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Bill of Complaint.

A true copy.

ROBERT H. McADAMS,
Clerk.

Service acknowledged as of time.

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E. R. McGLYNN,
Solr. of Deft. Morris Portnow.

Service acknowledged this 5th day of September, 1918.

E. R. McGLYNN.

Bill of Complaint.

Filed March 8, 1918.

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In Chancery of New Jersey

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey.

The complainant, Samuel Portnow, under the age of 21, by Benjamin Plotkin, his next friend of the City of Newark, County of Essex and State of New Jersey, respectfully shows:

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1. That complainant is the brother of Mollie Kobrin, who was a resident of the City of Newark, in the State of New Jersey, and was married to Samuel Kobrin, with whom she resided until her death.

2. That she died in the City of Newark, in the State of New Jersey, on the 11th day of October, A. D., 1917, intestate and without issue; and that no administration has as yet been taken on her estate.

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3. That at the time of her death, the said Mollie Kobrin was seized in fee in severalty of the following lands in the County of Essex, this State, being all her real estate known to your complainant, and which lands are more particularly described as follows, to wit: all that lot or tract or parcel of land situate in the City of Newark, County of Essex and State of New Jersey.

Bill of Complaint.

Beginning at a point in the Westerly line of South Seventeenth street 325 feet Southerly from the intersection of said Westerly line of said South Seventeenth street with the Southerly line of Sixteenth avenue thence Westerly and at right angles with South Seventeenth street 100 feet thence Southerly and parallel with South Seventeenth street 25 feet thence Easterly and at right angles with South Seventeenth street 100 feet to the said Westerly line of said South Seventeenth street thence Northerly along the westerly line of said South Seventeenth street 25 feet to the point or place of beginning.

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Being the same premises conveyed to the said Mollie Kobrin by two deeds, one made by Freda Rothberg and Harry Rothberg, her husband, dated June 27, 1917, and recorded June 28, 1917, in Book T-58 of Deeds for Essex County, page 456, and another made by Rosie Mazen and David her husband dated June 27, 1917, and recorded June 28, 1917, in Book T-58 of Deeds, for Essex County at page 458.

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4. That the heirs of the said decedent, Mollie Kobrin, are:
(a.) Morris Portnow, Joseph Portnow and Samuel Portnow, her brothers.

(b.) Sarah Waxman, wife of Morris Waxman and Zena Portnow, *his* sisters.

(c.) Solomon Kobrin, her husband.

To whom those lands descended on her death, and by whom they are now held as tenants in common in fee simple subject to the right of *courtesy* of her said husband in the same. The said Solomon Kobrin is now in possession of the said lands and receives the rents thereof.

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5. Complainant is seized of and entitled to the one equal undivided fifth part of said premises, subject to the right of *courtesy* of the said Solomon Kobrin and the said Sarah Waxman wife of Morris Waxman and Zena Portnow, her sisters, and Morris Portnow, Joseph Portnow *his* brothers, are each severally seized of an entitled to one-fifth part of the said premises, subject to the right of *courtesy* of the said Solomon Kobrin therein as aforesaid.

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6. Morris Waxman, husband of the aforesaid Sarah Waxman, has or may claim to have an inchoate right of *courtesy* in the said premises.

Bill of Complaint.

10 6a. That at the time that the said Mollie Kobrin purchased the premises hereinbefore described, she had in her possession the sum of \$225. belonging to and being the property of the said complainant, and that she used that money in and for part of the purchase price of the said premises, with the knowledge and consent of the complainant, under an agreement that he was to receive that amount out of the proceeds of the sale of the property which complainant claims is a lien upon said premises which the interest of the said defendants are subject to.

20 7. That complainant is desirous that a partition or division of the said tract of land and premises should be made among the complainant and the several parties seized of and entitled thereto, according to their several and respective rights, estates and interest therein, or in case (as complainant believes and avers the fact to be) that the said tract of land and premises cannot be divided among the owners thereof without great prejudice to their interests, that the same may be sold, including the interest of the said Solomon Kobrin and Morris Waxman as tenants by the courtesy, and the proceeds thereof divided among the complainant and the other parties entitled thereto as aforesaid, according to their respective rights and interests.

8. Complainant further says, that he is advised that he can only have adequate relief in the premises in this court, and therefor prays:

30 1. That Morris Portnow, Joseph Portnow, Sarah Waxman, Morris Waxman and Zena Portnow and Solomon Kobrin who are the defendants to this suit may answer this bill of complaint and each statement therein made.

