

New Jersey Court of Errors and Appeals. 10

Between :

JOHN F. SHANNON and MARY J. C.
GINOCCHIO,

Complainants-Appellants,

and

DANIEL C. WATT,

Defendant-Appellee.

Appeal from
Chancery.

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POINTS FOR APPELLANTS.

Statement.

The defendant moved to strike out complainants' bill on the ground that "it discloses no cause of action". This motion was granted.

An adequate statement of the facts cannot be given without setting forth in full every allegation in the bill, since every allegation in the bill is relied upon and is relevant and is to be taken as true on a motion to strike out, so far as properly pleaded. As the bill of complaint is voluminous, taking up 35 pages of the printed case, appellants refer to the bill. 30

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Grounds of Appeal.

The grounds of appeal are that the decree is erroneous in that the same is not in accordance with equity; that the bill should not have been dismissed but that the same should have been retained and the defendant required to answer the same; that the bill discloses a cause of action in the complainants entitling them to relief in equity and to have the defendant answer the bill.

Brief of the Argument.

1. With respect to the Vice-Chancellor's opinion.

2. A motion to strike out the defense interposed in the three ejectment actions is pending.

The defense at law is not adequate.

20 The chief defense at law is the statute of 1875. This defense is here set out at some length that this Court may have the matter before it in as complete a condition as possible; and our argument that curtesy is not now favored, is found under this head.

The Vice-Chancellor's decision states that curtesy is "favored in the law"; and he construes matters "in the light of this rule".

Curtesy is not now favored in the law.

30 3. The Agreement and the Findings of Fact, Conclusions of Law and Decree comprehend all interest and estate of the defendant arising during the wife's lifetime or after her death.

4. The proceedings in the New York Court determined the equities between the parties in the litigation there; the proceedings there bar the ejectment suits brought here; those proceedings are record evidence of the equities; defendant is estopped by virtue of those proceedings; the New York Decree is enforceable against the defendant

in the Court of Chancery by a decree for specific performance.

5. The husband and wife could contract as they did both as to curtesy in the land then owned by the wife, and in land that might be subsequently acquired by her.

6. The agreement in the New York proceedings, irrespectively of the decree in those proceedings as a decree, is enforceable against the defendant, both affirmatively by decree for specific performance, and defensively, by decree enjoining the defendant from asserting that he has any curtesy in the lands in question, although the agreement relates to lands. 10

(a) Because the agreement is evidenced by the Findings of Fact and the Decree, both signed by the Justice of the New York Court, the said Justice signing as the agent of the defendant; and

(b) Because the agreement has been partly performed, should it be held that the Justice did not so sign. 20

7. The wife held the land conveyed by the deeds made by the husband to Burke for her separate use, free of curtesy.

8. Complainants are privies who are entitled to enforce the agreement and the decree.

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With respect to the Vice-Chancellor's Opinion.

We should like to point out, first, that, in our view, the learned Vice-Chancellor has not considered that, on a motion to strike out, all the allegations which are properly pleaded are to be taken as true.

We think a reading of the bill and the opinion of the Vice-Chancellor supports this view. 40

The wife died seized of (1) certain lands which she had owned at the time of the decree of 1908, and (2) of certain other lands which had come to her by descent from her sister about a year before her death. The wife devised all of these lands to the complainants.

The husband conveyed his curtesy in the lands owned by the wife in 1908 when she obtained the decree against him. His conveyance was made expressly to divest his curtesy and was made to carry out his agreement and to comply with the decree. The bill alleges that he agreed to permanently divest his curtesy in these lands, and that by his conveyance he intended so to divest; that his conveyance was made to a man named Burke, who was not a purchaser; that Burke did not know the conveyance had been made to him until a sister of the wife procured him to convey the lands to her, the sister; that the sister executed conveyances of these lands to the wife, which conveyances were never delivered to the wife; that afterwards the sister died, and devised the lands and certain other lands to the wife.

The bill sets up fraud on the part of the defendant, and circumstances from which fraud may be inferred, and prays appropriate relief against the fraud.

The bill sets up facts which, we claim, estop the defendant from asserting that he is entitled to curtesy in the lands in question.

The bill alleges that the husband intended to and did convey these lands for the separate use of the wife permanently freed from curtesy; and that Burke and the wife's sister held the lands as the separate estate of the wife, freed from curtesy.

Judging alone by the face of his deed to Burke, the defendant certainly conveyed his curtesy in

the lands described in that deed. That deed was an executed conveyance of his curtesy.

We contend that there was an executed post-nuptial settlement, evidenced by the deed, which should be enforced to bar the curtesy of the defendant.

It is the claim of the complainants that they are entitled to affirmative and also to defensive relief; that the affirmative relief should be by a decree for specific performance, and that the defensive relief should be by a decree evidencing the estoppels of the defendant. 10

We contend that the wife, by virtue of the statute, copy of which follows, had the right to convey her lands.

“Husband may convey, mortgage, lease or devise real property.—Sec. 1. That any married woman who is living in a state of separation from her husband, under and by virtue of the final judgment or decree of any court, when such judgment or decree is founded upon her application for such separation, may, at any time during the continuance of such separation, convey, mortgage and lease or devise any interest, estate or right that she may have in any real property, except such as came to her by gift, through or from her said husband, in the same manner and with the like effect as if she were sole and unmarried” (Rev. 1877, p. 639; Compiled Statutes, p. 3230). 20

This statute is a defence at law to the ejection cases brought by the defendant; but it is not a full and adequate defence. The relief that we seek in equity is a restraint on the defendant asserting that the wife did not devise to the complainants, that is, from asserting that her will is invalid. 30

The wife’s will was under contest in the Hudson Orphans’ Court in a trial of many days, after which it was admitted to probate. An appeal taken to the Prerogative Court was dismissed. 40

The Vice-Chancellor in his opinion uses this language (p. 78, Case) :

“The rights of curtesy and dower are favored in the law. Neither the husband nor wife will be excluded from rights in the property of the other springing from the marital relations except by words that leave no doubt of the intention so to do.”

And he cites *Radley v. Radley*, 70 N. J. Eq., 248.

10 We think that *Radley v. Radley*, which is cited by the Vice-Chancellor to support a general statement, supports our contention that the conveyance made by the husband in this case, in connection with the acts of the parties and the surrounding circumstances, permanently divested the husband's curtesy.

20 Our statutes enlarge the wife's common law right and endow her of lands whereof her husband “or any other to her use” was seized of an estate of inheritance at any time during coverture.

There is no such statutory provision respecting curtesy.

30 But, assuming that what may be said of dower may be said of curtesy, we think that *Radley v. Radley* helps us, for, while it is held in that case (p. 52, Report) that a wife's mere release of dower to a grantee in trust does not of itself release or pass the right of dower in the trust estate which arises by the deed, it is also held that a wife may agree that her deed shall bar her against any future claim to dower in the equitable estate and that such agreement may be enforced, and that her conveyance may be treated in equity as sufficient evidence of such an agreement.

40 The bill alleges that the defendant agreed that his deed should bar him against any future claim to curtesy in the estate that he conveyed to Burke and prays to have this agreement appropriately enforced. The estate conveyed to Burke was not

an equitable estate, so far as the face of the deed was concerned; but the bill alleges that Burke received an equitable estate; it alleges that he held the legal title to the property for the wife.

Counsel for defendant argues that Watt has performed the decree. We think this argument rests on a misconception of the terms of the decree; and, further, we think that the learned Vice-Chancellor fell under the same misconception; for in his opinion he states (p. 79, Case) as follows: **10**

“By the terms of the agreement, the husband promised to convey whenever he might be requested by the wife so to do. In the agreement (evidenced by the findings of fact, conclusions of law and the decree) there is nothing indicating that the husband should lose his estate by the curtesy otherwise than by his conveyance (or, possibly, upon a failure to comply with the request of his wife to convey) *or that he should convey until requested by his wife so to do*” * * * **20**

(The italics are placed by us for emphasis.)

An examination of the decree (p. 52, Case) shows that it directs Watt to release his interest as tenant by the curtesy in the real property of Mary J. Watt, *and*

(b) to execute all instruments and conveyances necessary to carry out such release of his interest, *and*

(c) that he release whatever interest he might subsequently acquire as tenant by the curtesy in any property which Mary J. Watt might thereafter acquire, *and* **30**

(d) that he execute any instruments necessary to effect such release whenever he should be requested by said Mary J. Watt so to do.

Thus we see that Watt was directed by the decree to release his interest as tenant by the curtesy in the real property of his wife then owned by her, or that might be thereafter acquired by her, *with-* **40**

out reference to any request by her that he should so release.

We think this entitles us to say that the Vice-Chancellor was in error respecting the directions of the decree.

The decree provides *additionally* that Watt should execute any instruments necessary to effect such release "whenever he should be requested by the plaintiff so to do." This provision of the decree may be said to be prudential. At all events, the decree is complete and comprehensive with respect to a divesting of Watt's interest as tenant by the curtesy in the real property of his wife then owned by her or that might be thereafter acquired; and performance of the decree cannot be evaded because Mrs. Watt did not *herself* request Watt to execute instruments necessary to effect such release. (She once did request with respect to the land owned by her at the time the decree was signed.)

An examination of the Findings of Fact shows the same situation. These Findings recite a promise made by Watt in open Court to release his interest as tenant by the curtesy in all the real property of his wife as well in that which she then had as in any that she might subsequently acquire, *and* to execute any and all instruments and conveyances which might be necessary to carry into effect such release of such interest whenever he might be requested by her so to do.

Thus the Findings of Fact are divided into two parts, and we find that the promise and the obligation are *independent* of the making of any request by the wife for a release.

If the husband's curtesy was released by an agreement, or by the decree; or, if the wife was entitled to a release without a "request" by her, why are not the complainants, who are privies in estate with the wife, entitled to have the husband

release, under the general rule, which is expressed in Elliott on Contracts, §2287, as follows:

“It may be stated as a general rule that wherever the covenants in a contract respecting real estate could have been specifically enforced against either of the parties thereto, they may be so enforced by persons claiming under them in privity of estate, representation or title.”

And in *Hollander v. Central Metal & Supply Co.*, 71 Atl., p. 445, as follows: 10

“Wherever, and without regard to the form and technical character of the contract, performance of a covenant in respect to lands would have been decreed between the parties to it, it will, in the absence of controlling intervening equities, be decreed as between persons claiming under them in privity of estate, or of representation, or of title” (citing 2 Story’s Eq., 5th Ed., §§788, 790, 714, 715, 791). 20

This consideration does not seem to have been before the Vice-Chancellor when he wrote his opinion.

If it would have been fraud on the husband’s part to assert curtesy during the wife’s life, why is it not fraud for him so to assert after her death against the wife’s privies in estate?

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2.

A motion to strike out the defence interposed in the three ejectment actions is pending.

The defense at law is not adequate.

The chief defense at law is the Statute of 1875. This defense is here set out at some length that this Court may have the matter before it in as complete a condition as possible; our argument that curtesy is not now favored is found under this head.

The Vice-Chancellor's decision states that curtesy is "favored in the law"; and he construes matters "in the light of this rule".

Curtesy is not now favored in the law.

20 The Answers in the ejectment cases at law plead with such effect that the Act of 1875 is available as a defense.

The husband and wife were married in 1889; a child was born, which afterwards died. From 1908 to the time of her death, the wife lived in a state of separation under and by virtue of the final judgment or decree of the New York Supreme Court, which decree was founded upon her application. During the continuance of the separation she devised her lands to the defendants. The probate of her will was contested but the will was admitted to probate. These ejectment suits by the husband followed.

30 We contend that the Act is a complete defense at law unless the probate of the will be set aside. The bill was filed in Chancery to enjoin the plaintiff from proceeding with the ejectment suits and thus attempted to set aside the will. The Act of **40** 1875 was not passed upon by the Vice-Chancellor.

None of the land came to the wife by gift through or from her husband. The husband, with the wife, at the time of the decree, executed conveyances of the lands the wife then owned to a third party, who afterwards conveyed to the wife's sister, and that sister, by her will, devised these lands and other lands to the wife. The sister died a short time before the wife.

The Act under consideration is one of two sections and it is a supplement to the Married Woman's Act of 1874. It was approved April 5, 1875 (P. L. 1875, p. 52). The word "except" was omitted by mistake in the first section of the Act as passed in 1875; and in 1876 (P. L. 1876, p. 18) the Act was amended so as to insert the word "except."

The Act is found in Rev. 1877, page 639.

Apparently the Act represents well-considered legislation for it was enacted by two Legislatures; and twice it was approved by Governor Bedle, a lawyer of high ability and one who had been a Justice of the Supreme Court and who was fresh from the Bench.

The Act is found in Comp. Stat. 3230, and is as follows:

"Sa. MARRIED WOMAN LIVING SEPARATE FROM HUSBAND MAY CONVEY, MORTGAGE, LEASE OR DEVISE REAL PROPERTY.—Sec. 1. That any married woman who is living in a state of separation from her husband, under and by virtue of the final judgment or decree of any court, when such judgment or decree is founded upon her application for such separation, may, at any time during the continuance of such separation, convey, mortgage and lease or devise any interest, estate or right that she may have in any real property, except such as came to her by gift, through or from her said husband, in the same manner and with the like effect as if she were sole and unmarried. (Rev. 1877, p. 639.)

“8b. MARRIED MAN LIVING SEPARATE FROM WIFE MAY CONVEY, MORTGAGE, LEASE OR DEVISE REAL PROPERTY.—Sec. 2. That any married man who is living in a state of separation from his wife under and by virtue of the final judgment or decree of any court, when such judgment or decree is founded upon his application for such separation, may, at any time during the continuance of such separation, convey, mortgage, and lease or devise any interest, estate or right that he may have in any real property, except such as same to him by gift through or from his said wife, in the same manner, and with like effect as if he were sole and unmarried.” (Rev. 1877, p. 639.)

We understand that counsel for the defendant concedes that the Legislature had power to enact the legislation under examination. This power is clear.

Vreeland v. Ryno, 11 C. E. Gr., 160;
Beal v. Storm, 11 C. E. Gr., 372;
Webb v. Jones, 9 Stew. Eq. 163;
Stoutenberg v. Hopkins, 43 Eq. 579.

The rules of Descent may be modified.

The Act of 1875 was passed before the marriage of the parties.

It is competent for a state, in its fundamental law, or by statute, to provide that all property thereafter acquired by, or coming to a married woman, is her separate property not subject to the control, nor liable for the debts, of her husband.

Allen v. Hank, 136 U. S. 300.

There are cases dealing with legislation passed after the estates came into existence but we have not that question here.

In 19 L. R. A., 256, *McNeer v. McNeer*, there is a “Note on the Power of Legislatures to change or destroy Estates of Dower, Curtesy or Similar Estates.” See this note at p. 259.

As to property acquired after the passage of a statute the decisions all hold that the right of curtesy or other interest of the husband in the wife's property may be defeated, although their marriage took place before the statute was passed; citing cases. A statute passed after a marriage would be competent to alter or modify such estates since all rights obtained by virtue of the status of marriage are taken subject to the sovereign power of the state.

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The Supplement to the Act Concerning Wills, which was approved April 12, 1864 (P. L. 1864, p. 698) empowered a woman, when above the age of twenty-one years, to thereafter dispose of all her real and personal property by will provided that such disposition should not include any interest the husband then had or, at the wife's death would have in her real and personal property.

"That any will or testament by any married female above the age of twenty-one years, hereafter made, of any real or personal property shall be held and taken to be as valid and effectual in law as if she were at the time of the making of such will or testament a feme sole and unmarried; *provided always*, that nothing herein contained shall be so construed as to authorize any married female to dispose of by will or testament any interest to which her husband is now or would be at her death entitled by law, in her real or personal property, but such interest shall remain in and survive to the husband in the same manner as if such will had not been made."

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By the Revision of 1877 (Rev. 1877, p. 638, Sec. 9) the authority of the wife in this respect was further extended and she was empowered by will to dispose of her entire property except such interest as her husband would, at her death, be entitled to in her real estate.

"That any will or testament here-

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after made in due form of law, by any married woman above the age of twenty-one years, of any real or personal property, shall be held to be as valid and effectual in law as if she were, at the time of making the said will, and at the time of her death, an unmarried woman; *provided always*, that nothing herein contained shall be so construed as to authorize any married woman to dispose, by will or testament, of any interest or estate in real property to which her husband would be, at her death, entitled by law; but such interest or estate shall remain and vest in the husband in the same manner as if such will had not been made.”

