[HIGH COURT OF AUSTRALIA.]

McCORMICK AND OTHERS . . . . APPELLANTS;
PLAINTIFFS,

AND

ALLEN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 18; *Nov.* 12.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Husband and Wife—Land which wife owned at her marriage—Interest of wife—Action in District Court of New South Wales against wife—Defence of coverture not raised—Sale and conveyance of land by Registrar—Whether any title conveyed to purchaser—Estoppel—District Courts Act 1858 (*N.S.W.*) (22 *Vict. No.* 18), *secs.* 59, 78, 79—*Registration of Deeds Act* 1843 (*N.S.W.*) (7 *Vict. No.* 16), *sec.* 16—*Acts Shortening Act* 1852 (*N.S.W*) (16 *Vict. No.* 1), *sec.* 67.

An action for debt was brought in 1887 in the District Court of New South Wales against a married woman who at the time of her marriage in 1869 was the owner in fee of certain land. She did not give notice, as provided in sec. 59 of the *District Courts Act* 1858 (N.S.W.), that she relied on the defence of coverture, and the only defence taken was "not indebted." Judgment having been given against her, the Registrar of the District Court purported, pursuant to secs. 78 and 79 of that Act, to sell and to convey to the purchaser the land and all the married woman's right, title and interest therein.

Held, by *Knox* C.J., *Higgins*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that, notwithstanding the absence of the notice that the defence of coverture was not relied on, the sale by the Registrar conferred no title to the land upon the purchaser.

Decision of the Supreme Court of New South Wales (*Long Innes* J.): *McCormick* v. *Allen*, (1926) 26 S.R. (N.S.W.) 221, reversed.

APPEAL from the Supreme Court of New South Wales.

Jeremiah Reardon, who died on 22nd April 1868, by his will devised certain land to his daughter Margaret Jane Reardon to hold to her absolutely. On 31st December 1869 Margaret Jane Reardon was married to John McCormick the elder; and about the year 1886 she left her husband and thereafter lived apart from him. On 21st September 1886 Margaret Jane McCormick by an indenture of mortgage purported to mortgage the land to one James Martin Green. That indenture did not purport to be acknowledged, and her husband was not a party to it. On 23rd April 1887 Margaret Jane McCormick by memorandum of agreement purported to agree to sell the land to one George Cox. On 25th November 1887 an action was instituted in the District Court of New South Wales against Margaret Jane McCormick to recover a debt alleged to be due by her to the plaintiff. The only defence taken was "not indebted," and no notice was given by the defendant that she relied on the defence of coverture. On 28th March 1888 judgment in that action was given for the plaintiff and in respect of that judgment a writ of *fieri facias* was, on 28th April 1888, issued directing the Registrar of that Court to "make and levy by distress and sale of the lands, tenements and hereditaments of or to which the said defendant is seised or entitled, or which she can either at law or in equity assign or dispose of," the amount due to the plaintiff upon the judgment. Pursuant to such writ the Registrar put the land up for sale at public auction and purported to sell to one Albert Allen the land in question and all the estate, right, title and interest of Margaret Jane McCormick therein, and on 12th July 1888 by deed of bargain and sale purported to convey the land to Albert Allen. On 29th April 1909 Margaret Jane McCormick died intestate, leaving her surviving her husband and three sons, Jeremiah McCormick, Edward McCormick and John McCormick the younger, and a daughter. On 21st November 1917 the successor in title to James Martin Green conveyed all his right, title and interest, if any, under the mortgage of 21st September 1886 to Albert Allen. In March 1917 Albert Allen applied to bring the land under the *Real Property Act*. On 6th July 1919 Albert Allen died, and on 30th September 1919 probate of his will was granted to George Albert

