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Opinion of the Judges of the Supreme Court relative to the right of a Husband to Vote on his Wife's Real Estate [Given March 30, 1878].

Rhode Island State Supreme Court

State of Rhode Island and Providence Plantations.

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JUDGES OF THE SUPREME COURT,

RELATIVE TO THE RIGHT OF A

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To His Excellency Charles C. Van Zandt, Governor of the State of Rhode Island and Providence Plantations.

We have received from your Excellency a communication requesting our opinion upon the following question, to wit:

"Can a husband, under the State constitution, Article II, Section 1, be entitled to vote by virtue of any right or interest which he may have as husband in the real estate of his wife, and if so, under what circumstances?"

We think it proper, in giving our answer to this question, to give the reasons also on which our answer rests. This will oblige us to go back to the doctrines of the common law, which previous to 1844 was the law that determined the right of the husband in the property of his wife in this State.

At common law the husband, simply by force of his marriage, without the birth of issue, acquired an estate in all the wife's real property in possession, whether of inheritance, or for the life of the wife, and whether vesting in her before or after marriage, during their joint lives. The estate thus acquired is commonly denominated an estate by marital right. It entitles the husband to the entire usufruct of the property during its continuance. It is a freehold, or an estate for life, though whether for the life of the husband or of the wife is uncertain. It may be leased or sold by the husband, or taken on execution for his debts, unless the law forbids. It is not, however, an independent estate, for under the old law it was forfeitable for the felony of the wife, and the husband is seized of the entire property jointly with his wife in her right, and not separately of his marital estate in his own right. But this is before issue born. If the property of the wife is an estate of inheritance, then, after the birth of issue capable of inheriting it, the estate by marital right expands into an estate for the life of the husband, and becomes more independent and indefeasible. Indeed it has been held that, after the birth of issue, the husband becomes solely seized of a freehold estate in his own right, and that the interest of the wife is a mere reversionary interest, consequent upon his life estate. But the decisions on this point are not uniform. The estate after issue born, though not forfeitable by the attainder of the wife, may be forfeited by a divorce *a vinculo* for the fault of the husband. The estate is not consummate in the husband until the death of the wife. Before her death and after issue born, the husband is denominated tenant by the curtesy initiate.

The question submitted is therefore in effect whether a married man, who is qualified by age, residence and citizenship, can vote as tenant by marital right, or by curtesy initiate, on the real estate of his wife, under the constitution, Art. II, Section 1. Under that section no one has a right to vote unless—to quote the words of the section—he is "really and truly possessed in his own right of real estate * * * * of the value of one hundred and thirty-four

dollars over and above all incumbrances, or which shall rent for seven dollars per annum over and above any rent reserved or the interest of any incumbrances thereon, being an estate in fee simple, fee-tail, *for the life of any person*, or an estate in reversion or remainder, which qualifies no other person to vote." This section is very similar to a provision of the election law which was in force when the constitution was adopted. That law, however, required that the qualifying estate should be "at least an estate for a person's own life." We understand that it was the uniform practice under that law to permit a man to vote on his wife's estate of inheritance, if of sufficient value, after the birth of issue capable of inheriting it. It must therefore have been understood that an estate by the curtesy initiate was an estate for the husband's own life. The constitution was doubtless adopted under that understanding, which we think was entirely correct. The constitution, as will be seen, is not less liberal in this respect than the election law. We think, therefore, there can be no doubt that an estate by curtesy initiate, as it existed at common law, may be a sufficient real estate qualification under our constitution, Article II, Sec. 1.

In regard to the estate by marital right there is more doubt. The estate by marital right was clearly not sufficient to qualify under the old election law, for under that law the estate was required to be "at least an estate for a person's own life." In the constitution, instead of this the requirement is simply an estate "for the life of any person." The change is significant. It was evidently intended to extend the electoral right. It evidently extends it to the owner of an estate *pur autre vie*. But if that is all that was intended, the change was of trifling importance; for the estate *pur autre vie* is of rare occurrence. The estate by marital right is an estate for the life of one of two persons, that is to say, of the one of them who dies first, and it is therefore within the description of an estate "for the life of any person." We think it is fair to presume that the question of extending the electoral right to tenants by marital right was considered, when those words were adopted by the framers of the constitution; and if it was

then considered, we can hardly conceive that the words would have been adopted, if they were not designed to embrace the estate by marital right as well as other estates for life. We think, therefore, that the estate by marital right, as it existed at common law, may also be a sufficient property qualification under Art. II, Sec. 1.

Perhaps it may be suggested that a mere tenant by marital right cannot vote under Art. II, Sec. 1, because that section requires that the person claiming to vote shall be "possessed in his own right," whereas a tenant by marital right is held to be seized jointly with his wife *in her right*. The difficulty is, however, merely verbal. The words "in her right," are used not so much to describe the character of the estate as of the seizin or tenure thereof. The words, "in his own right," mean that the person claiming to vote shall be entitled or hold beneficially for himself, and not simply as trustee or custodian. The words are in the old election law, where they could not have been intended to exclude an estate by marital right, but could only have been used in the sense above indicated.

Almost immediately after the adoption of the constitution, the common law was changed. Dig. of 1844, p. 270. It was enacted that "The real estate, chattels real, household furniture, plate, goods, stock or shares in the capital stock of any incorporated company of this State, or debts secured by mortgage on property within this state, which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall be and are hereby so far secured to her sole and separate use, that the same and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken for the debts of the husband, either before or after his death; and upon the death of the husband in the lifetime of the wife, shall be and remain her sole and separate property." The act also provides that the receipt or discharge of the husband for rents and profits shall be a sufficient receipt or discharge, until notice in writing is given by the wife; after which the receipt or discharge of the wife alone shall be sufficient. It still further provides that nothing in the act shall be construed to impair the rights

of the husband upon the death of the wife as tenant by the curtesy. The act, by express provision, does not affect any property owned by any married woman previous to its enactment. And inasmuch as it does not affect her property previously acquired, of course it does not affect her husband's right to vote upon her property previously acquired.