40 2. That a fair partition and division of the above described premises may be made, if the same be practicable and consistent with the rights of all parties interested therein, among complainant and other persons entitled to shares of the said premises, according to their respective rights and interests therein, and in case such partition and division in fact of the said premises shall be found to be impracticable, or if it should appear that the same cannot be made without great prejudice to the owners of the said premises, then the said tract of land and premises may be decreed by this honorable Court to be sold, including the right of courtesy of the defendants Solomon

Notice of Motion to Dismiss.

Kobrin and Morris Waxman, and the proceeds thereof, after paying the costs and charges of this suit, and the aforementioned sum of \$225., advanced by the complainant, divided among the several parties interested therein, according to their respective rights, shares and interests; and that complainant have such further relief as the nature of the case may require.

3. May it please your Honor, the premises considered, to grant unto complainant the states writ or writs of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said Morris Portnow, Joseph Portnow, Sarah Waxman, Morris Waxman and Zena Portnow and Solomon Kobrin, commanding them and each of them by a certain penalty therein to be expressed, to be and appear before your Honor in this honorable Court, then and there to answer all and singular the said premises, and to stand to and abide by, and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And complainant will ever pray as in duty bound, etc.

HARRY CASTELBAUM,
Solicitor for Complainant.

DOMINICK M. ACOCELLA,
Of Counsel with Complainant.

A true copy.

ROBERT H. McADAMS,
Clerk.

Notice of Motion to Dismiss.

Filed May 4, 1918.

To Harry Castelbaum, Esq., Solicitor of Complainant:

TAKE NOTICE that on Tuesday, May fourteenth, nineteen hundred and eighteen, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, before the Chancellor, at the Chancery Chambers, 763 Broad street, Newark, New Jersey, I shall move for an order dismissing the bill filed in the above entitled matter upon the following grounds:

Conclusions of Vice-Chancellor.

First. That the Bill of Complaint filed in the above entitled matter does not set forth a cause of action.

Second. That the complainant's estate in the premises described in the Bill of Complaint is an estate of remainder, and that the defendant Meyer Kobrin is entitled to exclusive possession of the premises described in the Bill of Complaint, and that without his consent a suit for partition cannot be main-
10 tained.

Third. That the section or sections of the partition act which authorized a sale of a life estate or a sale free from dower or curtesy does not empower the Court of Chancery to order the sale of a life estate which is in severalty and is in the actual use, occupation and enjoyment of the life tenant and none of the remainder-men or reversioners are entitled to possession in any form, either with the life tenant, exclusive of him or in conjunction with him.
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Respectfully,

E. R. McGLYNN,
Solicitor for Defendant.

A true copy.

ROBERT H. McADAMS,
Clerk.

Conclusions of Vice-Chancellor.

30 Filed May 18, 1918.

Mr. Edward R. McGlynn for the motion to dismiss bill.

Mr. Harry Castelbaum for complainant.

FOSTER, V. C. (orally).

The motion to dismiss the bill in this cause should prevail, because it appears from the allegations of the bill that Meyer Kobrin, one of the defendants, is entitled to the exclusive possession of the premises for which partition is sought, as the tenant by the curtesy, and he does not consent to the pro-
40 ceedings.

It is clear, from a consideration of the act relating to partition (C. S., p. 3897, &c.) and the act relating to the sale of lands (C. S., p. 4680) that the attempted sale of the life tenant's interest cannot be obtained in the manner sought.

Order Dismissing Bill.

The Court of Errors and Appeals, in *Smith v. Gaines*, 39 Eq., 545, had this precise question before it, and decided that this Court is without the power to order the sale of the life estate which in severalty is in the actual use and enjoyment of the life tenant, without that tenant's consent.

And in *Radley v. Radley*, 78 Equity, 170, Chancellor Walker, then Vice-Chancellor, held that a life estate may be involuntarily sold away from the life tenant only when it exists as an interest in lands, the remainder of which is in others who are entitled to possession in some form, either with the life tenant or exclusive of him, or in conjunction with him. 10

As the bill does not aver complainant to be entitled to possession in any of the forms mentioned, it will be dismissed.

A true copy.

ROBERT H. McADAMS,
Clerk. 20

Order Dismissing Bill.

Filed May 28, 1918.

This matter being opened to the Court by Edward R. McGlynn of counsel for the defendant Meyer Kobrin, and it appearing that due notice has been given to the complainant of an application to dismiss the bill in this cause, and upon hearing Harry Castelbaum of counsel for the complainant, it is, on motion of Edward R. McGlynn, of counsel as aforesaid, 30

It is on this 21st day of May, 1918, ORDERED that the bill of complaint in this cause be and the same is hereby dismissed with costs; and it is further

ORDERED that a counsel fee of twenty-five dollars be allowed and taxed by the clerk in the taxed bill of costs.