The Act of 1874 (Rev. 1877, p. 638, Sec. 6) is as follows:

“That any married woman whose husband may be an idiot, lunatic, or of unsound mind, or whose husband may be imprisoned in the state prison of this or any other state, upon conviction of any crime, or who is living in a state of separation from her husband, under and by virtue of the final judgment or decree of any court, may, at any time during the continuance of such idiocy, lunacy, unsoundness of mind, imprisonment or separation, sell, release, transfer and convey any interest, estate or right that she may have in any real property, in the same manner and with the like effect as if she were sole and unmarried; but such sale, conveyance, or release shall not affect any estate or right that her husband may then have in such property.”

This Act is found in Comp. Stat. at p. 3229, Sec 6.

Thus we find the Legislature in 1874 dealing with cases where the wife was “living in a state of separation under and by virtue of the final judgment or decree of any court”; but then saving rights to the husband.

Then came this Act of 1875. At the time this Act was passed a wife “living in a state of separa-

tion under and by virtue of the final judgment or decree of any court" could "sell, release, transfer and convey any interest she had in lands in the same manner and with the like effect as if she were sole and unmarried; but such sale, conveyance or release shall not affect any estate or right that her husband may then have in such property."

In this Act of 1875 the restrictive words of the prior legislation are omitted.

Why were the restrictive words omitted?

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If the Act gave no greater right to the wife, if it did not change the situation defined by the Act of 1874, why was it enacted?

It is clear that the legislature determined that "a final judgment or decree of any court" should have some force given to it; the wife, being entitled to and having secured a final decree, the Legislature determined that she should have full power of disposition over her own property.

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Apparently this Act of 1875 was passed to enlarge the wife's rights. It is to be presumed that this Act creates a situation that did not exist before its passage. It is to be presumed that it is more than a mere affirmation of an existing statutory situation.

The Act cannot mean that the parties need to be divorced absolutely as a condition precedent to the wife's devising, first, because the Act does not say so, and, secondly, because that situation was covered by the law prior to the Act.

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While it might be argued that the words "in the same manner" would relate only to the validity of a Will and would give to the married woman only the right to make a will which would be as valid as if she were sole and unmarried (and which would not cut off curtesy) we have the further words "with the like effect as if she were sole and unmarried." These words undoubtedly mean

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that a will thus made has the same operation and effect with respect to a married woman's property as though she were sole and unmarried. The words "with the like effect" are construed in *Taylor v. Midland R. R. Co.*, 197 Fed. 323 where it is held that the words are equivalent to "with the same result" and "with the same consequences."

10 There is another Act showing the trend towards giving to married women as full protection as the circumstances demand and freeing the real estate of married women from the control of husbands; and this Act and a decision under it explain the Act of 1875 and bear on the construction of that Act.

20 This Act was passed in 1878 (Laws 1878, p. 334) and the Act was amended in 1889, (Laws 1889, p. 43) to provide for service by publication of papers on absent husbands. This Act of 1878 does not call for a judicial separation.

The Act is as follows: (Comp. Stat., 3230, Sec. 8d.)

30 "8d. MARRIED WOMAN LIVING SEPARATE FROM HUSBAND WHO NEGLECTS TO SUPPORT HER MAY CONVEY, MORTGAGE OR LEASE REAL PROPERTY UNDER ORDER OF COURT OF CHANCERY.—Sec. 1. That any married woman who owns real property in the State of New Jersey and is living in a state of separation from her husband, and whose husband neglects and refuses to maintain and support her, may, at any time during the continuance of such separation, neglect and refusal to support and maintain her, apply by petition to the court of chancery of this state, asking said court to make an order or decree that, during such separation, neglect and refusal to support her, she may sell, convey, mortgage or lease any interest, estate or right that she may have in any such real property, in the same manner and with like effect as if she were sole
40 and unmarried; and upon such notice to the

husband, or by publication, according to the law and practice of said court in case of absent defendants, as the court may direct, and upon satisfactory proof to said court that she is living separate and apart from her said husband, and that he neglects and refuses to support and maintain her, it shall be lawful for said court to decree or order that, during such separation, neglect and refusal to support her, she may sell, convey, mortgage and lease any interest, estate or right that she may have in such real property, except such as came to her by gift through or from her said husband, in the same manner and with the like effect as if she were sole and unmarried; and that any sale, conveyance, mortgage or lease by her of any interest, estate or right which she may have in such real property, made in pursuance of such order or decree, shall pass any and all such interest, estate or right that she may have in such real property, except such as came to her by gift through or from her said husband, in the same manner and with the like effect as if she were sole and unmarried.”

It is to be noted that this Act of 1878 contains the same language as the Act of 1875, namely, “in the same manner and with the like effect as if she were sole and unmarried” and that this phrase is used several times in the Act of 1878. It is to be noted further that both the Act of 1875 and the Act of 1878 deal with the wife’s own property and that both exclude from their operation land that came to her by gift through or from her said husband, and that the language in this respect is the same in both Acts.

These Acts are all part of one general scheme protecting married women and represent an endeavor to do justice to married women and are part of “the steady advance which legislation has made in this and other states to free the married woman from hardship under the rules of the common law which subjected her real estate so largely to her husband’s control.”

There is a reported decision by Vice-Chancellor Stevenson under this Act of 1878, *In re Stehali*, 78 Eq., 74, wherein he says:

“In such case the theory of the statute, I think, is that the wife shall be, with respect to her own real estate which did not come to her from her husband, in the same position as a *feme sole*. * * *

10 “The right which this wife asks to have recognized in this case is not the right to have her husband support her, but the right to use her own property that did not come from him for her own support. * * *

“It will be observed that the decree described by the statute is one which renders the married woman capable of conveying real estate of a certain class as if she were a *feme sole*.

20 “The decree, therefore, not only gives the wife a general capacity to convey her real estate but also adjudicates against the husband that the land described in the petition did not come to the wife by gift from him, and that the wife, in the exercise of the new capacity conferred upon her, may convey the same free from all claims on the part of the husband.”

30 While it is true that in this *Stehali* case it appears there was no issue of the marriage, that fact in no way entered into the decision of the Vice-Chancellor, nor did that fact bring the Act into play. The Act makes no reference to this feature, nor is jurisdiction under the Act to be taken by the Court of Chancery only in cases where there has been no issue of the marriage.

In dealing with this situation, the Vice-Chancellor's words are significant:

40 “If it may be urged with any force that the husband ought not to be deprived of his possible curtesy or of his control over the conveyance of his wife's real estate during the marriage, a sufficient reply, it seems to me, is

found in the steady advance which legislation has made in this and other states to free the married woman from hardship under the rules of the common law which subjected her real estate so largely to her husband's control."

It seems to us clear that we are no longer entitled to rely upon ancient cases holding that presumptions are in "favor" of curtesy, in view of this "steady advance" in legislation and the numerous statutes that have been passed clearly manifesting that no such presumption should be indulged. The recent statute abolishing curtesy may be cited in this connection. It certainly may be said that many, if not most, people are in favor of legislation putting matters with respect to a husband's control of, or ownership in, his wife's property on a basis of equality and common sense. 10

Thus we find that we have a construction of the words in the Act of 1875 "in the same manner and with the like effect as if she were sole and unmarried"; and that the construction is that the wife is empowered to dispose of her own property free of curtesy if she "is living in a state of separation from her husband under and by virtue of the final judgment or decree of any court when such judgment or decree is founded upon her application for such separation at any time during the continuance of such separation." 20

Vice-Chancellor Van Fleet, in the case of *Merritt v. Merritt*, 12 N. J. Law Journal, 341. which case was brought under the Act of 1878, stated that the only inquiry in a case brought under that Act is whether the parties are living in a state of separation and whether the husband neglects and refuses to support and maintain her and he stated that if those conditions existed the Court would give her the power mentioned in the Act during the continuance of that condition. 30

The Act of 1875 is made up of two sections, one 40

for the benefit of the husband and one for the benefit of the wife.

It cannot be said that the words in the second section (the one for the benefit of the husband) mean only that he is thereby given the right to make a will, for he had the right to make a will before that Act was passed.

Porch v. Fries, 18 Eq. 204 decides that the estate by the curtesy initiate was destroyed by the Married Woman's Act. Therefore, a husband held no estate during his wife's lifetime before the Act of 1875. The Act must mean something more than taking away only curtesy by the initiate; for that kind of curtesy did not then exist.

We think the case of *Vreeland v. Ryno*, decided May Term 1875, 26 Eq. 160 bears on the genesis of the Act of 1875. This case was reversed on Appeal, 27 Eq. 522 but only to decide that the executor of the wife, and not her husband, as her administrator, was the proper representative to receive the fund in question in that case. The husband deserted the wife and was guilty of grave fault. This woman died in 1869 and around the time of the bringing of the action the Act of 1875 was enacted. This was a case showing hardship since the man lived separate from the wife for years and was guilty of adultery and desertion of the wife and he got into possession of the legacy that the wife's uncle provided for the wife and intended the wife to have. Cases like this and the process of the evolution of legislation in emancipation of married women led up to the Act of 1875. The Act did not entirely meet the situation of a wife circumstanced as the wife in the *Vreeland* Case but there must have been other cases to which the Act gave relief—cases where it was found that the situations were outrageous. There probably were cases where there was a conscientious scruple in the way of asking for an absolute divorce; and

the Legislature gave the wife relief if she secured a "final decree" though the same were not a decree of absolute divorce.

There probably were cases where women were entitled to separation and where husbands were at fault and in those cases it was simple justice to give wives full dominion over the disposition of their own property, but the Legislature was not then satisfied to give relief in such a situation unless the husband's fault was manifested by a final decree of a Court. However, the Act was a step forward. 10

We understand that counsel for defendant does not contend that to bring the Act of 1875 into play the "judgment or decree" needs to be a judgment or decree of a New Jersey Court. Nevertheless, to get matters clearly before the Court I add a few words as to this.

The statute speaks of the "final judgment or decree of any Court." This language is very comprehensive. If only the Court of Chancery of New Jersey were intended the Act would have so stated. At the time the Act was passed that Court was the only Court in New Jersey that could decree a separation and, therefore, the use of the word "any" negatives the idea that the Legislature intended to cover only a case where the Decree was granted by the Court of Chancery. Moreover, we have the words "judgment or decree"—the idea being that some Courts would call their determination a "judgment" and that others would call the same thing a "decree". The Act comprehends the judgments or decrees of any Court of any State—of any Court competent to give a judgment or decree of separation. 20
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The decree of the New York Supreme Court in this case conclusively determined the status of the parties to the action and authorized the wife to live in a state of separation. 40

Bullock v. Bullock, 7 Dick. Chy. 561.

The decree of divorce rendered in accordance with the laws of the Forum by the Court having jurisdiction of the subject matter and of the parties is valid everywhere.

14 Cyc 814.

10 To the suggestion that the Court of Chancery has no jurisdiction under the Act of 1878 if a child has been born, we answer, first, that the Act contains no reference to such a situation; that it does not contain any reference to the absence or presence of children; and, secondly, that Vice-Chancellor Stevenson's decision in *re Stehali* does not rest at all on the fact that there happened to be no issue in that case; and, thirdly, we refer to a great number of the decrees in ex parte cases on file in the Chancery Clerk's office at Trenton in proceedings under the Act of 1878.

20 An examination of the records in the Chancery Clerk's office shows that many ex parte proceedings under the Act of 1878 have been brought in which decrees were advised by Advisory Masters Dickinson and Buchanan, and the decrees wherein were signed by the Chancellors then in office. In these cases the records do not show that any inquiry was made before the masters, nor is there any reference in the decrees showing that decrees were made only in cases where there were no children. The decrees recite and are based only upon the prerequisite facts stated in the act. Under these decrees land has been conveyed all over the state and, apparently, free from curtesy. The decrees and the action under them mean nothing else.

30 The construction of the Act of 1878 adopted by the Court of Chancery controls the construction of the Act of 1875.

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"A final decree" demanded as a prerequisite in the Act of 1875 is equivalent to the decree of the Court of Chancery provided by the Act of 1878. The decree under the Act of 1878 is merely a decree declaratory of the existence of the facts stated as prerequisites in the Act of 1878. "A final decree" which brings into play the Act of 1875 is equivalent to a judicial proceeding in the Court of Chancery under the Act of 1878 declaring that facts exist which bring the Act of 1878 into play. 10

There is another statute which helps us to decide that the Act of 1875 means that a woman circumstanced as provided in that Act may devise her land free of any curtesy.

We refer to the Act of 1896 found in Comp. Stat. §8h, p. 3231:

"MARRIED WOMAN LIVING SEPARATE FROM HUSBAND MAY CONVEY, MORTGAGE, LEASE OR DEVISE REAL PROPERTY UNDER ORDER OF COURT OF CHANCERY. 20

"Sec. 1. Any married man or woman owning real estate in this state, and who have lived in a state of separation from each other for more than seven years immediately preceding the application herein provided for, may apply by petition to the chancellor for an order authorizing such married man or woman to convey or mortgage said real estate, and the chancellor may, upon due proof taken, order that such married man or woman be authorized to convey, mortgage, lease or devise any interest, estate or right that he or she may have in any real property with like effect as if he or she were sole and unmarried; provided, that such authority to convey shall not permit the conveyance or mortgaging any real estate which came to him or her by gift through or from the other" (P. L. 1896, p. 126). 30

It is to be noted that this Act of 1896 permits a wife to devise and the words of the Act are the 40

same as the words of the Act of 1875, "with like effect as if she were sole and unmarried"; and that "any real estate which came" to the spouse "by gift through or from the other" is saved from the operation of the Act.

10 An examination of the records in the Chancery Clerk's office shows that many ex parte proceedings have been brought under this Act of 1896 and that decrees have been made in those cases permitting husbands and wives to convey, mortgage, lease or devise free of dower, or free of curtesy, as the case may be.

20 When Chancellor Pitney took office he changed the rules and directed that in proceedings under this act the husband should have notice. Formerly, Chancellor Magie and the preceding chancellors had ruled that no notice was necessary. In this proceeding different decrees have been made and, as we are informed, land has been sold free of curtesy.

The Act of 1915, (sections 6 and 7, page 65 Laws 1915) provides as follows:

30 "6. In all cases where any person shall die seized of any lands, tenements or hereditaments, in his or her own right in fee simple, without devising the same in due form of law, leaving him or her a widow or husband surviving, such widow or husband, as the case may be, shall take and have a life estate in one-third of such lands, tenements and hereditaments; *provided*, this section shall not affect the right of such husband or widow to take such lands, tenements and hereditaments in fee simple as provided for in section six of the act to which this is supplemental, the same being section three of this act.

40 "7. The estates and interests of dower, and right of dower and curtesy be and the same are abolished hereby; *provided, however*, that nothing in this act shall affect any of such estates or interests which may have become vested heretofore."

In case of intestacy the husband takes a life estate in one-third of the lands; and the estate and right of curtesy are abolished.

In case of testacy there is no estate or right of curtesy in the husband.

While this Act was approved March 3, 1915 and Mrs. Watt died December 18, 1914, prior thereto, we are entitled to say that any general doctrine that curtesy is "favored" as stated in one or two of the very old cases, cannot *now* be invoked as a principle of construction bearing upon the construction to be given in this case to the Act of 1875, to qualify the express words of that Act, nor to affect the status of the defendant in this case now before this Court in the year 1917; rather may we say that curtesy is not now "favored" in New Jersey. 10

Jurists agree that curtesy is not to be "favored." Chancellor Kent says that the extent of the law of curtesy may be justly complained of. The obvious reason is that it gives to the husband what would otherwise belong to the heir of the wife. It has no moral foundation to rest upon, and hence the spirit and tendency of the times is towards its abolition rather than its extension. The legislature of this state abolished it twelve years ago as to subsequent marriages and several other states have done the same thing. 20

Nobbs and Stevenson, Conn. Probate Law, 1905. 30

At the meeting of the New Jersey Bar Association held June 16, 1916, the Association referred to the Committee on Legislation the question of taking action regarding the contemplated amendment to the Married Woman's Act, with instructions to report at the mid-winter meeting. The Committee reports that at the last session of the legislature a resolution was adopted by 40

the Senate authorizing the appointment by the President of the Senate of three senators to prepare and submit to the present session of the legislature such bill or bills as in their judgment might be necessary to revise and amend the laws of this state relating to real and personal property of married persons. The Committee reports that the Committee of the Senate has gone so exhaustively into the matter that it might not be

10 able to make a report at this session of the legislature and that such report may be delayed until the next session of the legislature.

It appears that the Senate Committee is examining the laws of all the states of the Union in regard to dower, curtesy, married women, husband and wife, descent and distribution, and also method of conveyance by married persons.

While it is not now known what report the

20 Senate Committee will make, we think it may be said that its report will not advocate a continuance of any situations of hardship with respect to married women nor a reversion to the older situations; and that the Committee will advocate what we may call "progress" and that the report of the Committee will favor "the steady advance which legislation has made in this and other states to free the married woman from hardship under the rules of the common law" (quoting from the language of Vice-Chancellor Stevenson

30 in *re Stehali*).

