding the construction put upon the Married Woman's Act and her right to convey or encumber her separate property the courts still hold that the statute did not have the effect of depriving the husband of his right of curtesy in such estate. (*Myers v. Hansbrough*, 202 Mo. 495; *Donovan v. Griffith*, 114 S. W. 621.)"

"The husband having the right of curtesy in the property in controversy, a lease made by the wife without joining the husband would not therefore affect such right * * *"

"And the fact that the wife had no issue born alive of the marriage * * * is immaterial as the law is that so long as the marital relation continues the possibility of such issue still exists."

* * *

It was therefore held that the plaintiff having procured a lessee willing to take a lease in which the husband should join, but unwilling to accept one in which he should not join, had earned his commission. But the court misconceived the

121. *Supra*, p. 19.

122. (1910) 152 Mo. App. 493.

123. *Supra*.

124. *Ennis v. Eager* (1910) 152 Mo. App. 493, 497.

nature of curtesy, for, a child not having been born, the husband did not have "the right of curtesy in the property in controversy" as stated. Even at common law he had, before the birth of issue, only a possibility or expectancy of an estate by the curtesy. No right of curtesy in the property would accrue to the husband until issue was born, and then his right in the property would vest subject to such rights and burdens as had already lawfully attached to it. It is admitted that a married woman may lease her land, and, therefore, a husband whose estate of curtesy vests after such lease must take his estate subject to the lease.

The latest word on the subject of curtesy was spoken in the Supreme Court by Commissioner Blair in *Teichenbrock v. McLaughlin*,¹²⁵ and adopted as the opinion of the court, all of the judges concurring. Commissioner Blair at the beginning of his opinion said:¹²⁶ "Whether a husband's curtesy in such [separate] property of his wife is more than an estate for his life after her death contingent upon her failure to sell, is a question not definitely settled in this state (*Bank v. Hagelucken*, 165 Mo. 443; *Myers v. Hansbrough*, 202 Mo. 495) and, in the view we take, not essential to the decision in this case." And the Commissioner concludes by saying:¹²⁷ "As stated, the question whether the wife's sole deed carries full title, freed from curtesy, does not arise in this record." But assuming "for present purposes, that the wife's separate conveyance of her statutory separate estate does not affect the husband's curtesy in case it could otherwise exist," the court goes on to inquire what the nature may be of the husband's curtesy initiate in his wife's land. The following are some of the significant statements on the subject:¹²⁸

"* * * It is true it was recently said (*Myers v. Hansbrough*, 202 Mo. 495) that curtesy initiate is a vested interest, but by that it was not meant the husband as such tenant had any present, actual, vendible interest or possessory right in the wife's realty (acquired since 1889) prior to her death. * * *

125. (1912) 246 Mo. 711.

126. *Ibid.* 717.

127. *Ibid.* 721.

128. *Ibid.* 718 to 720.

"In view of what has been said, the similarity between the inchoate right of dower and curtesy initiate (in lands acquired since 1889) is such that decisions respecting the nature and value of the inchoate right of dower may with profit be consulted in the course of an endeavor to ascertain the character of an estate by the curtesy initiate."

"* * * He [the husband] could have no present interest in the property inherited by his wife. He could be seised neither in law nor fact until his wife's death. He could have neither possession nor right to possession prior to that event. He could, during the wife's life, have no estate more susceptible of valuation than the inchoate right of dower, nor could he sell or convey. He could never have any actual interest unless he outlived his wife. * * *

"The only right of possession he can ever have is contingent upon his surviving his wife. The present value of his interest is as difficult of ascertainment as is that of the inchoate right of dower."

At common law curtesy initiate was a vested life estate in possession; curtesy consummate was merely its continuance after the wife's death. That curtesy consummate still exists in Missouri, when the wife dies intestate not having disposed of her real property, seems clear. It perhaps is not yet finally settled that curtesy initiate is more than an expectancy as regards real property of women married since 1889, or real property acquired by married women since that date. If it is more than an expectancy it might possibly be looked at either as a vested estate in the nature of a sort of remainder, or as an inchoate right in the nature of an incumbrance on the property, like dower. The Supreme Court in its last consideration of the subject prefers to view it in the latter light. Clearly the last word on the subject has not yet been spoken.

The writer believes that a revision of the law with regard to married women's property would be very desirable and opportune at the present time, and he would make the following suggestions: § 8309 should be so redrafted as to make it clear whether the married woman's real estate, though "her separate property and under her sole control" is to be subject to her husband's curtesy initiate if a child is born alive capable of inheriting, or whether it is to be free from such interest, leaving curtesy merely effective in the distribution of a married woman's real estate if she dies intestate. If curtesy initiate is to be retained as a present interest in the wife's real estate, it should be determined whether such curtesy is still a vested estate, or is an inchoate right similar to dower. § 2788, which now provides for

disposition of the wife's real estate by joint conveyance of husband and wife, should be changed to conform to those decisions which hold that the wife may convey alone such interest as she has in her real estate. A similar change should be made in § 2789, dealing with conveyances of a married woman's land by power of attorney; and it would follow that § 8297, providing for authorization of a wife by a circuit court to sell her real estate would be superfluous as regards her interest therein, and should therefore be stricken out or made to apply to such interest, if any, as her husband may continue to have in such property. Since by § 8309 the real estate of a woman married after 1899, or real estate acquired by a married woman after that date, remains her separate property, under her sole control, § 8302, which provides that compensation for damages to a married woman's real estate may be so invested as to give her the same right in the sum awarded as she would have had in the real estate, and which gives the circuit court power to see that this is done, should be made to apply only to land of women married prior to 1899 and acquired before that date. The same is true of §§ 8305, 8306 and 8307, giving the circuit court power to authorize a married woman, whose husband has given her cause to live separate from him, to enjoy her separate real estate for her sole use and benefit. That part of § 8299, which gives a married woman her own earnings while her husband fails to support her, should be eliminated, for by § 8309 she is given an absolute right to her wages. Possibly there are other changes which could well be made, and which will suggest themselves to the reader.

CHARLES K. BURDICK.