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Allen, Arthur John Allen and Albert Allen the younger. On 16th November 1925 administration of the estate of Margaret Jane McCormick was granted to John McCormick the elder. On 26th December 1925 John McCormick the elder died, and on 4th February 1926 administration *de bonis non* of Margaret Jane McCormick's estate was granted to two of her sons, Jeremiah McCormick and John McCormick the younger. A suit was brought in the Supreme Court in its equitable jurisdiction by Jeremiah McCormick, Edward McCormick and John McCormick the younger against George Albert Allen, Arthur John Allen and Albert Allen the younger, in which the plaintiffs alleged that the application to bring the land under the *Real Property Act* had not been granted but that the Registrar-General had stated that upon certain information being furnished by the defendants the application would be granted. The plaintiffs prayed (*inter alia*) (1) that the defendants might be restrained from further proceeding with the application to bring the land under the Act, and (2) a declaration that the plaintiffs were entitled as some of the next-of-kin of Margaret Jane McCormick to a title to their respective shares in the land as tenants in common in fee simple. The suit was heard by *Long Innes* J., who made a decree ordering that the suit be dismissed with costs, holding that, by reason of the fact that Margaret Jane McCormick had not given notice, as required by sec. 59 of the *District Courts Act* 1858, that she relied on the defence of coverture, the plaintiffs were estopped from setting up that she was a married woman: *McCormick* v. *Allen* (1).

From that decision the plaintiffs now appealed to the High Court.

Other material facts appear in the judgments hereunder.

Brissenden K.C. (with him *Taylor*), for the appellants. The learned Judge was wrong in his conclusion that the plaintiffs were estopped from asserting that Margaret Jane McCormick was a married woman at the time when the action was brought against her in the District Court. She had no interest in the land which the Registrar of the District Court could, under secs. 78 and 79 of the *District Courts Act* 1858, sell and convey. All that the Registrar

(1) (1926) 26 S.R. (N.S.W.) 221.

could seize and take under sec. 78 was the land, as defined by the *Acts Shortening Act* 1852, sec. 6, of or to which she was "seised or entitled" or which she could assign or dispose of. But at that time husband and wife were one person—they were seised in fee in right of the wife of land which she had at the time of her marriage. The wife by herself had nothing as long as her husband was alive (*Johnson* v. *Gallagher* (1); *Polyblank* v. *Hawkins* (2); *Ramsay* v. *Margrett* (3); *In re Lush's Trusts* (4); *Pike* v. *Fitzgibbon* (5)). The wife herself was seised of nothing and entitled to nothing during the coverture, nor had she anything which she could assign or dispose of.

[KNOX C.J. referred to *Williams on Real Property*, 17th ed., p. 333; *Robertson* v. *Norris* (6); *Hinkle* v. *Schonbein* (7); *Newman* v. *Jones* (8); *In re White*; *Ex parte Stephen* (9).

[ISAACS J. referred to *Co. Litt.*, 326a (notes 2 and 3), 351a; *Thornley* v. *Thornley* (10); *Tennent* v. *Welch* (11).

[RICH J. referred to *Eversley's Domestic Relations*, 3rd ed., pp. 185, 190.

[STARKE J. referred to *Williams on Vendor and Purchaser*, 3rd ed., p. 878; *Took* v. *Glascock* (12).]

Sec. 78 does not enable the Registrar to give a better title than the wife herself could give, and the wife could give no title (see *Beynon* v. *Jones* (13)). There is a difference between a husband and wife holding by entireties and a husband and wife holding in right of the wife. In the former case they hold as two persons but in the latter they hold as one person only (*Crofton* v. *Bunbury* (14)).

Teece K.C. (with him *D. Wilson*), for the respondents. The decision of *Long Innes* J. that the plaintiffs were estopped from alleging that Margaret Jane McCormick was married was correct.

(1) (1861) 3 DeG. F. & J. 494, at p. 509.
(2) (1780) 1 Doug. K.B. 329.
(3) (1894) 2 Q.B. 18, at p. 25.
(4) (1869) L.R. 4 Ch. 591, at p. 597.
(5) (1881) 17 Ch. D. 454.
(6) (1848) 11 Q.B. 916.
(7) (1865) 4 N.S.W.S.C.R. 306.
(8) (1881) 2 N.S.W.L.R. (L.) 287.
(9) (1890) 1 B.C. (N.S.W.) 5.
(10) (1893) 2 Ch. 229, at p. 233.
(11) (1888) 37 Ch. D. 622, at p. 636.
(12) (1669) 1 Wms. Saund. 250, at p. 253 (n. 4).
(13) (1846) 15 M. & W. 566, at p. 569.
(14) (1853) 2 Ir. Ch. 465, at pp. 471 et seqq.

