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*Bill of Complaint.*

**BILL OF COMPLAINT.**

Filed August 7, 1925.

**In Chancery of New Jersey**

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*Between*

ALBERT HOLLANDER,  
*Complainant,*  
  
*and*  
  
ANNA RUSKIN ABRAMS, also  
known as ANNA RUSKIN,  
*Defendant.*

---

*On Bill for  
Specific  
Performance.  
  
Bill of  
Complaint.*

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

20

The complaint of Albert Hollander of the City of Newark, County of Essex and State of New Jersey, respectfully shows as follows:

1. The defendant Anna Ruskin Abrams, who also uses the name of Anna Ruskin and is known thereby, is a resident of the City of Newark, County of Essex and State of New Jersey.

30

2. On May 22, 1925, the defendant was, and ever since has continued to be, seized in fee simple of all that lot, tract or parcel of land and premises situate, lying and being in the City of Newark, County of Essex and State of New Jersey, and by metes and bounds described as follows:

BEGINNING in the westerly line of Washington Street at a point therein distant southerly one hundred fifty-four and seven-

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*Bill of Complaint.*

10           teen hundredths feet from the southwesterly  
corner of the same and William Street; from  
thence running north sixty-three degrees  
forty-two minutes west through the centre  
of the party wall between the house on the  
lot hereby conveyed and the house on the  
lot adjoining on the north sixty-five and  
fifty-five hundredths feet; thence north sixty  
four degrees thirty-three minutes west sixty-  
seven and seventy hundredths feet to the  
rear line of the lot; thence along that line  
south twenty-six degrees ten minutes west  
twenty-six and forty-six hundredths feet;  
thence south sixty-four degrees twenty  
minutes east one hundred thirty-three and  
twenty-five hundredths feet to Washington  
Street aforesaid; and thence along the same  
20 north twenty-six degrees ten minutes east  
twenty-six feet to the point and place of  
BEGINNING.

3. On the said 22nd day of May, 1925, the  
said defendant entered into written articles of  
agreement with complainant, wherein and where-  
by the said defendant agreed to sell and convey  
unto complainant the above described lands and  
premises and the complainant agreed to purchase  
30 the same, for the consideration of Twenty-one  
thousand two hundred (\$21,200.) dollars, to be  
paid in the following manner:

- |   |          |
|---|----------|
| (a) On the execution of said agree-<br>ment ..... | 500.00   |
| (b) On the delivery of deed in<br>cash .....      | 20700.00 |

40           A true copy of said agreement is hereto at-  
tached and made part hereof as though here fully  
recited at length.

*Bill of Complaint.*

4. In and by said articles of agreement it was expressly agreed that the same would be consummated by the delivery of a deed of Warranty by the defendant and the payment of the consideration by the complainant on July 1st, 1925, at the law office of Lane, Lynch & Smith, Esqs., Prudential Building, Newark, N. J. The said firm of Lane, Lynch & Smith were the attorneys acting for the defendant in the preparation of said articles of agreement. The details were attended to by Joseph L. Smith, Esq., a member of said firm. 10

5. The said defendant being absent from the State of New Jersey at the time fixed in said articles of agreement for the consummation thereof, the time for performance was mutually extended to Wednesday, August 5, 1925, at ten o'clock in the forenoon, which time and the office of Lane, Lynch & Smith, as the place, was fixed for the performance of said agreement. 20

6. On August 5, 1925, at ten o'clock in the forenoon at the office of the attorneys of the defendant Lane, Lynch & Smith at 763 Broad Street, Newark, N. J., complainant attended by his attorney, at which time and place the defendant attended in person. Complainant was then and there ready, able and willing to consummate said articles of agreement and to pay to the defendant the purchase price in good and lawful money of the United States of America and then and there tendered himself ready and willing to perform said agreement and to pay said purchase price, but the defendant then and there refused to perform said agreement and then and there informed complainant's attorney that she regretted her bargain and would under no circumstances consummate the said agreement by delivering 30 40

*Bill of Complaint.*

10 the deed and accepting the agreed payment therefor. She then and there instructed her attorney Charles F. Lynch, Esq., not to accept from complainant or his attorney the purchase price nor complete the transaction. Defendant's said attorney was then and now is in possession of a  
10 duly executed deed of conveyance for said lands and premises from said defendant to complainant, but owing to the instructions from his said client, he declined to deliver to complainant or complainant's attorney the said deed of conveyance and accept the purchase price therefor. The said defendant still refuses to perform said agreement and to convey said lands and premises unto this complainant.

20 7. The complainant hereby tenders himself ready, able and willing to perform his part of the agreement aforesaid and says that he is without adequate remedy at law.

Complainant therefore prays to this Honorable Court for the following relief, to wit:

30 (a) That process to compel the defendant to answer this complaint issue out of this court directed to the said Anna Ruskin Abrams, also known as Anna Ruskin.

(b) That the said Anna Ruskin Abrams, also known as Anna Ruskin, make answer without oath to all and singular the charges and allegations contained in this bill.

(c) That the said Anna Ruskin Abrams, also known as Anna Ruskin, be compelled specifically to perform the aforesaid articles of agreement. (Complainant hereby offers to perform his part of said agreement.)

*Bill of Complaint.*

(d) That an account be taken of the moneys due from the complainant to the defendant, as contemplated by said articles of agreement, and that upon the complainant paying or tendering the amount so found to be due, the defendant Anna Ruskin Abrams, also known as Anna Ruskin, be compelled to deliver to complainant the deed of conveyance now in the custody of her attorney, Charles F. Lynch, Esq., or she be compelled to execute and deliver unto the complainant a good and sufficient deed of conveyance as contemplated by the terms of the said articles of agreement. 10

(e) That the complainant have such further and other relief as the nature of the case may require and as shall be agreeable to equity and good conscience. 20

LEBER & RUBACK,  
Solicitors for and of Counsel  
with Complainant.

THIS AGREEMENT, Made the 22nd day of May in the year of our Lord One Thousand Nine Hundred and Twenty-five

Between Anna Ruskin (widow), of the City of Newark in the County of Essex and State of New Jersey, party of the First Part; 30

And Albert Hollander of the City of Newark in the County of Essex and State of New Jersey, party of the Second Part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twenty One Thousand Two Hundred (\$21,200.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, 40

*Bill of Complaint.*

made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that she the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of warranty free from  
 10 all encumbrance except as hereinafter mentioned on or before the first day of July next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

BEGINNING in the westerly line of Washington Street at a point therein distant southerly one hundred fifty-four and seventeen hundredths feet from the southwesterly corner of the same  
 20 and Williams Street; from thence running north sixty-three degrees forty-two minutes west through the centre of the party wall between the house on the lot hereby conveyed and the house on the lot adjoining on the north sixty-five and fifty-five hundredths feet; thence north sixty-four degrees thirty-three minutes west sixty-seven and seventy hundredths feet to the rear line of the lot; thence along that line south  
 30 twenty-six degrees ten minutes west twenty-six and forty-six hundredths feet; thence south sixty-four degrees twenty minutes east one hundred thirty-three and twenty-five hundredths feet to Washington Street aforesaid; and thence along the same north twenty-six degrees ten minutes east twenty-six feet to the point and place of BEGINNING.

And the said Albert Hollander for himself, his heirs, executors and administrators, doth  
 40 covenant, promise and agree to and with the said

*Bill of Complaint.*

party of the first part, her heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty One Thousand Two Hundred (\$21,200.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: 10

On Execution of this agreement for which this is also a receipt.....	\$ 500.00
On delivery of deed, cash.....	\$20700.00
	<hr/>
Total consideration.....	\$21200.00

Commissions to be paid upon the delivery of the deed pursuant to Real Estate Board Schedule by the party of the first part. 20

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the First day of July next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the office of Lane, Lynch & Smith, Prudential Building, Newark, New Jersey, between the hours of nine in the forenoon and five o'clock in the afternoon on the said first day of July next ensuing the date hereof. 30

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 40

*Bill of Complaint.*

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats, and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to  
10 be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings  
20 upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing  
30 the same where such ordinances, regulations and said act apply.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments nor depends upon adverse possession.

It is hereby agreed that all assessments are to be paid by party of second part except such assessments are *are* a lien on the date hereof,  
40 which party of first part agrees to pay.

*Bill of Complaint.*

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

ALBERT HOLLANDER (L. S.)  
ANNA RUSKIN (L. S.)

Signed, Sealed and Delivered 10  
in the presence of

SARAH D. SEILER  
As to Albert Hollander

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this 26th day of May in the year of our Lord, One Thousand Nine Hundred and Twenty-Five, before me, the subscribed, a Master in Chancery of New Jersey, personally appeared Anna Ruskin (widow) who, I am satisfied, is the Grantor in the within Agreement named; and I, having first made known to her the contents thereof, she did then acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed. 20

JOSEPH L. SMITH, 30  
A Master in Chancery of New Jersey.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to at same hour and place

WITNESS our hands and seals this day of

*Answer.*

**ANSWER.**

Filed October 8, 1925.

The defendant, residing in the City of Newark, County of Essex and State of New Jersey, says that:

- 10      1. She admits Paragraph 1 of the Complaint.  
           2. She admits Paragraph 2 of the Complaint.  
           3. She admits Paragraph 3 of the Complaint.  
           4. She admits Paragraph 4 of the Complaint.  
           5. She admits Paragraph 5 of the Complaint.  
           6. She admits Paragraph 6 of the Complaint,  
 20      except that she denies that she refused to perform the agreement because of the reason in said paragraph set forth, and she denies that her attorney was then or now is in possession of a duly executed deed of conveyance for the premises.

**DEFENSES TO THE COMPLAINT.**

**FIRST DEFENSE:** The certificate of acknowledgement to the contract referred to in and a copy whereof is annexed to the complaint was not  
 30      attached to or affixed thereto by the person taking said acknowledgment at the time when the contract was actually delivered, but said acknowledgment was affixed thereto and written thereon after the making and delivery of said contract. By virtue whereof the said contract is not enforceable against the defendant.

**SECOND DEFENSE:** At the time of the making, execution and delivery of said contract, the defendant was a married woman, having a husband  
 40      then living and by virtue thereof was unable to

*Answer.*

and could not execute said contract without the joinder thereon of her husband, and the failure of her husband to join therein, prevents the complainant from enforcing the said contract as against her.

THIRD DEFENSE: The defendant was at the time of the making, execution and delivery of said contract a married woman and her husband did not join therein. By virtue of the statute in such case made and provided, the defendant was and now is relieved from being obligated to specifically perform the said contract. 10

MILTON M. UNGER,  
Solicitor for Defendant.

Consent is given to the filing of the within answer as of time. 20

LEBER & RUBACK,  
Solicitors of Complainant.

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*Stipulation of Facts.***MOTION TO STRIKE OUT ANSWER AND TO  
ENTER DECREE.**

Filed November 10, 1925.

To MILTON UNGER, Solicitor for Defendant:

10 PLEASE TAKE NOTICE that on Tuesday, November 10, 1925, before the Chancellor, at Chancery Chambers, at Newark, at ten o'clock in the forenoon of that day or as soon thereafter as the matter can be heard, we shall move to strike out your answer filed in this suit, upon the ground that said answer presents no defense.

ALSO TAKE NOTICE that at said time and place, we shall move for the entry of a decree in favor of the complainant and against the defendant.

20 Dated: November 10, 1925.

LEBER & RUBACK,  
Solicitors for and of Counsel with Complainant.

**STIPULATION OF FACTS.**

Filed December 13, 1925.

30 The complainant having filed his bill in this cause for the specific performance of the contract in said bill described and the defendant having filed her answer, and the solicitors for complainants being about to move to strike out the said answer on the ground that the same presents no defense and it being deemed advisable by the solicitors for the respective parties that for the purpose of said motion, the facts be stipulated and agreed to, said solicitors do  
40 hereby stipulate as follows:

A. D. 19

*Stipulation of Facts.*

1. That the facts hereinafter set forth shall for the purposes of said motion to strike out the defendant's answer be deemed a part of such answer with the same effect as though said facts were in said answer expressly pleaded.

2. That the facts, stipulated for the purpose  
10  
aforementioned, are as follows:

On May 26, 1925, the defendant executed and acknowledged at the office of her attorneys, Lane, Lynch & Smith, at Newark, the agreement described in complainant's bill, of which a true copy is annexed to said bill. The said agreement was acknowledged by the defendant before her attorney, Joseph L. Smith, a Master in Chancery of New Jersey, who certified to such acknowledgment in the manner appearing on  
20  
the said copy of said agreement annexed to complainant's bill. The said agreement was executed by the defendant in duplicate and was left by her with her attorney, Mr. Smith, for the purpose of securing the execution of the agreement by the complainant and for the further purpose of making appropriate delivery. Thereafter, Smith, delivered said agreements to Messrs. Leber & Ruback, attorneys for complainant, who attended to the execution of said  
30  
agreements by complainant. Said agreement was executed by complainant on the 27th or 28th of May, 1925, and thereupon the said Joseph L. Smith retained one copy for himself as attorney for defendant and delivered the other copy to Meyer E. Ruback, one of the attorneys for complainant.

The facts set forth in the complainant's bill in paragraphs 1, 2, 3, 4 and 5 thereof are admitted.  
40

*Stipulation of Facts.*

On August 4, 1925, complainant's attorney called at the office of defendant's attorneys, Lane, Lynch & Smith and was there handed a deed for examination and approval. The said deed had been executed by the defendant and her husband, Abraham Abrams, and purported to convey to the complainant the lands and premises involved in this suit. The said deed was then and there examined by complainant's attorney and was approved by him. An appointment was made between the attorneys to meet the following morning at ten o'clock, for the purpose of delivering the deed and paying the purchase price. Accordingly, the following morning complainant's attorney met with the defendant at the office of the latter's attorneys, at which time and place she was represented by Charles F. Lynch, Esq. Complainant's attorney tendered the purchase price but the defendant declined to receive the same and instructed the said Charles F. Lynch not to deliver said deed. The defendant then refused and still refuses to perform the agreement. Complainant has ever been ready, willing and able to perform the agreement on his part by paying the consideration and accepting a proper deed of conveyance.

At the time of the making of the contract, performance of which is sought in this suit, the defendant was a married woman, her husband being Abraham Abrams. At the time of the execution of said contract, complainant did not know of the fact that defendant was a married woman, but believed her to be a widow. The defendant was married to the said Abrams on August 20, 1923, and was divorced from him by the decree of the Supreme Court of Ohio

*Stipulation of Facts.*

entered on July 7, 1925. The divorce suit which resulted in said decree of divorce was pending at the time of the making and delivery of the agreement involved in this suit, which fact, however, was not disclosed to or known by complainant until after the entry of said decree of divorce. At the time of the making and delivery of the contract involved in this case, the defendant was living in a state of separation from her husband, said Abraham Abrams. No issue was ever born to the defendant of her marriage to said Abraham Abrams. She has not remarried since the entry of said decree of divorce. The defendant became the owner of said land and premises on March 6, 1923.

LEBER & RUBACK,  
Solicitors for Complainant. 20

MILTON M. UNGER,  
Solicitor for Defendant.

Dated: October 22, 1925.

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*Conclusions of Vice-Chancellor.***CONCLUSIONS OF VICE-CHANCELLOR.**

Filed February 4, 1926.

BERRY, V.-C.

10 This is a bill for specific performance of an agreement for the sale of land. The complainant is the vendee and the defendant the vendor. The sole defense to the bill is that the defendant, at the date of the contract, was a married woman, and that the contract was executed and acknowledged by her alone, without the joinder of her husband. The matter comes before me on motion to strike out the answer and enter decree. While the answer admits most of the facts set out in the bill of complaint, the solicitors of the respective parties have filed a stipulation  
20 containing an agreed state of facts for the purposes of this motion. From this stipulation it appears that on May 22, 1925, the defendant, under the name of Anna Ruskin, executed and acknowledged the written agreement which is the subject of this suit, and that at that time she represented herself to be a widow, and was so described in the agreement of sale. The contract was duly executed by the complainant, and he thereupon paid the sum of \$500 on account of the purchase price and in accordance with the terms of the agreement. The time fixed for closing was July 1, 1925, but owing to the absence of the defendant at that time settlement was postponed, by mutual agreement, until August 5, 1925. On August 4, 1925, there was submitted to the attorney of the complainant, for his approval, a deed for the property, the subject of the sale, which deed was executed and acknowledged by the defendant under the  
30 name of Anna Ruskin Abrams, and also by one  
40

*Conclusions of Vice-Chancellor.*

Abraham Abrams, who was described in the deed as the husband of the defendant. This deed was approved by the complainant's attorney and returned to the attorney of the defendant. On the following morning the parties, with their attorneys, met for the purpose of settlement. The complainant tendered the balance of the purchase price, but the defendant declined to receive it, and instructed her attorney not to deliver the deed and refused to perform the agreement, claiming that she was not obliged to do so, because at the time of making the contract she was a married woman, and the contract was not joined in by her husband. Neither the complainant nor his attorney knew the defendant had a living husband until the submission of the deed for approval as above mentioned, the complainant relying on the defendant's representation that she was a widow. The property which is the subject of the agreement was acquired by the defendant by deed prior to her marriage to Abraham Abrams. At the time of the execution of the agreement she was living in a state of separation from her husband, and divorce proceedings were then pending between them and a final decree, dissolving the bonds of matrimony, was entered in that suit on July 7, 1925. No issue was ever born of the marriage.

This motion is based upon the following grounds as stated by the solicitor of complainant:

1. The defendant is estopped in equity because of her fraud from setting up the defense of coverture.
2. The disability of coverture having been removed before the time fixed for performance,

*Conclusions of Vice-Chancellor.*

the contract is enforceable against the defendant as a *feme sole*.

10 3. That a sufficient concurrence by the defendant's husband in her said agreement is evidenced and manifested by the deed of conveyance executed by him, together with the defendant, which deed of conveyance the defendant, after its due execution, refused to deliver to complainant.

20 4. There was no necessity for the husband's concurrence in the agreement in question, because section 8-p of the Married Women's act qualifies and enables a married woman, circumstanced as was the defendant at the time of the making of the contract, to convey without the concurrence of her husband.

The defendant counters with the following propositions:

1. The doctrine of estoppel is inapplicable and cannot be invoked in this case.

30 2. Although the divorce from her husband may have operated to make the defendant a *feme sole* as to contracts made subsequent to the divorce decree, nevertheless, contracts made prior to the dissolution of the marriage ties, being invalid and unenforceable at that time, carry that "taint" with them thereafter, and, consequently, are unenforceable.

3. It is elementary that a deed, even though duly executed with all due form and solemnity, is a nonentity unless its execution is attended by delivery.

40 4. In view of the foregoing, section 8-p of the Married Women's act has no application.