E. R. WALKER,

C. 40

Respectfully advised,

JOHN E. FOSTER, *V. C.*

A true copy.

ROBERT H. McADAMS,
Clerk.

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Order Dismissing Bill.

MAY 20 1918

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New Jersey Court of Errors and Appeals

Between

SAMUEL PORTNOW, by next friend,
Complainant-Appellant,

and

MORRIS PORTNOW, *et al.,*
Defendant-Respondents.

APPELLANT'S BRIEF.

Facts.

This cause is on appeal before this Court from a decree of dismissal made in the Chancery Court, dismissing the bill of complaint (Case, 2 to 5) filed in said Court by complainant-appellant as one of the heirs-at-law of one Mollie Kobrin, deceased, naming as defendants the other heirs-at-law and respondent, husband of said Mollie Kobrin, who claimed an interest as tenant by the curtesy in the lands whereof she died seized.

The object of the bill of complaint was to have partition between the said complainant-appellant and his tenant in common of the reversion and the tenant by the curtesy, of all of the lands whereof the said Mollie Kobrin died seized, and in case that actual partition be impracticable then to have the said lands sold, including the interest of the said respondent as tenant by the curtesy.

A further allegation of the bill of complaint filed by said complainant-appellant sets forth that part of the purchase price of the lands in question had been furnished by him to the said Mollie Kobrin under an agreement that he was to receive that amount out of the proceeds of the sale of the property to which said amount complainant-appellant claimed the interest of the defendants to said suit were subject to.

The respondent thereupon moved to dismiss the bill of complaint filed in said cause (Case, 5 to 6) on the ground, first, that the bill did not set forth a cause of action; second, that a suit for partition could not be maintained without his consent, for the reason that he was entitled to the exclusive possession of the premises and, third, on the ground that there was no author-

ity in the partition act to empower the Court of Chancery to order the sale of a life estate which is in severally and in the actual use, occupation, and enjoyment of the life tenant, and none of the remaindermen are entitled to possession in any form, either with the life tenant, exclusive of him or in conjunction with him.

The motion to dismiss the bill of complaint was granted on the ground (Case, 6) that respondent was entitled to exclusive possession of the premises as tenant by the curtesy, and did not consent to the partition proceedings. The appellant urged on the motion that even if partition could not be maintainable, the bill should be properly retained as a bill to impress an equitable lien upon the premises for the amount advanced towards the purchase of the same, which contention was not upheld by the Court of Chancery and the bill of complaint accordingly dismissed.

POINT 1.

The Court erred in finding as a matter of law, that a suit for partition brought by a remainderman without the consent of the tenant by the curtesy, will not lie.

The Legislature seems to have drawn a distinction between those cases where the remainder or reversion is owned by several persons, subject to a particular estate, such as a life estate, and those cases where there is merely an outstanding right of dower or right of curtesy.

In the first named class of cases, there cannot be partition without the consent of the owner of the particular estate; in cases of estates subject to dower or curtesy there can be.

The cases first named are governed by section 27 of the Partition Act, Compiled Statute 3906, which reads as follows:

“Partition or sale by consent of particular tenant.—Where there is an estate for life or lives, or other less estate, in any lands or tenements situate in this state, and the reversion or remainder in fee is owned by several persons as joint tenants shall consent thereto, partition of the said lands or tenements may be made among said joint tenants, co-partners or tenants in common, by any court or jurisdiction having authority to make partition of lands”; and in case the land cannot be partitioned, provides for a sale, etc.

Cases subject to dower or curtesy are dealt with by section 18 of the Sale of Land Act, Compiled Statute, p. 4680, which reads as follows:

“Sale in partition or by executors, etc., of premises, including estate in dower or by curtesy; notice to dowress or tenant by the curtesy:—That in proceeding for the partition of lands in any court of this state, or for the sale of any lands by executors, administrators, or guardians, by order of the Orphans’ Court, if it shall appear to the court in which such proceedings are pending, that any person is entitled to an estate in dower or by the curtesy *in the whole or any part of share of the premises*, it shall be lawful for the said court at the time of making the order for the sale of such premises to consider and determine under all the circumstances of the case, having regard to the interests of all persons interested, whether such right or estate in dower or by the curtesy should be excepted from such sale, or whether the same should be sold, and to order and decree accordingly; and if the sale of the premises including such estate shall be ordered, the estate and interest of every such person shall pass thereby, and the purchaser, his heirs and assigns shall hold such premises free and discharged from all claims by virtue thereof; provided, however, or by the curtesy of the intended application for the sale of said lands free and discharged of such estate at least twenty days prior to such application, or by publishing such notice at least four weeks next preceding the time of making such application, in one of the newspapers printed and published in the county where such lands are situate.”

