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CONVEYANCES BY HUSBAND AND WIFE UNDER THE REVISED CODE

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The formalities of conveyances involving the property rights of husband and wife have been much simplified in the Revised Code. The simplification has resulted largely from fundamental changes made in property rights arising from the marital relationship, the general effect of which is to place the husband and the wife on a parity with reference to the rights of each in the other's property and to divest the husband of his former control over the wife's disposition of her property. In order to have a full realization of the formalities and complications which have been abandoned, and to differentiate therefrom essentials which have survived or which have been newly created, it will be necessary to compare somewhat in detail the older statutory provisions with the new.

Freeholds

Under the former Code, the wife had (as she has now under the Revised Code) an inchoate right of dower in all realty of which the husband was seized during coverture,¹ but she had no direct control over the husband's disposition of his realty. It is true that she could refuse to join in the husband's deed for the purpose of releasing her right to dower, and thus indirectly hamper a conveyance of his realty, but such refusal was merely an act exercised with reference to her own property right — her right of dower in the husband's realty — and was not an assertion of

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¹ W. VA. CODE (Barnes, 1923) c. 65, § 1; hereinafter cited as CODE 1923.

any power to control or inhibit a disposition of the husband's interest. He had absolute power to convey his property by his sole deed, subject to the right of dower. His desire to convey might have been thwarted because the grantee refused to accept a conveyance subject to the dower encumbrance; but, if so, the obstacle arose as a mere incident to the wife's exercise of her own property right, and not from any privilege which she possessed to interfere with the husband's right to convey his interest. Consequently, if the wife joined in the husband's deed, she did so solely in order to relinquish her own property right of dower, and not in order to give any efficacy to the deed so far as it disposed of the husband's interest in the realty.

The situation with reference to the husband's curtesy was more complicated. Under the former Code, he had no curtesy initiate, or inchoate right of curtesy. Under the statute,² he had curtesy only in realty of which the wife died seized. From the very definition of curtesy as embodied in the statute, it would seem plain that any disposition of the wife's realty during her lifetime which worked a disseizin as to her would, *ipso facto*, have extinguished the husband's possibility of curtesy; and the Supreme Court of Appeals has uniformly so held, in each instance basing its decision on the supposition that, under the statute defining curtesy and the statutes divesting the husband of control over the wife's property, the husband had no vested right of curtesy in the wife's realty until death of the wife.³ In *Calvert v. Murphy*,⁴ the wife was disseized during her lifetime through adverse possession by her grantee holding under her deed which was void for nonjoinder of the husband, and it was held that the husband's curtesy was extinguished, although he was under the disability of insanity during the entire period of adverse holding and at the time of the wife's death. In this case, adverse possession for the statutory period was necessary in order to work a disseizin, because the deed, being void, could not alone accomplish such a result. However, it would seem that, if there were any circumstances under which the wife could execute a valid deed convey-

² CODE 1923, c. 65, § 15.

³ *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405 (1902); *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166 (1908); *Calvert v. Murphy*, 73 W. Va. 731, 81 S. E. 403, 51 L. R. A. (N. S.) 534 (1914); *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 460 (1917).

Where by statute a wife has dower only in lands of which the husband dies seized, the sole deed of the husband bars the wife's right of dower. See 9 R. C. L. 564 and cases cited.

⁴ N. 3, *supra*.

ing her realty without joinder of the husband, a deed so executed, without more, would, *ipso facto*, have worked a disseizin as to her and so would have extinguished the husband's possibility of curtesy. Two conditions were prescribed in the former Code,⁵ under either of which, with the observance of certain specified formalities, such a deed might have been executed: (1) when the husband and the wife were living separately and apart; and (2) when the husband was *non compos mentis*. In pursuance of the first condition, it was held in *Spangler v. Vermillion*⁶ that a deed executed by a wife living separately and apart from the husband, without joinder of the husband, extinguished his possibility of curtesy. He was denied any right of curtesy after death of the wife, not on the ground that he had forfeited his right by being at fault in bringing about the separation, but solely because the fact of separation, regardless of whose fault, had enabled the wife to convey her property without his joinder in the deed, and so to defeat the possibility of any vested right of curtesy. In the light of this decision, it would seem that the court must have reached the same conclusion as to a deed executed in pursuance of the second condition, when the husband was *non compos mentis*, although no case has been found involving the application and effect of the latter provision.

In spite of what would seem to have been the plain purport of the statute defining curtesy and of the decisions construing it, the former Code contained another statute⁷ which seemed to recognize curtesy as an inchoate right which was the subject of disposition during the lifetime of the wife. This statute not only described curtesy as a "right of curtesy" existing prior to death of the wife, but also provided a method for its release by intervention of the court when a wife desired to sell and convey her realty and the husband was under the disability of infancy or insanity and so could not join in the wife's deed.

As will be noted later, a married woman under the former Code could not execute a valid conveyance disposing of her freehold without joinder of the husband in the deed. He was required to join because the law was supposed to require his consent to the conveyance. If the statute last noted had merely purported to substitute the consent of the court for the consent of a husband who was under disability, and hence was incap-

⁵ CODE 1923, c. 73, § 6.

⁶ *Supra* n. 3.

⁷ CODE 1923, c. 83, § 10.

able of consent, it would have been entirely consistent with the other statutes dealing with curtesy and with the decisions construing them. But it purports to deal with dower and with curtesy on equal terms and there is not the slightest hint that it was promulgated for the purpose of furnishing supervision over the wife's disposition of her property — for the purpose of preventing her from making a profligate conveyance. On the contrary, its whole purport indicates that its object was solely to provide a mechanism for the release of dower and curtesy rights.