*Conclusions of Vice-Chancellor.*

I will consider these opposing propositions in their order—

## 1.

The first question which arises is as to the application of the doctrine of equitable estoppel under the circumstances of this case. The general rule of equitable estoppel as applied to married women is stated by Professor Pomeroy in his work on 2 *Pom. Eq. Jur.* (4th ed.) 814, thus:

“Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense.”

That the doctrine of estoppel is applicable to married women in New Jersey, both at law and in equity, is shown by the following cases: *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. 477; *Besson v. Eveland*, 26 N. J. Eq. 468; *National Bank v. Hamilton*, 34 N. J. Eq. 158; *Francis v. Lawrence*, 48 N. J. Eq. 508; *Ruckelschaus v. Oehme*, 48 N. J. Eq. 436; *Hamlen's Administrator v. Bennett*, 52 N. J. Eq. 70; *Ruckelschaus v. Borchering*, 54 N. J. Eq. 344; affirmed, 55 N. J. Eq. 589; *Wheeler*

*Conclusions of Vice-Chancellor.*

& *Wilson Manufacturing Co. v. Litwin*, 57 N. J. Eq. 660; *Mertens v. Schlemme*, 68 N. J. Eq. 544; *Mayer v. Kane*, 69 N. J. Eq. 733; *Neslor v. Grove*, 90 N. J. Eq. 554; *National Bank v. Rutter*, 91 N. J. Law, 424; affirmed, 92 N. J. Law 621.

10 It is contended by the defendant, however, that the doctrine of estoppel is not here applicable, and he cites as authority for this contention the case of *Belmar Bank v. Shumard*, 91 N. J. Law, 379; but that case, whatever may be its authority at law, is not, in my judgment, authority for the proposition that a married woman may not be estopped in equity. In that case, which was a suit at law on a promissory note, it was held that a married woman was not liable as an accommodation endorser, and  
20 that she was not estopped from setting up coverture as a defense by her representation made at the time of the endorsement that she was then a widow; but that was an action at law, and the weight of this decision is now questioned by counsel for complainant in view of the later case of *La Rosa v. Nichols*, 92 N. J. Law 375.

In the *Shumard Case* Mr. Justice Swayze said: "The case of a married woman is like the case of an infant, except in so far as her incapacity  
30 has been removed," and then refers to the case of *Parker v. Hayes*, 39 N. J. Eq. 469; 41 N. J. Eq. 630, for a statement of the rule of application of the doctrine of estoppel to infants. In this latter case Vice-Chancellor Van Fleet said (at p. 478):

40 "It is no answer at law to the fact of infancy that the person dealing with the infant was induced to do so by the infant's fraudulent representation that he was of full age. \* \* \* The rule in equity, however, is different. In equity, in the language

*Conclusions of Vice-Chancellor.*

of Lord King, infants have no privilege to cheat men. If an infant obtains property by fraudulently representing himself to be of full age, equity will compel him either to pay for the property or to surrender it.

“The justice of this rule is manifest. At law an infant is incompetent to make a valid contract except in certain exceptional instances. He may be old enough, and cunning enough, to contrive and carry out a fraud, yet, if he does, the law is powerless to give redress. The law cannot prevent him from using the shield which was intended simply as a protection, as a cover for his own cheating. Equity, to correct this wrong, steps in and declares that when an infant induces another to deal with him by fraudulently representing himself to be of full age, that, to the extent that the contract is just and fair to him, and also to the extent to which it is necessary to hold him to it to prevent him from reaping the fruits of his fraud, he shall be compelled to abide by it.”

On appeal, the Court of Errors and Appeals approved this statement of the equitable rule of estoppel.

In *La Rosa v. Nichols*, 92 N. J. Law 375, the Court of Errors and Appeals held, however, that the doctrine of estoppel was applicable *at law* to an infant who had represented himself to be of full age and had thereby obtained credit. Chancellor Walker, who wrote the opinion, said: “If this suit were in the Court of Chancery a plea of infancy in the circumstances of this case would not be tolerated.”

If the common law disability of a married woman is like the common law disability of an infant, as was said in the *Shumard Case*, and as was said also in the later case of *Bank v. Rutter*,

*Conclusions of Vice-Chancellor.*

92 N. J. Law 621, and if the defense of infancy would not have been tolerated in equity in the *La Rosa Case*, then the defense of coverture ought not to be tolerated here. The case of *Bank v. Rutter*, 91 N. J. Law 424, and on appeal affirmed in 92 N. J. Law 621, is not opposed to  
 10 complainant's contention here. The *Rutter Case* was a suit against a married woman who was an accommodation maker of a note to the order of her brother. After the words, "value received," on the note, the words "for my own use and benefit" were written. As a matter of fact, the married woman obtained no benefit whatever from this note, and the jury found as  
 20 a fact that the statement that the note was for her own use and benefit was known by the bank officials to be untrue. This representation, therefore, did not deceive the bank, and, of course, under those circumstances, there could be no estoppel.

The case of *Corby v. Drew*, 55 N. J. Eq. 387, is mainly relied upon by counsel for the defendant in support of his contention that this contract is unenforceable. Numerous other cases are cited by counsel for defendant to show that the rule of *Corby v. Drew* is still the law, and among  
 30 them the following: *Goldstein v. Curtis*, 63 N. J. Eq. 454; *Schwartz v. Regan*, 64 N. J. Eq. 139; *Ten Eyck v. Saville*, 64 N. J. Eq. 611; *Moore v. Baker*, 65 N. J. Eq. 104; *Wolff v. Mayer*, 75 N. J. Law 181; *Schickhaus v. Sanford*, 83 N. J. Eq. 454; *Chassman v. Wiese*, 90 N. J. Eq. 108; 106 Atl. Rep. 19; *Patterson v. Loiseaux Lumber Co.*, 92 N. J. Eq. 569; *Kotok v. Rossi*, 94 N. J. Eq. 327; *Kolinsky v. Pilz*, 94 N. J. Eq. 796; *Chianese v. Cachia*, 3 N. J. Mis. R. 1229.

*Conclusions of Vice-Chancellor.*

*Corby v. Drew* held that equity would not specifically enforce a married woman's contract to convey her lands without reference to whether or not her husband joined therein. In that case Vice-Chancellor Stevens said: "But if she cannot convey without the concurrence of her husband, it would seem to follow that she cannot agree to convey without that concurrence." 10

This language is seized upon by counsel for the defendant in support of his contention that the defendant's contract is unenforceable. In the previous case of *Union Brick and Tile Co. v. Lorillard*, 45 N. J. Eq. 289, the question of the capacity of a married woman to contract without the joiner of her husband was also left undecided. Both of these cases, however, were decided prior to the revision of the Conveyancing act of 1898. Also the case of *Moore v. Baker*, although decided after the revision, had under consideration a contract made prior to that revision. None of these cases are wholly applicable to the case at bar. 20

The first case involving a contract of a married woman to convey lands after the revision was *Goldstein v. Curtis, supra*. In that case Vice-Chancellor Pitney held that a married woman's contract for the sale of land which was duly acknowledged and joined in by her husband was enforceable in equity. That case is not opposed to complainant's contention in the case at bar. 30

*Wolff v. Mayer* was a suit against a married woman for damages for breach of her contract to convey land. Her husband did not join in the contract nor was it acknowledged by her. Mr. Justice Swayze, speaking for the Supreme Court, said: "It was suggested, but not decided in *Corby v. Drew*, that if a married woman could 40

*Conclusions of Vice-Chancellor.*

not convey without the concurrence of her husband, she could not agree to convey without that concurrence. The impossibility of performance of a contract to convey made by a married woman alone is, however, not, strictly speaking, an impossibility in law such as would make the contract void. It is an impossibility which may or may not arise, and is dependent on the will of her husband. One authorized to contract may make a valid contract although the possibility of performing depends upon the will of another.”

The defendant was held liable in damages. *Goldstein v. Curtis* and *Wolff v. Mayer* show that the authority of *Corby v. Drew* is somewhat modified.

But the possibility of performance of the contract here does not depend upon the will of another. It is dependent upon the defendant alone. If a married woman's unacknowledged contract is valid at law, as was held in *Wolff v. Mayer*, a fortiori, is her acknowledged contract good in equity?

The cases of *Schwartz v. Regan* and *Chianese v. Wiese* have no application here, as the only point involved in those cases was the lack of an acknowledgment to the contract of sale. *Schickhaus v. Sanford* is not applicable because there the question was as to the validity of certain building restrictions. Whatever was said by Vice-Chancellor Emery in that case in reference to specific performance of married women's contracts requiring conveyances of lands in consummation thereof, was *dictum*. In *Kotok v. Rossi* the question there before the Court was as to the effect of a married woman's unacknowledged power of attorney as a conveyance. It was very properly held that, the power of attorney being

*Conclusions of Vice-Chancellor.*

unacknowledged, the contract signed and acknowledged by the agent, pursuant to that power, was unenforceable. The "river could rise no higher than its source." In *Kolinsky v. Pilz* the lease which was construed to be a contract of sale was not acknowledged by the defendant married woman separate and apart from her husband, as required by law at its date, and this was held to preclude specific performance. In *Ten Eyck v. Saville*, as in *Schwartz v. Regan* and *Chassman v. Wiese*, one of the points involved was that the contract was not acknowledged by the married woman, and it was on that account held unenforceable. In *Chianese v. Cachia*, 3 N. J. Mis. R. 1229, cited by counsel for defendant to show that *Corby v. Drew* is still the law, the Court found as a fact that the husband was dead when the contract was executed by the defendant who set up coverture as a defense. In none of these cases did the question of estoppel arise. In *Patterson v. Loiseaux Lumber Company* the estoppel claimed was based upon complainant's letter, but the letter itself was induced by a misrepresentation of the defendant, and the Court held that the complainant, a married woman, was not estopped by her letter because of that misrepresentation. But there was no suggestion in that case that the doctrine of estoppel was not applicable to a married woman in a proper case.

There is ample authority in other jurisdictions supporting the application of the doctrine of estoppel to a married woman in cases similar to this case, and supporting the text from Pomeroy, above quoted. See *Roberson v. Goldsmith*, 57 So. Rep. 908; *Keller v. Lindow*, 133 S. W. Rep. 304; *Townsend v. Woodworth*, 169 N. W. Rep. 752;

*Conclusions of Vice-Chancellor.*

*Overcast v. Lawrence (Ky.)*, 131 S. W. Rep. 1029; *Bigelow v. Foss*, 59 Me. 162; *Engholm v. Ekrem (N. D.)*, 119 N. W. Rep. 35; *Galbraith v. Lunsford (Tenn.)*, 1 L. R. A. 522; *Stafford v. Stafford*, 58 Eng. Ch. 150 (44 Reprint 697); *Mathews v. Murchison*, 17 Fed. Rep. 760; *Graham v. Mcneilly*, 16 Grant U. C. Ch. 661.

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In *McCoy v. Niblick (Pa.)*, 77 Atl. Rep. 551; 30 L. R. A. (N. S.) 353, it was held that a married woman whose husband does not refuse to join in a deed of her real estate cannot avoid her contract to make the sale on the theory that he has not joined, where the statute gives her the same right to sell her real estate as though she were sole, except that her husband must join in the deed. That was a suit in ejectment. It appeared that the husband had not joined in the contract of sale. The married woman vendor refused to perform, alleging coverture and non-joinder of the husband as an excuse. It appeared that the husband had not refused to join in the conveyance and had not even been asked to join. The Court held that the wife was bound to affirmatively show a refusal by her husband to join in the conveyance. This she was unable to do, but on the contrary the husband testified that he was willing to join in the conveyance. The Court held that it was no more her privilege to refuse to perform than if she had been a single woman. The Court said:

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“When a married woman cannot perform her contract for the sale of her real estate the law will not make her, but when she simply will not, it will not help her to escape her covenant. When she cannot carry out an honest contract to sell she is not morally blamable, and the law will exact nothing more from her than compensation to her

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*Conclusions of Vice-Chancellor.*

vendee for any loss he may have sustained in reliance upon the contract; but when she capriciously will not perform, she becomes not only *persona non grata in foro conscientioe*, but a plaintiff without cause of action in a suit at law in repudiation of her contract."

The restriction on conveyances by married women is much the same under the Pennsylvania and New Jersey statutes, so that the language of the Court in the case last cited is quite applicable here. A married woman's contract being enforceable only at the will of the husband, as was said in *Wolff v. Mayer, supra*, she cannot substitute her will for his. While the husband may refuse to join in the deed for any reason or no reason at all, she has no right to refuse because of mere whim or caprice. The law excuses her if she *cannot* perform because of her husband's refusal, but it does not excuse her merely because she *will not* perform. One who can but will not ought to be made to perform. That is the situation here.

In order to determine just what are the rights of a married woman with respect to contracts and conveyances affecting her separate estate, as applied to the instant case, it is necessary to consider sections 5 and 14 of the Married Women's act (3 Comp. Stat. pp. 3226, 3237), together with sections 21 and 39 of the act respecting conveyances. 1 Cum. Supp. Comp. Stat. pp. 627, 632. Section 5 of the Married Women's act fully and completely empowers a married woman to bind herself by contract to the same extent as though she were unmarried, with certain specified exceptions, and such contracts are made enforceable both at law and in equity. The only restriction on this power with which we are here

*Conclusions of Vice-Chancellor.*

concerned is that contained in section 14 of the Married Women's act, which prevents an actual conveyance of her land without the joinder of her husband, except in certain specified instances. Section 39 of the act respecting conveyances provides that "every deed or instrument of the nature or description set forth in the twenty-first section of this act," executed and acknowledged by a married woman, "shall be good and effectual to convey or affect" her lands. Agreements of sale are specifically included in the list of instruments mentioned in section 21 of that act. In *Goldstein v. Curtis, supra*, Vice-Chancellor Pitney (at p. 461), said:

"A familiar way to 'affect' the interest of a person in land is to contract to convey it; and the only mode in which such a contract can be made 'good and effectual' is to compel its specific performance by a decree of this Court."

It appears, therefore, that a married woman is as free to contract with respect to lands of her separate estate as a *feme sole*, except for the restriction that she cannot convey or encumber her lands without the joinder of her husband. The purpose of this restriction, as contained in section 14 of the Married Women's act, was to protect *her husband* in his rights in his wife's property; to prevent her from conveying or encumbering his rights as a tenant by the courtesy without his consent. *Lorillard v. Union Brick and Tile Manufacturing Co.*, 44 N. J. Eq. 5.

In *Wolff v. Mayer*, 75 N. J. Law 181, Mr. Justice Swayze said: "An agreement to convey is obviously not a conveyance," and in *Sullivan v. Barry*, 46 N. J. Law 1, Chief-Justice Beasley held that the word "encumber," as used in section 14 of the Married Women's act, was used in its

*Conclusions of Vice-Chancellor.*

ordinary and not its technical sense, and that agreements to convey were not encumbrances within the meaning of the word. In *Kotok v. Rossi*, 94 N. J. Eq. 327, Vice-Chancellor Buchanan said that a contract for the sale of lands is an equitable conveyance, and if invalid as a conveyance is unenforceable as a contract; but that language was intended to apply only to the state of facts which was then before the court, and so far as it is applied to any other state of facts it is *dictum*. 10

But it is insisted by counsel for defendant that a married woman occupies a status *sui generis*, and that the law throws around her a "cloak of protection" which protects her from the "outside world" and prevents her from making a contract or conveyance affecting her lands without the joinder of her husband. In so far as this contention assumes that the common law disabilities of the married woman were designed for her protection I am unable to subscribe to it. My notion of the reason for the common law disabilities of the married woman is not that she required greater protection of the law than a *feme sole*. These disabilities were not a "cloak of protection from the outside world." The disability provisions of the common law had two objects—*first*, to protect the husband in his rights acquired by the marriage, and *second*, to protect the wife from undue influence of her husband. 1 Bl. (Lewis' ed.) 442 note 75. At common law the effect of marriage was to merge the existence of the wife into the legal life of the husband, so that with respect to property and civil rights, she, as a separate person, had no recognition. *Perkins v. Elliott*, 23 N. J. Eq. 526. 20 30 40

*Conclusions of Vice-Chancellor.*

Upon marriage the husband became vested with such an interest in his wife's property, real and personal, that it was subject to his debts, and he had the power of disposal. *Bristol v. Skerry*, 64 N. J. Eq. 624. As a result of this rigorous rule there was built up the equitable doctrine of the wife's "separate estate" for her protection. It had its beginning as early as the seventeenth century, but as late as 1722 some of the English judges denied the right of a married woman to have a separate estate. *Powell v. Hankey*, 2 P. W. 82 (*Old English*). All the modern enabling acts enlarging the rights and powers of married women are the outgrowth of this equitable doctrine. The "cloak" which the law has thrown around the married woman was, therefore, never for her protection from the "outside world." Its paramount purpose was the protection of the husband. The "cloak" of present-day law is enabling, not restrictive. The requirement of joinder of the husband in the wife's conveyance is but a survival of that ancient common law which vested in him all his wife's property and subjected it to the payment of his debts. Her right now to contract with respect to her separate estate and her right to convey are merely extensions of the equitable doctrine of the wife's separate estate, which was originally built up for her benefit. This equitable doctrine has been enlarged and extended by both courts and legislative bodies to the point where, since the adoption of the nineteenth amendment to the federal constitution, practically all of the disabilities of women, both married and single, have been removed, so that today she has practically all the rights and privileges of the male citizen. There is now, therefore, no real reason

*Conclusions of Vice-Chancellor.*

for any different application of the rule of estoppel to a married woman than to a *feme sole*, or to the male citizen. It is neither right nor just that, having come into the possession of all these rights and privileges, she should cling to them with one hand while retaining with the other some part of those ancient common law disabilities as a cloak for her fraud. Modern woman, generally speaking, needs no protection at law which is not afforded to man. The idea that woman is man's inferior in business, professional or political life, has long since been thrown into the discard. She has been placed on a plane of practical equality with man, and in most, if not all, fields of endeavor to which she has applied herself, has proven herself man's equal. Why then should she need a "cloak of protection?" She has, of course, retained her individuality in her intrinsic womanhood, and in this respect does now, and always will, occupy a loftier plane than mere man, and laws designed to protect her in this respect are, of course, an exception to this rule of necessity. But while the law protects her, it gives her no license to commit fraud. If, therefore, she has equal rights with man, she should assume equal responsibilities. Why should not the wife's contract, not joined in by the husband, stand in the same position as the husband's contract not joined in by the wife? There is, in principle, no reason. The requirement of joinder in both cases is a survival of an archaic law. In a proper case the husband's contract will be enforced with an abatement on account of the wife's dower, as where he procured her dissent by fraud. *South Jersey Furniture Co. v. Dorsey*, 95 N. J. Eq. 530; *Luczak v. Mariove*, 92 N. J. Eq. 377. In my judg-

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*Conclusions of Vice-Chancellor.*

10 ment, the modern Married Women's law, as reflected in our statutes governing married women's contracts, does not have the effect claimed for it by counsel for the defendant. I see no reason why the rule of estoppel should not be applied to the defendant under the circumstances of this case. If it be said that this decision marks a departure from established rules and precedents, that this is, in effect, an enlargement of the rights and powers of a *feme covert* over her separate estate, my answer is that, while not admitting such departure or enlargement, changing conditions in the world of business from time to time, require modifications in the rules of law and equity previously promulgated to meet different circumstances, and for this proposition I have no less authority than Chief-Justice Beasley, speaking for the court of errors and appeals in *Perkins v. Elliott, supra*, where he said:

20  
30 "My examination has satisfied me that this entire subject, with respect to the power of the *feme covert* over her separate estate, has been the creation of the court of equity, and that the system has been from time to time circumscribed or extended, not under the coercion of any inflexible rules or established principles, but in accordance with judicial opinion founded on very general considerations as to the propriety or policy of the particular circumscription or expansion."