In view of these things, we repeat, in construing the Act of 1875, there is no reason for saying that curtesy is now "favored"; or that the principles of the construction should be, in any way, affected by any language, found stated in the older cases, that curtesy is "favored."

We invoke the principle of construction that the popular and generally accepted meaning of

40 language will be applied to the construction of

an act of the legislature in the absence of a legislative intent to the contrary.

There is an Act in New York passed in 1848 and 1849 (see a succeeding page of this brief) which contains the same words as the New Jersey Act of 1875 and which Act was adjudicated by the Courts of New York to bar curtesy if a wife devised, and these adjudications by the New York Courts were prior to the passage of the Act of 1875.

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The decisions of the New York Court are distinct and clear cut and the construction of the New York Act of 1849 is distinctly that the "Act of 1849 permits the wife to dispose of her real property by deed or by will to the exclusion of the husband. This Act gives the wife the ability to defeat curtesy. This Act gave power to the wife to alienate and thereby defeat estate by the curtesy. At the wife's death the husband has no rights whatever in her property unless, at her death, she has failed to dispose of the same. By the words used, the intention of the legislature is made plain. The character of the wife's estate is changed and it is given the status which belongs to the property of a single woman and this character is preserved after her death if she devises; and it follows that the husband can take no curtesy under the common law by virtue of any marital rights."

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See in *re Starbuck*, 122 N. Y. Supp. 586-587; 137 App. Div., 866; affirmed 201 N. Y., 531.

What "the intention of the legislature" of New York was, must be ascertained from the New York decisions. The ideas expressed for defendant cannot give to the New York legislature an intention other than that disclosed by the decisions of the New York courts.

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Thus we find that the New York Act of 1849 (without reference to any later legislation) "gives the wife the ability to defeat curtesy" and that if she devises, "it follows that the husband can take no curtesy under the common law by virtue of any marital rights."

We see no reason why the construction of the Act of 1849 by the New York courts is not a determining factor in construing the New Jersey
 10 Act of 1875.

Counsel for the defendant states that, "The meaning of these acts" (the Acts of 1848 and 1849) led to much doubt"; and he refers to the decision in the case of *Hatfield v. Sneden*, 54 N. Y., 280.

An examination of this decision, which is referred to on a succeeding page of this brief, shows that the "doubt" was not with respect to
 20 the wife being empowered to devise real estate free from curtesy, but that it was on the question whether, if the wife died intestate without having exercised the power conferred upon her to dispose of her real estate by deed or will, the husband would have curtesy—whether curtesy was destroyed under *all* circumstances.

We do not find that the decided cases in New York show a doubt with respect to the wife being empowered to devise free of curtesy.

30 Indeed, it may be said that the decisions of the New York Courts on the meaning of the Act of 1849 (which decisions are referred to on a succeeding page of this brief) resulting, as they did, in a definite construction of that act by those courts, undoubtedly came to the attention of the legislators of New Jersey. Those legislators had before them at the time of the adoption of the Act of 1875 (and again in 1876 when the act was amended to insert the omitted word "except") words whose meaning had been judicially
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approved by the New York Supreme Court and by the New York Court of Appeals, courts of the most important state of the Union,—a neighboring state, moreover—and one whose courts ranked high and the decisions of whose courts were influential in New Jersey. And, moreover, those legislators had before them the fact that the Supreme Court of New Jersey, in *Naylor v. Field*, 29 N. J. Law, p. 292, (see a succeeding page of this brief), had referred to the words of the New York Act of 1849 as sufficient to empower a married woman to bar curtesy by devising her lands. This construction was in front of the draftsman in the Act of 1875, and the legislators who enacted it. 10

To the statement of counsel for the defendant that

“The remarks of Vice-Chancellor Stevenson” (in *re Stehali*, 78 Eq. at the foot of page 76) “respecting the general tendency of legislation favoring married women is not applicable here because of the provision in the act inimical to the right of dower,”— 20

We answer, that “the tendency in legislation” referred to is a tendency to give married women rights equal with the rights of married men, and such a tendency is manifested by the Act of 1875, because, under like circumstances, *both* dower and curtesy are destroyed. One section is “inimical” to curtesy, and the other section is “inimical” to dower; and the result is a “tendency” to equality as between married men and married women; and this is the “tendency in legislation” referred to by Vice-Chancellor Stevenson. 30

To the statement of counsel for the defendant in comment on the form or decree advised by Vice-Chancellor Stevenson, in *re Stehali*, that

“It is especially to be remarked that the form of chancery decree used in the proceeding was entirely unauthorized by the statute.” 40

we answer that the decision of the Vice-Chancellor advising the form of decree is a judicial decision on the meaning of the statute under which the proceeding was brought, and to say that "the form of the decree is entirely unauthorized by the statute," is only to say that the decision is wrong; and we add, if the decision is not wrong, but right, it is distinct and respectable authority for our contention in view of the learning and standing of the Vice-Chancellor who pronounced it; and the form of the decree advised leaves no doubt that the Vice-Chancellor decided that the act under which the proceeding was brought empowered a decree that the wife's land should be sold free of curtesy.

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 Answering the statement of counsel for the defendant, that the provisos in sections 9 and 14 (Married Women's Act) "necessarily apply to section 8-a" (the Act of 1875) we answer they do not apply, because, to use counsel's own language "they are inconsistent with it"; and, secondly, they do not apply, because the language in sections 9 and 14 preceding the provisos, and the subject matter of those sections, is different from the language and the subject matter of section 8-a (the Act of 1875).

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 The language of section 9 provides that a married woman may make a will, that is, a will that is as valid as if she were an unmarried woman. This section merely empowered a married woman to make a will; and, so far as her will of personal property was concerned, the husband would be barred.

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 The language of section 14 comprehends only "conveyances and mortgages." Why should the restrictive words in section 14 relating to "conveyances and mortgages" apply to section 8-a, whose provisions include "conveyances, mortgages, leases and devises" and whose provisions

moreover, except the property that came to a married woman by gift through or from her husband?

To the argument of counsel for the defendant that because the Act of 1875 contains a provision that the husband and the wife can legally do certain things which they theretofore had the right to do by virtue of the prior decisions of the courts, therefore the act has "a technical blemish," we answer, that the act was intended to be a statutory declaration of the rights of a husband and of a wife; it was intended to be as inclusive as possible; it was the part of wisdom, and the expected thing, to provide as the act does provide. Sometimes the Supreme Court decides that certain things may be legally done, and the Court of Errors and Appeals decides that the Supreme Court is wrong. Unless one makes a careful examination of the decisions of the Court of Errors and Appeals he is not prudent in drafting a statute if he omits to include an enumeration of rights even though some of those rights may have been possessed theretofore by virtue of some decision of some court. Moreover, it is to be considered that married women legislation at the time of the passage of the Act of 1875 was moving towards a system; and, moreover, the draftsman had in mind especially giving powers to a married woman "living in a state of separation by virtue of the final decree of a court founded on her application," and he should include powers possessed by married women generally, to exclude the idea that a married woman "living in a state of separation by virtue of the final decree of a court founded upon her application" was not to have those powers.

Let us adopt the method of counsel for the defendant in treating the Act of 1875 in this respect. If the Act of 1875 means no more than the pre-

ceding legislation authorizing a married woman to make a will (under which curtesy would not be barred) why was the act passed? A married woman had the power to make a will at the time the Act of 1875 was passed. Why pass a statute that a married woman could do that which the statute (not merely a decision of a court, but a statute) already said she could do?

10 There seems to be no escape from our contention that the Act of 1875 is an act that enlarges the power of a married woman if she is "living in a state of separation under the final decree of a court founded upon her application."

The Act of 1875 is found in the Revision of 1874 section 18, pages 639-640.

20 Counsel for the defendant refers to section 9 (page 638 Revision) and to section 14 (page 639 Revision) and argues that the Act of 1875 "is just as effectually incorporated in the code of which it is made a part and just as effectually limited by the foregoing general provisions of that code as any of the original amendments unless a clear intent to the contrary appears."

To this we add that the intent *is* clearly expressed, for the restrictive words found in the prior legislation are omitted.

30 But, take the Revision of 1874 title "Married Women" as a whole, as a code, as a body of revised law; we find that section 14 to which counsel for defendant refers as a "General Provision," and which he thinks should limit section 18 (the Act of 1875), provides that section 14 shall apply "except in those instances for which express provision is herein made." Section 18 is an instance "for which express provision is herein made."

40 Answering arguments of counsel for the defendant, that "it is to be noted that the act should be

confined to its expressed meaning for important practical considerations; it would lead to surprise and confusion to enlarge its meaning so as to affect dower and curtesy; the proof needed to establish a title resting upon the exercise of the power conferred by this act would be very complicated if dower and curtesy were affected * * * such proof could never be adequately recorded or preserved"—We answer, that few titles rest entirely upon records in the offices of county clerks or registers. Proof that people are alive or dead is frequently called for. Proof that parties are divorced *a vinculo* must be found outside of the county records. Proof that a man did or did not leave a widow; proof that there are or are not after-born children; all these things may be called complicated at times; and much of this kind of proof cannot be recorded at all. Affidavits must be relied upon frequently in passing titles. In the case in hand the proof is clear and no complication with respect to this feature is perceived.

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Indeed, many titles now rest upon decrees of the court of Chancery by virtue of proceedings under the Act of 1878 (as amended in 1889) referred to on this brief, and under the Act of 1896, referred to on this brief. Such titles would be disturbed by a decision that the words "in the same manner and with the like effect as if she were unmarried" do *not* mean that a wife circumstanced as in those acts, who had obtained a decree under either of those acts, and who had conveyed free of curtesy could convey free of curtesy.

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The fact that there is no decision as to the meaning of the Act of 1875 shows, at least, that the effect of the act has never been questioned in the courts.

In *Naylor v. Field* (1861) 29 N. J. 292, our Supreme Court states:

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"It is true that in the State of New York it has been decided (28 Barb.) that the husband has no curtesy, but in that state the statute, in express terms, gives the wife the *jus disponendi*. * * * Our act is a copy of that of the State of New York, so far as it goes, but refuses to follow it, so far as regards the power to convey or devise."

Thus we see that our Supreme Court in this case of *Naylor v. Field*, has referred to the Act
 10 of New York of 1849, for the case referred to in the opinion in that case, in 28 Barb., namely, *Billings v. Baker*, page 343, is a decision on the New York Act of 1849.

Why, then, may we not say that *the Supreme Court of New Jersey has passed upon the meaning of the New York Act of 1849*; and in favor of our contention?

Our Supreme Court substantially says that the
 20 New York Act of 1849 means what it says: that the words of that act are "express."

Our Supreme Court substantially says that if our statute of 1852 (which was under examination in Naylor v. Field) contained the "express" words contained in the New York statute, curtesy would be barred.

These "express" words are the words found in the Act of 1875, "in the same manner and with the like effect as if she were unmarried."

30 To what we have said on the preceding pages of this brief to the effect that curtesy should now be "favored", we add the following; and we also contend that the Act of 1875 is a remedial statute and that it should be construed on the principle set forth below.

Why should curtesy be "favored"? Why should it be said to be "favored"?

No statute of New Jersey defines or protects
 40 curtesy. Dower and inchoate right of dower are

defined and protected by statute (Comp. Stat. 2043; page 3909, §39). A statute (Comp. Stat. 5515, §318) provides that in condemnation proceedings curtesy shall be "extinguished" on "payment to the owner of the fee simple."

For the convenience of the Court we quote at some length from *Billings v. Baker*, 28 Barb., 343 (N. Y. Supreme Court, 1859), and the italics are those used in the opinion of the Court.

In this case of *Billings v. Baker*, the decision was to the effect that the New York Act of 1849 abolished *the whole* estate of curtesy; that it did more than abolish the estate of curtesy if the wife conveyed or devised. 10

This case was decided at the Special Term, and also afterwards by the General Term; and the opinions of both are found in the same volume of Barbour.

This case also decided that the New York statutes of 1848 and 1849 20

"are remedial in their nature and should be construed with a view to the advancement of the remedy; that the courts should look at the precise words used in the statute and then construe them in their ordinary sense, unless such construction would lead to an absurdity or manifest injustice; that the *intent* of a remedial statute, like the intent of an agreement, is to be gathered from the plain language employed in it."

"If the reasons for the introduction of this peculiar feature of the common law called 'tenancy by the curtesy' in estates in land, had ceased to exist, if in practice the law failed to be useful; or if it had become an evil, or was inapplicable to our American system of laws, it presented a reason, perhaps a necessity, for a remedial act to abrogate it, and such remedial statute is then to be construed with reference to the condition of things thus presented. One of the 30

reasons for the introduction of this estate into the English system was that the husband being the natural guardian of his child, was entitled to the profits of the land in order to maintain the child; but a more prominent and important idea of the system was, the reason that then existed in England in regard to all estates in land under the feudal law; to wit, that the husband having become dignified by having an interest in lands, was bound to do homage to his superior lord, and the interest being once vested in him, it was the policy of the feudal system, not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was his due from the land.

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"To this estate the husband never had any *natural* right. (Bac. Abr. Tenant by the Curtesy.) Sir J. Jekyl says, 'This estate has no *moral* foundation to support it.' (Green. Cruise, tit 5, §3). *Crabb*, an English writer, says, 'The term *curtesy* is derived from *courtesie*, Latin *curialitas*; to signify suavity or urbanity, to denote that the custom sprung from *favor to the husband*, rather than from any *right*.' By thus becoming the vassal or tenant of his superior lord, he was permitted 'by the curtesy of England' to attend his lord's court, or curtis, (as it was called) and to do him homage, by reason of having become the husband of a wife who had died possessed of an estate in lands, after issue born. Such

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were the reasons, and such the basis for the introduction of such a title to lands unto the law of England. This common law was adopted into our system in this state, by the 35th section of the constitution of 1777. This examination of its history, of its basis, and the reason of its adoption, seemed to me to be necessary, in order to ascertain, first, whether such reasons continued to exist; and next, the applicability or basis of such a law to our own local system; and lastly, to examine whether these causes may not have had an influence in determining the

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intent of the legislature, either in continuing or in abrogating this feature of law in regard to real estate, by the acts of 1848 and 1849, above referred to.

“There is no doubt that the legislature had the *power*, either to modify or abrogate this estate, at their pleasure, if it was regarded as public policy so to do. It was so held in *Sleight v. Read*, (18 Barb. 165) and *Moore v. Mayor of New York*, (4 Seld. 114) ‘It is not,’ says Denio, J., ‘a part of the marriage contract which cannot be affected or impaired by statute, but it stands on the foundation of positive law, as one of the institutions of the country.’ From this we see 1st. That the legislature had power to abrogate this estate as to all prospective cases; 2d. That every reason for the introduction of this estate into our system of law, except only that of the maintenance and support of the children, is entirely inapplicable to the public policy of this country, and to the institutions of this state, and 3d. That the provisions contained in those acts were intended to introduce a most important, if not an entire change in the existing law of this state in that particular. The question then is, have future estates of tenancy by the curtesy been abrogated by those acts?

“The answer to this question depends mainly upon the construction to be given to (what seems to be) the very plain language of the act. In determining such construction, we must be guided by those sound rules of interpretation, which long experience and the settled wisdom of the courts have uniformly approved. This, as has been said, is to be regarded as a *remedial* statute; and its language is to be so construed as to give effect to the end the legislature had in view, and if possible to prevent a failure of the remedy intended. (1 Kent’s Com. 465.) What then was the mischief felt, that was the occasion of, or created the necessity for this statute? What was the object intended to be effected by it? Experience had shown that the only

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sensible reason for the introduction of this tenure into real estates, to wit, the maintenance of the children, had sadly failed of its object. The estate was not only alienable, but was also liable to the payment of the husband's debts. And it was found that in too large a proportion of cases, worthless, spendthrift and intemperate husbands, instead of using the estates intended for the support, maintenance and education of their children, exhausted them upon themselves, during their own lives, too frequently leaving the children objects of public care. What was the remedy? Let then this statute first speak for itself. The first section of the Act of 1848 provides for the estates of females who may thereafter marry. It provides that her estate real and personal, and the rents, issues and profits thereof, shall not be subject to the disposal of her (future) husband, nor be liable for his debts, and shall *continue* her sole and separate property, as if she were a single female.

"The second section was intended to carry out the same provision as the first, in relation to estates of married women. It has been already judicially passed upon in various reported decisions, but its application to the property of the wife who was married at the time of the passage of the above act is not a question necessary to be examined here, except so far as it goes to show the *intent* of the legislature.