The present case comes within the language of this latter section, to-wit, section 18 of the Sale of Land Act. This being a case where there was “a person entitled to an estate by the curtesy in the whole” of said premises.

The Court of Chancery in forming its rules must have had in mind that a partition could be brought while there was an outstanding estate of curtesy *in the whole* of the premises, without obtaining the consent of the owner of the curtesy, for Rule 229 provides as follows:

“In partition suits, where the person is entitled to an estate in dower or by the curtesy, *in the whole or any part or share of the premises*, and the master shall report that said premises should be sold free and discharged of such estate, no decree for the sale of said premises free and discharged from such dower or curtesy shall be made until notice shall have been given to the party entitled to the said estate of the intended application for the sale of said lands free and discharged as aforesaid. Such notice shall

be served personally on said party within or without the State at least twenty days prior to such application, or if he or she be without the State or cannot be found therein, may be published in one of the newspapers printed and published in the county or counties where such lands are situate, once a week, for at least four weeks next preceding the time of making such application; if published, a copy thereof shall be mailed prepaid to such party, if his or her residence can be ascertained."

The statute, and these rules, if they indicate anything at all, indicate that premises can be sold under partition not only without the consent of the owner of the curtesy, but against his objection.

These two statutes have stood for years in practically their present form.

In *Bleecker v. Hennion*, 23 Eq., p. 123, two earlier acts, one an Act Concerning Partition (supplement of 1858); the other an Act Concerning the Sale of Land (supplement of 1855), were construed. They were both similar to the present acts. By the supplement of 1855, the estates of any tenant in dower or by curtesy could be sold. The question was raised in this case whether a bill for partition was properly filed in view of the fact that a dowress was in possession of the entire property, dower not having been assigned, and it was urged that the right of possession made her a particular tenant within the meaning of the Act Concerning Partition.

The Court after explaining that the right of quarantine is only an incident of dower, says:

"So regarded it necessarily appertains to the estate specified in the supplement of 1855, and cannot therefore, be included in, or attached to, any of those enumerated in the supplement of 1858. This construction harmonizes with the provisions of the two supplements which under a different construction would be discordant and conflicting."

The present appellant contends that his case is governed by section 18 of the Sale of Lands Act.

It may be contended that the case of *Radley v. Radley*, 78 Eq., p. 170, is against appellant's present contention, but a careful reading of this case will show that what the Chancellor says in reference to these two statutes, as to sections 26 and 27 of the Partition Act have no application at all to the present case, as appellant is not relying upon those two sections of the statute, but relies upon section 18 of the Sale of Lands Act.

What the Chancellor has to say on section 18 is *dicta*. For section 18 only applies where the land cannot be partitioned and there is an actual sale; but in the Radley case there was an actual admeasurement of dower, prior to the bringing of the suit, and the dowress was in possession of a particular piece of land which had been set off to her.

POINT 2.

The statute of Henry VIII which became the common law in this State, expressly authorizes the bringing of a suit for partition between a remainderman and a tenant by the curtesy.

In *Stevens v. Enders*, 13 N. J. L., p. 271, at the bottom of p. 274, and top of p. 275, says:

“Between what class or description of tenants, then, could partition be brought under the Statutes of 31 and 32 Henry VIII. I answer, those who held as joint tenants or tenants in common in estates of inheritance in their own right or in the right of their wives, and those who held as tenants in common or as joint tenants for life or years; or where one had an estate for life or years, and another of freehold or inheritance, and I may add, by the equity of the statute, *a tenant by the curtesy*; for though he is neither a tenant in common or a joint tenant, he is, as the books express it, ‘in the same mischief.’”

That this was the common understanding of the law in this State is shown in the footnote to the case of *Weise v. Walsh*, 30 Eq., p. 431, wherein it states:

“although a dowress had at common law no such interest in lands as entitled her to partition, the rule was otherwise, as to a tenant by the curtesy intiate or consummate,”

citing *Riker v. Dacke*, 4 Edw., Ch. 668, and *Tilton v. Vaile*, 42 Hun, 638.