With the enlargement and extension of the rights and privileges of both married and single women, so should their liabilities and responsibilities correspondingly enlarge and extend.

40 Counsel for the defendant says that, as "equity follows the law," the legal rule of estoppel should be applied here. It is true that "equity

*Conclusions of Vice-Chancellor.*

follows the law" in the sense of obeying the law. An example of this is in the application of the statute of limitations in equity. But this maxim "operates within very narrow limits. Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. The maxim is very partial and limited in its application." 1 *Pom. Eq. Jur.* (4th ed.) § 427. 10

As a matter of fact, the whole equitable doctrine of a married woman's separate estate has been built up in equity in direct violation of legal rules.

In my judgment, the first point on which the complainant bases his motion is well taken.

## 2.

Having come to the conclusion that the defense of coverture is not now available to the defendant because of the application of the doctrine of estoppel, this pronouncement might very well stop here; but because I feel that the other objections raised by the complainant to the interposition of the defense of coverture here are sufficient to warrant the decree which I have determined to advise, I will also consider the other points advanced. 20 30

The next question, therefore, is as to what effect should be given to the entry of the decree of divorce between the defendant and her former husband before the time fixed for the performance of her contract. It appearing, as hereinbefore pointed out, that the restriction on married women for the sale of lands was imposed for the protection of the husband, it would seem that, when the reason for this restriction ceases to exist, the restriction itself should be removed. 40

*Conclusions of Vice-Chancellor.*

In *Union Brick and Tile Co. v. Lorillard*, 44 N. J. Eq. 5, the Supreme Court said:

10        “At the death of the husband the limitation upon the execution of the contract by conveyance, and, with it, the objection to the specific performance of the contract, is removed. I conceive that the only purpose of the limitation is to enable the husband to pre-serve from alienation a property in which he may acquire an estate. The possibility of such acquisition is extinguished at his death.”

The possibility of the husband's acquiring any interest in his wife's property is as effectually extinguished by divorce as by death. *Supreme Council American Legion of Honor v. Smith*, 45 N. J. Eq. 466; *Bucci v. Popovich*, 93 N. J. Eq. 121.

20        Counsel for defendant insists, however, that a contract which was invalid and unenforceable during coverture cannot be made valid and enforceable thereafter. The difficulty with that proposition is that it is based on a wrong premise. A married woman's contract for the sale of land is not invalid. In fact, it is made both valid and enforceable by the statute. *Married Women's act*, § 5; 3 *Comp. Stat.* p. 3226. It is only unen-  
30        forceable at the will of the husband. The law gives him the right to protect his interest in his wife's lands by giving him the privilege of refusing to join in a conveyance, and has thus rendered the contract enforceable only at his will; but when this right to exercise that will ceases to exist, performance is no longer subject to his will. In my judgment, the removal of the disability of coverture before the time fixed for performance renders the contract enforceable, irre-  
40        spective of the fact that the former husband has

*Conclusions of Vice-Chancellor.*

already executed the deed in pursuance of that contract.

## 3.

The defendant contends that the deed which has been executed by the defendant and her former husband, until delivered, is ineffective as a conveyance. This undoubtedly is the law. *Ten Eyck v. Saville, supra.* Nor is the deed an acknowledged agreement within the meaning of the Conveyancing act; but if this contract is enforceable for other reasons, this court may direct the delivery of the deed already executed, if necessary. It is sufficient evidence of the husband's willingness to convey if any such evidence were necessary. *Hulmes v. Thorpe*, 5 N. J. Eq. 415 (at p. 423); *Krah v. Wassmer*, 75 N. J. Eq. 109; *South Jersey Furniture Co. v. Dorsey*, 95 N. J. Eq. 530; *Luczak v. Mariove*, 92 N. J. Eq. 377.

## 4.

Complainant's contention that there was originally no necessity for the concurrence of the husband in the agreement in question because of the provisions of section 8-p of the Married Women's act is not entirely correct. The case of *Wolfe v. Clohessy*, 40 N. J. L. J. 299, is cited in support of this proposition. That was a case in the Supreme Court, tried before Judge Spear at the Hudson circuit, and it was there held that a deed of a married woman coming within the provisions of this act conveyed an estate in fee-simple, and that her heirs were estopped from questioning its validity; but it has uniformly been held in this court that the acts authorizing conveyances by married women who are living in a state of separation from their husbands authorize a conveyance only of the interest of the

*Conclusions of Vice-Chancellor.*

wife, subject to whatever interest the husband may have. The latest case on this subject is that of *Mullen v. Mullen*, 129 Atl. Rep. 749; 3 N. J. Adv. R. 1264.

10 In the case *sub judice*, the stipulation of facts brings the defendant clearly within the provisions of this act. She could, by virtue of this statute, contract and convey all of *her interest* in her lands, subject to whatever rights her husband had. She could not convey clear of those rights, but as divorce has put an end to whatever rights her former husband had, a discussion of the effect of her conveyance on his interest is purely academic. The complainant being now willing to accept a conveyance of such interest as the defendant has, and the defendant being within the provisions of this statute, the contract is enforce-  
20 able.

Under all the circumstances I feel that the complainant's motion should prevail. I can imagine no more glaring lack of respect for the obligation of a contract than that here displayed. A mere recital of the facts is sufficient to shock the conscience of the court. The first thought which comes to mind upon hearing this recital of facts is that the defendant ought to be made to perform. In equity, wherever there is an "ought,"  
30 there is a remedy. To refuse to enforce this contract would, in my mind, be to set the stamp of this court's approval on dishonest business transactions. The world's business today is grounded on faith and reliance upon the obligation of contract. This is known as credit. Women as well as men should be taught to respect their obligations if this business credit is to be maintained.

40 The complainant's motion is granted and I will advise a decree in accordance with these conclusions.

*Final Decree.*

**FINAL DECREE.**

Filed February 17, 1926.

This cause coming on to be heard on a motion to strike out the defendant's answer, on the ground that the same presents no defense to the complainant's bill, and counsel for the respective parties to this cause having for the purpose of said motion stipulated the facts, said stipulation providing that said stipulated facts be deemed a part of the defendant's answer, with the same effect as though said facts were in said answer expressly pleaded; and said motion to strike out having been argued in open court by Meyer E. Ruback, Esq., of Leber & Ruback, solicitors for and of counsel with complainant, and Milton M. Unger, solicitor for and of counsel with the defendant; and the Court being of opinion that defendant's answer and said stipulated facts do not present any defense to complainant's bill and that said answer should be stricken out and complainant afforded the relief prayed for:

And it satisfactorily appearing to the Court that by virtue of an agreement in writing, dated May 22, 1925, duly made, executed, acknowledged and delivered by the defendant as vendor, to the complainant as vendee, the said defendant agreed to convey unto the complainant by Deed of Warranty, free from all encumbrances, all that lot, tract or parcel of lands and premises, situate, lying and being in the City of Newark, County of Essex and State of New Jersey, by metes and bounds particularly described as follows:

BEGINNING in the westerly line of Washington Street at a point therein distant southerly one hundred fifty-four and seven-

*Final Decree.*

10           teen hundredths feet from the southwesterly  
               corner of the same and William Street; from  
               thence running north sixty-three degrees  
               forty-two minutes west through the centre of  
               the party wall between the house on the lot  
               hereby conveyed and the house on the lot ad-  
               joining on the north sixty-five and fifty-five  
               hundredths feet; thence north sixty-four de-  
               grees thirty-three minutes west sixty-seven  
               and seventy hundredths feet to the rear line  
               of the lot; thence along that line south  
               twenty-six degrees ten minutes west twenty-  
               six and forty-six hundredths feet; thence  
               south sixty-four degrees twenty minutes east  
               one hundred thirty-three and twenty-five hun-  
               dredths feet to Washington Street aforesaid;  
 20           and thence along the same north twenty-  
               six degrees ten minutes east twenty-six feet  
               to the point and place of BEGINNING.

And it further appearing that the agreement  
 in writing provided that said conveyance by de-  
 fendant to complainant would be made for the  
 sum of \$21,200.00, by the payment of \$500.00 on  
 the execution of said agreement, which sum was  
 then paid, and by the balance of \$20,700.00 in  
 cash on the delivery of deed, and that upon the  
 30           delivery of said deed, the rents of said premises,  
               insurance premiums, water rents and taxes,  
               should be adjusted, apportioned and allowed as  
               of the date of the delivery of said deed; and it  
               further appearing that the complainant has al-  
               ways been, and still is ready and willing in all  
               things to comply with the stipulations of said ar-  
               ticles of agreement on his part, and has prayed  
               the order or decree of this court directing the  
               defendant to comply with and fulfill the same in  
 40           all things on her part; and the Chancellor being

*Final Decree.*

of opinion that the complainant is entitled to the specific performance of said articles of agreement on the part of said defendant, as in his said bill he has prayed:

It is, on this 16th day of February, 1926, on motion of Leber & Ruback, Esqs., solicitors for and of counsel with complainant, ORDERED, AD- 10  
JUDGED AND DECREED, that the defendant's answer herein filed be, and the same is hereby stricken out:

And it is further ORDERED, ADJUDGED and DE-  
CREED, that the said articles of agreement be in all things specifically performed by the said defendant, and that the said defendant do, within thirty days from the date of this decree, make, execute and acknowledge, in due form of law, and deliver to the complainant, a good and suffi- 20  
cient warranty deed for the premises hereinabove described, and that she deliver, at the same time, to the complainant, possession of the said premises, and that thereupon the complainant pay or cause to be paid unto the defendant the sum of \$20,700.00, less such sum as complainant shall be entitled to on an apportionment and adjustment of the insurance premiums, water rates and taxes by said agreement required to be ap- 30  
portioned and adjusted, and that if the parties hereto cannot agree as to said items of apportionment and allowance, that the account be taken by Nicholas W. Bindseil, Esq., one of the Masters of this Court, to whom the matter is hereby referred for that purpose, and that the complainant pay such sum as shall be found by the said Master to be justly due under said articles of agreement, the apportionments and adjustments to be made as of the date of the de-

*Final Decree.*

livery of the deed by the defendant to complainant in pursuance of this decree:

And it is further ORDERED, ADJUDGED and DECREED, that the defendant pay to complainant his costs in this cause to be taxed, including a counsel fee to complainant's solicitors of \$500.

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E. R. WALKER,

C.

Respectfully advised,

MAJA LEON BERRY.

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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed February 19, 1926.

TO MESSRS. LEBER & RUBACK, Solicitors of Com-  
plainant.

SIRS:

PLEASE TAKE NOTICE, that Anna Ruskin  
Abrams, also known as Anna Ruskin, the de-  
fendant in the above-entitled cause, hereby ap-  
peals from the final decree made in this court  
in the above-entitled cause, and from the whole  
and every part thereof, to the Court of Errors  
and Appeals, and the last resort in all causes.

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MILTON M. UNGER,  
Solicitor of Defendant.

I consider that there is good cause for appeal  
in the above suit.

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MILTON M. UNGER,  
Of Counsel with Defendant.

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*Petition of Appeal.***PETITION OF APPEAL.**

Filed February 23, 1926.

10 The petition of Anna Ruskin Abrams, also known as Anna Ruskin, the defendant-appellant herein, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date February 16, 1926, wherein Albert Hollander was complainant and Anna Ruskin Abrams, also known as Anna Ruskin, was defendant, in these respects, to wit, that the said decree orders, adjudges and decrees that:

20 1. Defendant's answer and said stipulated facts do not present any defense to complainant's bill, and that said answer should be stricken out and complainant afforded the relief prayed for.

2. That the said decree allows to the complainant his costs in this cause to be taxed, including a counsel fee to complainant's solicitors of \$500.00.

30 And your petitioner humbly appeals from the portions of the decree of the Chancellor which decree adversely to the defendant as aforesaid, upon the ground that the same is erroneous in that:

1. The evidence does not justify the finding that the complainant is entitled to specific performance of the agreement entered into between said complainant and defendant on May 22, 1925.

40 2. The evidence justifies a finding that the agreement between the parties was unenforcible,

*Petition of Appeal.*

and that therefore the defense interposed by the defendant was a defense good in law, and should be permitted to remain; that complainant's motion to strike out the answer should have been dismissed and a decree entered in favor of the defendant dismissing complainant's bill.

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Your petitioner further prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such other relief in the premises as to this Honorable Court shall seem meet.

MILTON M. UNGER,  
Solicitor for and of Counsel  
with Defendant-Appellant.

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Due and Legal Service of the within petition of appeal is hereby acknowledged this 20th day of February, A. D. 1926.

LEBER & RUBACK,  
Solicitors of Complainant-Appellee.

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*Answer to Petition of Appeal.*

**ANSWER TO PETITION OF APPEAL.**

Filed March 11, 1926.

The answer of Albert Hollander, the above-named complainant-appellee, to the petition of appeal of Anna Ruskin Abrams, also known as  
10 Anna Ruskin, the above-named defendant-appellant.

This respondent (complainant-appellee), not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the 16th day of February, 1926, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein  
20 stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent (complainant-appellee).

LEBER & RUBACK,  
Solicitors for and of Counsel with  
30 Respondent (Complainant-Appellee).

## New Jersey Court of Errors and Appeals

*Between*

ALBERT HOLLANDER,  
*Complainant-Appellee,*

*and*

ANNA RUSKIN ABRAMS,  
also known as ANNA RUSKIN,  
*Defendant-Appellant.*

*On Bill, etc.*

*On Appeal  
from the  
Court of  
Chancery.*

*(Vice Chan-  
cellor  
Berry.)*

### BRIEF OF DEFENDANT-APPELLANT.

#### Statement of Facts.

The appellant on May 22, 1925, executed and acknowledged an agreement, also executed by the appellee, whereby she agreed to convey to the appellee, premises in the City of Newark. She was to receive from him the sum of \$500.00 on account of the purchase price. Title was to pass, by delivery of a deed of warranty, on July 1, 1925. The appellant being absent from the state on that date, the time fixed for the consummation of the agreement was mutually extended to August 5, 1925.

The attorney for the appellee on August 4, 1925, examined and approved a deed prepared by the appellant's attorney, executed by the appellant and one Abraham Abrams. The appellant on the next day, August 5, 1925, declined to accept the purchase price and refused to perform the agreement. The deed was never delivered. In an agreed state of facts, filed in the court below, the following appears:

“At the time of the making of the contract, performance of which is sought in this suit, the defendant was a married woman, her

husband being Abraham Abrams. At the time of the execution of said contract, complainant did not know of the fact that defendant was a married woman, but believed her to be a widow. The defendant was married to the said Abrams on August 20, 1923, and was divorced from him by the decree of the Supreme Court of Ohio entered on July 7, 1925. The divorce suit which resulted in said decree of divorce was pending at the time of the making and delivery of the agreement involved in this suit, which fact, however, was not disclosed to or known by complainant until after the entry of said decree of divorce. At the time of the making and delivery of the contract involved in this case, the defendant was living in a state of separation from her husband, said Abraham Abrams. No issue was ever born to the defendant of her marriage to said Abraham Abrams. She has not remarried since the entry of said decree of divorce. The defendant became the owner of said land and premises on March 6, 1923."

The appellee filed a bill for specific performance of the agreement on August 7, 1925. Vice-Chancellor Berry, on motion to strike out the appellant's answer, advised that the motion be granted, and a final decree was entered on February 17, 1926, ordering the appellant to specifically perform the agreement. This appeal is directed to that decree.

The questions on this appeal are:

1. Whether the Court of Chancery was in error in striking out the answer of the appellant in the Court below, and in decreeing that this appellant specifically perform the agreement, and more particularly:
  - a. Whether the doctrine of estoppel is applicable against a married woman in this case.

b. Whether the statutes of this State relating to married women, are primarily for their benefit and protection, or for that of their husbands.

c. Whether the Conveyance Act of 1898 renders nugatory cases decided by the courts of this State, otherwise binding authorities upon the present controversy.

d. Whether, although the divorce from her husband may have operated to make the appellant a *feme sole* as to contracts made subsequent to the divorce decree, nevertheless, contracts made prior to the dissolution of the marriage ties, being invalid and unenforcible at that time, carry that taint with them thereafter, and consequently are unenforcible.

The appellant contends that the court below was in error in holding contrary to the following contentions, all of which, except the fourth, were raised in the brief of this appellant in the court below.

1. The doctrine of estoppel is inapplicable and cannot be invoked in this case.

2. The cloak of protection thrown around a married woman by the law is primarily for her protection and not for the protection of her husband.

3. The Statutes of New Jersey relating to married women have not changed the law to such an extent that cases decided prior to the enactment of those statutes are no longer binding authorities on the decision of this controversy.

4. The decree of the Court of Chancery marks an unwarranted departure from established rules and precedents, enlarging the rights and powers of married women.

5. Although the divorce from her husband may have operated to make the appellant a *feme sole* as to contracts made subsequent to the divorce decree, nevertheless, contracts made prior to the dissolution of the marriage ties, being invalid and unenforcible at that time, carry that taint with them thereafter, and consequently are unenforcible.

#### POINT ONE.

The doctrine of estoppel is inapplicable and cannot be invoked in this case.

On page 19, of the State of the Case, the opinion of the learned Vice-Chancellor reads as follows:

“That the doctrine of estopped is applicable to a married woman in New Jersey, both at law and in equity is shown by the following cases.”

The Vice-Chancellor then proceeds to cite cases, which will be considered presently.