"The third section, as amended in 1849, provides that any married female may take by inheritance, or by gift, grant, devise or bequest, (from any person other than her husband) and hold to her sole and separate use, and convey and devise, real and personal property, *any interest or estate therein*, and the rents, issues and profits thereof, in the same manner and *with like effect*, as if she was unmarried, and the same shall not be subject to the disposal of her husband, nor liable for his debts. * * *

"The effect of this statute then, is that the useless and ridiculous fiction of 'tenancy

by the curtesy of England' is abrogated, and no longer remains to disfigure our system of common law, or the republican institutions of this state. * * *

"I think it is more important, at this day, that the courts should adhere strictly to the sensibly expressed intention of the legislature, than to permit old maxims applicable only to ancient observances of an obsolete system of feudal tenures, to control the construction of our own abrogating statutes. Our rights, under *remedial* statutes, ought to rest upon a surer basis than this. Even in England, it was held that in case of a *remedial* act, every thing is to be done in the advancement of the remedy that can be done consistently with any construction that can be put upon it. (*Johnes v. Johnes*, 3 Dow. 15.) Nor is this view I have taken of the construction of this statute, without high authority. * * *

"It is of itself a consistent and reasonable statute, suited to the genius and spirit of the age, and to the wants and institutions of a country whose laws lay claim to the basis of equality of rights. It is entitled to fair judicial construction by the courts, having reference to the existing mischief, and to the intended remedy, divested of the clogs to progress, by a veneration for any of the ancient relics of feudalism. It would fail of being the remedial statute intended, if it did not remove the unjust disabilities of the wife arising from coverture, and substitute in some degree, a sensible, living practical equality, for the exploded fiction that the legal existence of women, as well as her estate, is merged in a husband by marriage; nor only that, but that her own subsistence for her life, as well as the support and maintenance of her children after her death, of an estate derived perhaps solely from her are to be put at more than the peril of loss, that a husband, whether worthy or worthless, may be dignified by its control. We have already seen that the reasons for its introduction into a system of

law, no longer exist. There is found in practical experiment no such superiority in the husband, in regard to a provident management of estates, that demands its longer continuance.

10 "Divesting then this question, as I do, of all reference to common law tenures, which were intended to be abrogated, and construing this remedial statute by the light of its own plain intent, as manifested in its clear and express language, the parties in interest are restored by it, in degree, to their natural rights. What are they? The right of independent existence on the part of the wife—the right to enjoy property, and the right to a certain support, and maintenance of her children. These are as strong by nature, and have as high a claim to consideration and protection upon public justice, as the claims of the husband's superior dignity. The very spirit of our government is, and it should be of our laws, that the rights of each citizen to support and protection, whether infant or adult, whether male or female, husband or wife, shall stand upon an equality, and the power of any one so to control the rights or interests of another, as to annihilate or destroy them, is contrary to nature, and should be subject to the control of law * * *

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30 "With all my veneration for the common law, whenever its existence is found to be inconsistent, not only with the just and equal rights of a class of citizens, but in direct conflict with our remedial statutes—when I find its existence has neither a natural nor a moral basis to sustain it—I must find a more solid reason for its retention than the ancient custom of rendering homage to a superior lord, in order to create any reverential awe that shall restrain me from an examination as to its usefulness, or hesitation about construing a statute sensibly, for fear of derogating from the ancient glory of that system.

40 "I have come to the conclusion above expressed, but I admit not without much em-

barrassment, on account of the highly respectable authorities deciding the same question the other way. I refer to *Hurd v. Cass* (9 Barb. 366) per Mason, J., at special term; and *Clark v. Clark* (24 Barb. 581) per Marvin, J., also at special term; the latter, however, basing his opinion mainly on the former. But what is a little singular, the last authority cited by Justice Marvin, is directly against the conclusion he himself arrives at, to wit: *Crabb on Real Property*, §1106. In his conclusion, the learned judge also says: 'If the legislature had intended to deprive the husband of his rights by the curtesy, when the wife had not conveyed or devised the estate, it should so have expressly declared in the act.' With all deference I think if the legislature after passing an act, which in its express terms did take it away, had intended still to retain it in the system, they would have said so, as they did in the 1st R. S. 754, §20, in which such a reservation seemed to be necessary, in order to secure it from abrogation. * * *

"It is exceedingly important that this question should have an early and a correct settlement on account of the frequency of the occasions on which the question must necessarily arise in future practice. It is certainly most natural that different and various construction should be given to the meaning of this statute, for the reason that it makes important changes in the law in regard to the marital relation, so far as the rights of property are concerned. These somewhat extraordinary innovations in established law in that regard, are in conflict with such opinions as time and long experience had adopted as settled, and which had become familiar to the courts and to the bar; but it now being a law, and proceeding as it does from the highest source of power authorized to enact laws, it is the duty of the court to give it due regard, and to construe it according to its true spirit and intent; and it is therefore not at all surprising that at first, like all other measures of

sudden and violent reform, it encounters the prejudices arising from long established and fixed habits of thought; from a committed feeling of regard and veneration for ancient forms, precedents, maxims and adjudications, and be subjected to a jealous criticism of its new and somewhat unfamiliar forms of expression. The highest court of this state, however, has already broken ground in this particular, and has declared in regard to it, as follows: 'The object of the statute is remedial; to remove the disability which the common law attached to coverture, and to enable a married woman to have something which she might call her own, and to do something for her own subsistence, and that of her offspring'; and also, 'that the act should have a liberal construction.' (*Darby v. Callaghan*, 16 N. Y. Rep. 79). In the case of *Wadhams v. The American Home Miss. Soc.* (2 Kern. 415) Denio, J., says: 'The statute of 1848 was the commencement of a new system respecting this branch of domestic relations.' Construing this statute then, in the spirit that it becomes the duty of the court to construe a remedial statute, giving the fullest effect to every provision that can consistently be put upon it in order to advance the remedy; or in other words, considering that 'the court is to look at the precise words used, and to construe them in their ordinary sense, unless this construction would lead to an absurdity or manifest injustice,' let us see what is its real intent, as it regards the question at issue. * * *

"Why shackle and trammel the estate of a married woman with the expensive paraphernalia of trustees, and commissions, and deeds of settlement, and agencies, when the same language enacted, in a plain spoken statute, performs this duty? Why, when the two systems of law and equity are to be administered by the same Court, should there be two systems of law controlling the estates of married women? Why, in this noon of the 19th Century, and under a free govern-

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ment, are we solemnly warned against innovations upon the common law as it existed, and the legal precedents established in the days of the Norman conqueror? Did all knowledge exist in the past? Is the glory of the ancient common law so dazzling, that the learning of the present day, and all the attempted reforms upon the system to meet the wants of the age, are to be regarded as dangerous experiments? With melancholy auguries against progress I have no sympathy. For theories which have no support, but antiquity I have no veneration. For the outcry against innovation upon the mysterious excellence of the English common law, which I cannot behold, I have no reverence. I hold an honest, sensible construction of the statute, according to its true intent, to be practical wisdom; and that the spirit of justice befitting the wants of the age, is the soundest philosophy in a system of law. I regard it as a humiliating admission of intellectual decline, and worse than weak superstition, to assume that all wisdom existed in the former common law of England, or that laws suited to the condition of a free government could only be framed by the ancient inhabitants of Britain, whom Blackstone with fond partiality calls 'our Saxon *princes*;' nor do I believe that it is *only* in the annals of *past* ages that we shall look for the wisdom necessary to guide us in our own. As changes are wrought in the circumstances of a people, or country, it is necessary, not only that their laws themselves, but also the spirit of the laws should be accommodated. I bow with willing submission to the shrine of legal reason. I am not opposed to seeing it traced to its sources, nor to explore its earliest teachings; but *'tempora mutantur et nos mutamur in illis.'* * * *

"From the influences of such considerations, I held before, and seeing no reason to change those views, I hold now, that our natural progress in knowledge and intelligence, our advanced social and political condition, our changed system of government, our better and

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more full appreciation of equal and natural rights of every class and condition of citizens, presented a reason, and I thought and still think, a *necessity*, for the passage of an act for the eradication of this unnatural and worse than useless tenure, called curtesy, as one of the vestiges of a by-gone, military age, which had too long remained an excrescence upon our system of law, based as we claim it to be, upon the theory of an equality of natural rights. In my judgment, the provisions of these statutes, of 1848 and 1849, are aptly fitted, and were intended to effect, a radical change in relation to those tenures; that they introduced changes more suited to the necessities of the times, and to the present condition of the parties; and that such a change was demanded by the highest considerations of public policy; was dictated by the soundest views of justice, and rested on a substantial basis of good sense. * * *

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“In my former opinion, I placed my decision substantially upon the ground that the *intent* of a remedial statute, in relation to the estates of married women, should be construed in the same manner as the *intent* of a devise, marriage settlement, or trust estate, created for the same purpose, if the language was either identical, or the same in substance; and that the manifest *intent* in both, should be the criterion to determine. The cases above cited, it will be seen, fully sustain that position. These cases could be multiplied if necessary. * * *

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“Still another argument against this view of the statute has been most strenuously insisted on, upon the argument; that is, if it had been the intent of the legislature to have changed or abrogated the common law, or to have cut off the husband’s curtesy, they would have so declared in terms, in the statute itself. Such an argument has its force, and is to be duly weighed. It has less force, however, when applied to a *remedial* statute, than it might to some others. But this argument, when applied to this statute, proves

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far too much; for in the very argument submitted, the learned counsel admit that it has abrogated a part of the common law in relation to this same estate, to wit: That the incidents of enjoyment and alienability, during the life of the wife at least, are entirely cut off, and yet did not say so in terms. But the courts have already gone far beyond this concession of the counsel, and we are not at liberty to overrule it. In *Blood v. Humphrey* (17 Barb., 662), the general term of the 6th District have held that those statutes of 1848 and 1849, have not only repealed so much of the revised statutes as require a married woman in making an acknowledgment of a deed to be examined separately, if the deed relates to estates acquired since that law, but they also held that they have abrogated much of the prior common law in regard to *their rights*, Mason, J., says: 'The legislature intended to remove the entire disability, which both the common law and the statute had thrown around married women, not only as regards their right to take and hold, free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying both by grant and devise, and to place them, so far as the lands which they hold in their own right are concerned, on the *same basis precisely as unmarried females.*' This, it seems to me, is a full answer to this last position of the plaintiff's counsel, and it also appears to me to contain a pretty satisfactory answer to the whole argument.

"If, then, the position is sound that the *intent* of a remedial statute for a given purpose, and the *intent* of a devise or agreement to effect the same purpose, are alike controlling in giving construction, and if identical or equivalent language is to be held to mean the same thing in each, then these statutes which assimilate these two estates of equity and of law, and establish thereupon one uniform and equal basis, exempt from the technical embarrassments which have so long

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10 been tolerated from veneration of ancient forms and precedents, should receive from the Court such construction as shall give full effect and operation to their provisions, and so that their design and object be not evaded, and when superadded to this, the statutes are found to establish benevolent provisions, such as are consistent with the demands of an enlightened and progressive age, in harmony with the long continued efforts of the courts to mitigate in some degree the inequalities and injustice of the common law in relation to married women and their immediate heirs, and to prevent the squandering of their estates by improvident husbands, it should be the willing duty of the courts to sustain and give efficiency to their just and equitable provisions. They should enter upon the duty of its construction, with the same remedial spirit in which the legislature entered upon their duty of enacting the law, by discarding all the unnatural maxims and precedents and clogs to progress. Thus sustaining its letter and intent, it will become a kind of magna charta, in the restoration of natural rights, too long and too unreasonably withheld.

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“Having come to the conclusions above expressed, after a careful consideration of the arguments presented, and the authorities to which I have had access, I have been unable to change the conclusion at which I before arrived. I cannot hold that a remedial statute, whose letter and title declare its design to be, protection of the estates of married women, shall by construction, not warranted by its language, be made to protect their husbands and to give to the latter an estate which all elementary writers declare that they have neither a natural, nor a moral right to hold.”

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Billings v. Baker, 28 Barb., 343.

The New York Act.

Chapter 375, Laws of 1849, New York: An Act to amend an Act entitled, "An Act for the more effectual protection of the property of married women," passed April 7, 1848.

"Any married female may take by inheritance, or by gift, grant, devise or bequest from any person other than her husband and hold to her sole and separate use and convey and devise real and personal property and any interest or estate therein and the rents, issues and profits thereof in the same manner and with the life effect as though she were unmarried and the same shall not be subject to the disposition of her husband nor be liable for his debts." 10

The Act of 1848 which was the beginning of a new system respecting this branch of domestic relations, does not reach the case; it does not give power to bequeath or devise. The succeeding legislature effected that object. 20

Laws 1849, p. 528;

Wadhams v. Am. Miss'y Society, 12 N. Y., p. 426 (1855).

"By the Act of 1849 (Ch. 375, Sec. 1), any married woman is capable of taking by gift, grant, etc., from any person other than her husband, and can hold to her sole and separate use, and convey and demise real and personal property, and any interest or estate therein, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband nor liable for his debts. The effect of this provision is, to put such property, during the lifetime of the wife, entirely at her disposal; and to impart to the wife the power to make an effectual disposition of it, by any valid testamentary bequest, and thus to place it, if she chooses, wholly beyond the power 30 40

or reach of the husband. If, however, she fails to make any disposition of the property by way of sale, during her lifetime, or by testamentary bequest, to take effect upon her death, then the rules which always prevailed before the statutes of 1848 and 1849 were enacted, take effect, and the husband has all the rights given to him by the common law and by those provisions of the Revised Statutes which have never been repealed by these later acts."

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Ransom v. Nichols, 22 N. Y., at p. 111
(1860).

The object of the Acts of 1848 and 1849 was to divest the title of the husband *jure mariti* during coverture and to enable the wife to take absolute title as though she were unmarried (Laws 1849, p. 528).

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Knapp v. Smith, 27 N. Y., at p. 279;
Draper v. Stouvenel, 35 N. Y., at p. 512
(1866).

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"The only remaining question is as to the effect of the married women's acts of 1848 and 1849 upon the law in respect to curtesy. After sundry conflicting decisions, the law has become substantially settled, that while those acts excluded the husband during life from control of, or interference with, his wife's separate real and personal estate, and gave to her alone the power of disposition by deed or will, yet they left the husband the right of curtesy in her real property and of administration for his own benefit of her personalty, in so much as remained at her death undisposed of and unbequeathed. (*Matter of Winne*, 2 Lansing, 21; *Ransom v. Nichols*, 22 N. Y., 110, and *Barnes v. Underwood*, 47 Id., 351.)

Hatfield v. Sneden, 54 N. Y., 267 (1873).

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It will be observed that these acts confer upon

a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell or give it away.

Cashman v. Henry, 75 N. Y., at p. 113
(1878).

There is other legislation in New York affecting the wills of married women so far as personal property is concerned; and a casual reading of some of the reported cases in New York may be misleading unless this is kept in mind. 10

The courts of New York have decided that the husband has no curtesy if the wife dies testate; and that only by the wife dying intestate does the husband have curtesy.

Zimmerman v. Schoenfeldt, 3 Hun, 698; 20
Matter of Clark, 40 Hun, 247;
Waters v. Cullen, 3 Brad. Surr., 354;
Young v. Langbein, 7 Hun, 156;
Arrowsmith v. Telinger, 8 Hun, 610;
Leach v. Leach, 21 Hun, 382.

The Act of 1849 permits the wife to dispose of her real property by deed or by will to the exclusion of the husband. This Act gives the wife the ability to defeat curtesy. This Act gave power to the wife to alienate and thereby defeat estate by the curtesy. At the wife's death the husband has no rights whatever in her property unless, at her death, she has failed to dispose of the same. By the words used, the intention of the legislature is made plain. The character of the wife's estate is changed and it is given the status which belongs to the property of a single woman and this character is preserved after her death if she devises; and it follows that the husband can take 30 40

no curtesy under the common law by virtue of any marital rights.

In re Starbuck, 122 N. Y. Supp., 586-587; 137 App. Div., 866; affirmed, 201 N. Y., 531.

10 "It is difficult to see how McCarty's signature to the mortgage added anything to its effect, as, since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the curtesy initiate, as to lands acquired since the passage of those acts, consists simply of a *status* which is never a vested right and is not separately alienable during coverture, but may be modified or annulled at any time before it becomes consummate by the death of the wife. While merely initiate, it is not an estate, but a simple possibility or expectancy like that of an heir apparent. Either may be destroyed at will by the owner of the fee."

20 *Albany Co. Savings Bank v. McCarty*, 149 N. Y., 71, at p. 85.

Curtesy still exists in New York provided the wife has not alienated the estate in her lifetime or devised it. The distinction seems to be that curtesy initiate is abolished *sub modo* and that curtesy consummate survives all the reforms.

Fowler's Real Property Law of New York, 3d Ed., p. 153.