The situation was still further complicated by the existence of the statute, heretofore noted,⁸ providing that, when the husband was *non compos mentis*, the wife, by merely resorting to certain prescribed formalities of execution, could convey her realty, and, presumably, bar the husband's possibility of curtesy, by her sole deed without intervention of the court. Why prescribe court action in the one section, if by the other section the same end could be accomplished by resort to a few additional formalities in the deed? Was it intended that, construing the two sections together, the wife might execute a valid sole deed under the one section, but subject to the husband's right of curtesy unless released under the other section? If so, then what becomes of the reasoning in *Spangler v. Vermillion*?⁹ If it was possible to give one section precedence over the other by virtue of priority in enactment or re-enactment,¹⁰ the court never resorted to any such distinction. In fact, the section providing for release of a right of curtesy by intervention of the court seems to have been entirely ignored in the decisions.

With this review of the former law relating to dower and curtesy in mind as a background, we may now proceed to a consideration of the essentials and formalities of conveyances involving the marital relationship under the former Code.

As has already been noted, at the common law and under

⁸ *Supra* n. 5.

⁹ *Supra* n. 3.

¹⁰ CODE 1923, c. 83, § 10, originally provided only for release of a dower right when a husband wished to sell his realty and the wife was an infant or insane. It was for the first time made to apply to a right of curtesy by Acts of 1889, c. 31. The section was last amended and re-enacted by Acts of 1911, c. 44. CODE 1923, c. 73, § 6, providing for the execution of a deed by a married woman when the husband was *non compos mentis* or the husband and the wife were living separately and apart, was in the Code of 1868 and has continued in the Code ever since. It was last amended and re-enacted by Acts of 1919, c. 65.

the former Code, a husband could convey his realty, subject to the wife's right of dower, without joinder of the wife in the deed. But a married woman, under the common law, except when the husband had abjured the realm, or was an alien residing continuously abroad,²¹ could not convey her realty by grant.²² She was divested of her title, if at all, by the fictitious procedure of fine or common recovery.²³ Any power to convey which she has ever possessed is wholly statutory. Hence it is necessary to look to the statutes for the requisites of her conveyances; and it has been decided that at least substantial compliance with the statutory requirements is essential.²⁴

Under the statutes prior to the Revised Code, when the husband and the wife were living together and the husband was under no disability, it was absolutely essential that the husband join in the wife's deed conveying her freehold in order to give it validity.²⁵ But, seemingly, in spite of the contradictions heretofore noted in the statutes, he was not required to join in the deed in order to release a right of curtesy or any other right which he was supposed to have in the wife's realty. The legislative intent in requiring participation of the husband in the wife's conveyance, as construed by the court, was supposed to be that the wife should not be permitted to convey her realty without the husband's consent, and his joining in the deed was prescribed as a mechanism evidencing such consent.²⁶ So strict was the requirement that the husband should join construed to be, that failure of the husband to join rendered the deed absolutely void.²⁷ Moreover, it was absolutely necessary that the husband join in the identical deed executed by the wife. Execution by each alone of precisely similar separate deeds was not sufficient. In such case, the wife's deed was nevertheless void.²⁸ However,

²¹ *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, 64 A. S. R. 354 (1897). "The same rule has been extended and applied when the husband resided without the state of the wife's residence, he having deserted her".

²² *Ogle v. Adams*, 12 W. Va. 213, 240 (1877); *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918 (1900); *Crookshanks v. Ransbargar*, 80 W. Va. 21, 92 S. E. 78 (1917).

²³ *Shumate v. Shumate*, 78 W. Va. 576, 90 S. E. 824 (1916); *Crookshanks v. Ransbarger*, *supra* n. 12.

²⁴ *Rosenour v. Rosenour*, *supra* n. 12; *Bennett v. Pierce*, 45 W. Va. 654, 31 S. E. 972 (1898); *Gillespie v. Bailey*, 12 W. Va. 70, 88 (1877); *Watson v. Michael*, 21 W. Va. 568 (1883).

²⁵ *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56 (1892); *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207 (1893); *Calvert v. Murphy*, *supra* n. 3.

²⁶ *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 695 (1901).

²⁷ Cases in note 15 *supra*. But see *Shumate v. Shumate*, *supra* n. 13.

²⁸ *Cecil v. Clark*, 44 W. Va. 659, 688-9, 30 S. E. 216 (1898).

since the husband joined in the wife's deed, seemingly not to convey or release any right of his own, but merely, in pursuance of the formal statutory requirement, to indicate his assent to the wife's conveyance, it was not necessary (though the usual and commendable practice) for him to be named as a grantor or otherwise in the body of the deed. His mere signature to the deed was sufficient, because the fact that he signed the deed was sufficient evidence of his consent.¹⁹ But when the wife joined in the husband's deed conveying his realty, the formalities were different.

As has already been observed, the wife had (and still has) an inchoate right of dower in the husband's realty. If she failed to join in the deed conveying his realty, the realty was conveyed subject to her right of dower, which she might assert against the grantee in the event that she survived the husband. Hence she joined in the husband's deed, not to evidence assent to his conveyance, but in order to relinquish her inchoate right of dower. Wherefore, it was held, in order to accomplish such purpose, it was necessary, not only that she sign the deed, but also that she be designated as a party in the body of the deed.²⁰ However, the fact that she was designated in the body of the deed as the "wife" of the husband grantor, her name appearing only in her signature to the deed, was held sufficient.²¹

The general formalities with reference to conveyances involving the marital relationship under the Revised Code will best be understood by first referring to the provisions affecting generally the property rights of husband and wife. Curtesy has been abolished.²² The husband and the wife now each have an inchoate right of dower (in general, similar to the wife's right of dower under the former Code) in the other's realty.²³ It is the general policy of the Revised Code to place the husband and the wife on an equality with reference to property rights, and further to preclude the husband from any control over the wife's property.²⁴ Hence the husband's assent to the wife's conveyance and his signature to her deed as formal evidence of

¹⁹ *Morgan v. Snodgrass*, *supra* n. 16.