In the case of *First National Bank of Belmar v. Shumard*, 91 Law 379, Justice Swayze, speaking for the Supreme Court, says on page 379:

“The decree nisi did not dissolve the marriage and the defendant was a married woman when she endorsed the note. The only question is whether she is estopped by her representation that she was a widow. *The authorities settle the case in her favor on solid grounds.* *Cannan v. Farmer*, 3 Exch. 698, a case where the defendant signed the note, ‘Ann Farmer, widow;’ *Liverpool Adelphi Loan Association v. Fairhurst and wife*, 9 *Id.* 422; *Wright v. Leonard*, 11 C. B. N. S. 258. In the first case cited, Baron Parke said: ‘The defendant’s incapacity to contract, by reason of her coverture was not removed by her representation. It is not an estoppel in any way.’”

In this case of *Belmar v. Shumard, supra*, it is to be noted that the married woman after her marriage, continued to do business in, and otherwise use, her former name. In the present case, much reliance is placed by the appellee on the fact that the property involved in this controversy was recorded in the name of Anna Ruskin.

The factor just noted in the Shumard case, however, disposes of this contention adversely to the appellee, as does *Den v. Demarest*, 21 Law, at page 541, in a more direct manner.

In *Kinsey v. Feller*, 64 Equity, 367, the Court of Errors and Appeals held, as set forth in the syllabus:

“A wife’s separate estate will not be charged with the debt of her husband merely because she stood by in silence while he represented the property as his, and permitted the creditors to act in the belief that this representation was true.” *Carpenter v. Carpenter’s Executors*, 12 C. E. Gr. 502.

The case of *Lorillard v. Union Brick & Tile Manufacturing Co.*, 45 N. J. Equity 289, is not decisive of this point. The Court of Errors and Appeals said in that case:

“The question so mooted, namely, whether a married woman can enter into a contract for the sale of her real estate apart from her husband was not decided below, nor need it be decided here. Its decision is unnecessary, because the rights of the complainant against this defendant can rest upon the contract of Mrs. Van Buskirk, entered into after her condition as *feme covert* had ceased to exist. This contract is to be found in the deed made by her to Lorillard, in 1887.”

The syllabus in this case is instructive.

“A married woman made a lease containing an agreement that she would sell a part of the leased property for a certain sum, if

the lessee elected to buy within five years. After the death of her husband she conveyed all the leased premises to a third party, *her deed containing a clause that it was subject to the said lease and the said agreement contained therein.* Afterwards the lessees, within the prescribed time, elected to purchase the part as above mentioned, and failing to get a deed, filed their bill for a specific performance of the agreement. —HELD, that the reference to the original agreement contained in the deed made by the widow was equivalent to a *new execution of that agreement after her condition as feme covert had ceased to exist*, and bound her and her grantees.

In *Bishop v. Bourgeois*, 58 Equity 417, the complainant filed his bill to enforce payment of Mrs. Bourgeois' note. After holding that he was in the proper tribunal since the note was an agreement between Mrs. Bourgeois and her husband, Vice-Chancellor Grey said on page 425:

“In the Hackettstown Bank case, *ubi supra*, the learned vice-chancellor, in dealing with the question of estoppel, uses language which shows some color of a declaration, that where the face of the wife's promissory note does not indicate that she was undertaking to satisfy the liability of another, she should thereafter be estopped as against one who discounted her paper to deny that she was liable as on her own original contract. *Hackettstown Bank v. Ming*, 7 Dick. Ch. Rep. 160, 161. The case presented for his consideration, however, showed that while the wife executed the note as maker, she also actually received the credit for the moneys raised on the note. She therefore had a beneficial consideration supporting the contract, as in fact her own primary undertaking to repay to the bank what she received. This was the ruling in *Bank of Elizabeth v. Craig*, *supra*, which the learned vice-chancellor cites. The first syllabus in the Hack-

ettstown Bank case, in express terms, limits the estoppel against the wife to 'Her acts done within the scope of the enabling acts,' and the discussion shows that the learned vice-chancellor dealt with the acts done by the wife as within the power given her by the enabling statute. To have been within the power given her by this statute, her undertaking could not have been to discharge the liability of another, but must have been to perform her own contract, made upon a consideration beneficial to her. No estoppel was necessary to charge her. It was not a case where, while incapable of acting, she, by her conduct, induced another to believe she had effectually acted, and on this to change his own position. She was capable of acting, and did act, and because she acted was held to be bound.

An estoppel will not be worked to enforce a contract which the party whom it is sought to estop, had no power to make. \* \* \*  
Where there is no legal capacity to contract, a party will not be estopped, even by falsely representing that he has capacity, for incapacity cannot be removed by the fraudulent representation of the actor. The law will not permit one legally incapacitated, to do that indirectly, which he or she cannot do directly. Herm. Estop. 1105."

It is to be noted that these are the words of a court of equity. There is no foundation for the argument of it in the court below that the opinion of Justice Swayze in the *Belmar v. Shumard* case will not apply in a court of equity. Here we have a very cogent example of the application by that court of the very rule laid down by Justice Swayze.

Nor does the fact that in *Bishop v. Bourgeois* the subject matter of the suit was a note given for the accommodation of the husband and not a contract for the sale of lands as here, render

the words of the Vice-Chancellor, last quoted, any less decisive as an authority for the proposition they embrace. In *Trustees v. Stocker*, 42 N. J. Law 115, the Court held on page 117:

“A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided.”

Many cases have been cited by the learned Vice-Chancellor in the court below to sustain the view that the doctrine of estoppel is applicable to this controversy.

The case of *Brinkerhoff v. Brinkerhoff*, 23 Equity 477, cited by him to sustain the contrary of the appellant's contention on this point does not accomplish the purpose ascribed to it. In that case a son confessed judgment to his *widowed* mother. Seven years before, he conveyed his lands to his wife, one of the defendants, through a third person. The mother now seeks to satisfy the confessed judgment out of these lands, claiming that the conveyance was voluntary and void as against her, because she was her son's creditor. The Court dismissed the bill, holding that the complainant (the mother) had stood by in silence when the conveyances were made when she should have spoken, and, therefore, equity would not later permit her to speak. The complainant was a widow at the time of all the transactions in this matter, her husband having died many years before the conveyances and the incurring of the indebtedness by the son. The case is, therefore, very distinguishable.

In *Mayer v. Kane*, 69 Equity 1733, cited below by the Vice-Chancellor, the Court distinctly said

that there was no occasion to apply the doctrine of estoppel.

*Besson v. Eveland*, 26 N. J. Equity 468, did not deal with a situation at all like the instant one. No consideration of the Married Woman's Act was involved. The same was the fact in *National Bank v. Hamilton*, 34 N. J. Equity 158, and in *Francis v. Lawrence*, 48 Equity 508. In these and all the other cases cited with them by the Court, the question of the effect of coverture, and the statutes relating to married women were not involved. The case of *Bank v. Rutter*, 91 Law 424, affirmed in 92 Law 621, is rather an authority in appellant's favor. The decisions in the other cases turned on conveyances in fraud of the husband's creditors, and would have been the same even though a married woman was not involved, and a man of full legal capacity filled the role played by the married woman in those cases. They are, therefore, not controlling in this situation.

In 30 Corpus Juris, page 778, the following appears:

"However, a fraudulent misrepresentation that she has capacity to contract will not generally create an estoppel against a married woman *as where she represents herself to be a widow*; and she cannot be estopped by her misrepresentation as to a matter of law."

Authority outside the state is not wanting to support the proposition that the doctrine of estoppel is not applicable in a case of this kind. In *Lowell v. Daniels*, 68 Mass. (2 Gray) 161, a leading case, the Court said, speaking of married women in a case very similar to this one on its facts, on page 168.

"She can make no valid contract in relation to her estate. Her separate deed of it

is absolutely void. If she were to covenant that she was sole, was seized in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them nor estopped by them. \* \* \* And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate.”

To uphold the decree of the court below, would place the stamp of judicial approval upon a construction of our statutes which would enable any married woman to throw off the restraints the law places upon the alienation of her lands, merely by making a false representation, and causing it later to be disclosed, inviting at the same time a suit for specific performance, thereby effectually dispensing with the requirement that her husband join in her conveyance, and thus enlarge the capacity to which the law has seen fit to limit her.

See also to the same effect:

- Powell's Appeal*, 95 Penn. St. 394;
- Bemis v. Call*, 10 Allen 512;
- Drury v. Foster*, 2 Wall. 24;
- Bateman v. Faber* (1895) 1 Ch. 144, C. A.;
- Behler v. Weyburn*, 59 Md. 143;
- Rangeley v. Spring*, 21 Maine 130;
- Merriam v. Boston*, 117 Mass. 241, 244.

## POINT TWO.

The cloak of protection thrown around a married woman by the law is primarily for her protection and not for the protection of her husband.

The learned Vice-Chancellor, in his opinion filed in the Court below, said, as set forth on page 30 of the State of the Case:

“The ‘cloak’ which the law has thrown around the married woman was, therefore, never for her protection from the ‘outside world.’ Its paramount purpose was the protection of the husband. The ‘cloak’ of present-day law is enabling, not restrictive. \* \* \* Modern woman generally speaking, needs no protection at law which is not afforded to man. \* \* \* Why should not the wife’s contract, not joined in by the husband, stand in the same position as the husband’s contract not joined in by the wife? There is, in principle, no reason. The requirement of joinder in both cases is a survival of an archaic law.”

Almost four pages of the opinion of the Vice-Chancellor, as set forth in the State of the Case, are devoted to development of this theory and it is largely upon the conclusions that the Vice-Chancellor reached in that endeavor that he rested his decision.

In Chase’s Edition of Blackstone’s Commentaries the following appears on page 159:

“These are the chief legal effects of marriage during the coverture, upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England.”

In *Bishop v. Bourgeois, supra*, the Court in construing that part of the Revision of 1877, which provided that “nothing herein contained

shall enable such married woman to become an accommodation endorser \* \* \* etc.," said on page 424:

"The face of this statute, so far from enabling a wife to become chargeable upon a promise to pay the debt of another, *appears rather to positively protect her* from such a possibility."

It is to be noted that Section 14 of the Act Concerning Married Women (3 C. S. p. 3237) requiring joinder of the husband in conveyances of wife's lands, also uses the words, at the very beginning:

"That nothing in this act contained shall enable any married woman \* \* \* " etc.

This, it will be seen, is by its very terms, *restrictive* and not *enabling* as contended by the learned Vice-Chancellor, and should have the same construction as the provision considered in the *Bishop v. Bourgeois* case, as to the person for whose protection it was enacted. By its terms it continues in full vigor the principles of the Common Law, except as otherwise provided for, and the authorities abound in support of the proposition that at Common Law, the protection afforded was for the paramount purpose of throwing a protecting cloak about the married woman.

Williams, in his work on Real property (1845) at page 165, says:

"In order more completely to protect the wife the Court of Chancery allows property thus settled for the separate use of a woman, to be so tied down for her own personal benefit, that she shall have no power, during her coverture, to anticipate or assign her income; for, it is evident that, to place the wife's property beyond the power of her husband, is not a complete protection for her—it must also be placed beyond the reach

of his persuasion. In this particular instance, therefore, an exception has been allowed to the general rule, which forbids any restraint to be imposed on alienation."

This statement, supported by much authority, certainly is evidence of the extent to which the Court of Chancery will go, in affording protection to a married woman, even to create an exception to the salutary rule forbidding restraints upon the alienation of property.

Pomeroy, in his work on Equity Jurisprudence (4th Edition) says (Volume 3, p. 2157) speaking of trusts for the separate use of a married woman:

"It is also the established doctrine, designed to protect her from the moral influence of her husband, that in creating the trust a clause may be inserted against 'Anticipation,' by which her power of alienating her interest is taken away during her marriage; and, as the rule is generally accepted, the restraint of such clause may operate during any future as well as present marriage."

To the same effect see also *Castree v. Shotwell*, 73 Equity 590.

In *Pentz v. Simonson*, 13 Equity 232, Chancellor Williamson said, speaking of the Married Women's Act of 1852:

"The statute provides that a married woman shall convey her lands only by joining with her husband in a conveyance and by an acknowledgment upon a private examination apart from her husband that the deed was executed freely, without fear, threat or compulsion. \* \* \* It is obvious that if a contract thus interred into (that is, entered into without the full consent of the wife, ascertained in the mode pointed out by statute) by a married woman is to be specifically enforced in equity, the statute,

(of 1852) so far from operating, as its title imports, 'for the better securing the property of married women,' *will strip them of all the protection with which the jealousy of the common law guarded their rights against the authority and control of the husband.* She will, in fact, be in a more unprotected condition against the control of her husband in regard to her separate property than she is in regard to her estate in the property of her husband."

The Court below in its opinion (p. 29, State of the Case) stated that the protection accorded at common law to a *feme covert* was only from her husband and not from the outside world. But this is merely to admit in an indirect manner the contention of the appellant; for how else at Common Law could a husband take advantage of his wife except through the outside world? A conveyance between husband and wife was impossible. The only manner in which a husband at Common Law could secure for himself more of, or a greater interest in, the property of his wife, than his estate by the marital right, or curtesy initiate gave to him, was by a third person, through the outside world.

Besides, it is a familiar proposition, as stated in 13 R. C. L. 1159, that:

"The creditors of a husband have no right as a general rule to subject the wife's separate property to the payment of their claims against the husband, and the fact that he has the management of his wife's separate property will not affect her title to it insofar as his creditors are concerned."

What is this but to say that in spite of the merger of personalities effected by marriage, the wife is, nevertheless, free from the claims of creditors—the outside world—of her husband, into whose being she has, in contemplation of law, been assimilated?

Not only indirectly, but also directly, was the married woman protected from those other than her husband. For this proposition we have no less an authority than Chief Justice Beasley. In *Perkins v. Elliott*, 23 Equity 526, he said, in speaking for the Court of Errors and Appeals (p. 533):

“Nor do I think that the principle which would remove from the present case, and from analogous cases, the disability of the married state, would be a wise or politic regulation. Few woman have, or are likely to have, business habits or training. From their habits in life they are necessarily exposed to imposition. They must rely mainly upon others with respect to the legal effect of their acts. To give to such an inexperienced body of persons the right to endorse notes, to accept bills and to become surety on bonds and other instruments under the urgency of their husband, *or from the importunities of their relatives or friends, would not be a boon, but a calamity.* In my opinion there is nothing in the general doctrine appertaining to the subject, that should compel this court to concede the existence of the power in question, nor is there any consideration of public policy which seems persuasive of such a concession.”

Certainly, “relatives” and “friends” are the outside world, and if married women are to be protected from them in respect to accommodation endorsements and surety arrangements, surely they are also to be equally protected in respect to their lands. They are still in the main “an inexperienced body.” It may continue to be said of them that “from their habits in life they are necessarily exposed to imposition.” The married woman of today, in spite of the cosmopolitan and complex nature of American life, continues by a vast majority, to be the home maker. She continues, not only from environ-

ment and training, but also from her innate character, which is eternal, to stand upon a plane, wholly foreign to those upon which men engage in commercial relationships.

Whatever the effect of the times upon her, she cannot, in the main, cope with the outside world with any decree of success. Of course, this cannot be said of all married women. But it is certainly true of a tremendous majority. It must be remembered that it is less than a century since married women were liberated from a state of civil bondage, and then, not completely unshackled. The period of civil capacity, incomplete in many respects, is but a shadow to that of men, enjoyed through many centuries.

It would appear, then, that the Common Law protection ran in favor of the married woman primarily, and against both her husband and the outside world, and should so continue.

Allusion has already been made to the fact that the wording of Section 14 of the Married Woman's Act is restrictive and by its very terms not enabling, and continues in full vigor the principles of the Common Law, except as provision to the contrary is made. In *Homan v. Headley*, 58 Law 485, the Supreme Court said:

“This dealing, under our statute, and its adopting clause in section 14 (Married Woman's Act) revision, page 639, *which left matters of dealing between husband and wife as at common law*, was clearly void and the wife took no title.”

It is, therefore, submitted that the court below was in error in holding as it did in respect to the effect of the Married Woman's Act, upon the principles of the common law relating to the nature and extent of the protections thrown about married women. And since it is obvious

that the learned Vice-Chancellor, by the lengthy attention he gave to this matter, and by the general tenor of his opinion, rested his decision largely upon the conclusions he reached in that inquiry, a strong ground for reversal is found here.

### POINT THREE.

The statutes of New Jersey relating to married women have not changed the law to such an extent that cases decided prior to the enactment of those statutes are no longer binding authorities on the decision of this controversy.

The appellant urged in the court below the case of *Corby v. Drew*, 55 Equity 387, in support of her contentions that specific performance of the agreement could not, under the circumstances of the cause, be decreed against her. The learned Vice-Chancellor, in his opinion, said that "the authority of *Corby v. Drew* is somewhat modified" (p. 24, State of the Case), and that it, and other cases cited in the lower court by the appellant here, were not wholly applicable because decided before the revision of the Conveyancing Act in 1898 (State of the Case, p. 23).

*Corby v. Drew* was a suit for specific performance, in which Vice-Chancellor Stevens said, on page 395, speaking of *Union Brick and Tile Manufacturing Co. v. Lorillard*, 44 Equity 1, much relied upon by the present appellee:

"It was the case of a wife who had made an agreement to convey, her husband agreeing to join in the conveyance. Before performance was sought to be enforced the husband died. The chancellor, thinking that his death had removed the impediment to performance, decreed it. He was evidently of the opinion that if the husband had lived

the agreement would have been incapable of performance in equity. He says: 'At the death of the husband the limitation upon the execution of the contract by conveyance, and with it the objection to a specific performance of the contract, is removed.' When the case went to the court of errors the court affirmed the decree on the second ground upon which the chancellor rested his decision. It held that the wife had in effect re-executed the contract after her husband's death, and was for that reason bound to perform it. It hesitated to go even as far as the chancellor had gone, declaring that it was not necessary to pass upon the validity or invalidity of the original contract, and it left the question as an open one. If, in the estimation of that court, it was doubtful whether the wife's contract, made in his lifetime, could be enforced after his death, it must, I think, to say the least, be open to much greater doubt whether it could be enforced in his lifetime.

The conclusion thus reached is fortified by that line of cases in which it is held that where a married woman has attempted to convey her estate, but the conveyance is defective for want of compliance with statutory requisites, equity will not lend its aid to supply the defect. *Hamar v. Medsker*, 60 Ind. 413; *Dickinson v. Glenney*, 27 Conn. 104."

And on page 392, the Court said:

"Now, so far as land is concerned, it is to be noticed, that her power in respect of it is not unlimited. It is, in the first place, as I have already shown, restricted by the fourteenth section of the same act, which declares that nothing therein contained shall enable any married woman to execute any conveyance of her real estate without her husband joining therein as theretofore. *But if she cannot convey without the concurrence of her husband, it would seem to follow that she cannot AGREE to convey without that con-*

*currence*. At all events it is true that if she can make herself liable in damages for non-performance at law, she cannot, acting alone, bind herself by an agreement which a court of equity will enforce by decreeing a conveyance."