30 The husband continues to take as tenant by the curtesy even in lands acquired subsequently to the Act of 1848 and 1849 where the wife dies seized of the estate without having transferred it. The objects of these statutes were simply to protect her during coverture and to empower her to convey by *deed* or *devise*. (The italics are in the book cited.)

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Gerard, Title to Real Estate in New York,
173.

The right to curtesy is upheld as to lands acquired since these acts in all cases subject to its being defeated by a disposition of the lands by deed or will. Unlike dower it can be defeated by the wife's deed or will.

Ibid.

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The words at the end of the Act of 1849 "and the same shall not be subject to the disposition of her husband nor be liable for his debts," does not make the act unlike the New Jersey Act of 1875, nor do these words give any foundation for the construction that has been placed upon the New York Act by the courts of New York as above stated.

The words, "In the same manner and with the like effect as though she were unmarried," found in the New Jersey Act of 1875, are in the New York Act of 1849; and we find that the construction of these words by the courts of New York, before and since the enactment of the New Jersey Act of 1875, to be that the wife may devise free of any claim by the husband.

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The following is taken from the just-issued sample pages of McKinney's Consolidated Laws of New York, Annotated, under the heading of "Certain Rights and Liabilities of Husband and Wife."

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"The Decedent Estate Law, Art. 3, Sec. 80, Subd. 4, provides that 'this article does not affect * * * tenancy by the curtesy.' And it is settled that the Married Women's Property Act, including the pioneer Act of 1848 and its amendments, in so far as they secure to a married woman the right to her real estate for her sole and separate use, do not deprive the husband of his common law right

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as a tenant by the curtesy consummate, if she dies intestate, without having exercised the power conferred upon her to dispose of her real estate by deed or will (*Albany County Sav. Bank v. McCarty* [1896], 149 N. Y., 71; 43 N. E., 427; *Bertles v. Nunan* [1883], 92 N. Y., 152; 44 Am. Rep., 361; *Hatfield v. Sneden* [1873], 54 N. Y., 280; Matter of Starbuck [1910], 137 App. Div., 866; 122 N. Y. S., 584; affirmed, 201 N. Y., 531; *Howells v. McGraw*, [1904], 97 App. Div., 460; 90 N. Y. S., 1; *Leach v. Leach* [1880], 21 Hun, 381; *Burke v. Valentine* [1868], 5 Abb. Pr., N. S., 164; 52 Barb., 412; affirmed, 6 Alb. L. J., 167; *Hurd v. Cass* [1850], 9 Barb., 366; *Clark v. Clark* [1857], 24 Barb., 581; In re Winne [1870], 2 Lans., 21; reversing, 1 Lans., 508; *Joycox v. Collins* [1863], 23 How. Pr., 496; *McIlvaine v. Kadel* [1865], 3 Robt., 429; *Beamish v. Hoyt* [1864], 2 Robt., 307; *Valentine v. Hutchinson* [1904], 43 Misc., 314; 88 N. Y. S., 862; Matter of Baird [1900], 30 Misc., 668; 64 N. Y. S., 331.)

“There is no doubt that the power conferred upon a married woman by the Married Women’s Property Acts to dispose of her real estate by deed or will as if unmarried enables her to dispose of her real estate during life by deed or upon her death by will and thereby defeat *in toto* into the husband’s right of curtesy. (*Collins v. Russell*, 96 App. Div., 136; 89 N. Y. S., 414; affirmed, 184 N. Y., 74; In re Clark [1886], 40 Hun, 233; Matter of Mitchell [1891], 61 Hun, 372; 16 N. Y. S., 180; *Leach v. Leach* [1880], 21 Hun, 381; In re Winne [1870], 2 Lans., 21.)”

3.

The Agreement and the Findings of Fact, Conclusions of Law and Decree comprehend all interest and estate of the defendant arising during the wife's lifetime or after her death.

An examination of the decree shows that the word "inchoate" is not used in connection with the defendant's interest. The language of the decree is broader than that. The word used is "interest." This means all of the defendant's interest. It means any interest that he had or might have. If we consider the words "tenant by the curtesy" as having special meaning, such meaning would comprehend the interests that came to the defendant *after* Mrs. Watt's death. 10

Further examination of the language of the decree shows that the defendant was to execute all instruments and conveyances. The word "conveyances" indicates that the direction was for the execution of deeds. 20

Further we find that the words of the decree are, "whatever interest he might afterwards acquire." These words comprehend such interest as the defendant might acquire *after* the death of Mrs. Watt. They are comprehensive of more than a mere inchoate interest. 30

The word "interest" in common speech, in connection with land, includes all varieties of title and rights and comprehends estates in fee for life and for years, mortgages, and every kind of claims to land which can form the basis of a property right.

Union Trust Co. v. Reed, 213 Mass., 199;
99 N. E., 1003.

The word "interest," in its ordinary significa- 40

tion, includes any right, title or estate in, or lien upon real estate.

Johnson v. Samuelson, 117 N. W., 470;
82 Neb., 201.

The natural and ordinary meaning of the term "interest in lands" includes the entire right held in lands and as used in an instrument conveying the grantor's interest without qualification and
10 operates to convey all the right of the grantor.

If a person divests himself of all his "interest" in land, he does not retain in the land any right whatever.

Dickson v. Wildman, 183 Fed., 398; 105
C. C. A., Circuit Court of Appeals, 618.

The word "interest" often is used to express or represent "an estate" as, for instance, an interest in a tract of land is often used as meaning the
20 same thing as an estate in a tract of land.

These two words are not infrequently used as convertible terms.

Hurst v. Hurst, 7 W. Va., 289.

The word "interest" is practically synonymous with the word "estate."

Widincamp v. Phoenix, 62 S. E., 478; 4
Ga. App., 759.

30 "Interest" in property is the most general term that can be employed to denote estates in lands.

In its application to lands or things real, it is frequently used in connection with the terms "estate," "right" and "title" and, according to Lord Coke, it properly includes them all.

Co. Litt., 345 b;
New York v. Stone, 20 Wend. (N. Y.),
40 142.

When applied to land "interest" means the estate, right or title held in or to it.

Ibid;

2 Black. Com., 103.

The words of the decree are comprehensive of all interest or estate to which the defendant was entitled, or of which he was seized during the lifetime of Mrs. Watt and *after* her death.

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4.

The proceedings in the New York Court determined the equities between the parties in the litigation there; the proceedings there bar the ejectment suits brought here; these proceedings are record evidence of the equities; defendant is estopped by virtue of those proceedings; the New York decree is enforceable against the defendant in the Court of Chancery by a decree for specific performance.

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In discussing the decree and the proceedings in the New York Court, in connection with our contention that the Court of Chancery should compel the defendant to specifically perform the direction of the decree, we discuss estoppel to some extent, although the discussion of estoppel properly pertains to the contention that we are entitled to defensive relief.

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The Findings of Fact and the Conclusions of Law are part of the Judgment Roll. Those papers give record evidence of the equities of the parties which cannot now be contradicted by the defendant.

The Rolls, being the records or memorials of the judges of courts of record, impose in them

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such incontrollable credit and verity as they admit no averment, plea or proof to the contrary.

Coke, Inst., 260a;

Herman on Estoppel & Res. Jud., p. 18.

10 A judicial record is one prepared by an officer of the court, whether in the form of a book or a roll, containing a chronological account of the proceedings of a court of justice and intended as a memorial thereof.

Cyc., "Estoppel," p. 685;

Herman on Estoppel & Res. Jud., Sec. 22.

A record imports such absolute verity that no person against whom it is admissible, shall be allowed to aver against it.

Herman on Estoppel & Res. Jud., Sec. 21.

20 Whatever has been duly authenticated by the signature of the Judge must be held to be an absolute verity.

Herman on Estoppel & Res. Jud., Secs. 22-23.

30 Estoppel by record is the preclusion to deny the truth of matters set forth in the record whether judicial or legislative and also to deny the facts adjudicated by a court of competent jurisdiction.

Cyc. "Estoppel," p. 684.

A recital in a judicial record imports absolute verity and all parties thereto are estopped from denying its truth.

Ibid.

40 It is a well established rule that the record of a court of justice imports absolute verity and no

one may, in a collateral proceeding, impeach it, by adducing evidence in denial of facts of which it purports to be a memorial.

Ibid.

Two sorts of estoppel arise from the record of a judgment; first, from the record considered as a memorial or entry of the judgment, and second, from the record considered as a judgment. As a memorial of the fact of the rendition of the judgment, the record imports absolute verity and may be impeached by no one whether or not a party to the proceeding in which it was made. As a judgment, on the other hand, the record has the further effect of precluding a re-examination into the truth of the matters decided; but in this aspect it is as a rule binding only upon the parties to the proceeding and their privies. This further and secondary effect of the record considered as a judgment is otherwise known as estoppel by judgment. The matters adjudicated being termed *res judicata*.

16 Cyc., p. 685.

A judgment by consent of the parties is more than a mere contract *in pais*. Having the sanction of the Court and entered as its determination of the controversy, it has all the force and effect of any other judgment being conclusive as an estoppel upon the parties and their privies.

23 Cyc. "Judgments", 729.

A judgment rendered upon the consent, stipulation or agreement of the parties is binding and conclusive upon them in the absence of fraud.

23 Cyc., 1228.

Judgments by agreement or consent will bind as *res adjudicata*. A judgment by consent cannot be distinguished from one after a trial.

Herman on Res. Jud. & Estoppel, pp.
41, 43.

The Bill alleges that the New York court had jurisdiction to provide as the decree provides.

A final judgment, such as the decree of the New York court, disposing of the property of the parties, is a bar to a subsequent action by either party to determine any of the property rights
10 which might have been settled in such action.

Cyc. "Divorce", p. 794.

The general rule is that the only ground upon which the judgment of a court of general jurisdiction can be disregarded in another state is, first, where the adjudging tribunal had no jurisdiction over the persons against whom judgment was pronounced, or of the subject-matter of the litigation, and second, where the adjudication
20 has been obtained by fraud.

Fairchild vs. Fairchild, 53 Eq., 678.

The bill alleges that the Court had such jurisdiction over the persons and the subject-matter of the litigation.

The bill alleges further that the matter adjudicated was presented by the pleadings.

The decree is a final decree for the settlement of equities; the rights in the cause were fully and finally disposed of; the leave found at the foot
30 of the Decree does not affect the Decree as a final decree.

Black on Judgments, 2nd Ed., § §41 and
43.

A decree in Chancery, like a judgment at law, when rendered on the merits, is final and conclusive on the parties, not only as to facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated.
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Ibid. §517 and cases cited.

In the application of the principle of *res judicata* there is no difference between courts of law and courts of equity.

Ibid, §517.

Herman on Estoppel & Res. Jud., p. 107.

The rule that a judgment of a competent court of a sister state is conclusive on the merits extends equally to decrees in chancery. 10

Black on Judgments, 2nd Ed., §858.

If an award directs acts to be done which, if stipulated for in a contract would render such contract capable of enforcement, then the award itself may be specifically enforced.

Pomeroy's Eq. Jur., §1402, p. 2764.

The judgment is conclusive on the merits of the agreement or subject-matter of the suit. 20

Fall vs. Eastin, 23 L. R. A. (N. S.), 931.

The case of *Bullock*, 53 Eq., 561 would seem not to support our contention that the decree itself is enforceable as a decree by a decree for specific performance, but an examination of the opinions rendered by the Justices in that case will show, we think, that the case is really an authority in support of our contention.

In this *Bullock* case the husband and wife were in litigation in the New York Supreme Court. The wife prevailed and the decree went against the husband. The decree directed that the husband should execute a mortgage on his lands. Subsequently an order on the judgment was signed, which directed the husband to execute a mortgage on his lands in New Jersey, the order describing the lands. In the meantime, the husband, who had in no way consented to the 30

decree, conveyed the land in New Jersey to third parties. Subsequently the wife filed her bill in the Court of Chancery, asking that the order made on the New York decree should be specifically performed and that the land should be charged with an equitable mortgage, and there was a prayer also for the setting aside of the conveyance made by the husband as fraudulent.

10 The majority opinion of the Court is not, in any way, against our contention that the defendant is *estopped*; but it is viewed by counsel for the defendant as authority against us on our contention that we are entitled to a specific performance of the decree as a decree. It is to be noted that this decision does not affect the question of the enforcement of *the agreement* made by the parties in this case in the New York proceedings.

20 This Bullock case was decided by a divided Court. The bill was dismissed below, and six judges were for affirmance, and five were for reversal. The opinion of Mr. Justice Garrison, he being one of the six for affirmance, clearly shows that he did not rest his vote on the reasons given by Vice-Chancellor Bird, nor on the reasons given by Mr. Justice Magie, who wrote the so-called majority opinion. He rested his vote for affirmance on the fact that what the complainant was seeking to enforce by a decree for performance was *an order* on a judgment. An understanding of his opinion means, we think, that Mr. Justice Garrison concurs in the so-called majority opinion only because of this fact, which shows that he really concurred in the opinion written by Mr. Justice Van Syckel speaking for the minority. Should this notion be correct, we then find this case of *Bullock v. Bullock* to be an authority in support of our contention in this case that the

30 New York decree, as a decree, is enforceable by a

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decree for performance, irrespectively of the question of whether the parties agreed in the New York proceeding, as the Bill of Complaint herein avers they did agree and without resorting to that agreement.

This Bullock Case does decide that a Court of Equity in one State, having acquired jurisdiction of the litigants, may make orders and decrees affecting their dealings with real estate beyond the jurisdiction in such manner as to bind them personally and such orders or decrees may be pleaded as a cause of action, a bar, or a defense in the State where the land lies. **10**

See also 23 Cyc., "Judgments" 1548.

A decree by a Court of Equity in one State, directing a conveyance of land situate in another, may be pleaded as a cause of action, or as a ground of defense in the Courts of the State where the land lies although no conveyance has been executed; and unless impeached for fraud, is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined. **20**

Herman on Estoppel & Res. Jud., §514,
p. 617.

An acceptance of an offer of judgment merges all claims that might have been litigated.

Ibid. **30**

The Courts are bound to treat judgments rendered in a sister state with full force of *res judicata*. They are bound to treat such judgments, supposing no question of jurisdiction to arise, as they would be treated in the state in which they were rendered.

Bigelow on Estoppel, 6th Ed. (Ed. 1913),
p. 602. **40**

Such judgments are to be regarded as record evidence throughout the Union.

Ibid. p. 315.

They are conclusive through the Union upon all issues that were tried in the sister state.

Ibid.

The case of *Burnley v. Stevenson*, 24 Ohio St.,
 10 p. 476, states the law as follows:

20 "The main proposition submitted in this case is whether under and by virtue of a decree of the Circuit Court of Kentucky, and the master's deed made in pursuance thereof, or of either of them, such an estate or right was vested in John Evans, as entitled the defendant, who has succeeded to all the rights of Evans, to the possession of the lands in controversy, as against the complainants, whose claim of title is derived from the parties against whom the decree was rendered."

The Court held that the Kentucky Court was a court of general equity jurisdiction; there was service of process; the subject matter of the bill on which the decree was rendered was the enforcement of a trust and the specific performance of a contract to convey lands situated in the State of Ohio. The Court held that courts exercising chancery powers in one state had jurisdiction to enforce a trust and to compel the specific performance of a contract in relation to lands situated in another state after having obtained jurisdiction of the persons of those upon whom the obligation rests, and the Court held that this doctrine was fully settled by numerous decisions, citing cases. The Court further held:

40 "Such court may make its decree operate as a conveyance * * *. The decree was *in personam* and bound the consciences of those against whom * * * it was rendered. Such decree is record evidence of the facts

and also of the fact that it became and was the defendant's duty to convey the legal title * * * . The defendant is bound by the decree * * * . The decree did not constitute a good defense at law. In equity it was a sufficient defense * * * . That this decree had the effect in Kentucky of controlling the equities of the parties to the land in this state we have fully shown. The Courts of this State must accord it the same effect. True, the Courts of this State cannot enforce the performance of that decree by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein unless it be impeached for fraud." 10

In *Black on Judgments*, 2nd Ed., §872, p. 1302, we find the following statement of the law:

"There is an indirect way in which in certain cases the decree of a court of equity may affect the title to land lying in another state. The Chancery Court in another state having acquired jurisdiction over the persons of the litigants may enforce a trust, or decree the specific performance of a contract in relation to lands situated in another state; and although the decree in such case, or the deed of the master executed in pursuance thereof cannot operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties and it concludes them in respect to all matters and things properly adjudicated and determined by the Court. And when the decree in such case finds and determines the equities of the parties in respect to such land and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense in the courts of the state where the land is situated and it is entitled in the court 20 30 40

where so pleaded to the force and effect of record evidence of the equities therein determined unless it be impeached for fraud."

The defendant is estopped by virtue of what happened in the Court in New York and the proceedings in that Court. This estoppel is enforceable in the Court of Chancery.