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The judgment in the District Court is still good : a judgment suffered by a married woman who had not pleaded coverture operated to the prejudice of the husband until it was reversed (*Dick* v. *Tolhausen* (1)). The judgment against Mrs. McCormick binds all persons entitled in her right. Under sec. 16 of the *Registration of Deeds Act* 1843 (N.S.W.) a married woman could make a valid conveyance of her lands without her husband's concurrence provided the husband did nothing to avoid the conveyance (see *Needler* v. *Bishop of Winchester* (2) ; *Ann Hungate's Case* (3)). Sec. 59 of the *District Courts Act* 1858 recognizes that if a married woman was sued in the District Court, she could rely on the defence of coverture, but enacted that she must plead her coverture. The wife had in land of which she and her husband were seised in her right an interest of which she could dispose, and that interest the Registrar could sell and convey under sec. 78. The effect of sec. 33 of the *Probate Act* 1890 (N.S.W.) was that the only interest a man had in the land of his deceased wife was as one of the statutory next-of-kin, so that the only title the plaintiffs can set up to the land is as her personal representatives. Against them the judgment in the District Court is a conclusive estoppel. [Counsel also referred to *Millard's Law of Real Property in New South Wales*, 3rd ed., pp. 134, 183 ; *Eversley on Domestic Relations*, 4th ed., Part I., chap. VIII. ; *Judgment Creditors Remedies Act* 1901, sec. 12 (1), (2).] The learned Judge was wrong in finding that the respondents had abandoned their possession of the land.

Brissenden K.C. in reply.

Cur. adv. vult.

Nov. 12.

The following written judgments were delivered :—

KNOX C.J. The appellants, who are the administrators *de bonis non* and some of the next-of-kin of Margaret McCormick, brought this suit for an injunction to restrain the respondents from proceeding with an application to bring certain land under the provisions of the *Real Property Act* and for a declaration that the plaintiff

(1) (1858) 4 H. & N. 695.
(2) (1615) Hob. 220, at p. 225.
(3) (1613) 12 Rep. 122.

administrators were entitled to the land in question for an estate in fee simple.

The relevant facts alleged and proved are as follows :—Margaret McCormick—then Reardon—was the devisee of the land under the will of her father, who died in the year 1868 ; in the year 1869 she married John McCormick, and there was issue of the marriage five children including two of the plaintiffs. In the year 1887 an action was brought in the District Court against Margaret McCormick as a feme sole to recover the sum of £10 10s. alleged to be due for work and labour done. The only ground stated in her notice of defence in that action was "not indebted," and in March 1888 judgment was entered for the plaintiff in the action for £10 10s. and costs. In April 1888 a writ of *fieri facias* was issued on the judgment, directing the Registrar of the District Court to levy, by sale of the land of or to which the defendant in the action was seised or entitled or which she could either at law or in equity assign or dispose of, the amount due on the judgment. Acting in alleged pursuance of the writ, the Registrar sold to the predecessor in title of the defendants in the present suit the land in question and all the right, title and interest of Margaret McCormick therein, and subsequently by deed of bargain and sale purported to convey the same to the purchaser. Margaret McCormick died in 1909 intestate, leaving her husband and several children her surviving. Her husband died in 1925. In 1917 Albert Allen, the purchaser from the Registrar, applied to bring the land under the provisions of the *Real Property Act*, and the plaintiffs seek in this suit an injunction to restrain the defendants from proceeding with that application. The defendants in answer to the plaintiffs' claim set up both a possessory and a documentary title to the land.

On the hearing of the suit *Long Innes* J. held, rightly, I think, that the defendants had failed to establish a possessory title. As to the documentary title he held, and I agree, that the defendants could only succeed in destroying the plaintiffs' title to relief by establishing that Albert Allen acquired under the conveyance from the Registrar a title superior to that of the plaintiffs. On the question whether Albert Allen had so acquired such a title the learned Judge arrived at the conclusion that the plaintiffs were estopped

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from asserting as against the defendants that, at the date of the sale by the Registrar, their predecessor in title, Margaret McCormick, was a married woman without the *jus disponendi*. His decision was founded on sec. 59 of the *District Courts Act* of 1858 (22 Vict. No. 18), which provides that no defendant in any District Court shall be allowed to set up by way of defence, and to claim and have the benefit of, coverture without the consent of the plaintiff, unless notice of such defence shall have been given to the Registrar in accordance with the rules. He thought that the effect of this provision was that, although a contract by a married woman possessed of no separate estate was a nullity at common law, yet, where such married woman, being defendant in an action in the District Court, omitted to give notice that she relied on coverture as a defence to the action and judgment was recovered against her as a feme sole, she was estopped for all purposes of the action, including judgment and execution hereunder, from afterwards asserting that she was a feme covert at the material date.