And on page 393:

"Conceding, therefore, that the married woman might, under section 5 of the Married Woman's Act, be liable at law for a breach of her contract, it does not follow that equity would be willing or able to compel a conveyance."

In his learned opinion, the Vice-Chancellor, in the court below (State of Case, p. 23), quoted the following from *Wolff v. Meyer*, 75 Law 181:

"It was suggested but not decided in *Corby v. Drew*, that if a married woman could not convey without the concurrence of her husband, she could not agree to convey without that concurrence."

An examination of *Corby v. Drew* will show that it was a suit for specific performance of an agreement. There was no question in the case of the deed of a married woman. The words of Vice-Chancellor Stevens, last above-quoted, were, therefore, *necessary* to the decision of the cause. The Court was, therefore, in error in *Wolff v. Meyer* in making the statement set forth above. *Wolff v. Meyer*, it should be noted, was a suit at law for damages. No equitable considerations were involved. The words of the Court, therefore, were dicta, as far as they concern the authoritative force of *Corby v. Drew*, of a kind not worthy of being given much weight.

As to the effect of the revision of the Conveyancing Act of 1898, upon *Corby v. Drew*, the following from *Schickhaus v. Sanford*, 83 Equity 454, is decisive:

"The wife's contracts or obligations which relate to lands which she owns or in which

she has an interest, are enforceable in equity to the same extent as if she were a *feme sole*, with the qualification that if, as against a *feme sole*, the creation or enforcement of such contracts requires a conveyance or other instrument, then in the *case of a married woman this conveyance or instrument must be executed with her husband as heretofore, otherwise it cannot be created or enforced.*

“This construction prevents any decree for specific performance of a contract for conveyance of land by a married woman, in which the husband did not join, as was held by Vice-Chancellor Stevens in *Corby v. Drew*, 55 N. J. Equity 387,” said the court.

Likewise, the case of *Moore v. Baker*, 65 N. J. Equity 104, also approving the *Corby v. Drew* decision, holds that,

“Under the statute a married woman may be compelled to perform, as vendee, a contract for the conveyance of land, although she is declared not authorized to convey her real estate, and could not be compelled to perform as vendor.”

Or in another way,

“The fourteenth section of the Married Women’s Act (Gen. Stat., p. 2015) prevents this section from authorizing her to convey her real estate, and, therefore, as Vice-Chancellor Stevens held, relieves her from being obliged to specifically perform a contract to convey lands. But it does not affect her contract to purchase lands, and such contract may, therefore, be carried into effect by decree for specific performance, where the further performance of the contract on her part does not require a conveyance of lands by her.”

Vice-Chancellor Backes, in the case of *Chassman v. Wiese*, 90 E. 108, also cites with approval the case of *Corby v. Drew*, and in connection with it the case of *Schwarz v. Regan*, 64 N. J.

Equity 139, the opinion in which, because of its brevity, is herein cited at length:

“EMERY, V. C.

This bill is filed to compel the specific performance of a contract by a married woman and her husband to convey lands belonging to the married woman. The contract (as alleged by the bill) is evidenced by a memorandum, in writing, signed by the husband and wife on June 2nd, 1902, containing the terms of the contract which are set out in the bill. The contract does not appear to have been acknowledged by the married woman in the manner provided by the thirty-ninth section of the act respecting conveyances (revision of 1898), P. L. of 1898, p. 685. The invalidity of the contract, by reason of the omission of the married woman to acknowledge it, is one of the reasons specified for striking out the bill. That this reason is well founded is settled in this court by the decision of Vice-Chancellor Stevens in *Corby v. Drew*, 10 Dick. Ch. Rep. 391 (1897), where it was expressly held that under the then existing laws a contract for sale of lands which had not been acknowledged according to law could not be specifically enforced in equity against a married woman. In *Goldstein v. Curtis*, 18 Dick. Ch. Rep. 454 (May, 1902), Vice-Chancellor Pitney held that by virtue of the additional provision made in this section 39 as to the effect of the acknowledgment of the deed upon the married woman's estate, a contract which had been acknowledged could not be enforced. The decision in *Corby v. Drew* has not been questioned in any court and it has been followed by Vice-Chancellor Stevenson in a late case—*Osten v. Oesman* (September, 1902, memorandum decision)—as settling the law in this court. In this case, also, the bill for specific performance against a married woman was dismissed because the contract has not been acknowledged according to law. So far

as relates to the present question, *the law as to married women is still the same as when the decision in Corby v. Drew was rendered.*

Upon the authority of these decisions the bill must be dismissed."

This case was decided after the Conveyance Act of 1898.

That *Corby v. Drew*, 55 N. J. Equity 387, is still the law is emphasized by the decision rendered in the case of *Kotok v. Rossi*, reported in 94 N. J. Equity, page 327, where Vice-Chancellor Buchanan, on page 332, said:

"It is obvious, therefore, that *the rule in Ten Eyck v. Saville*, 64 Equity 611, as well as that in *Corby v. Drew*, is yet the law."  
\* \* \* "The vendee's right of action in equity is very different from his right of action at law. The former rests upon the *validity* of the contract, not as a mere contract but as a conveyance." \* \* \* "Obviously, then, *if a contract is invalid as a conveyance, the vendee has no equitable right, because none was conveyed to him thereby, and he has, therefore no cause of action to compel conveyance to him of the legal title, either as against the vendor or a subsequent grantee.*" *Ten Eyck v. Saville, supra.*

Hence, in order for complainant to maintain an action for specific performance, he must prove that the contract was valid as a conveyance and did transfer to him the equitable title.

In the case at bar, the complainant is hopelessly unable to establish that the contract was valid as a conveyance, because the contract was invalid in its inception in that it lacked the joinder of defendant's husband, and an estoppel cannot, as shown above, be invoked to supplant it.

The statement of Vice-Chancellor Buchanan that "the vendee's right of action in Equity is very different from his right of action at Law," adequately disposes of the case of *Wolff v. Meyer, supra*, which, it has been pointed out, was a suit at law for damages.

Still more cumulative authority evidences itself in support of the case of *Corby v. Drew, supra*, in the decision by the Court of Errors and Appeals in the case of *Kolinsky v. Pilz*, 94 N. J. Equity 796, where the Court, adopting the opinion filed by Vice-Chancellor Griffin, held,

"It is quite plain that, in the absence of the husband joining in the deed, even though the wife properly acknowledged it according to law, equity could not decree specific performance." *Corby v. Drew*, 55 N. J. Equity 387, \* \* \* In *Lorillard v. Union Brick and Tile Manufacturing Company*, 45 N. J. Equity 289, the wife made a contract which was regarded as unenforcible, but subsequently, her husband died, which made her free to contract. She then conveyed to Lorillard, *subject to the contract*, and the Court of Errors and Appeals held that this was, in fact, a new contract which bound her vendee."

Another case which is in point is the recent case of *Patterson v. Loiseaux Lumber Co.*, reported in 114 Atlantic 336, where Vice-Chancellor Buchanan held,

"Complainant is a married woman, and a conveyance by her is not valid without her acknowledgment, (*Chassman v. Wiese*, 90 N. J. Equity 108, 106 Atl. 19) *nor without her husband joining in the same.*" (*Corby v. Drew*, 55 N. J. Equity 387, 36 Atlantic 827.)"

All these cases, it will be noted, were decided *after* the revision of the Conveyance Act of 1898.

That Section 39 of that enactment was not designed to do away with the requirement of joinder of the husband, and does not have that effect, is evident from Section 39a which reads as follows:

“Conveyances by *feme covert*; joinder of husband by power of attorney, Sec. 1.

Any deed or deeds of a conveyance of the lands of any married woman heretofore or hereafter made, acknowledged and delivered by her in which the husband of such married woman joined or shall join by attorney duly constituted by power of attorney executed by the husband authorizing such attorney to join in the conveyance of the lands of the wife, shall be as good and effectual to pass the estate of the said married woman as if her husband had personally joined in the making, execution and delivery of such deed or deeds (P. L. 1901, p. 226).”

Why provide for the joinder of the husband in any manner if such joinder were not necessary? Obviously the Act was not intended to, and surely does not have the effect claimed by the learned Vice-Chancellor in the lower court.

In *Crandall v. Graham*, 93 Equity 675, the Court of Errors and Appeals, said, adopting the words of Vice-Chancellor Lewis in the lower court:

“Under section 39 of the Conveyance Act, as amended by the act March 21, 1912, (P. L. 1912, p. 158) read in conjunction with section 21 of the Conveyance Act, as amended by act April 14, 1914 (P. L. 1914, p. 306), and sections 5 and 14 of the Married Women's Act (3 Comp. Stat. p. 3226), an ‘agreement or sale’ of lands of a *feme covert*, executed by her, *in which her husband joins*, and which has been acknowledged by her as provided therein, can be specifically enforced in favor of the vendee in this court. *Goldstein v. Curtis*, 63 N. J. Eq. 459; 52 Atl. Rep.

218; *Ten Eyck v. Saville*, 64 N. J. Eq. 611; 54 Atl. Rep. 810; *Wolff v. Meyer*, 75 N. J. Law 181; 66 Atl. Rep. 959.”

This is the construction of these various enactments adopted by this Court in its unanimous *per curiam*, and is, the true state of the law on this question.

The Vice-Chancellor in the lower court recognized in his opinion the necessity of a joinder by the husband, when he said (*State of Case*, p. 34),

“The law gives him the right to protect his interest in his wife’s lands by giving him the privilege of refusing to join in a conveyance \* \* \* .”

Besides, Section 39 of the Revision of the Conveyancing Act cannot relate to a contract for the sale of lands, and still be within the provisions of Paragraph Four of Section Seven of Article Four of our State Constitution which reads:

“To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace one object and that shall be expressed in the title.”

Now, the act under consideration is entitled,

“An Act respecting conveyances (Revision of 1898).” In *Wolff v. Meyer*, 75 Law 182, Justice Swayze said on page 183.

“An agreement to convey is obviously not a conveyance.”

In *Sullivan v. Barry*, 46 Law 1, Chief Justice Beasley said, speaking of the words “convey” and “encumber”:

“The former of the terms is appropriate for the transfer of a title to a freehold \* \* \* .”

This being so, the object of the Conveyance Act cannot extend to a contract for sale, for it is not a conveyance. It would follow then that if anything should be found in that act relating to such contracts, it would be beyond the pale of the Constitutional provision. But under the familiar rule that constitutionality is presumed and the contrary must be clearly proved, it must be taken the Legislature did not intend to violate the provisions just referred to by including within an act respecting conveyances, provisions respecting contracts. The words are not clearly indicative of an intent to embrace the latter class of instruments. The general tenor and purport of the section is to lay down a rule concerning acknowledgments. The reasonable conclusion is, in view of these considerations, as well as of the deliverances of this and other courts of this State, that the state of the law applicable to the present controversy did not render nugatory binding authorities in the form of judicial decisions and statutory enactments.

#### POINT FOUR.

The decree of the Court of Chancery marks an unwarranted departure from established rules and precedents, enlarging the rights and powers of married women.

The learned Vice-Chancellor in his opinion said (State of the Case, p. 31):

“Why should not the wife’s contract, not joined in by the husband, stand in the same position as the husband’s contract not joined in by the wife? There is, in principle, no reason. The requirement of joinder in both cases is a survival of an archaic law.”

And on page 32 of the State of the Case:

“If it be said that *this decision marks a departure from established rules and prece-*

*dents*, that this is, in effect, an enlargement of the rights and powers of a *feme covert* over her separate estate, my answer is that, while not admitting such departure or enlargement, changing conditions in the world of business from time to time, require modifications in the rules of law and equity previously promulgated to meet different circumstances \* \* \* .”

“With the enlargement and extension of the rights and privileges of both married and single women, so should their liabilities and responsibilities correspondingly enlarge and extend.”

There is no doubt that the review of the cases under point three above clearly discloses the decree below to a well-defined departure from the settled law. There is no doubt that the learned Vice-Chancellor apprehended that the decision was outside the circle of authority on the matter in controversy. The question is: Is this enlargement and extension of rights, and clear departure from rules and precedents, warranted?

The learned Vice-Chancellor rests upon the various statutes securing to married women the fuller enjoyment of their property than heretofore, and upon the Nineteenth Amendment to the Federal Constitution. It has already been pointed out, it is submitted, that our Married Woman's Act retains in full vigor the principles of the Common Law applicable to the particular question involved in this cause. Whatever our statutes, and decisions under them have done in the way of extending the rights and powers of a *feme covert*, they have not lifted her to a point where she can dispose of her lands without the joinder of her husband. So much more should, and it is submitted, *does* the law disable her from disposing of them by force of her own machinations, indulged in to enlarge the capacity to which

the law has limited her. The appellant again refers the court to its own very recent pronouncement in *Crandall v. Graham, supra*.

What effect then, has the extension of the right of suffrage to women, had to make it possible for them to convey their lands without the joinder of their husbands? It certainly is not potent enough to warrant a court in rendering a decision contrary to the expressed will of the people of this State through their legislature. Yet this must be the force which must be ascribed to it if it is to be set up as a part of the foundation for the decree below.

Again, the extension of the right to vote does not, in any considerable measure, cause a married woman to acquire business experience and acumen. And even if it did, which is not admitted, it is not only environment and training, but most particularly the innate characteristics and traits of women which render them unqualified to advantageously brush elbows with the world in business transactions, without the counsel of one conversant in those matters; to which function the law has properly appointed the husband of a married woman, who, because of her marriage, is removed, in occupying the role of home-maker, from the sphere of commercial activity. The law still tenaciously clings to the doctrine that men, who have enjoyed civil and property rights for many decades, cannot dispose of their entire property in their lifetime without the independent advice of their own counsel. Can it be said that it is less jealous of the welfare of married women, who have had no such extensive civil and proprietary rights and worldly experience? It is the function of the Legislature and not the courts to effect a change

in the status of married women applicable to the present controversy.

The great American Commentator has said in his celebrated work (1 Kent. Comm. 417):

“The language of Sir William Jones is exceedingly forcible on this point: ‘No man,’ he says, ‘who is not a lawyer, would ever know how to act; and no man who is a lawyer would in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate.’”

The certainty of a rule is often of much more importance than the reason of it. If it is desired that this inconsistent situation be wiped out of the bounds of possibility in judicial decisions, this should be done by the people, through the Legislature.

Black, in his work on Judicial Precedents (1912) says on page 212:

“It is not sufficient reason for disregarding or overruling a prior decision, which correctly laid down the general rules on the subject, that its application to the particular case before the court will work hardship or even injustice. In the infinite variety of cases which come before the courts, there must sometimes be instances in which the enforcement of a general rule of law, sound and salutary in the main, will bear heavily on the suitor and cause unmerited suffering. Yet if the courts, for this reason permit themselves to deviate from the rule of strict adherence to precedent, they may relieve the individual, but they injure the body of the law.”

It is to be noted that we have, in the present case, not only decisions of a court of last resort to reason with, but also statutory enactments and their construction. In *Bates v. Relyea*, 23

Wend. (N. Y.) 336, the Supreme Court of New York said:

“The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound for certain purposes, to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case.”

Persons, especially laymen, look at once to judicial explanation of a statute, as a guide out of the labyrinth, of its often obscure and not easily understood terminology, and therefore depend upon the permanence of judicial construction in their business transactions. The decision of the present controversy is not for the benefit of, and will not stop at, in its effect, the parties in court alone.

Even a change in the complexion of the Court, or a sound desire to establish a principle different from the established one, does not warrant a departure from the settled tenor of the law. In *Bowman v. Board of Freeholders*, 73 Law 543, the present Chief Justice, speaking for the Court of Errors and Appeals, said on page 547:

“Most of the present members of this court have been appointed since the promulgation of the two decisions referred to, and, perhaps, if the question presented by this writ of error was one of novel impression a different conclusion might be reached. But this fact affords no ground for our refusal to accept and enforce the rule which our predecessors have established. As has already been said, nothing short of an absolute conviction of its unsoundness would justify such action on our part. If the decision of a court of last resort is to be overturned by that body whenever its accuracy may be thought by the judges to be questionable, it is difficult to divine, (in the language of the

late Chief Justice Beasley, in *Graves v. State*, 16 Vroom 208) upon what stable basis the administration of the law is to be conducted.”

In short, the situation in this case presents not only clear-cut judicial decisions, but also unambiguous construction of statutes. Not only should the cases *be* followed, but also is it true that the statutes *must* be followed. If repetition will be pardoned, it is not the function of the judiciary to make new law while statutes in force cover the matter. Rather should the Court,

“Not clinging to some ancient saw,  
Not mastered by some modern term,  
Not swift to change, but firm,  
And in its season bring the law.”

#### POINT FIVE.

Although the divorce from her husband may have operated to make the appellant a feme sole as to contracts made subsequent to the divorce decree, nevertheless, contracts made prior to the dissolution of the marriage ties, being invalid and unenforcible at that time, carry that taint with them thereafter, and consequently are unenforcible.

Even as far back as 1834, it was held by the Court of Chancery in the case of *Wooden v. Morris*, 3 N. J. Equity 65, that—

“The agreement of a feme covert, with the assent of her husband, for the sale of her real estate, is absolutely void at law, and the courts of equity never enforce such a contract against her.” \* \* \* “And were this not the case, married women would derive but little protection from our Act of Assembly. Rev. Laws 458, Sec. 4.”

Later on, after the revision of the Married Woman's Act in 1852, Chancellor Green, in the case of *Pentz v. Simonson*, 13 N. J. Equity 232, declared:

“There is no doctrine of the common law better settled than that a married woman can enter into *no* contract or covenant by which she will be personally bound. *Leaycraft v. Hedden*, 3 Green's Ch. R. 552.”

furthermore—

“Though a wife may convey her estate by deed, she will *not* be *bound by* a covenant or agreement to convey her estate. *The agreement by a feme covert*, with the assent of her husband for a sale of her real estate, is *absolutely void* at law, and the courts of equity never enforce such a contract against her.” 4 Kents' Com. 156; *Martin v. Dwelly*, 6 Wend. 9; 5 Daly 496; *Batter v. Buckingham*, 2 Jac & Walk, 412; Mad. 261.

In that case the husband did not sign but stood by and assented. That assent alone is not sufficient but that the *husband must actually join* in the contract to convey, with his wife, in order to make the contract valid, is, in addition to the foregoing authorities, further fortified by the prudential decision of *Corby v. Drew, supra*.

Though in *Wolff v. Meyer, supra*, decided in 1907, the Court said:

“The impossibility of performance of a contract to convey made by a married woman alone, is however, not strictly speaking, an impossibility in law, such as would make the contract void.”

this was a decision at law in a suit for damages, and has already been distinguished above.