It has frequently been held that an estoppel *in pais* is not available at law in connection with
10 actions of ejectment.

A. & E. Enc., p. 89 "*Estoppel*" citing 6 Hill, (N. Y.) 14.

The facts of an estoppel *in pais* may sustain a bill for conveyance of land.

Favill v. Roberts, 3 Lans., 14, 56 N. Y., 222.

It is commonly said that there are three kinds
20 of estoppel: by matter of record, by matter in writing, and by matter *in pais*.

In pais, means matter of fact as distinguished from matter of record or conventional writing. Equitable estoppel is really estoppel *in pais*.

In this case the defendant is estopped by matter of record, and also by matter *in pais*.

In New York it has been held that the defendant in ejectment may plead any equitable defense as an estoppel and apparently, in the action
30 itself.

Equitable estoppel cannot be well pleaded in the three actions of ejectment brought by the defendant because of the circumstances and the complication of matters.

We find matters on this head stated in *Pomerooy's Equity Jur.*, §807, at p. 1343 as follows:

"Even at the present day equitable estoppel
40 by which the owner of land is precluded from asserting his legal title, is distinctly equit-

able; it is not admitted and enforced at law except in states where the principles of equity are administered through the means of legal actions and remedies."

The case of *Clement v. Young Co.*, 69 Eq., 347, 60 Atl., 419, is a case of equitable estoppel where specific performance was decreed and injunction was granted against an action in ejectment. This case holds that where negotiations have been conducted by parol and even as to agreements within the Statute of Frauds, where such an agreement has been partly executed, specific performance would be decreed. 10

While equitable estoppels are cognizable at law as well as in equity, it is important to remember that the recognition and enforcement of equitable estoppels by courts of law is an innovation; originally they were available only in equity and they are now enforced at law only in cases where such enforcement is in accordance with the procedure in courts of law and will work complete justice to all parties. 20

See

Ruckelschaus v. Oehme, 48 N. J. Eq., 436.

In the case of *Kronson v. Lipschitz*, 68 N. J. Eq., 373, the vice-chancellor granted an injunction in a case of equitable estoppel.

The case of *Society, etc., v. Lehigh Valley R. R.*, 32 N. J. Eq., p. 347, deals with equitable estoppel. 30
 "On such an admission, the right of a court of equity to intervene and to put an end to the legal actions is undoubted. Such a power is one of the inherent and original prerogatives of the jurisdiction of a court of conscience. Nor can the circumstances that estoppels of this character are now, in a degree, given effect to in the common law courts, affect such equitable jurisdiction, for it is the well settled rule that such a jurisdiction 40

cannot be taken away in such an incidental manner * * *. These cases are sufficient to exemplify the principle above stated, that when, from equitable considerations of a certain character, it would be unconscientious in a litigant to prosecute a claim, and such party is striving to do so in a suit at law, a proper ground is afforded for enjoining such legal proceeding. On this foundation I think the chancellor was authorized to proceed as he has done, and to require this controversy to be settled in his court, where alone it is plainly evident that it can be properly investigated and decided.”

10 The case of *Central R. R. v. MacCartney*, 68 N. J. Law, 175, deals with the doctrine of equitable estoppel.

20 The fact that the form of action and precise remedies sought are different in the two suits will not prevent the raising of an estoppel. The estoppel grows out of matter of substance and form has little, if anything, to do with it.

Bigelow on Estoppel, 3d Ed., p. 96.

Estoppel arises regardless of any identity in the cause of action; the only requirement being that the point in issue, as distinguished from the whole cause of action, shall be identical in the two cases.

30 In these cases the judgment operates as an estoppel in regard to those matters in controversy upon which, or upon the determination of which, the verdict or finding, as distinguished from the judgment itself, was rendered.

Ibid., p. 100.

40 The estoppel in the case in hand runs with the land and extends to all who are privy in estate to either of the parties to the former judgment. Such an estoppel makes part of the title to the

land and extends to all who claim under either of the parties.

Ibid., p. 161.

The heir and devisee are in privity with the ancestor or the testator.

Ibid., p. 166, citing cases.

The facts constituting estoppel *in pais* may be ground for filing a bill for a conveyance of real estate. 10

Ibid., p. 777, and cases cited.

It is everywhere conceded indeed, that the title to land can be affected by estoppel *in pais* arising from fraud. Thus it has been held that the vendor of land will not be allowed, after representing that there is an alley between two lots of his at the time of selling one of them, to deny the representation after the sale has been made and the representations acted upon, though the deed contains no allusion to the alley. 20

Ibid., p. 278.

In the case in hand the fraud consists in the defendant paying only \$15 weekly alimony, instead of a greater sum, under the wife's notion, induced by the husband, that the defendant had released, or would release, all his interest in her real property. 30

It has been held that the doctrine of estoppel by conduct, where the subject of the estoppel is the title to real estate or property, which can only be passed by deed, is available in equity but not in a court of law.

Bigelow on Estoppel, p. 778.

It is not the judgment that creates the estoppel; it is not the recovery that creates the *res* 40

judicata; but the matter alleged by the party on which the recovery proceeds, creates the estoppel. No matter whether the recovery is by consent, default, admission or after a contest before a court and jury, or if upon demurrer, a judgment is rendered by the Court upon a cause of action, the matter alleged, that judgment is a judicial action upon the merits between the parties and merges that cause of action.

- 10 Herman on Estoppel and Res Judicata,
pp. 41, 43.

Where, upon the trial of a cause, negotiations lead to the entry of a judgment by consent, such judgment cannot afterwards be repudiated.

Ibid., p. 341.

- 20 Where a suit in equity is brought in one state to enforce a decree entered in the courts of another state, the Court will not inquire into the merits of such decree, and estoppel applies.

Ibid., p. 617.

The defendant is now estopped from denying that he consented.

Ibid., p. 49.

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5.

The husband and wife could contract as they did both as to curtesy in the land then owned by the wife, and in land that might be subsequently acquired by her.

It is familiar that although courts of law will not enforce contracts between husband and wife, equity will recognize and enforce the same; that for many purposes courts of equity treat husband and wife as distinct persons, recognizing their ability to mutually contract and to possess separate estates and interests. 10

21 Cyc., 1271.

Under the act of 1874 the contract of husband and wife are subjects of jurisdiction in the court of equity alone. 20

Turner v. Davenport, 49 Atl., 463.

In equity, the contract of husband and wife, relating to the wife's separate property, is as valid as if the wife were a *feme sole*.

Arnold v. Talcott, 55 Eq., 519.

The rule is that whenever a contract would be good at law, when made with trustees for the wife, the contract will be sustained in equity when made with each other without the intervention of trustees. 30

"That the husband can make an absolute sale of his property to the wife is entirely settled," said Chancellor Kent, in *Livingston v. Livingston*, 2 Johns Chy., 537.

"A husband and wife may contract for a bona fide and valuable consideration for the transfer of property from him to her * * * Such transfer is enforceable in equity." 40

Garwood v. Garwood, 56 Eq., 265.

Courts of equity alone give a remedy on a contract between husband and wife where the redress is sought by one of the original parties or by or against the legal representative of one or both of them.

Wood v. Chetwood, 45 Eq., 369; 44 Eq., 64.

10

In the case of *Mannatt v. Griffith*, 124 N. W. (Iowa), 753 (1910), the plaintiff and his wife, who had been living apart for some years, executed several joint deeds, blank as to consideration and grantees, dividing the real property between them, the intention being that thereby they would transfer the property described in the respective deeds free from any dower interest of the other.

20

The wife, desiring to create a trust, executed a trust contract with Griffith and then caused Griffith's name, as trustee, to be inserted as grantee in the blank deed to the premises in question which had been left in her possession, caused the blank as to consideration to be filled by a recital of the trust and, with the blanks so filled, she delivered the deed to Griffith who caused it to be filed of record. Prior to the wife's death, the plaintiff had caused the blanks in his deed to be filled and the deeds delivered to various grantees.

30

It was held that the plaintiff was estopped to claim dower in the land conveyed to Griffith, the statute denying to either husband or wife the power to contract with the other in regard to their dower interest, not preventing an estoppel of one of the spouses as against the grantees of the other. In this case it was argued that the agreement was contrary to law and, therefore, that the same could not afford a basis for estoppel, the statute of Iowa denying to either husband or wife

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the power to contract with the other in regard to

the dower interest which each has in the other's property. *The Court stated it found nothing in the cases interpreting this statute to indicate that one of the parties may not, by subsequent conduct, become estopped as against the grantee of the other to assert such dower interest; that, on the contrary, it is well settled that such an estoppel may arise.* Citing cases.

In the case of *McBreen v. McBreen*, 154 Mo., 343 (1900); 55 S. W., 463, it was decided that the husband and wife may contract for the relinquishment of the husband's curtesy in the wife's property; that a condition in a separation agreement between husband and wife by the terms of which the husband releases his right to curtesy in the property of the wife may be set up as a defense in ejectment by the husband to recover such right in the property of the wife on her death where the contract has been complied with, although the contract itself is not enforceable at law as against public policy.

In the case of *Luttrell v. Boggs*, 168 Ill., 361 (1897); 48 N. E., 171, the husband and wife agreed to separate and thereupon entered into a contract in writing agreeing to live apart and to release each to the other their interests in the real estate. The husband released all his interest in all property of which the wife was seized at the time of the marriage. After the death of the wife the husband filed a bill for the assignment of his dower in lands of which the wife had died seized. Under the statute he was entitled to dower in the lands owned by the wife during coverture, unless he was barred by this contract. The court held that the husband had released all claim to dower in the lands.

This case follows *Crum v. Sawyer*, 132 Ill., 443, and *Heisen v. Heisen*, 145 Ill. 665. The Court held that the agreement was based upon a valid

consideration; and as the husband had full power to make a contract no reason was perceived why it should not be enforced and he be compelled to abide by it. To the objection that the contract was void because against public policy, the Court said that the part wherein the husband released his inchoate dower was valid.

10 In the case of *Crum v. Sawyer*, 132 Ill., 443, it was held that a husband may contract with his wife to release all interest including his contingent right to curtesy in all her lands, that the right to dower, when vested in the husband, is an estate in land inchoate during the life of the wife, and since the statute has in no way restricted his power to convey he may release his right or bar himself of its assertion in any mode to which the ordinary rules of law would give that effect. The statute has imposed no disability on the husband with respect to his releasing his curtesy. 20 Further held in this case that the husband was estopped to assert claim for dower; that courts of equity support assignments not only of choses in action but of contingent interests and expectancies and also of things which have no present, actual or potential existence but rest in possibility only.

30 In the case of *MacGregor v. MacGregor*, 21 Kings Bench Div., p. 424, the husband and wife were in litigation to the extent that cross summonses on complaints of assault had been issued. The Court held that a husband and wife in litigation can compromise the suit and such compromise is binding on the husband. In this case the agreement was oral and it was held that it did not come within the Statute of Frauds as an agreement "that is not to be performed within the space of one year from the making thereof" for it might be wholly performed in a year and there was no express stipulation to the contrary; 40 could by possibility be performed within the year;

that where there is a valid consideration as between husband and wife there is no need of the intervention of a trustee.

When husband and wife may legally contract with each other, or when their agreement would be valid in equity, a release of the property rights in the estate of the other, such as dower or curtesy may, if fairly made, be sustained.

21 Cyc, 1301.

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Equity will sustain an agreement whereby a husband releases for the benefit of the wife an interest which he may have in her property.

Ibid, 1257.

6.

The agreement in the New York proceedings, irrespectively of the decree in those proceedings as a decree, is enforceable against the defendant, both affirmatively by decree for specific performance, and defensively, by decree enjoining the defendant from asserting that he has any curtesy in the lands in question, although the agreement relates to land.

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(a) Because the agreement is evidenced by the findings of fact and the decree, both signed by the justice of the New York Court, the said justice signing as the agent of the defendant; and

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(b) Because the agreement has been partly performed, should it be held that the justice did not so sign.

The agreement between the parties made in the Court in New York is enforceable against the defendant, by decree for performance although it

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relates to lands, because it was signed for him by the Judge of the Court.

In the absence of a statutory provision to the contrary, an agent's authority to sign a memorandum of a contract within the Statute of Frauds, is not required to be in writing any more than in any other case of agency.

20 Cyc. "Statute of Frauds," 276.

- 10 Authority to sign an agreement for the sale of lands binding on the principal under the Statute of Frauds may be conferred upon an agent by parol.

Keim v. Reilly, 54 Eq., 418.

The signature need not be with the name of the principal or be stated to be made his act where the memorandum is signed by the agent.

- 20 *A. & E. Enc. of Law*, Vol. 8, p. 718.

The agreement made between the parties in the New York proceedings is enforceable against the defendant although it relates to lands, because it has been partly performed.

The making of substantial improvements by one in possession of real estate upon the faith of a parol contract has often been held to amount to such part performance as will justify a decree of specific performance.

- 30 *Elliott on Contracts*, Sec. 2303.

Courts of Equity have gone further, and in most jurisdictions have engrafted the exception upon the statute that, where the oral agreement has in good faith been so far performed, that it is impossible to put the parties in *statu quo*, or to compensate the party in damages for the breach of the agreement, and where certain specified acts of part performance have been done, the statute no

longer applies and equity will grant specific performance. This doctrine is established law in England. It has been embodied in the statutes of several of the states and is recognized as law in all jurisdictions which have courts of full equity jurisdiction; but in the absence of a statute it is of no effect at law.

The New York Statute provides that nothing contained in it is to abridge the powers of equity to compel the specific performance of agreements partly performed. 10

If the parol agreement is clearly and certainly proved and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part, has done some acts of performance on the faith of them, and to the knowledge of the defendant, a court of equity may decree specific performance when it would be a virtual fraud to allow the defendant to interpose the Statute as a defense, and at the same time secure to himself the benefit of what has been done in performance. 20

Elliott on Contracts §1271;
D'Elissa v. D'Amato, 97 Atl. 42.

The doctrine that part performance of a contract will make valid a contract invalid by the Statute is exclusively a creature of equity and applies only to contracts relating to land. The ground is equitable fraud; not an antecedent fraud in entering into the contract but a fraud inhering in the consequence of setting up the Statute as a defense. 30

7.

The wife held the land conveyed by the deeds made by the husband to Burke for her separate use, free of curtesy.

The defendant conveyed the property described in the deeds to Burke for the separate use of Mrs. Watt.

- 10 A deed from a husband to a wife should be construed as operating to create a separate estate in her as if the conveyance were by a third person.

21 Cyc, 1289.

- Although by common law the husband, after title to his wife's property is vested in him, cannot reconvey it to her yet equity will recognize a waiver or relinquishment of his marital rights by unequivocal acts on his part showing an intention to create a separate estate for the wife. Such waiver of his rights may be made by express declaration of intention or may be inferred from his conduct.
- 20

21 Cyc., 1161.

- Under a conveyance for separate use the wife will take the property freed from her husband's marital rights. While the intention to create the separate estate should be clear the circumstances may serve to establish it.
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If property is, in any mode, by sufficient and apt words to express the intention, given directly to the wife, either before or after marriage, for her sole and separate use, without the intervention of a trustee, equity will take cognizance of that fact and will regard the property as her separate estate and will protect it against the claims of her husband and of his creditors.

Pomeroy's Eq. Jur., Sec. 1100, p. 2139.

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No particular form of words is necessary in

order to vest property in a married woman for her separate use and to thus create a separate estate. Technical words are not necessary to create a separate estate in a *feme covert*.

Emery v. Van Dyckel, 17 N. J. Eq., 572;
Hutchins v. Dickson, 11 Md., 29.

The deeds to Burke must be read in connection with what happened in the New York proceedings in order to determine their effect; and if thus read the intention of the husband to permanently divest himself of curtesy and to convey to the separate use of the wife is found to be clear and unequivocal. 10

8.

Complainants are privies who are entitled to enforce the agreement and the decree.

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The complainants are privies with respect to the decree as a decree, and they are also privies with respect to the agreement made between the parties in the New York proceedings.

The case of *White v. White*, 46 N. Y. S., 658, decided by Judge Gaynor, was a case where heirs enforced an ante-nuptial agreement in connection with curtesy.

Judge Gaynor says:

“The necessary privity is had here through the real estate. * * * Heirship suffices to establish privity.” 30

We do not understand that heirship, to establish privity, needs to be heirship by blood. The rule is that heirship by virtue of devise establishes privity.

Heirs and devisees are in privity with the ancestor or testator and may urge the estoppel arising in his favor. 40

16 Cyc., "Estoppel," 718.

An heir is in privity with his ancestor, and a devisee with his testator.

Black on Judgments, 2nd Ed., Vol. 2,
Sec. 558.