²⁰ *Laughlin v. Fream*, 14 W. Va. 322 (1878).

²¹ *Hill v. Horse Creek Coal Land Co.*, 70 W. Va. 221, 73 S. E. 718 (1912).

²² W. VA. REV. CODE (1931) c. 43, art. 1, § 18; hereinafter cited as REV. CODE.

²³ REV. CODE, c. 43, art. 1, § 1.

²⁴ REV. CODE, c. 48, art. 3, §§ 1, 2.

such assent are no longer necessary.²⁵ Precisely as the husband under the former Code could convey his realty without joinder of the wife in the deed, but subject to her right of dower, so now either spouse can convey without joinder of the other, but subject to the other's right of dower.²⁶ And in like manner, it is provided that the wife may bind herself by a contract to sell or convey her realty.²⁷

Since the husband's consent to the wife's conveyance is no longer necessary, he will not join in the wife's deed in order to give it validity so far as it purports to convey her interest. As a conveyance subject to the future assertion of his dower right if he should survive her, it is wholly valid without his joinder. The only object in having him join is in order to release his inchoate right of dower. Since this is so, presumably, under the authority of *Laughlin v. Fream*,²⁸ in order to accomplish the present purpose of having him join, it would not be sufficient, as formerly,²⁹ that he merely sign the wife's deed. It would seem that he must now be designated in some manner in the body of the deed as a party to it; but, under the authority of *Hill v. Horse Creek Coal Land Co.*,³⁰ merely describing him in the deed as the "husband" of the wife grantor would seem to be sufficient.

Since neither the husband nor the wife is now required to join in the other's conveyance in order to give validity to it, there is no longer any reason why the dower right of either spouse should not be released by a separate deed executed solely by the spouse entitled to the dower right, and a section in the Revised Code so provides.

"When one spouse has, without the other's joining in the deed or other writing, conveyed his or her interest in real estate in which the other is entitled to a contingent right of dower or other interest, the spouse not so joining may thereafter, but not before, release or relinquish his or her contingent right of dower or other interest in the same by his or her separate deed, or bind himself or herself to do so by separate contract. When one spouse has, without the other's joining in the contract or other writing, agreed to sell or convey any real estate in which the other is entitled to a

²⁵ REV. CODE, c. 48, art. 3, § 2.

²⁶ REV. CODE, c. 48, art. 3, §§ 2, 3.

²⁷ REV. CODE, c. 48, art. 3, § 3.

²⁸ *Supra* n. 20.

²⁹ *Morgan v. Snodgrass*, *supra* n. 19.

³⁰ *Supra* n. 21.

contingent right of dower or other interest, such other spouse may thereafter, but not before, agree to relinquish his or her contingent right of dower or other interest in the same by separate contract.”²¹

Of course an inchoate right of dower should not be released or conveyed prior to conveyance of the fee. In order to prevent such a possibility from arising through construction of the statute, it is expressly provided that the dower right may be released by a separate deed only after, “but not before”, conveyance of the fee. To this extent, the inhibition intended by the statute undoubtedly accomplishes a meritorious purpose, and perhaps it was only to this extent that the revisers had specifically in mind any function which the inhibition would serve. But it would seem that addition of the words “or other interest” after the word “dower” has brought confusion into the statute. For example, suppose that the “other interest” should be an interest of one spouse in common with the other spouse; in other words, that the husband and the wife should own the realty in fee as tenants in common. The effect of this section, literally construed, would seem to be to prevent either spouse from conveying his or her undivided interest, subject to the other’s right of dower, until the other spouse has conveyed his or her interest. The result would be that neither spouse, as a tenant in common, would be able to convey an undivided interest by a separate deed, a result obviously not intended by the revisers. The very absurdity of the result, contrary to the primary object of the statute, would seem to be sufficient to prevent a court from construing the section as having such an effect. Nevertheless, it would seem desirable to eliminate the contradiction from the phraseology; and it would seem that this may be done by eliminating the words “or other interest” in each instance in which they occur in the section. With these words eliminated, the section would seem, without further change, entirely sufficient to accomplish the purpose for which it was intended.

It will be understood, of course, that, ordinarily, the acknowledgment to a conveyance serves only the purpose of authenticating the signatures of the grantors for purposes of recordation. In other words, the acknowledgment is no part of the execution of the deed itself and gives no additional validity

²¹ REV. CODE, c. 48, art. 3, § 5.

or efficacy to it as a conveyance *inter partes*.³² However, under the former Code, acknowledgment by a married woman was necessary to the validity of the deed, even *inter partes*, and hence was a part of the execution of the deed, in addition to the function which it served for purposes of recordation.³³ Moreover, acknowledgment by the husband of his signature to the wife's deed was essential as his final act of approval, and hence in this respect was a part of the execution of the deed.³⁴ Furthermore, although the husband and the wife might have acknowledged separately, and the acknowledgments might have been certified in separate certificates, the wife was not authorized to acknowledge her signature until the husband had signed the deed,³⁵ a requirement which has frequently brought confusion into titles, apparently because the obscurity of its source and its lack of any logical reason has offered a temptation to ignore it.³⁶ Failure to observe this latter formality in all prior deeds was cured by Acts of 1921,³⁷ but the necessity for its observance was not entirely eliminated until enactment of the Revised Code.

Under the Revised Code, acknowledgment of a married woman's deed is no longer a part of the execution of the deed

³² Heck v. Morgan, 88 W. Va. 102, 106 S. E. 413 (1921).

³³ CODE 1923, c. 73, § 6; Shumate v. Shumate, *supra* n. 13.

³⁴ Morgan v. Snodgrass, *supra* n. 16.