On the other hand, *Pentz v. Simonson*, laying down the opposite doctrine has consistently been followed in the decisions of the Court of Chancery

in *Eckert v. Reuter*, 33 N. J. Law 268; *Peeler v. Levy*, 19 N. J. Equity 332; *Phelps v. Morrison*, 24 N. J. Equity 200; *Pierson v. Lum*, 25 Equity 391, and in *Busath v. Prival*, 84 Equity 599, and has never been criticized or overruled.

In 30 C. J. 759, it is said:

“Where a statute requires a joint deed, the wife’s separate deed is void.”

In *Rake v. Lawshee*, 24 N. J. Law 613, the Supreme Court said (p. 616).

“By the Common Law, the legal existence of a married woman is merged in that of her husband, so that as a general rule, she can make no contract without his consent. A contract so made by her is absolutely void.”

This case was decided in 1854, two years after the Married Woman’s Act of 1852. It is cited in *Moore v. Rake*, 26 N. J. Law 574; *Ross v. Adams*, 28 N. J. Law 160; *Armstrong v. Ross*, 20 Equity 119; *Phelps v. Morrison*, 24 Equity 199.

In 1859 Justice Vredenburgh said in the case of *Ross v. Adams*, *supra*:

“There can be no doubt that at the common law the deed of a married woman was absolutely void, so much so that she could plead to it *non est factum*. It never was a case like mere infancy, where the title passed, but could be avoided by matters subsequent.”

In *Armstrong v. Ross*, *supra*, decided in 1869, Chancellor Zabriskie, speaking for the Court of Chancery, said:

“It is settled, that in this state the deed of a married woman, although duly acknowledged, if made without her husband, is void.”

In 13 R. C. L., page 1317, it is said:

“It is generally held that the capacity conferred by statute on a married woman to convey her land in conjunction with her husband does not render her capable of mak-

ing a binding executory contract to convey and therefore such a contract, if made, is void, and will not support an action at law, nor will a court of equity compel specific performance of it."

The learned Vice-Chancellor below, placed much reliance on the case of *McCoy v. Niblick*, 228 Penn St. 342, 77 Atl. 551, 30 L. R. A. (U. S.) 353. The suit was at law in ejectment. It is cited in 13 R. C. L. 1317, for the following proposition:

"Where a married woman is given full power to contract and to convey her real estate as if a *feme sole*, her executory contract to convey is binding on her, and when she is given full capacity to contract, though in conveying her land the joinder of her husband is required, well considered authorities uphold her executory contract to convey in so far as her liability in damages for its breach is concerned, though it cannot be specifically enforced, against her if her husband should refuse to join in her conveyance."

It is, it is submitted, clearly established by these authorities, that the engagements of a *feme covert* for the disposal of her lands when the joinder of her husband is required, are absolutely void. It would necessarily follow that being void in their inception, the subsequent divorce of the parties cannot give them a status of validity. There are states whose courts hold that even the Legislature cannot give effect to a void conveyance by a married woman.

(See the collection of authorities in 31 L. A. R. (N. S.) page 1080.) And even in states where it is held that such legislation is valid and not contrary to constitutional inhibitions, they do not go to the extent of holding, that a court may, by operation of its decree, make valid a contract initially void.

It would seem that the effect of the decree of divorce subsequent to the making of a void contract, should stand in very much the same light as a subsequent ratification by the *feme* on becoming discovert. On this last, it is said on page 1323, 13 R. C. L.:

“But, since her deed is void if it is not executed as required by statute, it is not the subject of ratification by her on becoming discovert, unless the alleged ratification takes a form equivalent to the execution of a new deed, and her subsequent assent to the deed or her parol adoption of it, or expression of a willingness by her to make it valid or execute a new deed, does not operate to affirm her defective deed.”

Whenever it was sought to accomplish the result of validating a void engagement, claimed by the court below to follow, in this case from the dissolution of the marriage, the legislatures have passed curative acts and the judiciary have not held contracts of the kind involved in this controversy to be validated by decree of a court. See *Downs v. Blount*, 170 Fed. 15; 95 C. C. A. 289; 31 L. R. A. (U. S.) 1076.

The following from 6 R. C. L., page 706, is illuminating on this point:

“The weight of authority, however, sustains the opposite view that where a contract is entered into in violation of a statutory or constitutional provision, the subsequent repeal of such provision does not make the contract valid. The ground upon which this rule is based seems to be that as the contract never had a legal existence, the repeal of the statute does not restore to it any validity.”

It would seem from this that *a fortiori*, the continuance in force of the statute with a mere change in the relationship of a contractor, cannot breathe life into something which has the form and semblance of a contract, but is a nullity.

Neither is it perceived how Section 8-P of the Married Woman's Act can render the contract in this case enforceable in equity.

Of this section, Vice-Chancellor Stevenson said in *Demarest v. Terhune*, 62 N. J. Equity, at page 668:

“It is by no means clear that the defendant, at the time she made the conveyance in question, was within the operation of the act of 1880. It is true that the bill alleges that the defendant was then living ‘in a state of separation from her husband,’ thus employing the very phraseology of the statute; but this statement is qualified by subsequent allegations showing that she was residing in the same house with her husband, and that her husband, presumably, was providing otherwise for her support. The main purpose of the act of 1880 must have been to enable married women separated from their husbands to sell their real estate, in order to procure the means of support which their husbands were not supplying. The defendant's situation, at the time she made the conveyance and note in question, does not seem to be within the spirit or the letter of this statute. If, however, this conclusion is incorrect, the defendant still, practically, was unable to make an advantageous sale of her real estate without having her husband join in the deed, because ‘the state of separation’ necessary to make the statute applicable was not perceptible to any ordinary observer—to the class of persons who would be possible purchasers. When a man and wife are living together in the same house—the house of the husband—the common judgment would be that they are not ‘living in a state of separation’ within the meaning of the act of 1880.

“If the state of separation from her husband in which a wife were living should be plain and notorious, the husband living in one county and the wife in another, still

the signature of the husband to the wife's deed would add value thereto, apart from any question in regard to his possible estate by the curtesy, because any title taken from a married woman, under the provisions of the act of 1880, would always have to be defended by proof of facts which might be difficult to prove. In the present case the defendant's situation, at the time she made the conveyance in question, if, in fact, within the statute of 1880, would in all probability, after a very short time, be extremely difficult to bring within that act by evidence which could be obtained and produced in any court."

There is nothing to show this Court that the appellant executed the instrument involved in this controversy for the purpose of procuring funds with which to support herself. There was nothing to show that the "state of separation" necessary to make the statute applicable, was perceptible to "the ordinary observer—to the class of persons who would be possible purchasers," to use the words of Vice-Chancellor Stevenson. On the contrary, from the appellee's own case it appears that he relied on the representation that the appellant was a *widow*. This, therefore, disposes of Section 8-P.

### Summary.

From the foregoing observations and review of authorities, the conviction is inescapable, it is submitted, that by weighty and well-considered decisions, and among them, those of this Court, the doctrine of estoppel is inapplicable to the appellant in this case and a resort to it has the effect of enlarging the capacity of married women by their own acts in clear contravention of much quoted and followed statutory enactments and decisions; that the cloak of protection thrown

about a *feme covert* by the common law and the force of the laws of this State and the deliverances of its courts, are primarily for the protection of the married woman against the acts, persuasions and superior commercial ability of both her husband and the outside world; that Section 14 of the Married Woman's Act and Section 39 of the Conveyance Act of 1898 do not, in the light of other statutory enactments, particularly Section 39-A of the Conveyance Act of 1898, and in the light of judicial construction, so change the state of the law that long followed decisions are not binding authorities on the present controversy, among them especially, *Corby v. Drew, supra*, and *Crandall v. Graham*, also *supra*; that the decree of the court below marks an unwarranted departure from established rules and precedents in opposition to the keystone principle of our system of jurisprudence „*stare decisis et non quieta movere*”; that the decree of divorce entered after the appellant executed the instrument which is the foundation of this cause, under all the circumstances adverted to above, does not render that instrument enforceable against the appellant. These considerations, taken together with the fact that the appellant has received no pecuniary advantage by her action in this cause (not having received any of the purchase or deposit money), and that the decision of this Court will in its ultimate effect reach far beyond the present parties at its bar, warrant and require a reversal of the decision of the Court of Chancery.

Respectfully submitted,

MILTON M. UNGER,  
Solicitor for and of Counsel with  
Complainant-Appellant.

# New Jersey Court of Errors and Appeals

*Between*

ALBERT HOLLANDER,  
*Complainant-Appellee,*

*and*

ANNA RUSKIN ABRAMS, also  
known as ANNA RUSKIN,  
*Defendant-Appellant.*

*On Appeal  
from the  
Court of  
Chancery.*

*(Vice-  
Chancellor  
Berry sat  
below.)*

## BRIEF FOR COMPLAINANT-APPELLEE.

### Statement of Facts.

This appeal brings up for review the decree of the Chancellor advised by Vice-Chancellor Berry, who sat below. The decree is for the specific performance of a contract for the sale of realty, the suit having been brought by the vendee against the defaulting vendor. The answer substantially admitted all the material allegations of the bill, but counsel for the respective parties, for the purpose of presenting for adjudication the sole issue in the case, in writing stipulated the facts and agreed that such stipulated facts be considered by the Court in the same manner as though the stipulated facts constituted the answer in the cause. The stipulation appears on pages 12, 13, 14 and 15 of the state of the case. The original stipulation is on file with the Clerk in Chancery. Those stipulated facts, reduced to their very essence, are as follows:

On May 26, 1925, the defendant duly executed and acknowledged the agreement, performance of which is sought. That agreement was executed by the purchaser, the complainant, and delivery of the agreement was thereafter duly had. The time

fixed in the agreement for performance was July 1, 1925, but at the request of the defendant, this time was extended to August 4, 1925. On the last mentioned date, and at the office of the defendant's attorney, the parties met for the purpose of the consummation of the agreement. That appointment was fixed for that purpose. At the appointed time and place, the defendant announced that she would not perform her agreement. Complainant's tender of the purchase price was then made and was then and there promptly refused by the defendant. At said time and place, the defendant's attorney was in possession of a duly executed deed of conveyance, to the complainant, for the lands involved in this suit, which deed was executed by the defendant and her former husband, Abraham Abrams, from whom the defendant was divorced on July 7, 1925. That deed had been submitted to complainant's attorney the day before for approval and had been examined and approved by him. The defendant instructed her attorney not to deliver the said deed and the defendant has ever since refused to perform her agreement. The defendant also admits in the stipulation that the complainant has always been ready, willing and able to perform his part of said agreement by paying the purchase price and accepting a proper deed of conveyance.

In the said agreement, the defendant represented herself to be a widow. The stipulation admits that fact and also admits the fact that at such time defendant was not a widow, but was a married woman, her husband being the aforementioned Abraham Abrams. It is also admitted by the defendant that at the time of the execution of the said agreement, complainant did not know that the defendant was a married woman, but believed her to be, as represented by her, a widow.

Defendant by the stipulation also admits that she became the owner of the lands and

premises before she was married (see stipulation stating that the defendant became the owner of the lands on *March 6, 1923*). She was married to Abrams on August 20, 1923, and was divorced from him on July 7, 1925. The defendant also admits that the divorce suit which resulted in the decree of divorce was pending when the defendant made her agreement with complainant, which fact, however, was not disclosed to or known by complainant at the time and was not ascertained by him until after the entering of the decree of divorce.

The stipulation also admits that at the time of the making and delivery of the contract in question, the defendant was living in a state of separation from her husband and that no issue had ever been born to the defendant of her marriage to her said husband. It is also admitted that she has not remarried since the entry of the decree of divorce and is now a single woman.

Complainant gave notice of a motion to strike out the answer (see p. 12 of State of Case), and the matter was argued on the stipulation of facts. After oral argument and the filing of briefs, the Court concluded that, under the stipulated facts, the defendant had no defense, in equity, to the relief sought by complainant's bill and accordingly struck out the answer and advised the final decree appealed from (see conclusions of the Vice-Chancellor, pp. 16-36 of State of Case, and final decree, pp. 37-40).

A reading of the stipulation will at once indicate that there is but one question in the case, and that is whether the defense of coverture can avail the defendant in her resistance of the specific performance sought by the complainant, particularly in view of the defendant's admitted wilful and fraudulent misrepresentation made at the time of the signing of the agreement that

she was then a widow. In this connection, it may be well to mention that while our adversary in his brief refers to facts not set up in the stipulation or within the scope thereof, there is no evidence in the case except that resulting from the stipulation. Upon the stipulated facts and those alone, the parties to this controversy must stand.

It will also be observed that the stipulation admits the agreement annexed to the bill of complaint. That agreement appears on pages 5-9 of the state of the case. The agreement recites that the defendant vendor received on account of the purchase price the sum of \$500 (see page 7 of State of Case). We refer to this fact at this time, for somewhere in the concluding portion of his brief (p. 38, l. 26) our adversary makes the assertion that the appellant received no pecuniary advantage by her action in making the agreement, "not having received any of the purchase or deposit money." This is palpably an error, being in direct contradiction of the stipulation.

Without further discussion of the facts in the case, we proceed to present our argument.

### **ARGUMENT.**

Specific performance is resisted by the defendant on the sole ground that, being a married woman at the time of the making of the contract and her then husband not having actually joined therein, the same is not enforceable against her. This contention we shall necessarily meet in the discussion of the four reasons we advance to support our view that the answer in the light of the stipulated facts presented no defense and that it was properly stricken out and a decree

for performance entered. These reasons are as follows:

*First:* The defendant is estopped in equity, because of her fraud, from setting up the defense of coverture.

*Second:* The disability of coverture having been removed before the time fixed for performance, the contract is enforceable against the defendant as against a *feme sole*.

*Third:* That a sufficient concurrence by the defendant's husband in her said agreement is evidenced and manifested by the deed of conveyance executed by him together with the defendant, which deed of conveyance the defendant, after its due execution refused to deliver to complainant.

*Fourth:* There was no necessity for the husband's concurrence in the agreement in question because Section 8 P of the Married Woman's Act qualifies and enables a married woman, circumstanced as was the defendant at the time of the making of the contract, to convey without the concurrence of her husband.

## POINT I.

### Estoppel in Equity.

At the oral argument before Vice-Chancellor Berry, it was conceded by the defendant's counsel that the defendant's representation of being a widow, coupled with the non-disclosure of her true status as a married woman, constituted a fraudulent misrepresentation. It will be observed that the fact of such fraud was found by the Court below and expressed in its conclusions. Defendant's counsel insisted, however, and in

this Court now insists, that no matter how fraudulent be the conduct of a married woman, the doctrine of estoppel cannot be invoked against her. While that has been held in one case *in a court of law*, that contention is wholly unsound *in equity*.

In the case of *First National Bank of Belmar v. Shumard*, 91 Law, page 379, Justice Swayze, speaking for the Supreme Court, held that a married woman was not liable as an accommodation endorser and that she is not estopped from setting up coverture as a defense by her representation, made at the time of endorsement, that she was then a widow. It will be observed that that case was an action at law for damages. Justice Swayze uses language and cites cases leading directly to the established principle, that while the foregoing may be the rule *at law*, it is not the rule in equity. We quote from the Supreme Court opinion the following:

“The case of a married woman is like the case of an infant, except so far as her incapacity has been removed. It has not been removed so as to enable her to become an accommodation endorser, and to that extent she is incapable as an infant is incapable, although liable for her torts. *Cases of infancy are therefore in point*. As to them our law is settled.” *Parker v. Hayes*, 39 N. J. Eq. 469; 41 *Id.* 630. Although the Court of Errors and Appeals in that case reversed the decree advised by the Vice-Chancellor, it approved the legal principle stated by him, saying: “It is, of course, true that at law the execution of this paper by a minor is voidable. Nor would his assertion, made at the time of its execution, that he was of age, operate to change his position in a court of law. The fact that the infant had, by his false representations,

led the other contracting party to negotiate and execute the contract, and injuriously change his position even, would, in an action by an adult to enforce it, be no answer to the plea of infancy.

These authorities suffice to show that the defendant cannot be held personally *at law* in any form of action. What rights there may be, if any, against her by reason of anything she may have received by means of the endorsement is a question not now before us."

The case of *Parker v. Hayes* (referred to by Justice Swayze in the Shumard case) was an equity suit decided by Vice-Chancellor Van Fleet and reported in 39 Equity, page 469. That case presented the circumstance of an infant, misrepresenting himself to be of age and thereby inducing his trustee to make payment to him of a sum of money. We quote Vice-Chancellor Van Fleet in holding that the infant was estopped in equity from setting up his incapacity to contract:

"But deciding the question of fraud against the complainant does not necessarily involve the denial of all relief to him. Infancy is a legal privilege. The release upon which the defense rests is, at law, without the slightest force. It is no answer *at law* to the fact of infancy, that the person dealing with the infant was induced to do so by the infant's fraudulent representation that he was of full age. 1 Chitty on Cont. (11th Am. Ed.) 195. *The rule in equity, however, is different. In equity, in the language of Lord King, infants have no privilege to cheat men.* If an infant obtains property by fraudulently representing himself to be of full age, equity will compel him either to pay for the property or to surrender it. *Evroy v. Nicholas*, 2 Eq. Cas. Abr. 488; *Clarke v. Cobley*, 2 Cox 173. So, if he engages in business and incurs debts

by fraudulently representing that he is of full age, and is afterwards adjudged a bankrupt, the debts so incurred may be proved against his estate. *Ex parte* Unity Bank, 3 De G. & J. 63. And so if he is entitled to a sum of money on attaining twenty-one years of age, and he induces his trustees to pay it to him in advance of that time by falsely representing himself to be older than he is, he will, in equity, be bound by the payment (*Cory v. Gertcken*, 2 Madd. (40) 362), but only to the extent that he actually receives payment. If his trustee, on paying him only a part of what is due, induces or procures him to release the whole, the release, being void at law, will only be held good, in equity, to the extent of the payment actually made. *Overton v. Banister*, 3 Hare 503. The justice of this rule is manifest. At law, an infant is incompetent to make a valid contract except in certain exceptional instances. He may be old enough and cunning enough to contrive and carry out a fraud, yet, if he does, the law is powerless to give redress. The law cannot prevent him from using the shield which was intended simply as a protection, as a cover for his own cheating. Equity, to correct this wrong, steps in and declares that when an infant induces another to deal with him by fraudulently representing himself to be of full age, that, to the extent that the contract is just and fair to him, and also to the extent to which it is necessary to hold him to it to prevent him from reaping the fruits of his fraud, he shall be compelled to abide by it."