10 The ground of privity is property and not personal relation. To make a man a privy to the action he must have acquired an interest in the subject matter of the action either by inheritance, succession or purchase from a party subsequently to the action.

Bigelow on Estoppel, 159.

20 It may be stated as a general rule that wherever the covenants in a contract respecting real estate could have been specifically enforced against either of the parties thereto, they may be so enforced by persons claiming under them in privity of estate, representation or title.

Elliott on Contracts, Sec. 2287.

30 "Wherever, and without regard to the form and technical character of the contract, performance of a covenant in respect to lands would have been decreed between the parties to it, it will, in the absence of controlling intervening equities, be decreed as between persons claiming under them in privity of estate, or of representation, or of title."

71 Atl. Rep., *Hollander v. Central Metal & Supply Co.*, p. 445, citing 2 Story's Eq. (5th Ed.), Secs. 788-790, 714, 715, 791.

9.

Complainants are entitled to relief in the Court of Chancery.

It is not to be pretended that Mrs. Watt, when she refrained from going forward with the giving of testimony in the action in the New York court, when she came to an agreement with the husband, when the decree was signed, did not intend to fully and finally settle her property rights in connection with the husband. She was getting rid of an undesirable husband, who finally reached the point of agreeing to pay \$15 weekly alimony, and to give up, once and for all, his marital rights in her property, provided she would not go forward with the giving of bitter and disgracing testimony. 10

Nor can it be pretended that the husband did not intend and agree to permanently divest his curtesy in all lands then owned or thereafter to be owned by the wife. 20

The bill alleges that the husband so intended and so agreed; and the allegations of a bill are to be taken as true on a motion to strike out.

Why is not the agreement, and the decree in evidence of it, enforceable by the complainants? If the husband agreed to release, and if, as we have shown, he agreed to release and was directed by the decree to release, independently of any request by the wife, why is he not now estopped from asserting title? If the wife could have compelled a specific performance, what reason is perceived why specific performance cannot now be decreed at the instance of the complainants? Is it not fraud on the part of the defendant to now assert that he has any title? 30

The bill alleged fraud; and, as we have pointed out on another page of this brief, the defendant's assertion of title is a fraud that complainants are entitled to have restrained. 40

This case belongs in the Court of Chancery, for a complete determination of the issues cannot be made by a court of law.

See Pomeroy's Eq. Remedies, Sec. 645.

10 Where the decision of the equities would necessarily defeat the whole right in the law court and destroy the entire legal cause of action, the Chancellor must take the entire controversy under his own control; it is then a matter of right and not of discretion.

Pomeroy's Eq. Remedies, Sec. 646, p. 1008, citing 4 Pomeroy's Eq. Jur., Sec. 1362, Note 2.

20 The Court of Chancery should take cognizance of this case if for no other reason than that the doctrine of part performance is purely a creation of equity and is not recognized at law. Hence it follows that no distinctively legal action can be maintained on an oral contract within the Statute of Frauds. Equity alone can grant relief.

See Pomeroy's Eq. Remedies, Sec. 818.

We respectfully submit that the bill should not have been dismissed, and that the defendant should be compelled to answer.

MARSHALL VAN WINKLE,
Of Counsel with Complainants-
Appellants.

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New Jersey Court of Errors and Appeals.

Between—

JOHN F. SHANNON and MARY J.
C. GINOCCHIO,
Complainants-Appellants,

AND

DANIEL C. WATT,
Defendant-Respondent.

On Appeal from
Chancery.

BRIEF FOR RESPONDENT.

This appeal brings up a decree dismissing the bill of complaint upon motion.

The facts of the case, set forth in the bill of complaint, are as follows:

Mary J. Watt, the late wife of Daniel C. Watt, the respondent, died in December, 1914, seized of sixteen parcels of lands and premises in Jersey City. There had been a child of the marriage. She left a will which became the subject of protracted contest, by which she devised all of this real estate to the two appellants. The appellant Shannon is a cousin of Mrs. Watt; the appellant Ginocchio is a friend.

Her husband, the respondent, was not named in the will, but, contending that the will was not inconsistent with his right of courtesy, and relying

upon the familiar limitation of the testamentary power of a married woman, contained in the 9th section of the "Married Women" act, viz.:

"provided always, that nothing herein contained shall be so construed as to authorize any married woman to dispose, by will or testament, of any interest or estate in real property to which her husband would be, at her death, entitled by law; but such interest or estate shall remain and vest in the husband in the same manner as if such will had not been made".

he began ejectments against the appellants in the Supreme Court to recover his estate.

In these ejectments the appellants pleaded that it was competent for the wife to devise her lands, freed of the husband's curtesy, by virtue of Section 8A of the "Married Women" act. This question was argued at the Circuit, but was not decided because the further prosecution of the ejectment actions was enjoined upon the filing of the bill herein; after dismissal of the bill it was reargued at the Circuit and decision upon it is now pending.

The bill is diffuse and complicated, but it will be found reducible to an attempt to enforce in New Jersey one of the provisions of a decree of the Supreme Court of New York rendered in an action for partial divorce and maintenance, brought by the said Mary J. Watt against her husband, the respondent.

The decree in the New York Supreme Court (Case, pp. 52, 53) was pronounced in four parts. It separated the parties from bed and board; it required the husband to pay alimony of \$15. per week; it required the husband (he having consented thereto in open Court) to release his right of curtesy in all lands then owned (in 1908) by the wife, and to release his right of curtesy in all lands that she might thereafter acquire, whenever he might be requested by his wife so to do; lastly, the decree declared that either party might apply to the Court

for such further order or direction as might be just and reasonable.

It is noteworthy in passing, that although the decree thus commands the husband to release his curtesy, it contains an express reservation that the alimony payments shall not be in lieu of the wife's dower.

The husband gave full obedience to the decree and promptly executed deeds releasing his curtesy upon the request of the wife. He also paid the alimony decreed until his wife's death.

There are allegations of "fraud" in the bill and mention of it in the brief. The suggestion is so groundless that it would be superfluous to argue upon it. Mrs. Watt, from the date of her divorce to her death, accepted her husband's performance of the decree without complaint. She never suggested that her husband's conduct was "fraudulent".

But the lands which the wife owned at the time of the New York decree, and which Watt released to one Burke, as a trustee for the wife, and which were later conveyed by Burke to Mrs. Sheridan, also as a trustee for the wife, became again the property of the wife in her own name on June 20th, 1913, about eighteen months before the death of Mrs. Watt. Mrs. Sheridan was a sister of Mrs. Watt, and when she died she devised the lands which she thus had held as a trustee for Mrs. Watt as well as twelve other parcels of real estate to Mrs. Watt. (Sometime previous to this will Mrs. Sheridan had made a deed of the four parcels held in trust to Mrs. Watt, so that, as to them, the will was simply a confirmation of the deed.)

Mrs. Watt being thus re-invested with the legal title to the four parcels which her husband had released, and having acquired the twelve additional parcels, held all of these properties for about eighteen months until her death, without requesting her husband to release his curtesy therein.

But eighteen months after Mrs. Watt had died, which was three years after she had acquired the property under the will of her sister, the appellants, as owners under the will of Mrs Watt, by Mr. Van Winkle, as their attorney, demanded that Watt release his curtesy, and presented quitclaim deeds to him for that purpose (Case, p. 20). The date of this demand was March 24, 1916, which was after the ejectment suits had been commenced by Watt. If we understand the theory of the bill and the brief, it was the refusal of Watt to execute these deeds that showed "fraud".

The appellants' brief from page 10 to page 52 is given up to an argument to show that, by virtue of the "Married Women" Act, the will of the wife is effectual to vest her lands in the appellants to the exclusion of the right of curtesy. In other words, to show that the three actions of ejectment, which it was the object of the present bill to enjoin, can be successfully defended at law.

The litigation of these actions is now proceeding before the Supreme Court, and the argument before that Court, upon this statute, is the same as that now presented in the brief of the appellants.

We will not add to this confusion of procedure by answering here an argument that shows, if it is sound, that the appellants have no standing in equity. It was not made upon the argument below, and it is not mentioned in the opinion.

The theory of the bill was, necessarily, that the remedy at law was inadequate. Upon that theory a temporary injunction against the prosecution of the suits at law was obtained. Upon dismissal of the bill the actions at law were resumed and decision of them is now pending.

These actions of ejectment were begun before this suit in equity. They depend for determination upon the construction of the statute mentioned. There can be no excuse for taking the determination of this legal question from the Supreme Court, unless there is a paramount equity which makes it unconscionable for the respondent to proceed at law. The appellants came into Chancery alleging that they had such an equity, and whether they had, or whether they had not, is the proper and only subject for determination upon this appeal.

I.

The bill discloses that the respondent has fully performed and obeyed the decree of the New York Supreme Court, and that decree being intended only to secure the wife in the enjoyment of her marital right to support ceased to be of effect after the wife's death.

The respondent has, as the bill shows, fully performed the decree of the New York Supreme Court. He released his curtesy and paid the decreed alimony as long as his wife lived. His wife never asked him to release again the rights in the lands that he had once released, or to release the new rights that accrued to him from the acquisition by her of new lands.

The appellants recognizing this defect in their case attempted to supply it by making a demand themselves upon Watt for the release of his curtesy.

This demand was made on March 24, 1916, nearly 18 months after the death of Mrs. Watt and nearly three years after she had acquired the property by

the will of her sister, Mrs. Sheridan. The demand was futile. The New York decree expressly provided that Watt should release if "the plaintiff" (his wife) should request him to do so (Case, p. 53). This devolved no right upon the appellants to make the demand that the wife had never seen fit to make.

The New York decree was confined to the object of securing proper maintenance to the wife. The Court was proceeding in virtue of its jurisdiction in divorce. The litigation was strictly personal to the parties; dealt solely with their marital status and obligations, and established no rights available to strangers.

The right to alimony being based on the personal necessities of the wife, is held in New Jersey to be so strictly personal that it is not classed as a property right. It is an incident of the marital contract and cannot be assigned. In *Lynde v. Lynde*, 64 N. J. E. 736, in the Court of Errors and Appeals (1902), it was said (2nd syllabus):

"A wife's claim for allowance of permanent alimony, on a divorce *a vinculo*, is a purely personal right and not a property right. Alimony to be allowed and paid *in futuro* is intended for the personal benefit and support of the wife, and in its nature is not susceptible of assignment by the wife to another nor capable of being enjoyed by her in anticipation."

Justice Pitney's discussion of the nature of an alimony, from the top of page 750 to page 757 is exhaustive and omits no leading case on the topic.

It is true that the obligation to release curtesy which was enjoined upon Watt was not alimony in the strict statutory sense, but it was a provision for maintenance equivalent to alimony which the Court adopted, with Watt's consent, precisely as a similar provision was adopted in *Calame v. Calame*, 25 N. J. E. 548. There, in a suit for divorce, the husband agreed to deed lands to the wife in lieu

of her claim to maintenance. The Vice Chancellor had accordingly assigned, as part of the alimony, certain lands of the husband, in gross, deeming that he had power to do so under the 9th section of the Divorce Act (p. 549 of the Opinion), but the Court of Errors and Appeals reversed this direction. Chief Justice Beasley said in the opinion (p. 550, at the top):

“Now the terms alimony and maintenance are emphatically technical words, having for ages borne a fixed and established meaning, and they never have been held to comprise, within their legitimate signification, an allowance of a portion of the husband’s estate in fee.”

Nevertheless, the decree below was sustained as effectuating the terms of an agreement between the husband and wife for satisfaction in lieu of alimony, the opinion of the Chief Justice concluding as follows (p. 554):

“My deduction from these principles and decisions is that it was within the competency of equity to enforce *as a part of the decree of divorce*, the agreement made, in lieu of alimony, between the complainant and defendant. I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but, when it appears that the separation of the wife, forming the groundwork of the agreement, was justifiable, and the provision is suitable, to this extent it is, in my judgment, safe to say that the contract should be upheld.”

Here then is a precise precedent showing how, in our own highest court, a provision for alimony with the appendage of a provision touching lands in aid of the object of maintenance, is regarded and classified. It is regarded, in the words of Chief Justice Beasley, “*as a part of the decree of divorce*”, and is enforced only when the Court is satisfied of the propriety of the agreement. Although the provi-

sion was not classified as alimony because of the technical statutory definition of that term in New Jersey, it was adopted, as Chief Justice Beasley said, "in lieu of alimony" and as an equivalent for alimony, differing from it only in name.

Such a provision, being of the nature of alimony, falls by strict analogy within the reasoning of *Lynde v. Lynde* and the other authorities cited wherein the restriction of alimony to a marital and personal use is conclusively shown. These decisions rest on obvious considerations of public policy, and it follows from them that Mrs. Watt was the only person who could claim the performance of the decree requiring her husband to release his right of curtesy, and that, with her failure or decision not to do so in her lifetime, the right ceased and the decree was fulfilled.

Plainly it would conflict with the spirit and the reasoning of these precedents to hold, as alleged in the bill that there was such privity between Mrs. Watt and the complainants, her devisees, as should enable them, as successors to her right, to exact performance of this strictly matrimonial obligation from Watt.

II.

The provisional character of the New York decree is not to be lost sight of. It was not an absolute divestiture of the husband's right; on the contrary, it bade him surrender his curtesy right, in view of his assent thereto in open court, only when his wife should ask it.

To hold now that any one but the wife might ask such a surrender would be to enlarge the terms of the decree and, more especially, would be to require

Watt to do that which the record shows he never agreed to do. The New York decree is admittedly based on Watt's consent in open court, so that his consent, as recited in the decree, becomes the guide to determine the scope of the decree. If Watt agreed in open court that he would release, whenever requested to do so by his wife, would it not be doing plain violence to his intent to hold him now to a surrender in favor of devisees who have acquired the property without consideration?

Is it to be seriously supposed that Watt ever contemplated such an outcome when he stipulated the terms of the decree?

On the other hand, how can the Court ignore the circumstance that Mrs. Watt made her own deliberate election not to again ask her husband to release his curtesy? If Mrs. Watt had written a letter to her husband declaring it to be her intention not to ask him for this release, could the complainants be heard to contradict and nullify that intention by making a substituted demand in place of Mrs. Watt after her death?

Such an idea is not to be entertained for a moment, for the intent of Mrs. Watt thus expressed would have been final. When she reacquired the property and became possessed of new titles to land, as recited above in her own name, she became possessed at the same time of an equity (so far as the New York decree could secure such an equity) that entitled her to call upon her husband for new releases of his curtesy interest. This equity remained dormant unless she chose to exercise it, for unless she requested her husband to release he was under no obligation to do so. For the purposes of judicial inquiry, her intent is shown as effectually from her actions as if she had expressly declared it, and the fact that for eighteen months after she acquired these properties she forbore to ask her husband to part with his rights in them, must be taken as evidence of an intent not to do so.

It is quite possible that the will itself was made in

the recognition of the fact that it would not deprive Mr. Watt of his lawful estate in the property. Such a disposition of her lands made it possible for Mrs. Watt to favor her friends without depriving her husband.

It is by no means improbable that in the last year of her life Mrs. Watt thought of reconciliation with her husband. If the Court were to draw any inferences from her conduct that inference would be more strongly supported than any other, especially as her estate (and her husband's prospective curtesy) had been substantially enlarged by the acquisition of twelve new parcels of property. The case is destitute of a single fact that warrants question that Mrs. Watt refrained from asking this of her husband because she had made up her mind not to do so.

The Court, in the absence of contrary evidence, will make only the most favorable presumptions respecting the intent of persons who are still man and wife.

III.

Mrs. Watt, if living, could not enforce in New Jersey that part of the New York decree requiring her husband to release his interest as tenant by the curtesy.

This is the decision in *Bullock v. Bullock*, 51 N. J. E. 444; affirmed in 52 N. J. E. 561. In that case the wife had obtained a decree of absolute divorce in New York with a definite and final allowance of alimony (not as here, a tentative and variable allowance of alimony). In addition to the decree for alimony the New York court decreed that the husband should secure the alimony by mortgaging certain lands which he owned in New Jersey.

Instead of obeying this decree the husband conveyed and mortgaged his property with intent to evade the decree, whereupon the wife filed a bill in Chancery to compel him to perform the decree.

It was decided that the decree of the New York Supreme Court could not be enforced in this jurisdiction, upon the ground that the courts of New Jersey could not concede such a jurisdiction in a foreign court over the lands of this state as would enable it to make a decree touching such lands obligatory upon the courts of this State. It is a familiar doctrine of equity that a court having jurisdiction of a defendant may compel him to convey lands in a foreign jurisdiction, and that such conveyance so made is valid within the foreign jurisdiction but the validity so recognized is the validity of the deed and not of the foreign decree.

See opinion of Magie, J., in *Bullock v. Bullock*, 52 N. J. E. at pages 565, 566.