³⁵ Cecil v. Clark, *supra* n. 18.

³⁶ The requirement was based on the form prescribed by statute for certifying separately the acknowledgment of a married woman. CODE 1923, c. 73, § 4. The phrase "whose names are signed" was taken to indicate that both names must have appeared as signatures to the deed before the wife was authorized to acknowledge her signature. Cecil v. Clark, *supra* n. 18. It is said that the husband must have signed first so as to indicate his assent to the conveyance as a condition precedent to the wife's acknowledgment. Why? Granted that the object of his signing is to give his consent and that his signature and acknowledgment were necessary for such purpose, what difference should it make whether he so indicated his consent before or after the wife signed and acknowledged? The deed was wholly ineffective until it had received his signature and acknowledgment.

It is believed that the decision of Cecil v. Clark will have to stand on the bare implication arising from the form of the acknowledgment. Since this is so, it will be interesting to note another case in which the court decided that a seemingly more important provision in the joint form of acknowledgment for husband and wife might be disregarded as merely directory. The only peculiar feature in the joint form prescribed by CODE 1923, c. 73, § 4, and seemingly the only necessity for prescribing the form, is the description of the marital relationship; but it was decided in Wehrle v. Price, 80 W. Va. 666, 94 S. E. 477 (1917), that a description of the marital relationship might be omitted and could "be proven by evidence dehors the writing". A statement of the marital relationship was also omitted from the deed.

If the statutory form, in effect, was merely directory in the one case, why not so in the other?

³⁷ C. 63.

necessary to its validity. Like any other deed, such a deed will now be acknowledged solely in order to authorize its recordation.³⁸ It is no longer necessary that the husband shall have signed a deed as a condition precedent to the wife's acknowledgment.³⁹ Nor, of course, is it any longer necessary that the husband acknowledge the wife's deed as an act of assent to the wife's conveyance, for, as we already have seen, his consent is no longer required. Acknowledgment by either husband or wife is essential only for purposes of recordation and the priority in which they sign or acknowledge is immaterial.

Since under the Revised Code a married woman can convey her realty, even when living with her husband and when the husband is *sui juris*, without his consent or joinder in the deed — subject, of course, to his right of dower — the former statutory provisions for execution of deeds by a married woman without joinder of the husband when they were living separately and apart or when the husband was *non compos mentis* have been omitted.⁴⁰ A further reason why these provisions should be omitted, to the extent that they were intended to enable the wife to convey her realty by her sole deed so as to bar the possibility of curtesy, is the fact that the husband is now entitled to an inchoate right of dower in the wife's realty, of which he can be deprived only by his consent or by intervention of the court.

Although the Revised Code has extended the field of marital rights in realty to the extent of giving the husband an inchoate right of dower where formerly he had a bare possibility of curtesy, it has gone a long way in providing that neither the husband nor the wife may indirectly hamper the other in the sale or conveyance of his or her realty by arbitrarily refusing to relinquish an inchoate right of dower. It will be observed that there are two instances in which such an embarrassment may arise: (1) when the spouse entitled to dower is under a disability, and so is not capable of joining in a deed; and (2) when the spouse entitled to dower is *sui juris*, but merely refuses to join.

The section in the former Code, providing for release of dower or curtesy by intervention of the court when the spouse entitled to dower or curtesy was an infant or insane, with changes substituting the husband's right of dower for his former

³⁸ REV. CODE, c. 43, art. 3, § 3; and Revisers' Note.

³⁹ REV. CODE, c. 39, art. 1, § 5.

⁴⁰ See Revisers' Note to REV. CODE, c. 39, art. 1, § 6.

"right of curtesy", has been carried into the Revised Code,⁴¹ where its function, owing to the change made in the husband's interest, is now consistent with the nature of the rights upon which it operates. Another change is that convicts have been added to the disabled class.

Under the former Code, if the husband and the wife were living together and the husband was *sui juris*, it was impossible for the wife to convey any interest in her realty without joinder of the husband in the deed. By his mere refusal to join he could defeat absolutely a sale and conveyance of her property. If the wife under similar circumstances refused to join in the husband's deed conveying his realty, the most that he could do was to convey subject to her right of dower. Until the year 1919, the latter situation was not aided by the fact that she had joined in his contract to sell and convey. Until Acts of 1919,⁴² her contract to release her dower right could not be specifically enforced against her.⁴³

Under the Revised Code, neither spouse can arbitrarily hamper a *bona fide* sale and conveyance of the other's realty by refusal to join in the deed, although they are living together and both are *sui juris*. In the event of a refusal to join in the deed for the purpose of releasing the dower right, the right of dower may be released by intervention of the court.

"If the owner of real estate contracts to sell the same, and the spouse of such owner refuses to release his or her dower interest therein, such owner, or the person contracting to purchase, may institute suit in chancery for the purpose of having the dower interest released and the contract consummated. The court on the hearing may, in its discretion, and if satisfied that the contract of sale was made in good faith and without design to force such spouse to part with his or her dower interest, approve the sale and price, and cause to be paid to such spouse such gross sum, computed according to the method provided in article two of this chapter, as shall represent the present value of his or her inchoate dower right. Upon such payment as aforesaid the court shall order a release of the dower interest, by such spouse, or if he or she refuses to execute the release, then by a special commissioner to be appointed by the court for the

⁴¹ REV. CODE, c. 37, art. 1, § 9.

⁴² C. 65. Similar provisions have been carried into the REV. CODE, c. 48, art. 3, §§ 4, 5.