The decision of Vice-Chancellor Van Fleet in the Parker case was reviewed by the Court of Errors and Appeals. See 41 Eq. 630. While the Court of Errors and Appeals differed with the Vice-Chancellor in his finding of fact and for that reason reversed the Court below, the Court of Errors and Appeals nevertheless held, *that the equitable rule of estoppel against an infant*

was fully and correctly stated by the Vice-Chancellor in his opinion below. We quote from the Court of Errors and Appeals' opinion the following:

"It is, of course, true that at law the execution of this paper by the minor is voidable. Nor would his assertion, made at the time of its execution, that he was of age, operate to change his position in a court of law. The fact that the infant had, by his false representations, led the other contracting party to negotiate and execute the contract, and injuriously change his position even, would, in an action by the adult to enforce it, be no answer to the plea of infancy.

At law it is conclusively presumed that a person within the age of twenty-one is unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement.

In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction—the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by them, in determining whether he should be permitted to invoke successfully the plea of infancy. *Evroy v. Nicholas*, 2 Eq. Cas. Abr. 488; *Clarke v. Copley*, 2 Cox 173; *Ex parte Unity Bank*, 3 De G. & J. 63; *Cory v. Gertcken*, 2 Madd. 362; *Overton v. Banister*, 3 Hare 503; *Story's Eq. Jur. Sec. 240*; 1 *Pomeroy's Eq. Jur.*, Secs. 815, 945.

This equitable rule was fully and correctly stated in the opinion of the learned Vice-Chancellor when the case was before the Court of Chancery. In the judgment of that officer, however, the facts did not permit him to treat this as a case in which the plea

of infancy could be disregarded. The defendant's representative was ordered to account. I am compelled to differ from this conclusion. From the facts which I find proven, I regard the case as one in which the complainant is debarred from avoiding the release which he executed, and which, if accorded any significance, is a complete answer to his present demand."

In the case of *La Rosa v. Nichols*, 92 L., page 375, Chancellor Walker, speaking for the Court of Errors and Appeals in an infancy case, held that the doctrine of equitable estoppel, while the creature of equity and depending upon equitable principles, is not limited to courts of equity but is enforced alike by courts of law and equity. We wish to emphasize the Chancellor's opinion in this case for a number of reasons:

1st. It is a later case than the Shumard case, decided by Justice Swayze for the Supreme Court.

2nd. It has behind it the authority of the court of last resort.

3rd. In it the chancellor very clearly indicates that whatever may be the rule at law, the fraudulent misrepresentation of an infant operates in a court of equity to work an estoppel *in pais*, equitable estoppel. In fact, the chancellor in the Nichols case said:

"If this suit were in the Court of Chancery, the plea of infancy in the circumstances of this case, would not be tolerated."

We also cite the opinion of Vice-Chancellor Buchanan in the case of *Gibbs v. Gibbs* (92 Eq. 542) which was an annulment suit, as an indication of the extent to which the Court of Equity will enforce the doctrine of estoppel against one fraudulently misrepresenting his capacity to contract. In that case, Vice-Chancellor Buchanan held, that the suitor (infant) who is guilty of fraudulent and material representation, is

estopped to deny the truth of that which he, in order to induce a marriage, asserted to be the truth.

The rule relating to the estoppel of a married woman by her fraudulent representation as to capacity is stated in *Corpus Juris*, Volume 30, page 777, as follows:

“The rule has been laid down that the legal incapacity of a married woman cannot be removed, even by fraudulent misrepresentations, so as to create an estoppel in the act to which the incapacity relates. Other courts, however, have taken the broader view, that although a married woman may not be liable on her contract, yet if, in connection with it, she has made fraudulent misrepresentations, thereby causing another to act to his injury, she will afterward be estopped from setting up the invalidity of her contract; and, on the theory that a married woman has no more right to injure or mislead another by her conduct or representation than if she were *sui juris*, that, where it is made to appear that by fraud, misrepresentation, or concealment she has influenced another to act to his injury, whether by the performance on his part of a void contract, or otherwise, equitable estoppel will operate against her. Under statutes permitting a married woman to contract only with reference to her separate estate, she will, by false representations that a given contract related to her separate estate, be estopped to deny that such was the case. However, a fraudulent misrepresentation that she has capacity to contract will not generally create an estoppel against a married woman, as where she represents herself to be a widow; and she cannot be estopped by her misrepresentation as to a matter of law.”

In the cases noted under the section quoted, it will be observed that there are two New Jersey

cases referred to, *Brinkerhoff v. Brinkerhoff*, 23 N. J. E. 477, and *Belmar Bank v. Shumard*, 91 N. J. L. 377. We have already discussed the Shumard case and indicated that by the nature of the facts in that case and the language of Justice Swayze its authority does not extend to a case in equity. That case, if authority at all, is limited in its applicability to a court of law. The Brinkerhoff case, which was a chancery suit, very definitely stands for the proposition that equity will work an estoppel against one who by silence alone induces another to engage in a business transaction and by such silence conceals the existence of an adverse claim.

All the other cases cited in *Corpus Juris* under the quoted section are directly in point and sustain the doctrine of estoppel against a married woman who misrepresents her status.

In the case of *Roberson v. Goldsmith*, 57 Southern 908, the defendant, who was under the disability of coverture, represented herself to be a divorced woman and executed instruments inducing the plaintiff to part with money. She was held by the Court to be estopped from setting up the fact of coverture and the fact that her contract was unauthorized by her husband. The Court held that she could not impeach her note and her mortgage and escape the liability thereof because of her coverture, when the acceptance of her obligation was induced by her representation of being a divorced woman.

In the case of *Keller v. Lindow*, 133 S. W. 304, a married woman had falsely represented herself to be single and had conveyed lands to a grantee who had relied on that representation. The Court of Civil Appeals of Texas held that she was guilty of fraud and was equitably

estopped from asserting her title against him. The Court held that she had been guilty of a positive fraud and that she was therefore estopped from claiming the advantage that the status of a married woman would give her.

The case of *Townsend v. Woodworth*, 169 N. W. 752, is much in point. The statute of Iowa requires that a conveyance of a homestead should be invalid unless husband and wife both join. The husband had contracted to sell the homestead without disclosing its character. The wife had pointed out to the purchaser the boundaries of the parcel offered by the husband for sale. The Supreme Court of Iowa held that she was estopped from setting up her homestead claim. The Court in part said:

“Neither the Statute of Frauds nor the various statutory provisions enacted for the protection of the homestead claimant, can be held to do away with the general equity doctrine of estoppel *in pais*. While it is true some courts have held to the contrary, the weight of modern authority is to the effect that the doctrine of equitable estoppel will be applied to a married woman as well as to a *feme sole*. The doctrine is not invoked to render valid a contract which is void under the Statute of Frauds or under statutes for the benefit and protection of the homestead claimants, but it is invoked to prevent the successful perpetration of fraud by preventing wrongdoers from urging the provisions of such statutes to shield them in their tortious conduct.”

The Court also said:

“An estoppel can be invoked against a married woman as well as against a single woman whenever, by her conduct, she has led another to do a thing which it would be inequitable afterwards to permit her to deny is right to do. Equity will not permit this statute, made for the protection of women

in a home, to be invoked as a shield to perpetrate a fraud. These statutes were not enacted to encourage frauds and cheats—she is now estopped to deny that which she encouraged the plaintiff to believe to be a fact, and which she may have known he relied upon as a fact in consummating the deal and in paying her husband money called for by the contract.”

The case of *Overcast v. Lawrence* (Kentucky), 131 S. W. 1029, presents the situation where a married woman, suing in ejectment, is estopped from setting up her title because she acquiesced in the sale thereof by her husband's trustee. The Court of Appeals of Kentucky held, that the doctrine of equitable estoppel could be invoked against her despite her coverture, as it could be against a man.

In the case of *Bigelow v. Foss*, 59 Me. 162, a widow was estopped from asserting her maintenance or dower right, where she, by her conduct, induced the purchaser of the premises to accept title without disclosing the existence of her claim or estate. See case of *Engholm v. Ekrem* (N. D.), 119 N. W. 35, in which equitable estoppel is invoked against a married woman, in which the Court quotes with approval from Vol. 2 of Pomeroy's Equity Jurisprudence, 3d Ed. Sec. 14, as follows:

“Upon the question how far the doctrine of equitable estoppel by conduct applies to a married woman, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands and clothed them with partial or complete capac-

ity to deal with it as though they were single. Even independently of this legislation, there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense."

The last mentioned case even goes further and holds that married women enjoy no exception in the application of the principle of equitable estoppel, and that actual and positive fraud is not necessary in order to enforce the doctrine against them; it being sufficient that the act relied on constitutes constructive fraud.

In the case of *Galbraith v. Lunsford*, 1 L. R. A. 522, the Supreme Court of Tennessee held, that a married woman may be estopped from asserting what would otherwise be her right in realty; when the same conduct on the part of a *feme sole* would warrant an equitable estoppel. There are numerous cases cited in the Tennessee report, all to the effect that the legal disability of coverture carries with it no license or privilege to practice fraud or deception of other persons and that a married woman will be estopped *in pais* where her conduct is fraudulent, either actual or constructive.

See the English case of *Stafford v. Stafford*, 58 English Chancery 150 (44 Reprint 697).

See also *Matthews v. Murchison*, 17 Fed. 760.

*Drake v. Glover*, 30 Ala. 382;

*Reis v. Lawrence*, 63 Cal. 129;

*Paterson v. Lawrence*, 90 Ill. 174;

*Norton v. Nichols*, 35 Mich. 148;

*Williams v. Walker*, 111 N. C. 604;

*Sharp v. Foy*, 4 Chancery 35 (Eng.);

*Savage v. Foster*, 9 Mod. 35 (Eng.).

See case of *Graham v. Meneilly*, 16 Grant Chancery (U. C.) 661. That case holds that a married woman, owner of real estate, representing herself to be and selling property as a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed by her in conformity with the statutes governing conveyances of land by married women.

The case of *Engholm v. Ekrem*, decided by the Supreme Court of North Dakota in 1908, reported in 119 N. W., page 35, is very instructive on the question of equitable estoppel against a married woman. In that case, husband and wife, who were the owners of homestead property, made an oral agreement for the sale thereof, in pursuance of which agreement the purchaser paid part of the purchase price. It was contended in that case that because the statutes of North Dakota provide that a contract for the conveyance of homestead property by a married person shall be void unless signed by husband and wife jointly and acknowledged, hence the doctrine of estoppel could not be made available to supply the place of the statutory conveyance and that equitable estoppel could not be predicated on a void conveyance. The Court said:

“It is, of course, manifestly true that the alleged oral contract of sale was void under the Statute of Frauds; it not being in writing. It is equally true that, because of the homestead character of the land, the written contract of Nels O. Engholm, in the absence of his wife’s signature, was a nullity. What then, are the rights of the parties under the facts aforesaid? Can the equitable doctrine of estoppel by conduct be invoked in respondent’s behalf? If, as appellants’ counsel contend, this question must be answered in the negative, then a wrong has been

suffered by respondent for which he may have no adequate remedy. The appellants by their conduct induced respondent to pay a portion of the purchase price and to enter into possession of the premises in good faith and to make valuable improvements thereon. Upon the plainest principles of justice, respondent should be held to be the equitable owner of the premises, and appellants should not be permitted in a court of equity to deny such ownership in him. Neither the Statute of Frauds nor the various statutory provisions enacted for the protection of a homestead claimant can be held to do away with the general equity doctrine of estoppel *in pais*. While it is true some courts have held to the contrary, the weight of modern authority is to the effect that the doctrine of equitable estoppel will be applied to a married woman as well as to a *feme covert*. The doctrine is not invoked to render valid a contract which is void under the Statute of Frauds or under statutes for the benefit and protection of the homestead claimants, but it is invoked to prevent the successful perpetration of fraud by preventing wrongdoers from urging the provisions of such statutes to shield them in their tortious conduct. We are agreed that under the facts as disclosed by this record, the appellants should be, and are, estopped from asserting the title to the premises as against the respondent. In support of our conclusion on this point, we call attention to *Grice v. Woodworth*, 10 Idaho 459, 80 Pac. 912, 69 L. R. A. 584, 109 Am. St. Rep. 214, and the numerous cases cited; *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, and 2 Pom. Eq. Jurisprudence, Sec. 814, and cases cited." \* \* \*

"The opinion in *Galbraith v. Lunsford*, *supra*, is, to our minds, a very clear and sound exposition and treatment of the question here involved, and the same meets with our full approval. The gist of the decision

in that case is that there is no exception as to married women in the application of the principle of equitable estoppel, and that actual and positive fraud at the time of the act set up as constituting the estoppel is not essential to the application of the doctrine of estoppel; it being sufficient that the act relied on constitutes constructive fraud."

In the case of *Reis v. Lawrence*, 63 Cal., page 129, the Supreme Court of that state held, that where a decree of divorce obtained by a married woman is void, but where she had assumed her maiden name, lived apart from her husband, and represented herself as a feme sole, a deed of conveyance of her separate real estate, made and acknowledged by her as an unmarried woman, is valid and binding. In that case, counsel contended that estoppel does not conclude her even when she represents herself to be sole. The Court dismissed that contention, saying:

"Later on, in 1873, she resumed her maiden name, and thence hitherto acted and represented herself as a single woman. In that character she executed the instruments in question, and in that character, in our opinion, a court of equity ought to regard her in the construction of them. (As giving support to these views, see *Richeson v. Simmons*, 47 Mo. 20; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Patterson v. Lawrence*, 90 Ill. 174.)"

In the case of *Norton v. Nichols*, 35 Mich. 148, a married woman sought to avoid her mortgage because not acknowledged in conformity with the statute and therefore void. The Supreme Court of Michigan held that she was equitably estopped from doing this, saying:

"Whatever may be the rule concerning the formalities needed to bind married women, there is no doubt they may be estopped by their deliberate conduct as well as any one

else. The cases of *Sharp v. Foy*, 4 Ch. Ap. (L. Rep.) 35, *In re Lush's Trusts*, 4 Ch. Ap. (L. R.) 591, are analogous and in point. And the circumstances of this case show that the defendant would be grossly defrauded by the complainant's course if this mortgage is allowed to be set aside. There is no equity whatever in the bill, which on its face is an attempt without any merit to evade an honest claim which can never have been created unless the complainants had both done what they could to create confidence in it."

A very interesting case and one strikingly similar to the instant case is that of *Patterson v. Lawrence*, reported in 90 Ill. 174. There a married woman made a trust deed using her former name. *Upon being asked if she was a widow, she answered that she was. She thereafter sought to avoid her deed on the ground that when it was made, she was not a widow but a married woman and that her husband had not joined in the deed.* The Court said that it was clearly of opinion that the married woman was guilty of fraud in misrepresenting her name and her status, when she must have known that the party with whom she was dealing would not have taken the trust deed without her husband joining therein, "if she had given her true name and disclosed the fact that she was married." The Court lays down the rule in the following language:

"The true doctrine is, that contracts and agreements of married women in reference to their real estate, when not joined therein by their husbands, where such agreement is free from fraud, cannot be enforced at law or in equity. But where married women make such contracts or agreements by fraudulent means, and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up and relying on their coverture to retain the advantage. The

Court will require them to execute and perform the contract, if executory, or prevent them from avoiding it, if executed, or will compel them to place the other party in *statu quo* before they will be allowed to rescind or repudiate such agreements or contracts. Whether the one or the other form of relief will be granted, must depend upon the equities of the case."

We, on this point of estoppel, need only add that after a decree of divorce was entered whereby the defendant became a *feme sole*, she executed a deed of conveyance to complainant and submitted it to complainant's attorney for examination and approval. *This, we say, was also conduct which, in equity, should operate as a waiver and relinquishment of whatever defense the defendant then had to the enforcement of her contract* because of the former but no longer existing state of coverture. This, we say, was an affirmation by her, after the removal of her disability, of the contract made by her. Certainly, her conduct in executing the deed and delivering it for approval amounted to nothing less than a waiver of a defense, and that defense one that offends good morals and a sense of equity.

## POINT II.

The disability of coverture having been removed before the time fixed for performance, the contract is enforceable against the defendant as against a *feme sole*.

It will be remembered that the time fixed for performance by the agreement of the parties was the 4th day of August, 1925, and that prior thereto, to wit, on July 7, 1925, the defendant was divorced from her husband by the final

decree of the Supreme Court of Ohio. The decree of divorce, of course, operates with respect to the wife's lands in New Jersey to *determine* all rights which the husband had in the wife's lands by reason of the martial relation. See case of *American Legion v. Smith*, 45 Eq. 466 (see bottom of p. 467). The situation, therefore, is one where the defendant was a *feme sole* when the time for performance arrived and the question is whether her agreement to perform is affected by the circumstance that when made, she was a *feme covert*.

The case of *Union Brick & Tile Co. v. Lorillard*, 44 Eq., page 1, decided by Chancellor McGill in 1888, is very instructive on this point. There a married woman made a lease which granted to the lessee the option of purchasing the demised realty. The husband did not join in the instrument. The husband died and thereafter the tenant sought to exercise the option of purchase. The resulting suit was one for specific performance and there the question was raised as to the validity of the married woman's option agreement to convey without the concurrence therein of her husband. The Chancellor first held that the option to purchase was tantamount to an agreement to convey lands. (See p. 3 of the opinion.) He next considered the question as to the capacity of a married woman to make a contract to convey her lands, and after discussing the wife's rights as they existed prior to the revision of 1874, he finds that the enabling acts qualify the married woman in binding herself upon such a contract, subject to the limitation that she cannot *actually* convey it without the co-operation of her husband. The Court very distinctly holds that whatever question may arise as to the specific performance

of the wife's contract while her husband lives with her and refuses to join in the conveyance, yet the wife's contract is legal and binding upon her. The Court in part says:

“While I perceive that a question may arise as to the power of the court to order the specific performance of a wife's contract to convey her land while her husband lives with her, in full possession of his faculties, and refuses to join in a conveyance, and refrains from doing any act which may give the court jurisdiction to compel him to join in a conveyance, I am decidedly of the opinion that, in virtue of the statute, the wife's contract is legal and binding upon her.”

In the *Lorillard* case, the Chancellor concludes that upon the death of the husband, the limitation upon the wife's power to perform her contract is removed. The Court says:

“At the death of the husband, the limitation upon the execution of the contract by conveyance, and with it, the objection to a specific performance of the contract, is removed. *I conceive that the only purpose of the limitation is to enable the husband to preserve from alienation a property of his wife in which he may acquire an estate. The possibility of such acquisition is extinguished at his death.*”

We respectfully submit that the situation presented by the case at bar is unlike the usual case, where a married woman living with her husband resists performance because of the non-concurrence of her husband in the contract to convey. The case at bar is strikingly similar to the *Lorillard* case, in that before the time for performance arrived the disability of coverture was removed. If, as stated by Chancellor McGill in the *Lorillard* case, the purpose of the limitation on the wife's power is to enable the

husband to preserve from alienation the wife's property in which he might acquire an estate, then a situation is presented by the case at bar where the principle of the Lorillard case is perfectly applicable. The stipulation of facts admits that no issue was ever born to the defendant of her marriage to Abraham Abrams, in addition to which fact we have the effect of a final decree of divorce. The possibility of the husband's curtesy right arising having been completely extinguished, the wife's disability was completely removed, and with it, in the language of the Chancellor, "the objection to a specific performance of the contract is removed."