Penn v. Lord Baltimore, 1 Ves. 444.

Massey v. Watts, 6 Cranch, 148.

Lindley v. O'Reilly, 23 Vroom, 636.

Davis v. Headley, 7 C. E. Greene, 115.

Appended to *Proctor v. Proctor*, an Illinois case reported in 69 L. R. A. 673, is an exhaustive annotation upon the jurisdiction of equity in relation to real property in another State or country, which reviews all of the New Jersey authorities herein mentioned.

The dissenting opinion of Justice Van Syckel in the *Bullock case*, 52 N. J. E. at page 572, seems to imply that a Court of New York having jurisdiction of the parties may make a decree directing specific performance of a contract to convey lands in New Jersey, which the Courts of New Jersey may be obliged to recognize and enforce by virtue of the full faith and credit clause of the Federal Constitution. His remarks to this effect are found at page 574 and are as follows:

“A judgment in New York that a party defendant shall specifically perform a written

contract to convey lands in New Jersey would furnish no better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect they differ in principle is not apparent. In either case obedience to the mandate of the federal constitution would give effect to the judgment here."

It would be extraordinary, if such an elementary proposition were true, that a multitude of precedents should not be available to support it, and it is therefore not surprising that this dissenting opinion contains no citation even remotely sustaining its views. The two citations quoted from and discussed by Justice Van Syckel do not recognize any right of a foreign court to affect local lands, and do not sustain his contention. One of them, the case of *Huntington v. Attrill*, 164 U. S. 657; 36 Law Ed. 1123 (cited at page 575), had nothing to do with lands; it dealt with an attempted enforcement in Maryland of a judgment recovered in New York for the amount of a penalty for making a false certificate of the amount of capital stock. The other citation of the dissenting opinion, *McElmoyle v. Cohen*, 13 Pet. 312; 10 Law Ed. 177 (1839), one of the leading cases upon the effect of the full faith and credit clause also had nothing whatever to do with lands; the judgment there was upon a promissory note.

The brief for the appellants puts much reliance in this dissent by Justice Van Syckel and cites one case apparently supporting it, namely, *Burnley v. Stevenson*, 24 Ohio St. 476. This case was decided by three judges in 1873. Except in the paragraph from Black on Judgments, 2d Ed., § 872, p. 1302, cited in the appellants' brief, there is no reference to *Burnley v. Stevenson* that we have found; nor does there appear to be any decision in agreement with it. A decision dealing with a familiar topic, thus isolated is not only valueless;—it enforces the opposing argument.

The clear answer to the doubts expressed by Justice Van Syckel in this dissenting opinion, is found

in the following extract from the majority opinion of the Court written by Justice Magie, page 566:

“ But it is ingeniously contended in this court that the decree and order of the supreme court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation as it would compel him to perform his contract to convey or mortgage lands in its jurisdiction. Moreover, it is contended that the provisions of section 1 of article 4 of the constitution of the United States requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, impart to this decree and order a conclusive force with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by decrees in conformity therewith. Doubtless the judgment of the New York Court must be accorded in our courts a conclusive effect in certain respects. Thus it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony an indebtedness arises from time to time as such payments become due, an action at law would lie thereon and the decree would furnish conclusive evidence of such indebtedness.

But the question, upon the solution of which this case must turn, is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other States, and, as was said by Chancellor Zabriskie, in *Davis v. Headley*, *supra*, ‘leave to the courts of this state only the ministerial duty of executing their decrees’. For the doctrine that jurisdiction respecting lands in a foreign state is not *in rem* but only *in personam* is bereft of all practical force if

the decree *in personam* is conclusive and must be enforced by the courts of the *situs*.

If such is the effect which must be given to the judgments and decrees of the courts of a sister state respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position.

The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process. Moreover, the substantial part of the decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony.

The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands, to be enforceable, must be entered into and evidenced in a particular mode, but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for contracts and for our courts to construe the rule so prescribed and to determine when such contracts, whether within or without the statute, may be enforced. If it is true that the courts of another state, proceeding *in personam* may and must be conclusive in our courts and compel a degree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction

the foreign court put upon our laws, and not according to the construction of our own courts. Other examples will occur to any one considering the subject."

Bullock vs. Bullock, arising as it did, upon procedure similar to that in this case must control the disposition of the present controversy, regardless of the dissent, but the foregoing remarks upon the dissenting opinion are warranted by the course of the complainants upon the argument of this case.

IV.

The decree of the New York court is enforceable as a decree or not at all. It cannot be treated as evidence of an antecedent contract, and enforced as a contract and not as a decree.

The appellants, realizing that the decree is unavailable to them in view of *Bullock v. Bullock*, have advanced the novel theory that the decree of the New York Supreme Court may be given effect here not as a decree but as the evidence of a contract alleged to have been made in open court, between husband and wife, and embodied in the decree. This idea is based on the sixth finding of facts, which is as follows (Case, p. 50):

"VI. That the defendant promised in open court to pay the plaintiff the sum of Fifteen Dollars (\$15.) per week, for her support and maintenance during her natural life, and to release his interest as tenant by the curtesy in all her real property, as well in that which she now has as in any that she may subsequently acquire, and to execute any and all instruments

and conveyances which may be necessary to carry into effect such releases of said interest whenever he may be requested by plaintiff so to do."

The first answer to this contention is that the defendant has admittedly kept his promise thus judicially recited, for he has never refused to execute any release that his wife requested him to execute.

But the idea that the decree and the stipulations and transactions leading up to it can be separated and treated as independent and integral obligations is without the slightest authority to support it, and no authority has been cited by appellants.

The whole theory of the significance and effect of a decree repels such a conception. As the preliminary transactions leading up to a contract are merged and cancelled in the final expression of the contract, so are the preliminary proceedings, whether they be the giving of evidence, the deliberations of a jury, the stipulations of counsel or parties, or any other transactions or proceedings tending to the consummation of the decision itself, merged and cancelled in the pronouncement of the decree in its final terms.

In Freeman on Judgments, page 223, it is said:

"The rendition and entry of a judgment or decree establishes, in the most conclusive manner, and reduces to the most authentic form, that which had hitherto been unsettled; and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established and permanently attested, is said to merge in the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it was founded, just as they would, in construing a statute, seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined, to aid in interpreting the judgment, can never again become the basis of

a suit between the same parties. It has lost its validity; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It 'is drowned in the judgment', and must henceforth be regarded as *functus officio*."

"The well-established principle of law, that no further action can be prosecuted, between the same parties, upon a matter already ripened into judgment, is supported by a variety of reasons."

And it is further said (p. 225):

"The weight of authority in the United States shows that whatever may be a cause of action will, if recovered upon, merge into the judgment for decree. A contract by specialty merges into a judgment in the same manner as a simple contract. A judgment is extinguished when being used as a cause of action; it grows into another judgment."

The merger of a contractual consent of the parties in open court in the decree resulting therefrom, is clearly indicated in Cyc. under the title "Judgments," page 729, as follows:

"A judgment by consent of the parties is more than a mere contract *in pais*; having the sanction of the court; and entered as its determination of the controversy, it has all the force and effect of any other judgment, being conclusive as an estoppel upon the parties and their privies, and not invalidated, by subsequent failure to perform a condition on which the consent was based, although it may be inquired into for fraud practiced upon one of the parties, or as against other creditors of defendant."

But it is superfluous to discuss further the question whether a final judgment or decree can be analyzed into its component elements in this manner so that they may be separately used as evidence,

in view of the expressions in the very clearly written opinion of Vice Chancellor Bird, upon the decision of *Bullock v. Bullock* in the Court of Chancery 52 N. J. E. 444. The Vice Chancellor there says:

“ It being thus definitely settled that a judgment properly obtained in one state only determines the rights of the parties as to the merits of the controversy, and that such judgment can only be made available or introduced as an instrument of evidence in one of the sister states of the Union, and is only entitled to full faith and credit as such when so offered in evidence, the question with which we set out--by what method or procedure is it to be made available in a judicial proceeding in such sister state?—recurs. Happily, this has been settled beyond all controversy. The case last cited shows that a new suit must be instituted in the sister state in which the judgment is sought to be enforced.”

So likewise, in the second syllabus of Vice Chancellor's Bird's opinion, he says:

“ Such judgment, when properly obtained, is only *prima facie* evidence, in another state, of the matters litigated therein, and can only be enforced in such sister state by another suit.”

Vice Chancellor Bird, in this decision relied upon and quoted extensively from the leading case of *McElmoyle v. Cohen*, 38 U. S. p. 312; 10 Law Ed. 177 (1839), wherein it was laid down that:

“ By the law of Congress of May 26th, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it into another state the efficacy of a judgment upon property, or upon persons to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.”

The final expression of the law governing the force and effect of a judgment in foreign jurisdiction has been made in the leading case of *Lynde v. Lynde*, 181 U. S. 183; 45 L. Ed. 810, 814; where it was said:

“ By the Constitution and the act of Congress requiring the faith and credit to be given to a judgment of the court of another state that it has in the state where it was rendered, it was long ago declared by this court: ‘ The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.’ *McElmoyle v. Cohen*, 13 Pet, 312, 325, 10 L. Ed. 177; *Thompson v. Whitman*, 18 Wall, 457, 436, al L. Ed. 897, 899; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 292, 32 L. Ed. 239, 244, 8 Sup. Ct. Rep. 1370; *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435, and 52 N. J. Eq. 561, 21 L. R. A. 213; 30 Atl. 676.”

But it is a far-fetched construction of a stipulation in open court to call it a contract and separate it from the resulting decree. Oral agreements of parties and counsel are incorporated in the record and embodied in the decree or judgment in thousands of cases. Such parleys are common occurrences and only confusion could come of any attempt to give them a value or significance independent of the proceedings in which they occur.

V.

The New York decree providing as it does for future maintenance subject to modification upon reapplication of the parties is not a final judgment within the meaning of the full faith and credit clause of the federal constitution.

This is the doctrine of the leading case of *Lynde v. Lynde*, 181 U. S. 183; 45 L. Ed. 810. It was followed by Emerey, V. C., in *Freund v. Freund*, 71 N. J. E. 524, in which case he refused to make a decree awarding payment of arrears of alimony under a New York decree.

The subject of the inefficacy in foreign jurisdictions of alimony decrees that are made subject to future modification is completely annotated in *Isreal v. Isreal*, 9 L. R. A. (N. S.) 1168 (1906). In this annotation it is said:

“While there is no doubt that a decree for alimony for a gross sum payable presently is a debt of record entitled to full faith and credit in other states under the provisions of the Federal Constitution, and therefore enforceable in other states (*Lynde v. Lynde*, 181 U. S. 183; 45 L. Ed. 810; 21 Sup. Ct. Rep. 555 (Affirming 162 N. Y. 412; 48 L. R. A. 679; 76 Am. St. Rep. 332; 56 N. E. 979), it is now thoroughly established that a judgment for future alimony or maintenance, which, either by its own terms or by the laws of the state in which it is rendered, is subject to modification as to amount by the court rendering it, is not, even as to instalments which have accrued before the bringing of an action in another state to enforce the same, a final judgment entitled to full faith and credit in other states under the provision of the Federal Constitution. The decision of the United States Supreme Court in *Lynde v. Lynde*, *supra*, seems to have placed that point beyond dispute.”

The lack of finality in the New York decree is the more marked from the conditional language in which it is expressed, namely, that the husband shall release his interest, etc., if the wife shall request.

It was the privilege of the husband at any time to apply for a modification of the New York decree in any respect. He could have asked the Court to relieve him of the requirement to release his curtesy either upon the ground of changed circumstances, or upon the condition that he should increase the amount of the weekly allowance. It is not to be doubted that if Watt had represented to the New York Court that he was ready to increase the stated weekly payments upon condition that he should be relieved from the obligation to surrender his right of curtesy, he would have been permitted to do so. The Court would welcome any effort to provide proper support that tended also to preserve the right of curtesy because the curtesy right is favored in the law.

VI.

The New York decree can not be taken as the evidence of a contract made in open court for the purpose of taking the transaction out of the Statute of Frauds.

The appellants' contention is that the agreement of husband and wife in court was a contract touching lands; that although there is no written evidence of it except the decree, nevertheless the decree, as signed by the judge who made it, is the equivalent of a memorandum in writing inasmuch as the judge was acting by the consent and authority of both litigants, and was, to that extent, their agent.

No citations have been given to support this novel suggestion.

To turn the perfunctory act of a presiding judge in signing a decree into the exercise of an unconscious agency created by the stipulations of parties and counsel in open court would probably surprise no one so much as the judge himself.

When a judge signs a decree, he does so by virtue of the power and authority conferred by the laws of the State establishing his office and defining his duties. He does not and cannot act lawfully under any other authority. His signature gives authenticity to the decree to which it is appended. It has no other significance. It is neither an act of private agency nor the evidence of a private contract. It is strictly and only the evidence and authentication of the decree itself. Such a decree may be explained by a recital of findings based on the evidence, or of admissions and stipulations of the parties, but such admissions and stipulations have no independent value as evidences of a right. They are part of the proceedings culminating in and evidenced by the decree and they are merged in and superseded by the decree.

No rule of practice is more common than that which denies obligation to agreements, whether by parties or counsel, unless they have been reduced to writing. Until the stipulations of the parties in this case had been embodied in the record by the decree they were without obligation upon either party, and when they had been formally embodied in the record by the recitals of the decree they had lost the quality of a mere private contract and were subordinated to the higher obligation of the decree.

Lastly, as these stipulations were admittedly made in contemplation of the entry of a decree, it would be unfair and unjust to treat them as though they had been made under the ordinary circumstances of private contract. That is to say, it is impossible to assume now, that Watt intended this release of curtesy as a concession regardless of the decree that was about to be made, and it is impossible to assume that he would have been willing to make the con-

concession if the decree defining his marital obligations had not accompanied it.

The elements of an independent and separable contract are lacking in any stipulation in court by a defendant. There is no meeting of the minds where one of the parties is present under the coercion of legal process and consents to terms necessarily in the thought that he may have to meet more burdensome obligations if he so fails to consent.

VII.

There is no privity between the appellants and their testatrix growing out of that part of the agreement or of the decree in the New York action that deals with the husband's curtesy.

Privity is defined by Bouvier as being "The mutual or successive relationship to the same rights of property".

Privity is commonly illustrated in the relationship of landlord and tenant, heir and ancestor, devisor and devisee, and of parties to contracts and their assignees.

But, necessarily, "the ground of privity is property and not personal relation". *Bigelow on Estoppel*, 159; *Bailey vs. Sundberg*, 49 *Fed.* 583, 586, 1 *C. C. A.* 387; *Cyc. Title*, "Privity", page 392, Note 64. It is participation in a right to the same property or in a right growing out of the same contract that establishes privity between persons.

Thus, in the present case, Mrs. Watt devised certain lands to the appellant, Shannon, solely, and certain other lands to the appellant, Ginocchio, solely. Each of the appellants stands thereby in privity of estate with the testatrix as to the specific

lands so devised to him or her, but not as to the lands devised to the other. Therefore, as to the husband's estate by the curtesy, there could not be privity between the appellants and Mrs. Watt unless she had power to transmit it by her will, nor could privity of contract arise out of the alleged undertaking and the decree directing release, unless Mrs. Watt was capable of transmitting the right thereby accruing in her favor.

These remarks are enough to show that it is a misconception to suppose that the idea of privity can aid in a solution of the questions here involved. It is simply to beg the whole question of the right of Mrs. Watt to transmit her rights under the New York decree, to say that as to them, the appellants are in privity with the testatrix. They are so in privity with her if she did, in fact, transmit these rights, and they are not in privity with her if she did not.

VIII.

Curtesy and dower are favored in the law, especially as against strangers, and a partial divorce in New Jersey does not affect the marital rights of dower and curtesy.

McGuinness vs. McGuinness, 71 N. J. Eq. 7.

In *Cushing v. Blake, 30 N. J. E. 689*, Justice Depue, at page 697, said:

“Curtesy is a legal incident of the wife's estate of inheritance, and is a right favored in the law. A husband will not be excluded from rights in the property of the wife springing from the marital relation, except by words that leave no doubt of the intention to do so.”

Radley v. Radley, 70 N. J. Eq. 248.

IX.**The complainants are without standing in equity.**

The complainants are the beneficiaries of a testamentary gift. For what they have acquired they have given no consideration. They are volunteers and their claims are without merit. They must take the title in the condition in which they receive it and they have neither done nor suffered anything that will enable them to invoke the aid of equity to enlarge the gift by requiring the husband to part with a valuable right. The husband's right has priority and his equity rests upon the consideration of marriage.

It is respectfully submitted that the decree appealed from should be affirmed.

RUNYON & AUTENRIETH,
WALTER L. McDERMOTT,
Of Counsel with Respondent.