Putting aside any question of estoppel it is clear that Margaret McCormick could not, without the concurrence of her husband, at any time after her marriage have effectively conveyed or disposed of any estate or interest in the land in question. The position was as stated by *Long Innes* J., namely, that John and Margaret could together convey a good title to the fee simple by the method prescribed by the *Registration of Deeds Act* (7 Vict. No. 16), but that the husband without the concurrence of the wife could not make any disposition of the land which would defeat her interest in the event of her surviving him, while the wife without his concurrence had no power of disposition. And, apart from estoppel, I think it is clear that the Registrar was only empowered to sell and convey land of or to which the defendant was seised or entitled or which the defendant could at law or in equity assign or dispose of. The tenure of the land now in question being substantially the same as a tenancy by entireties, Margaret McCormick, the defendant in the action, could not at law or in equity during coverture assign or dispose of that land or of any interest therein. Nor, in my opinion, was she individually and separately at the date of the judgment or of the sale seised of or entitled to that land or any

estate or interest therein. Her husband was entitled to the freehold estate in the rents and profits during coverture, and the seisin of the estate in fee simple was vested in the husband and wife in right of the wife, neither being entitled separately to any interest therein. It seems to me to follow that by the conveyance by the Registrar, which under the Act is effectual only as a conveyance of the estate, right, title and interest of the judgment debtor, no estate in the land passed to the purchaser, if the Court is at liberty in this suit to accept proof that Margaret McCormick was at the date of the judgment and sale a married woman.

The contention of the defendants in the suit, which was upheld by the learned trial Judge, was that the plaintiffs as representatives of Margaret McCormick were estopped from asserting in this suit that she was at the relevant time a married woman and that the effect of the estoppel was to enable the Registrar to convey a good title to the land. As I understand the reasons given by *Long Innes* J., the estoppel was created by the operation of sec. 59 of the *District Courts Act* 1858 on the facts (a) that Margaret McCormick omitted to give the prescribed notice that she relied on the defence of coverture and (b) that judgment was given against her in the action. It may be conceded that sec. 59 of the *District Court Act* operated to prevent the validity of the judgment in that action being challenged on the ground of coverture and to give that judgment the same force and validity as if the defendant in the action were a feme sole. But I see no reason for holding that the section has the effect of enabling the Registrar to take in execution land in which the defendant had in fact no estate or interest and of which she had no disposing power, to sell such land, and to confer a good title on the purchaser to the prejudice of persons whose rights could not have been defeated by any conveyance or disposition made by the defendant in the action. It seems to me that sec. 59 deals only with proceedings in the action up to and including judgment, execution of the judgment being regulated by secs. 78 and 79.

But even if the effect of sec. 59 was to prevent Margaret McCormick for all purposes of the action, including execution under the judgment, from afterwards asserting that she was a married woman at the

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relevant date, I do not think the result would be to vest in the purchaser from the Registrar a good title to the lands in question. Even if a married woman, fraudulently representing that she is a feme sole, purports to convey an estate in land over which as a feme covert she has no power of disposition, her representation does not, as I understand the authorities, operate to validate the instrument which she executes or to make that instrument effectual to pass the estate. The true position seems to be that in such a case the fraud of the married woman gives to the party defrauded an equity to compel her to make good her engagement out of any property over which she has full power of disposition without the consent of any other person (*In re McIntyre's Trustees' Estate* (1); *Vaughan* v. *Vanderstegen* (2); *Lush on Husband and Wife*, 2nd ed., p. 33).

For these reasons I am of opinion that Albert Allen did not acquire by the conveyance from the Registrar a title superior to that of the administrators of Margaret McCormick. It follows that the appellants are entitled to the injunction and declaration which they claim.