⁴³ *Crookshanks v. Ransbarger*, *supra* n. 12.

purpose, which release shall be effectual to pass the property to the purchaser free of such dower right.’⁴⁴

Evidently the statute was drafted so as to be operative only when the spouse owning the realty has entered into a contract to sell it, because it was deemed inadvisable to invoke action by the court with reference to the dower right until the spouse owning the realty is legally bound to convey. Otherwise, the release of the dower right through order of the court might prove abortive, or the dower right might be released without any binding transfer of the fee. It will be noted that the court is authorized to compel a release only when the sale is “made in good faith and without design to force such spouse to part with his or her dower interest”; and, further, that the court, in any case, is given a discretion as to whether a release will be ordered.

It will be observed that the sections in the Revised Code providing for release of a dower right by intervention of the court apply only to two situations: (1) when a spouse owning realty “wishes to sell” it and the spouse entitled to dower is under a disability; and (2) when a spouse owning realty “contracts to sell” it and no disability is involved. No provision is made for the release of dower by intervention of the court after the realty has already been sold and conveyed subject to the dower right. The only provision affecting the latter situation is the section carried over from the former Code, with proper alterations so as to make it apply to the husband’s newly created right of dower, which gives the grantee of property conveyed by the sole deed of a spouse who dies after executing the conveyance the option to substitute a money compensation in lieu of assignment of dower in the property, provided the spouse entitled to dower survives the grantor in the deed and demands assignment of dower.⁴⁵ Perhaps the revisers omitted to make provision for release of the dower right by intervention of the court in this situation because it was surmised that, if either the spouse granting the fee or the grantee should desire a release of the dower right by intervention of the court, such relief should be sought pending the contract to sell and convey,⁴⁶

⁴⁴ REV. CODE, c. 43, art. 1, § 6. This section was held not unconstitutional as impairing vested interests in *Ruby v. Ruby*, 163 S. E. 717 (W. Va. 1932). See Note (1933) 39 W. VA. L. Q. 163.

⁴⁵ REV. CODE, c. 43, art. 1, § 15.

⁴⁶ Under REV. CODE, c. 43, art. 1, § 6. See n. 44 *supra*.

and not after execution of the deed. If the realty has already been conveyed subject to the dower right, the presumption would not seem unreasonable, either that the grantee was willing to take it on the gamble that the spouse entitled to dower would not survive the grantor, or that the grantee was willing, in the event of such a survivor, to resort to the section permitting him to pay money in lieu of submitting to the assignment of dower, and that the terms of sale had been adjusted to such a contingency.

Until the Revised Code, the common-law disability of the husband and the wife to contract with each other had not been removed. Hence neither could convey a legal title directly to the other. A deed from the husband to the wife passed only an equitable title and a deed from the wife to the husband was void.⁴⁷ If either spouse desired to convey realty to the other, it was necessary to resort to the medium of a third person. The husband and the wife joined in a conveyance to the third person and the third person immediately, as a part of the same transaction, conveyed to the spouse who was intended to have title.⁴⁸ Under the Revised Code, in pursuance of the general policy to remove the common-law contractual disabilities existing between husband and wife, it is provided that either the husband or the wife may convey a legal title directly to the other,⁴⁹ and the intervention of a third person as a medium is no longer necessary.

Leaseholds

It was decided under the provisions of the former Code that a married woman could execute a valid lease of her realty

⁴⁷ *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775 (1909), and cases cited. The reason stated in the cases why the wife's deed was void and did not even pass an equitable title was that the husband did not join in the deed. This, of course, was in accord with the letter of the statute. On the other hand, the object of having the husband join was in order to evidence his consent, and the fact that he, as grantee, accepted the deed was a substantial, if not formal, indication of his consent. Would equity have given the husband an equitable title if he had joined with the wife as a grantor in a deed conveying her property to him as grantee? Would such a multiplication of form be in accord with the ways of equity, which looks to the substance rather than to the form? Would it not be more like equity to say that such a deed was void because the husband was disqualified by interest to give his consent to a conveyance in which the wife undertook to convey her property to him?

⁴⁸ It has been held that judgment liens and dower encumbrances do not attach to the realty through the medium of the third person, he serving only as a conduit for the title and having only instantaneous seizin. 1 *WASHBURN, REAL PROPERTY* (6th ed.) §§ 395, 397.

⁴⁹ *REV. CODE*, c. 48, art. 3, § 7.

without joinder of the husband in the lease.⁵⁰ In view of the cases heretofore cited and discussed defining the nature and the incidents of the husband's former possibility of curtesy, it would seem that a lease so executed must have created a leasehold free from any molestation from a future vesting of the curtesy right, and hence that there was no necessity that the husband join in the lease for the purpose of releasing any right of curtesy⁵¹ for the duration of the term. But the same incidents did not attach to the dower right.

In order that the lessee may take the leasehold free from the encumbrance of dower, it is necessary that the party entitled to dower join in the lease.⁵² Hence, under the former Code, if a husband executed a lease without joinder of the wife, the property was still subject to her right of dower; and under the Revised Code, if either spouse executes a lease of his or her realty without joinder of the other spouse, the property will be subject to the other's right of dower. If the unreleased right of dower should become consummate pending the term, the writer knows of no rule of law or statute that would compel the spouse entitled to dower to resort to an apportionment of the rent, as such, in lieu of assignment of dower in the property, although there seems to prevail a rather common impression to that effect.

There does not seem to be any provision in either the former or the Revised Code to aid the situation where a spouse owning realty desires, or contracts, to lease it and the other spouse refuses to join in the lease. The sections in the Revised Code providing for intervention of the court "if the spouse of an infant or insane or convict husband or wife wish to sell real estate"⁵³ or "if the owner of real estate contracts to sell the same, and the spouse of such owner refuses to release his or her dower interest therein"⁵⁴ would hardly be construed as applying to the execution of a lease. Certainly the express language would not indicate that they were designed for such a purpose. If the surviving spouse should not elect to accept an appor-

⁵⁰ *Smith v. New Huntington General Hospital*, 84 W. Va. 281, 99 S. E. 461 (1919). See (1919) 26 W. VA. L. Q. 59.