### POINT III.

The defendant's agreement was sufficiently concurred in by his joining with her in a deed of conveyance to complainant, which deed the defendant has since refused to deliver.

The stipulated fact will be recalled that when the parties met on August 4, 1925, for the purpose of consummating the agreement, the defendant's attorney was in possession of a deed duly executed by the defendant and her husband, conveying to the complainant the lands which are now the subject of the controversy. That deed had been submitted a day before to complainant's attorney for approval and had been approved by him. We contend that the act of the husband in joining in the deed of conveyance in execution of the wife's contract to convey, is a sufficient concurrence within the meaning of the statute.

The defense in this case is based wholly upon the provisions of Section 14 of the Married

Woman's Act. (See Compiled Statutes, page 3237.) That section reads as follows:

“That nothing in this act contained shall enable any married woman to execute any conveyance of her real estate or any instrument encumbering the same, without her husband joining therein as heretofore, except in those instances for which express provision is herein made; nor shall any conveyance, deed, contract or act of such married woman, nor shall any judgment or decree against her, in any respect impair or affect the right of the husband in her lands as tenant by the curtesy, after her death; nor shall anything herein enable husband or wife to contract with, or to sue each other, except as heretofore.” (Rev. 1877, p. 639.)

We contend that under the statute, it is not necessary that the husband join in the wife's contract to convey but only in the actual instrument of conveyance. It will be observed that in the very section itself, the word “conveyance” is used in the sense of an instrument in the nature of a deed, for when in a subsequent clause, the idea of a *contract* is sought to be expressed in contra distinction to a *conveyance*, the words “*deed*” and “*contract*” are *both* used. We respectfully submit the contention that a married woman's contract to sell is neither a “conveyance” nor an “encumbrance” and we point to the case of *Wolff v. Meyer*, 75 L. 181, in which Justice Swayze speaking for the Supreme Court, suggests that a married woman's contract is not within the exception of her power enumerated in Section 14, in that it is neither a conveyance nor an encumbrance. We quote from that case the following:

“The exceptions to the wife's power in Section 14 are conveyances of the real estate and instruments encumbering the same. An agreement to convey is obviously not a con-

veyance. Is it an instrument encumbering the real estate? If we adopt the view of Chief Justice Beasley in *Sullivan v. Barry*, which was expressly approved by the Court of Errors and Appeals, that 'encumber' is used in its ordinary and not its technical meaning, it is fair to say that an agreement to convey is no more an encumbrance than was the term of years in that case. We might rest the case upon the construction there adopted which limited the encumbrances meant by the statute to mortgages or similar burdens, but there is an additional reason for the same result growing out of the language of the act respecting conveyances."

We quote from the Wolff case the following to indicate that a married woman's contract to convey realty is valid, though perhaps, not enforceable against her specifically if the husband refuses to join in the deed:

"It was suggested, but not decided in *Corby v. Drew*, that if a married woman could not convey without the concurrence of her husband, she could not agree to convey without that concurrence. The impossibility of performance of a contract to convey made by a married woman alone is, however, not strictly speaking, an impossibility in law such as would make the contract void. It is an impossibility which may or may not arise, *and is dependent on the will of her husband*. One authorized to contract may make a valid contract although the possibility of its performance depends on the will of another. An example is a contract by a lessee to assign his lease, although it contains a covenant not to assign without license. *Lloyd v. Crispe*, 5 Taunt. 249. Other cases are cited in the dissenting opinion of the present Chancellor in *Chism v. Schipper*, 22 Vroom 1, 18.

It is not necessary to dwell upon this point, since a similar question has been de-

cided by the Court of Errors and Appeals. In *Brown v. Honniss*, 41 Vroom 260, the plaintiff sought to recover damages for breach of a contract to convey land. The defendant was unable to make a clear title because of his wife's inchoate right of dower, but it was not suggested that such an impossibility of performance relieved him from liability to action."

We cannot depart from this subject without a reference to the case of *Goldstein v. Curtiss*, decided by Vice-Chancellor Pitney and reported in 63 Eq. 54. A reading of that case suggests that under Section 39 of the Conveyance Act, every deed or instrument of the nature set forth in the 21st Section of the Act, duly acknowledged by a married woman, is good and effectual to convey or *affect* the lands, tenements or hereditaments or her interest therein, thereby intended to be conveyed or affected. The Vice-Chancellor holds that a familiar way to affect the interest of a person in land, is to contract to convey it, and the only mode in which such a contract can be made "good and effectual" is to compel its specific performance by a decree of the court. While apparently there is some clash between the unqualified language of Section 39 of the Conveyance Act and Section 14 of the Married Woman's Act, it must be observed that the Conveyance Act was revised in 1898, while Section 14 of the Married Woman's Act was passed in the Revision of 1877. Consequently, insofar as the two acts conflict, the Married Woman's Act must be deemed to be repealed by implication insofar as the concurrence of the husband is required by the earlier provisions of the Married Woman's Act.

Before proceeding to the last and our main contention, we mention the case of *Corby v.*

*Drew*, 10 Dickinsons Chancery, page 387 (55 Eq. 387). It is upon this case that our adversary in his argument largely relies. That case was decided in 1897 by Vice-Chancellor Stevens. The case was decided before the Revision of the Conveyance Act and Vice-Chancellor Stevens himself, in the case of *Teneyck v. Saville*, 64 Eq. 611, points out that the *Corby* case was decided by him before the Conveyance Act and also adopts the principle of the case of *Goldstein v. Goldstein*, *ubi supra*. The *Teneyck* case stands mainly for the proposition that the authority of *Corby v. Drew* was nullified by the subsequent legislation of 1898 and for the further proposition that the Act of 1898 for the first time gives full effect to a married woman's agreement to convey (see page 613 of opinion). While the *Teneyck* case involves the question of the married woman's acknowledgment, it is very valuable as an expression by the Vice-Chancellor who wrote the opinion in *Corby v. Drew*, that its authority was destroyed by the legislation referred to.

#### POINT IV.

There was no necessity for defendant's husband to concur in the agreement in this suit sought to be enforced.

We wish to emphasize this point, for upon it we **MAINLY RELY**. In our opinion, it is dispositive of the defendant's position.

It will be observed that the requirement of Section 14 of the Married Woman's Act that the husband join, is qualified by an exception, reading as follows:

"Except in those instances for which express provision is herein made."

Such express provision appears in Section 8 P of the Married Woman's Act. That section reads as follows:

8 P "Sec. 1. That the provisions of the first section of an act entitled 'An Act for the better securing of the property of married women living in a state of separation from their husbands,' approved March third, one thousand eight hundred and eighty, be and the same are hereby extended to any married woman living in a state of separation from her husband, and having had no issue the result of such marriage, and that such married woman, may, without the concurrence of her said husband or his joining as a party to any deed of conveyance, grant, sell and convey any real property whereof she may be seized in fee-simple by deed of conveyance executed and delivered to her before said marriage (P. L. 1888, p. 266)."  
(Inconsistent laws repealed)."

It will be observed that this section unlike several others in the Married Woman's Act enables a married woman to sell *without her husband* and without the necessity of an application to the Chancellor. It is the only section which obviates the need for a petition addressed to the Chancellor, and the reason for this is that it is the only section that deals with a situation where the married woman "*living in a state of separation*" is seized of property acquired by her before her marriage and in which her husband has not yet acquired curtesy initiate by the birth of issue. It is a section intended to apply to a peculiar state of facts in which the following elements must concur:

(A) A married woman must live in a state of separation from her husband.

(B) There must have been no issue the result of her marriage.

(C) The property sold by the married woman must be such as came to her by deed of conveyance executed and delivered to her before her marriage.

All these elements are present in the case at bar. Mrs. Ruskin acquired this property before she married Mr. Abrams. No issue has ever been born to her of her said marriage. She was living in a state of separation at the time she sold the property to the complainant by means of the agreement involved in this suit. A reading of the stipulation in the case will at once indicate that all the facts essential to make Section 8 P applicable are present in the case. We desire to cite only one authority on the point under discussion. That is the case of *Wolff v. Clohessy*, decided by Judge Speer, sitting at the Hudson Circuit of our Supreme Court. The case was decided in 1917 and is reported in 40 N. J. L. Journal on page 299. In that case, which happened to be an ejectment suit, the necessary elements required by Section 8 P were present and Judge Speer held, *that the conveyance by the married woman without the joinder of her husband, conveyed an estate in fee simple and that her heirs were estopped from questioning its validity*. He held the statute applicable to all cases of married women, living separate from their husbands, whether or not the separation was the fault of the husband or the wife. We have deemed this case of sufficient importance to copy it in full and attach it to this brief.

Our adversary in his brief makes no mention of the case of *Wolff v. Clohessy*, although he has had notice thereof in our brief in the court below and in the conclusions of the Vice-Chancellor. (See p. 35 of State of Case.) Instead, our adversary refers to one case, that of *Demarest v. Terhune*, 62 Eq., page 663. Our reading of this

case suggests to us the thought that counsel has not examined this case with any great degree of care. The statute is *not* construed in that case. In fact at page 668 of the Opinion, Vice-Chancellor Stevenson stated that he would not pause to examine either the statute or the allegations of the bill in regard thereto. The question in that case was whether, *irrespective of the applicability of the act*, the husband's joining in the wife's deed, added value thereto so as to furnish a consideration for the wife's promise and the Court (at p. 669) concludes that *whatever may be the construction of the statute*, it is plain that the husband's signature added value to the deed and made the property salable without a sacrifice in price. The Court does call attention to the fact that the bill charges that the wife was living "in a state of separation from her husband" but the Court also indicates that "this statement is qualified by subsequent allegations showing that she was residing in the same house with her husband, and that her husband, presumably was providing otherwise for her support." The case before Vice-Chancellor Stevenson was on a demurrer to a bill and, of course, the demurrer operated constructively to admit *all* the allegations, and therefore the qualifications mentioned by the Vice-Chancellor changed the effect of the words "in a state of separation from her husband." In the case at bar, we have present a stipulated and admitted fact, *without any qualification*, that "at the time of the making and delivery of the contract involved in this case, defendant was living in a state of separation from her husband, said Abraham Abrams. No issue was ever born to the defendant of her marriage to said Abraham Abrams. She has not remarried since the entry of said decree of divorce. The defendant became the owner of

said land and premises on March 6, 1923." No clearer language could be employed to bring the case within the operation of Section 8 P of the Married Woman's Act (Compiled Statutes p. 3233) and *nowhere in the stipulation appears there any language to qualify the foregoing.* Manifestly, the Demarest case is far afield of the subject under consideration.

Our adversary seizes upon the language of Vice-Chancellor Stevenson in the Demarest case, to the effect that the main purpose of the act "must have been to enable married women separated from their husbands to sell their real estate in order to procure the means of support which their husbands were not supplying." Our adversary suggests that there is nothing in the case at bar to show that the appellant executed the agreement of sale for the purpose of procuring funds with which to support herself, and that there is nothing to show that the "state of separation" was perceptible to "the ordinary observer \* \* \* to the class of persons who would be possible purchasers." Our answer to this is that there are no such qualifications in the act itself and that when Vice-Chancellor Stevenson undertook to state the purpose of the act, he did not use language that was exclusive or controlling, for he said:

"The *main* purpose of the act, etc., *must have been, etc.*"

What our adversary suggests may perhaps constitute a good reason for a vendee refusing to accept the kind of deed contemplated by that statute under consideration, but certainly when the vendee is willing to accept such a deed, the vendor, being enabled by that statute to give the deed, cannot predicate a refusal upon it.

Suffice it to say that our adversary has stipulated that his client was "living in a state of separation" and has brought himself strictly within the provisions of the statute. To attempt now to seize upon inapplicable language in order to avoid the effect of the stipulation would seem to constitute an attempted repudiation of it. The learned Vice-Chancellor who sat in the court below well summarized the question when he said (State of Case, p. 36):

"In the case *sub judice*, the stipulation of facts brings the defendant clearly within the provisions of this act."

It might be well to restate here the fact that we rely upon Section 8 *P* of the Married Woman's Act, which is the only section of the act dealing flatly with the state of facts present in the case at bar. The other sections of the Act are not applicable for they involve different situations of fact.

### Conclusion.

We respectfully submit that the defendant is not entitled to escape the obligation of her contract fairly entered into and upon the faith of which the complainant parted with money by the payment to her of part of the purchase price. Certainly, in equity, she will not be permitted to take advantage of her confessed fraud, particularly when since the making of the agreement the disability of coverture has been removed and it is not necessary, in order to give relief to the complainant, that any husband join with her in her deed of conveyance. In fact, her own deed will be unnecessary upon the entry of a decree, for under the statute, the decree will execute itself. But persuasive against her as is the fact of her deliberate fraud and the resulting

equitable estoppel, more persuasive and quite controlling are the provisions of Section 8 P by virtue of which she was enabled and rendered competent to sell her property to complainant without the joinder of her husband, because of the circumstances then surrounding her marital status.

To us the defendant's conduct in the transaction involved in this suit is not only fraudulent, but brazenly and shockingly so. It is difficult to repress the indignation that rises in the face of an attitude which, while it confesses the commission of wilful and deliberate fraud, seeks to take advantage of that fraud and seeks judicial protection in such purpose. To permit the accomplishment of the defendant's purpose would be to permit changing what was intended as an enabling and beneficent piece of legislation into an instrumentality of fraud and corruption. We can conclude this thought in no better way than to quote from the Vice-Chancellor in the court below:

“Under all the circumstances I feel that the complainant's motion should prevail. I can imagine no more glaring lack of respect for the obligation of a contract than that here displayed. A mere recital of the facts is sufficient to shock the conscience of the court. The first thought which comes to mind upon hearing this recital of facts is that the defendant ought to be made to perform. In equity, wherever there is an ‘ought,’ there is a remedy. To refuse to enforce this contract would, in my mind, be to set the stamp of this court's approval on dishonest business transactions. The world's business today is grounded on faith and reliance upon the obligation of contract. This is known as credit. Women as well as men should be taught to respect their obligations if this business credit is to be maintained.”

For each and every reason advanced in this brief and emphasizing particularly the fourth reason relied on (Section 8 P of the Married Woman's Act) we respectfully submit that the action of the court below was correct and should be sustained.

Respectfully submitted,

LEBER & RUBACK,  
Solicitors for and of Counsel  
with Complainant-Appellee.

## APPENDIX.

*WOLFE v. CLOHESSY.*

(NEW JERSEY SUPREME COURT,  
HUDSON CIRCUIT, August, 1917.)

Joint Tenancy—Power of Survivor to Convey—  
Estoppel.

Case of *John J. Wolfe v. James Clohessy* in  
action at law for ejectment.

Messrs. Collins & Corbin for plaintiff.

Mr. James R. Bowen for defendant.

The facts on which the decision is predicated  
are thus stated to the editor of the Journal:

By deed dated February 17, 1887, the premises  
in controversy were conveyed to Thomas Hare  
and Mary Hare, his wife, as joint tenants and  
not as tenants in common. Thomas Hare died  
March 14, 1891. On February 24, 1903, Mary  
Hare married Philip Strasser. They lived to-  
gether until October, 1903, when, according to  
the testimony, Strasser left home because of  
the threats of his wife to poison or shoot him.  
There was no issue of the marriage.

By deed dated September 10, 1907, Mary Hare  
(Strasser) purported to convey the premises  
in question to James Clohessy by full covenant  
warranty deed. In this deed the grantor was  
described as "Mary Hare, widow." For a por-  
tion of the purchase money Clohessy gave a  
purchase money mortgage to "Mary Hare."  
Clohessy entered into possession of the premises  
almost immediately after the delivery of the  
deed to him and has remained in possession ever  
since.

In August, 1910, Mary Hare (or Strasser) died. Some little time later Strasser appeared and claimed that as husband he was entitled to all the personal property of his deceased wife, including the purchase money mortgage given by Clohessy.

The heirs-at-law of Mary Hare (Strasser) united in a conveyance of the premises to one of their number, and this grantee (John J. Wolfe) commenced an action in ejectment in the Supreme Court against Clohessy, on the theory that Mary Hare (or Strasser), being a married woman at the time of the deed to Clohessy, and Strasser not having joined in the deed, the deed was void.

The defenses were: (1) The deed was a good and valid one under Comp. Stats. 3233, section 8p; and (2) In view of the covenants in the deed to Clohessy, the heirs-at-law of Mary Hare (or Strasser) and their privies were stopped from denying the validity of deed.

WILLIAM H. SPEER, Circuit Judge: In this case, as argued, two questions emerge for decision: First, was the deed to defendant good and valid in law? Secondly, is plaintiff estopped from denying the validity of the deed to defendant? On both these questions my judgment is with the defendant.

I think, in contemplation of law, that Mary Hare was seized in fee simple of the premises in question by deed of conveyance executed and delivered to her before her marriage to Strasser. It is true that the conveyance was made to her and Thomas Hare, her prior husband, as joint tenants, and that, by virtue of survivorship, she became possessed of the sole interest in the property. But she was none the less seized in fee simple of the premises in question by virtue

of the nature of a joint tenancy and she comes clearly within the spirit of the statute as uniformly construed.

It is further claimed that the statute only refers to separations arising without fault on the part of the wife and is intended to provide for the case of women whose husbands neglect and refuse to support them. I do not so read the statute. Its terms contain no such limitation but are universal in their description of the class of women intended to be benefited. Such construction would be perilous in the extreme to the quietness of titles. The fact that a woman is living in a state of separation from her husband is one readily determinable, and indeed is manifest, whereas the facts regarding the causes of separation and the extent of alimantation are frequently well-nigh impossible of determination and are certainly always difficult of ascertainment, and the wisdom of the legislative enactment, when construed in its universal extent, from the viewpoint of the protection of the public, is manifest.

While the question of estoppel presents many complicated considerations, I nevertheless think that the defendant should prevail on this ground also.

*Patterson v. Lawrence*, 90 Ill. 174, is a case in point, and *Matthews v. Murchison*, 17 Fed. Rep. 766; *Norton v. Nichols*, 35 Mich. 148; *O'Brien v. Holburn*, 9 Tex. 297; *Fitzgerald v. Turner*, 43 Tex. 79; *Dart on Vendors and Purchasers*, p. 5-18; *McDonell v. Landstrum*, 87 Ken. 404; *Pilcher v. Smith*, 2 Head. (Tenn.) 208, are cases bearing upon the general question of estoppel as applied in the case of a married woman.

I must, therefore, give judgment for defendant.