ISAACS J. This appeal should be dismissed. Up to a certain point I come to that opinion for the reasons given by the learned primary Judge (*Long Innes* J.). As to the question of adverse possession, his view was clearly right. With respect to the rights arising by reason of the Registrar's conveyance of 12th July 1888, I entirely share the learned Judge's opinion that the judgment against the wife must be regarded in this proceeding as unimpeachable, that the writ of execution was properly issued upon that judgment, and that the judgment debtor—the wife—was entitled in law to the general property in the land subject to such rights as her husband by virtue of the marriage, possessed. But there remains one highly important question necessary to be considered before a conclusion favourable to the respondent can be reached. It is whether the word "seize" in the expression "seize and take under any writ of execution" in sec. 78 of the *District Courts Act* of 1858 (22 Vict. No. 18) was satisfied.

(1) (1888) 21 L.R. Ir. 421, at pp. 430, 431. (2) (1854) 2 Drew. 363.

The judicial sale under which the respondent claims title took place in 1888, and at that time sec. 78 of the Act of 1858 was the law. Since then the law has been amended, so as to bring it into accord with what has been the corresponding law in the Supreme Court since 1858 (22 Vict. No. 1, sec. 2), equitable interests having been already dealt with by the Act of 1841 (5 Vict. No. 9, sec. 31). The same law was not applied to the District Court until 1905, by sec. 48 of Act No. 22 of that year.

This raises a difficulty which I placed before learned Counsel as to whether the judgment debtor in 1888 had any seizable interest in the land. I doubted then, and my doubt has since been confirmed, whether, unless the wife were then actually "seised" of a present freehold in the land, the Registrar could have lawfully "seized" it, and consequently could have lawfully sold and conveyed it. The appellants' argument, which took no notice of this difficulty, pressed the contention so far as to deny any present right of property in the wife while the husband lived. This, in my opinion, is completely disposed of by the cases of *Robertson* v. *Norris* (1), and the authorities therein quoted, and *Tennent* v. *Welch* (2). To these I would add another, not there quoted. In *Greneley's Case* (3) it is said: "*she* hath a freehold and inheritance in the land, although she hath not the *sole* freehold or inheritance." (The italics are mine.) I also refer to my judgment in *Registrar-General* (*N.S.W.*) v. *Wood* (4). Those authorities establish that at common law the interest of a husband in lands which belonged to his wife in fee simple was an interest, so to speak, superimposed upon the wife's general right of property. That superimposed interest was protected by the creation of an incapacity in the wife to dispose of any interest in the land, except in certain ways, unnecessary to mention.

But having arrived at that point, which would entirely satisfy the word "entitled" in sec. 78 of the *District Courts Act* 1858, it does not carry the matter to the necessary point of establishing that the wife's interest was seizable by the Sheriff or Registrar under an execution. Cases like *Scott* v. *Scholey* (5) establish a principle that, unless there is something tangible belonging to the

(1) (1848) 11 Q.B. 916.
(2) (1888) 37 Ch. D. 622.
(3) (1609) 8 Rep. 71b, at 72a; 1826 ed., vol. IV., 283, at p. 285.
(4) *Post*, 46.
(5) (1807) 8 East 467.