⁵¹ *Idem.*

⁵² 1 MINOR, REAL PROPERTY 420; 1 TIFFANY, REAL PROPERTY (2d ed.) 768; *Rockland-Rockport Line Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, L. R. A. 1916F 352 (1911).

⁵³ REV. CODE, c. 37, art. 1, § 9.

⁵⁴ REV. CODE, c. 43, art. 1, § 6.

tionment of the rent in satisfaction of the assignment of dower, the only refuge for the lessee under the Code would seem to be the section heretofore referred to permitting "any person claiming under an alienation made by the deceased spouse" to pay the surviving spouse a money compensation in lieu of the assignment of dower.

"Any person claiming under an alienation made by the deceased spouse or under a sale made in pursuance of the judgment or decree of a court, in the lifetime of such spouse, may pay to the surviving spouse, during his or her life, lawful interest from the time the demand is made upon him by the surviving spouse, or his or her agent, for his or her dower in the lands, on one-third of the value thereof at the time of such alienation or sale, or he may pay a gross sum in lieu thereof, to be computed upon the principles provided in article two of this chapter; and in either case the payment so made shall be a full discharge and satisfaction of the claim of the surviving spouse for dower in the real estate so alienated or sold."¹²⁵

Would this section apply to an alienation for a term under a lease? An assumption, which may be conceded, that execution of a lease would constitute an "alienation" would indicate that the statute was intended to apply to leasehold conveyances; but its general operative effect would seem to indicate that it was intended to apply only to alienations of a freehold. A resort by the lessee to either of the alternatives provided by the statute would involve difficulties, either for himself, the heirs or the spouse entitled to dower.

A resort to the first alternative, permitting the lessee to pay interest on one-third of the value of the realty, would more nearly resemble the situation where the surviving spouse elected to take a portion of the rent, assuming that the lessee would be entitled to charge any sums so paid against the rent payable to the heirs. Interest on one-third of the value of the realty at the time of the execution of the lease might approximate one-third of the rent. Whether it should be greater or less would be immaterial if the surviving spouse is bound to accept it in lieu of dower and the lessee is entitled to charge it against the rent. But the statute provides that interest shall be paid to the surviving spouse on one-third of the value of the realty "during his

¹²⁵ REV. CODE, c. 43, art. 1, § 15.

or her life". What would be the effect of this provision if the surviving spouse should live beyond the term of the lease?

A resort to the second alternative would involve still greater difficulties. Questions like the following would arise. What should be done where the life expectancy of the surviving spouse exceeds the term of the lease? Would the surviving spouse, in spite of payment of the gross sum in lieu of dower, in any case be entitled to assignment of dower after expiration of the term of the lease? If the lessee should elect to pay the gross sum, how would such payment be adjusted to payment of the rent?

Of course the lessee would be protected under neither alternative unless he were permitted to charge against the rent payable to the heirs any sums paid to the surviving spouse in pursuance of the statute, a matter as to which the statute is silent. However, if the lease should contain the usual covenants made by a lessor, and nothing to the contrary, the heirs, as successors to the deceased lessor's liability under the covenants, might be compelled to submit to such an abatement of the rent, on the supposition that the assertion by the surviving spouse of his or her dower right worked a breach of the covenants.

Upon the whole, in the present state of the law, it would seem prudent for a prospective lessee in a long-term lease to insist that both the husband and the wife join in the lease as lessors. Such a procedure, if requisite for no other purpose, at the least will be a safeguard against the possibility of future annoyance.

Partnership Realty

Both the former Code and the Revised Code are silent as to the existence or nature of dower in partnership realty. It is said that in England, Canada and Virginia, partnership realty is deemed to be converted into personalty for all purposes; but that in all the other states it retains its nature as realty for all purposes except to the extent that it may be required to pay partnership debts and adjust partnership equities, and hence, with this limitation, is subject to dower.⁶⁸ Seemingly, the ques-

⁶⁸ "In England partnership realty is deemed converted into personalty for all purposes, and, accordingly, widows of deceased partners are not entitled to dower in partnership realty. A like rule prevails in Canada and in one state of the United States. The rule generally prevailing in this country, however, is that the partnership realty retains its character as such for all purposes except so far as it may be required to pay partnership debts and adjust partnership equities; and under this rule the wife of a partner is

tion has never been positively decided in West Virginia, but the cases are well supplied with *dicta*⁵⁷ by way of assumptions to the effect a wife has a right of dower in partnership realty after payment of the partnership debts and adjustment of partnership equities. Hence it would seem prudent to join both the husband and the wife as grantors in a conveyance of partnership realty. Particularly would such a joinder seem advisable when the status of the realty has not already been definitely fixed by deed. Whether realty is held by joint grantees in partnership or merely as tenants in common depends upon the intention of the grantees.⁵⁸ When the intention is not disclosed by the deed under which they hold title, it may be established by parol evidence;⁵⁹ and there is a presumption that they hold merely as tenants in common.⁶⁰ In a case where the presumption prevails, of course, the realty is subject to dower; and in no case would it be desirable to take a title which may be disturbed by the operation of facts which do not appear in the conveyance.

Powers of Attorney

A married woman under the former Code could execute a valid power of attorney, either to convey her own realty or to release her inchoate right of dower; but it was necessary that the husband join in the instrument creating the power.⁶¹ The provision in the Revised Code is as follows:

“A married woman may, by power of attorney duly executed, without her husband joining therein, appoint an

entitled to dower in partnership realty, subject to the prior payment of partnership debts and the adjustment of partnership equities. Where such is the agreement of the partners, there may be an out and out conversion of partnership realty into personalty for all purposes; and where such an agreement exists, partnership realty acquired under it is not subject to dower.”
19 O. J. 473-4.