Did the act so far modify the common law as to affect his right to vote upon her property subsequently acquired? The estate by marital right is evidently emasculated, and shorn of its strength, but it is not utterly abolished. It remains, protected from attachment for the husband's debts, to be enjoyed by him until the wife chooses to assert her right under the statute to take the rents and profits herself, by giving written notice, or by having, as under another section she may have, a trustee appointed to hold the property during coverture, unless the trust is sooner determined. In *Martin & Goff vs. Pepall*, 6, R. I. Rep. 92, it was held by the supreme court of the state, that under the act the husband has an estate which can be conveyed to a third person who would be entitled to recover and hold possession of it until the wife should interfere under the statute. This being so, the question is whether the estate, however its value, and especially its marketable value, may be impaired, is not still a freehold estate. We think it is; for it is clear upon authority that to be a freehold estate, or estate for life, the estate need not be such that it must necessarily endure for life, if only it is possible that it *may* endure so long. 4 Kent's Com. 26. We think, therefore, that the law of 1844 did not in any way affect the right of the husband to vote under Article II, Sec. 1, upon the property of his wife, so long as she left him in the enjoyment of it.

The law of 1844 remained without material change until the General Statutes went into effect Dec. 2, 1872. The General Statutes introduced an important modification by enacting that the real property of a married woman "shall be *absolutely* secured to her sole and separate use," instead of "so far secured to her sole and separate use that the same and the rents, profits and income thereof shall not

be liable to be attached or in way taken for the debts of the husband." It is true that the old provision that the husband may receive the rents and profits until the persons who are held for them are notified in writing by the wife not to pay them to him, remains unaltered. But this does not authorize us to conclude that the modification is of no effect. It is easy to construe that provision as being simply in the nature of a license or permission from the wife, which may be presumed until it is expressly repudiated or revoked. But there can be no estate by marital right in property which is absolutely secured to the sole and separate use of the wife. The estate is utterly incompatible with so exclusive an appropriation. See *Martin & Goff vs. Pepall*, 6 R. I. Rep. 94. Nothing remains for the husband which he can really call his own. We think, therefore, that no husband who has married since Dec. 2, 1872, or whose wife has acquired the property on which he claims the right to vote since Dec. 2, 1872, can be entitled to vote under Art. II, Sec. 1, simply as tenant by marital right.

The new statute contains no saving in favor of estates by marital right acquired previous to its enactment. Can the statute retroact so as to destroy an estate by marital right previously acquired, and thus disfranchise the tenant? We think not. The estate previously acquired was a vested estate and could not be devested by a mere legislative enactment (Cooley's Const. Lim. 360, 361.) We think, therefore, that any person who had acquired a right to vote previous to Dec. 2, 1872, as tenant by marital right, and, *a fortiori*, as tenant by the curtesy initiate, was not affected in his right by the new statute which then went into effect.

One other question remains to be considered namely: Can a husband who has married since Dec. 2, 1872, or whose wife has acquired the property on which he claims the right to vote since Dec. 2, 1872, be entitled to vote under Art. II. Sec. 1, if he has had issue by her capable of inheriting it? The new statute (Gen. St., Ch. 152, §14) provides that the right of the husband in the real estate of the wife as tenant by the curtesy shall not be impaired. But this cannot

mean that this right as tenant by the curtesy *initiate* shall not be impaired, for the absolute appropriation to the use of the wife necessarily excludes that right as well as the mere marital right. It means doubtless, that tenancy by the curtesy, in its stricter sense, as consummate by the death of the wife, shall not be impaired. Does it follow from this that the right to vote is lost? We think we are bound to uphold the estate, so far as we can consistently with the law, and while we think the estate cannot begin in enjoyment during the life of the wife, we can see no reason why it may not be held to vest during her life, not to be enjoyed until after her death. The vesting is not inconsistent with her absolute use. We think, therefore, that the estate vests, during the life of the wife, there being issue capable of inheriting; though its enjoyment must be postponed until the wife has deceased. In other words, the statute creates a new kind of vested remainder. Will such an estate entitle its owner to vote? We see no reason why it may not. Estates in remainder are enumerated in Art. II, Sec. 1, among the estates which will qualify their owner to vote, if no other person is qualified by the same property, and we can see no good reason why a remainder created by statute should not be as efficacious as a remainder created by deed or will. To hold that it is as efficacious does not contradict the letter of the constitution, and is eminently accordant with its spirit. We think, then, that a husband, married since Dec. 2, 1872, or whose wife has acquired the property on which he claims to vote since Dec. 2, 1872, may be entitled to vote under Art. II, Sec. 1, if he has had issue by her capable of inheriting it.

In conclusion, to answer the question submitted to us briefly, we would say:

1. Any husband who married his wife previous to Dec. 2, 1872, and whose wife acquired the property on which he claims the right to vote previous to Dec. 2, 1872, is entitled to vote under Art. II, Sec. 1, if he is otherwise qualified and if the property is a freehold estate of the value prescribed in the constitution, whether he has had children by his wife or not.

2. Any husband married since Dec. 2, 1872, or whose wife has acquired the property on which he claims the right to vote since Dec. 2, 1872, is entitled to vote under Art. II, Sec. 1, if he is otherwise qualified and if the property is an estate of inheritance of the value prescribed in the constitution, provided he has had issue by his wife capable of inheriting it,—but otherwise, not.

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