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debtor capable of being seized and of which delivery or its equivalent can be made, "seizure" is inappropriate and impossible. Then, was she "seised" of the lands in the necessary sense, remembering of course, that "lands" had the wide meaning given to it by sec. 6 of the *Acts Shortening Act* (16 Vict. No. 1)? The interest of the wife was not a mere reversionary interest. It was a subsisting, present estate of freehold of which she was seised, though subject to the present freehold interest of the husband, called by Lord *Denman* the pernancy of the profits. In *Robertson* v. *Norris* (1) the pleading was that the husband and wife became and "were seised in their demesne as of fee of and in the said demised premises." That, as shown by the note in *Williams' Saunders* (2), was the correct way of pleading the seisin of husband and wife where the estate belonged to the wife in fee. It accords with the judgment of *Kay* J. in *Tennent* v. *Welch* (3)—see particularly the answer to the 4th question at p. 636 of the report. See also *Challis on Real Property*, (3rd. ed., p. 474). The distinction must be observed between the wife's then present freehold interest in the land, and her reversionary interest in the pernancy of profits, which was expectant on the termination of the husband's interest. This distinction is prominently shown in the words of Lord *Denman* in the case of *Robertson* v. *Norris* (4), where the Lord Chief Justice says:—"If he" (the husband) "be attainted, that pernancy will pass to the Crown, the freehold *still* remaining in his wife." There was therefore in the wife, as judgment debtor, a seizable interest, and the respondent's title is in my opinion complete. The mere circumstance that she could not herself have effectually *conveyed* her interest is in my mind no reason for denying the respondents' title. That title is statutory. Sec. 59 of the *District Courts Act* 1858 expressly contemplated "coverture" as a possible defence, and expressly conditioned the right of the defendant to rely upon it. Coverture might be either a defence by way of abatement or in bar, but, whichever it might be, its effect could be lost to a defendant by force of sec. 59. That was in favour of the plaintiff. When we come to sec. 78, which is for the purpose of executing the judgment, and consequently for the benefit of

(1) (1848) 11 Q.B. 916.
(2) (1669) 1 Wms. Saund. 253.
(3) (1888) 37 Ch. D. 622.
(4) (1848) 11 Q.B., at p. 920.

the judgment creditor, the property seizable clearly includes the interest of a married woman in real property. Sec. 79 provides for a statutory transfer. The Registrar is required to execute "a proper deed of bargain and sale . . . to the purchaser." That is for *the security of the purchaser*, and completes the effectuation of the judgment in favour of the creditor. The deed of bargain and sale "shall operate and be effectual as a conveyance of the estate right title and interest of" the judgment debtor. As *Long Innes* J. observes, the section does not say the deed of bargain and sale shall have the same effect as if it were executed by the judgment debtor. That would afford no security whatever to a purchaser. How could he be expected to pay his money to the judgment creditor and take his chance as to the capacity of the debtor? The truth is that the word "conveyance" in that context does not refer to an instrument at all. It imports the act of conveying in law the title from the debtor to the purchaser. The deed is to operate and be effectual "as a conveyance" in the sense of "to convey," and by force of the section, the property of the debtor in the land to the purchaser. The reason of that is obvious. The Registrar necessarily sells whatever interest the debtor has, and cannot be expected to make out the precise limitation which an ordinary vendor would state and an ordinary purchaser would require. It was, particularly in 1858, necessary to make the express provision referred to to ensure that whatever interest, even up to fee simple, the debtor possessed, and not more than he actually possessed, should be conveyed by the Registrar's deed. Incapacity of the owner is immaterial: *capacity for the purpose is vested in the Registrar* and the purchaser need not inquire further or seek further assurance.

The respondent's title, in my opinion, is perfect, and the appellants fail.

HIGGINS J. The facts as to this appeal are stated so adequately in the judgment of *Long Innes* J. that I need not restate them.

I concur fully with the decision of the learned Judge so far as it rejects the claim of the late Albert Allen to the lands by virtue of the *Statute of Limitations*, or of the mortgage to Green, or of the agreement made by Margaret McCormick with Cox. The defendants

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must fail as against Margaret and her administrators unless they can establish title through the judgment against her for debt in the District Court.

On this last subject the material dates are:—22nd April 1868, death of Jeremiah Reardon, devising by will this land to his daughter Margaret. 31st December 1869, marriage of Margaret to John McCormick. 1886, Margaret left her husband. 25th March 1888, judgment for debt against Margaret in the District Court. 28th April 1888, writ of *fieri facias*. 12th July 1888, deed of bargain and sale, after sale by the Registrar as under sec. 78 of the *District Court Act* of 1858, Registrar to Albert Allen. 29th April 1909, death of Margaret, leaving her husband and some children surviving. March 1917, application by Albert Allen to bring the land under the *Real Property Act*. 6th July 1919, death of Albert Allen. 30th September 1919, probate of will of Albert Allen granted to the defendants as executors. 2nd August 1924, statement of claim. 16th November 1925, administration granted to John McCormick (the husband) of Margaret's estate. 26th December 1925, death of the husband. 4th February 1926, administration *de bonis non* of Margaret's estate granted to her sons Jeremiah and John McCormick the younger.