The state mentioned as the only one following the English rule is Virginia. “It is settled law in Virginia, as it is in England, that real estate purchased with partnership funds for partnership purposes is so far considered as personalty as not to be subject to dower or curtesy in favor of the consort of a deceased partner.” *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325 (1892).

⁵⁷ *Martin v. Martin*, 25 W. Va. 579 (1885); *Sleeth v. Taylor*, 82 W. Va. 139, 95 S. E. 597 (1918); *Shinn v. Shinn*, 105 W. Va. 246, 142 S. E. 63 (1928).

⁵⁸ *Sleeth v. Taylor*, *supra* n. 57; *Cunningham v. Ward*, 30 W. Va. 572, 5 S. E. 646 (1888). See earlier cases cited in 10 *MICHEE, ENCY. DIG.* 839.

⁵⁹ *Hancock v. Talley*, 1 Va. Dec. 433 (1881); *Brooke v. Washington*, 8 Grat. 248, 56 Am. Dec. 142 (Va. 1851); *Wheatley's Heirs v. Calhoun*, 12 Leigh 264 (Va. 1841).

⁶⁰ *Hancock v. Talley*, *supra* n. 59. See also *Wheatley's Heirs v. Calhoun*, *supra* n. 59.

⁶¹ CODE 1923, c. 66, § 3.

attorney in fact for her, and in her name to execute any deed or other writing which she might execute in person'⁶²

Covenants and Warranties

Two questions are involved here: (1) Is a married woman bound at all by a covenant or warranty in any deed, whether it be a deed conveying her own property or one in which she joins merely for the purpose of releasing her right of dower? (2) Conceding that a husband or a wife is bound by his or her covenant or warranty in a deed conveying his or her own property, is either spouse so bound when he or she joins in the other's deed for the purpose of giving validity to the other's conveyance or for the purpose of releasing a right of dower or curtesy?

These questions arise most frequently because of the ordinary practice of making, as a matter of course, the covenants and warranties, as well as other provisions in the deed, joint as to the husband and the wife, by employing such phraseology as "the said grantors (or "the said parties of the first part") covenant"; or "the said grantors (or "the said parties of the first part") convey with covenants". Such phraseology no doubt is usually resorted to merely as a matter of convenience, without any thought as to whether it is the intention that both parties are to be bound; or with the assumption that liability will be determined by presumptions arising from the primary objects with which the parties joined in the deed. The practice has perhaps further been encouraged by the facts that the husband is usually the owner of the property conveyed and that until recently the wife was precluded by statute from becoming liable on covenants in her deed.

It is frequently said, without qualification, in the cases and in the texts that a married woman is not liable on her covenants or warranties in a deed;⁶³ but an examination of the authorities will disclose that such statements, usually, if not, always, are based either (1) on the fact that her common-law incapacity to contract had not been removed; or (2) on the fact that, although she had been given general statutory capacity to contract, she was still specifically precluded from entering into a binding covenant or warranty in a deed.⁶⁴ The mere fact that she has been given

⁶² REV. CODE, c. 48, art. 3, § 6.

⁶³ See 3 WASHBURN, REAL PROPERTY (6th ed.) 229; 30 O. J. 749-750, and cases cited.

⁶⁴ Such was the law in West Virginia prior to 1919. See W. VA. CODE (1916) c. 73, § 6.

power to execute a deed conveying her property does not necessarily mean that she has capacity to enter into a binding covenant or warranty therein, in the absence of general capacity to contract.⁵⁵ No reason is perceived why the husband, possessing a general capacity to contract at the common law, is not bound by his personal covenants or warranties in a deed conveying the wife's property, if the covenants or warranties are express and there is nothing in the deed indicating a contrary intention.⁵⁶ Nor is any reason perceived why the wife should not be so bound in a deed conveying her husband's property, if she has by statute been given a general capacity to contract without specific limitation. It would seem that presumptions, if any, arising from the natures of the respective interests disposed of in the deed should not prevail in the face of the express covenant or warranty. So to permit would presuppose a mistake in the express terms of the deed. Moreover, should there be any presumption that a grantor joined in a deed solely in order to release a right of dower or curtesy or to assent to the conveyance? A joinder for such a purpose, with the use of proper language, could easily be made without a further joinder in the covenants or warranties. Liability on the covenants or warranties may have been an additional object of the joinder. The spouse owning the realty may have been financially irresponsible, and, although a consideration to support the liability would not be necessary, an apportionment of the purchase money between the spouses may have been an actual inducement to joinder in the covenants or warranties, thus adding to the equity of the liability.

The local law with respect to a married woman's covenants and warranties has had a rather varied history within recent years. Under the West Virginia statutes a married woman has long possessed a general capacity to contract with others than her husband, which, unqualified, would seem to have been sufficient to permit her to bind herself by her covenants and warranties in a deed; but, prior to 1919, it was not the legislative policy to

⁵⁵ *Jackson v. Vanderheyden*, 17 Johns. 167 (N. Y. 1819).

⁵⁶ However, when the covenantor conveys no title and delivers no possession, the covenant is merely one in gross, operative only between the covenantor and the covenantee. It does not run with the land and is of no avail to a remote grantee. *McDonald v. Rothgeb*, 112 Va. 749, 72 S. E. 692 (1911); *Burtner v. Keran*, 24 Grat. 42 (Va. 1873); *Randolph's Adm'x. v. Kinney*, 3 Rand. 394 (Va. 1825).

permit her to bind herself by such a covenant or warranty. In the section of the Code of 1916⁸⁷ which provided for the execution of a conveyance by a married woman, either for the purpose of conveying her own property or for the purpose of releasing her right of dower, is the following provision:

“ . . . And such writing shall not operate any further upon the wife or her representatives by means of any covenant therein.”