The Court, in the case of *Roarty v. Smith*, 53 Eq., p. 253, at bottom of p. 255, cites with approval the case of *Stevens v. Enders*, as to what classes of tenants could bring partition.

Appellant’s argument is this: that under the common law or such of the old English statute law that became the common law of this State, certain classes of tenants could bring partition, and among those classes of tenants was the tenant by the curtesy and a remainderman.

It follows, therefore, that the argument in cases such as *Smith v. Gaines*, 39 Eq., 545, and *Radley v. Radley*, 78 Eq., p 171, have no application because it is conceded in all these cases that the applicant for the partition is relying upon the statute or starts off with the assumption that the partition cannot be brought at common law and these cases merely decide that under the statute relied upon, a remainderman could not bring partition if the land is in the exclusive possession of a life tenant.

Let it be granted, then, that under the common law of this State, a tenant by the curtesy can bring partition against a remainderman, it is respectfully submitted that mutuality will require that the reverse of the situation should be true.

POINT 3.

The Court below should have retained the bill of complaint for the purpose of impressing an equitable lien upon the premises.

The bill, besides praying for partition, also set up that complainant had advanced the sum of Two Hundred and Twenty-five (\$225.00) Dollars as and for the purchase price at the time the premises were purchased upon an oral agreement with the deceased owner, the wife of the present tenant, by the curtesy that such amount was to be returned to him upon the sale of the premises. Complainant had no adequate remedy at law; no suit at law could be brought against the estate, because under complainant's own allegation the money was not due until the property was sold, and he must either rely upon something in the nature of a resulting trust or an equitable lien, to the extent of his contribution to the purchase price. The bill contained a prayer for general relief and a special prayer with reference to the recovery of the Two Hundred and Twenty-five (\$225.00) Dollars, and this point was urged upon the Court below. For the foregoing reasons it is respectfully submitted that the order dismissing appellant's bill should be set aside.

Respectfully submitted,

HARRY CASTLEBAUM,
Solicitor of Appellant.

CHARLES JONES,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between

SAMUEL PORTNOW, by next friend,
Complainant-Appellant,

and

MORRIS PORTNOW, *et al.*,
Defendants-Respondents.

On Bill, etc.

RESPONDENT'S BRIEF.

Facts.

This is an appeal from a decree of dismissal, dismissing the complaint filed herein, said decree having been advised by Vice-Chancellor Foster.

The complainant's bill of complaint was an ordinary bill of partition and a motion was made by Meyer Kobrin, one of the defendants who was the widower of Mollie Kobrin who died seized of the lands described in the bill of complaint. It was admitted that there had been a child born of the marriage who had predeceased its mother.

The basis of the motion to dismiss was the fact that the defendant Meyer Kobrin was entitled, by virtue of his right of curtesy, to the undisturbed possession of the land during his lifetime, and that therefore the remaindermen could not force a partition of the property without his consent.

Law.

I know of no better statement of the law involved in connection with this appeal than the conclusions of Vice-Chancellor Foster, and I shall repeat them in full and rely upon them solely.

“The motion to dismiss the bill in this cause should prevail, because it appears from the allegations of the bill that Meyer Kobrin, one of the defendants, is entitled to the exclusive possession of the premises for which curtesy is sought, as the tenant by the curtesy, and he does not consent to the proceedings.

It is clear, from a consideration of the act relating to partition (C. S., p. 3897, &c.), and the act relating to the

sale of lands (C. S., p. 4680) that the attempted sale of the life tenant's interest cannot be obtained in the manner sought.

The Court of Errors and Appeals, in *Smith v. Gaines*, 39 Eq., 545, had this precise question before it, and decided that this Court is without the power to order the sale of the life estate which in severalty is in the actual use and enjoyment of the life tenant, without that tenant's consent.

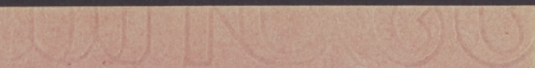
And in *Radley v. Radley*, 78 Equity, 170, Chancellor Walker, then Vice-Chancellor, held that a life estate may be involuntarily sold away from the life tenant only when it exists as an interest in lands, the remainder of which is in others who are entitled to possession in some form, either with the life tenant or exclusive of him, or in conjunction with him."

As the bill does not aver complainant to be entitled to possession in any of the forms mentioned in the preceding paragraph, the Vice-Chancellor was correct in dismissing it.

It is therefore most strenuously urged that the decree advised by the Vice-Chancellor be affirmed with costs.

Respectfully submitted,

E. R. McGLYNN,
Of Counsel with Respondent, Meyer Kobrin.



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London

nd

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