Probably I should add that by "Lang's Act," which came into force 1st July 1863, all land which under the English law would on the death of the owner intestate pass to the heir-at-law is to pass to the owner's personal representatives—like chattels real. And by the *Probate Act* 1890 estates by the curtesy and dower were abolished: "Any husband or wife shall be entitled on the death of the other intestate to the same share in the real or personal estate of the other as a wife is now by law entitled to in the personal estate of an intestate husband predeceasing her, and no estate by the curtesy or right of dower or any equivalent estate shall arise after the passing of this Act out of any real estate."

The question is, what is the effect of the sale and conveyance of this land by the Registrar of the District Court in 1888. The answer depends on secs. 78 and 79 of the *District Court Act* (No. 18 of 1858), taken with sec. 59.

Sec. 78 empowers the Registrar to take under any writ of execution

and to cause to be sold all and singular the lands, tenements and hereditaments " of or to which the person named in the said writ is or may be seised or entitled or which he can either at law or in equity assign or dispose of." Now, it is clear that under the law as it stood in 1888 Margaret was not seised of this land; the seisin was in herself and her husband in her right—" in their demesne as of fee." This is the correct expression as explained in *Took* v. *Glascock* (1); and as adopted in the declaration in *Robertson* v. *Norris* (2). But during the marriage the husband was entitled to take any profits of the wife's land—had a freehold interest in the land (*Johnson* v. *Johnson* (3) and *Robertson* v. *Norris*). So that at the time of the writ of execution the wife had no *present* estate; and *a fortiori no seisin*. Nor was she " entitled " to the land; she could not demand to be put in seisin or to have it conveyed to her in *præsenti*, as could be demanded of bare trustees by the beneficiary. It is admitted that the future right of Margaret or her heir after the marriage should end would not come under the Registrar's power. I am strongly inclined to think that, by virtue of the words of the Act as to *seizure* of the lands, and owing to the nature of the case, the word " hereditaments " ought to be treated as confined to corporeal hereditaments; but whether that word be so confined or not, the word " entitled " means having the whole title to the subject matter of levy—not a mere interest in it; and Margaret had not the whole title to this land.

As for the alternative of being able to assign or dispose of the land, it is clear that it did not apply to Margaret. The wife could not, herself, by any form of conveyance, either at law or in equity, assign or dispose of this land. As a married woman Margaret was, in 1888, incapable of conveying land at all without the concurrence of her husband. Such power of joint conveyance as there was at the time appears in the Act 7 Vict. No. 16, sec. 16; but assuming that the complicated formalities could be satisfied, the essential fact is that this execution debtor could not, without the concurrence of the husband—could not *herself*—" assign or dispose of " the land (*Cahill* v. *Cahill* (4); *Doe d. Freestone* v. *Parratt* (5); *Robertson*

(1) (1669) 1 Wms. Saund., at p. 253 (n. 4).
(2) (1848) 11 Q.B. 916.
(3) (1887) 35 Ch. D. 345, at p. 348.
(4) (1883) 8 App. Cas. 420, at p. 428.
(5) (1794) 5 T.R. 652, at p. 654.

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v. *Norris* (1); *Thornley* v. *Thornley* (2); and see *Preston's Abstracts of Title*, 2nd ed., 333, 336; *Halsbury's Laws of England*, vol. XVI., pp. 381 *et seqq.*). Indeed, sec. 78 does not touch on married women at all; and the doctrine was that lands of which a husband and wife were seised in the right of the wife (as here) were not liable to her debts and obligations at all; whereas the freehold interest which the husband had in such lands was liable to the husband's obligations (*Halsbury's Laws of England*, vol. XVI., p. 390).