By Acts of 1919,⁸⁸ this provision was omitted from the section as it appears in the Code of 1923.⁸⁹ Obviously, the legislative intent in eliminating the inhibition was to permit covenants and warranties made by a married woman to become in some manner and to some extent binding upon her. Otherwise, the elimination would have been useless. Hence it could not have been the intention to cause her to revert to her common-law status, in which she had no capacity to contract. Wherefore, since the inhibition was removed without any qualification, it must have been intended that she should have power and liberty to bind herself by covenants or warranties to the extent of her general contractual capacity provided by other statutes then in force. If so, it would seem that she could have bound herself, not only by her covenants or warranties in a deed conveying her own property, but also by those in a deed conveying her husband's property. This conclusion may be strengthened by the fact that the provision, in the section from which it was eliminated, qualified and limited the operation of deeds executed for the purpose of releasing a dower right, as well as deeds conveying the married woman's own property.

After Acts of 1919, there was no change in the statutes until the enactment of the Revised Code, when the following provision appeared:

“A married woman shall be liable on any covenant contained in any such deed, writing or contract, the same as if she were a single woman.”⁹⁰

In the revisers' note to the section containing this provision, is the following statement:

⁸⁷ C. 73, § 6.

⁸⁸ C. 65, § 6.

⁸⁹ C. 73, § 6.

⁹⁰ REV. CODE, c. 48, art. 3, § 3.

“A married woman is expressly made liable on her covenants, although this result probably followed from the removal of all restrictions on her right to contract.”

The section in which the provision last quoted appears deals exclusively with deeds, writings and contracts concerned with the conveyance by a married woman of “her own real estate”. Hence the provision purports to make her liable only on a “covenant contained in any such deed, writing or contract”. There is no provision in the Code expressly declaring that she shall, or shall not, be liable on her covenants or warranties in a deed conveying the husband’s realty. The two sections following the above mentioned section in the Revised Code²¹ provide for the execution of conveyances for the purpose of releasing a right of dower, applying equally to the husband and the wife. Nothing is said in either of these sections concerning the liability on covenants of either a husband or a wife who executes a conveyance for the purpose of releasing a dower right. Is a husband or a wife liable on such a covenant?

It may very well be argued that, under the principle *expressio unius est exclusio alterius*, the provision in the one section for liability of the wife when she is conveying her own property and the lack of any such provision in the other sections applying when she is releasing a right of dower, indicate an intention that she shall not be bound in the latter instance. By a process of extension, the same reasoning may be applied to the husband. The dower rights of the husband and the wife are identical, and so are their general contractual capacities and their capacities to convey. The same provisions regulate their deeds executed for the purpose of releasing their dower rights. In the present status of their property and contractual rights and capacities, there is no substantial reason for differentiating between the two as to liability on their personal covenants in each other’s deeds. Hence it may be concluded that, if it was not the intention that the wife should be bound on such covenants, it was likewise the intention that the husband should not be bound. Opposed to the implication which may be construed into the statutes, whether applied to the husband or the wife, we have the express covenant in the deed and the general contractual capacity to enter into it.

In the present state of the law, should it be considered over-cautious, when the intention is that only one spouse shall be bound

²¹ REV. CODE, c. 48, art. 3, §§ 4, 5.

by covenants or warranties in a deed, expressly to limit the operation of the covenants or warranties to the spouse who is intended to be bound?⁷³ Or if it is the intention that both spouses shall be bound by the covenants or warranties, to indicate the intention in a form still more emphatic than the usual form of joint covenants?⁷⁴

Releases

A question which has given rise to a difference of opinion, and which is not settled by either the former or the Revised Code, is whether it is necessary, or advisable, that both the husband and the wife join in the execution of a release of a vendor's lien reserved in a deed in which they are joint grantors.

Any doubts about the answer to this question will depend upon the manner in which the deed provides for payment of the deferred purchase money secured by the lien. If the deed provides, as it usually does, for payment of the deferred purchase money to the two spouses jointly (*e. g.*, "to the said grantors" or "to the said parties of the first part") and the lien is reserved to them jointly — or even though the lien is reserved generally, if the deed provides that the purchase money secured by the lien is to be paid to them jointly — there may be at the least a serious doubt as to whether it is not necessary to have both spouses join in the release, although one of them has apparently joined in the deed only for the purpose of releasing a right of dower. In such a case, on the face of the deed they are joint creditors,⁷⁴ and may be such in fact, for it may have been understood that each was to receive a portion of the deferred purchase money. It is true that payment to one of several joint creditors is a discharge of the debt as to all; but we are confronted here, not with a discharge of the debt, but with the execution of a release of the lien which secures the debt. The fact that one of the joint creditors is entitled to receive payment on behalf of the others may not necessarily indicate that he is entitled singly to release the lien re-

⁷³ For example, instead of "the said grantors covenant" or "warrant", or "the said parties of the first part covenant" or "warrant", let the deed state "the said grantor, John Doe, covenants" or "warrants", or "the said party of the first part, John Doe, covenants" or "warrants".

⁷⁴ For example, "the said grantors, John Doe and Mary Doe, his wife, each covenant" or "warrant"; or "each jointly and severally covenant", *etc.*

⁷⁴ *Sandusky v. West Fork Oil & Natural Gas Co.*, 63 W. Va. 260, 59 S. E. 1082 (1907)..

served to all. Upon the whole, it is deemed advisable, if not necessary, that both spouses, under such circumstances, join in the execution of the release.

On the other hand, if the deed expressly provides that the deferred purchase money is to be paid to only one of the spouses (*e. g.*, "to the said grantor, John Doe", or "to the said party of the first part, John Doe"), it would then perhaps be sufficient for that party singly to execute the release, although the lien were reserved by the grantors jointly.