In my opinion, therefore, this land does not come under either of the alternatives in sec. 78. I cannot but think that sufficient attention has not been given to the very limited nature of the power conferred on the Registrar as to real property by that section. It seems to be assumed that the Registrar of the District Court had been given the same power to levy on any interest as was specially given to the Sheriff in executing judgments of the Supreme Court by the *Advancement of Justice Act* 1841; but that is a mistake. By that Act, 5 Vict. No. 9, sec. 31, the Sheriff may under a writ of *fieri facias* take in execution and sell any equity of redemption or other equitable interest or any chose in action belonging to the judgment debtor, but such a power has never been conferred on the Registrar of a District Court even up to the *District Courts Act* 1912 (sec. 108). But for such a statutory provision an equitable interest could not be taken in execution by the Sheriff even under a judgment of the Court of King's Bench (*Scott* v. *Scholey* (3)). The language of Lord *Ellenborough* in that case shows (4) that the goods which may be seized "are properly of a tangible nature, capable of manual seizure, and of being detained in the Sheriff's *hands and custody*"; although a legal term of years was treated as included. The difficulty in the way of the Registrar under sec. 78 is not so much as to the meaning of the word "lands" (see *Acts Shortening Act* 1852 16 Vict. No. 1)), but as to the effect of the words "seised" and "entitled," and the limitation to property which the judgment debtor can "assign or dispose of." "Seised" is a technical word; and it is not applicable to mere interests in the land. The Registrar was not empowered to levy on mere interests in land, but on lands,

(1) (1848) 11 Q.B. 916.
(2) (1893) 2 Ch. 229.
(3) (1807) 8 East 467.
(4) (1807) 8 East, at p. 484.

tenements and hereditaments of which the debtor was "seised." The word "entitled" in the alternative of lands, &c., to which the debtor was "entitled" does not mean "interested," but means solely entitled. I take it that the main intention was to confine levies by District Courts to simple cases, mainly to the case of debtors having the sole legal title, though power was not withheld where the debtor had the sole equitable title.

But when we leave the discussion of the meaning of words, and set ourselves to "visualize the position," the argument against the respondents becomes infinitely stronger. It has to be borne in mind that sec. 78 does not refer specifically to married women at all. No doubt, they are not excluded from the operation of the section if the section fits them; but to treat the section as enabling the Sheriff to convey what the married woman could not herself convey (a feat which used to be regarded as impossible — *Anon.* (1)), and as enabling the Sheriff to deprive the husband of his right to the profits during the joint lives, although the section does not refer to the relative rights of husband and wife at all, would be such a violent interference with accepted principles and vested rights as ought to be rejected by any Court, in the construction of sec. 78.

But sec. 59 has to be considered. Under that section, no defendant in any District Court is allowed to set up by way of defence and to claim and have the benefit of coverture, &c., without the consent of the plaintiff unless notice has been given to the Registrar of the Court; and no such notice was given. The only plea was "not indebted." It is said that Margaret, and her administrators claiming under her, are therefore now estopped from saying that she was married at the time. The position cannot be put higher than estoppel by representation on the faith of which someone acted; but it is hard to see how a representation that she was not married can create an estoppel precluding her from saying the truth that this land is not land which the Registrar could sell under sec. 78. Estoppels must rest on certain, precise affirmations; and "conclusions shall not be wrought by inference or implication of a thing which is not directly alleged" (Co. Third Inst., p. 239; and see *Fisher* v. *Ogle* (2), *Dalgleish* v. *Hodgson* (3)). The provisions of sec. 59 relate merely

(1) (1536) 1 Dyer 7b.
(2) (1808) 1 Camp. 418.
(3) (1831) 7 Bing. 495, at p. 504.

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to procedure in the action, for the purposes of the action. Perhaps (I do not decide it) Margaret may be estopped under sec. 59 from resisting an arrest under sec. 59 under a *capias ad satisfaciendum*. But, even if it were granted that she is for ever estopped as against Albert Allen, the purchaser under the *fieri facias*, from saying that she was married at the time of the action, it by no means follows that by a false representation that she was unmarried she extended the class of lands on which the Registrar could levy under sec. 78. It by no means follows that if she estopped herself from saying the truth she estopped her husband from saying it, or from claiming his common law right in his wife's lands. It by no means follows that this land, of which she and her husband were seised, becomes land of which she is seised, for the purpose of applying the words of sec. 78. Nor does sec. 79 alter the position: it merely allows a conveyance in the case of a sale of land allowed by sec. 78—a sale of land of or to which the person named in the writ is or may be seised or entitled or which he can either at law or in equity assign or dispose of. Moreover, I need not refer at length to such cases as *Stanley* v. *Stanley* (1)—a case cited with approval by Lord *Selborne* in *Cahill* v. *Cahill* (2)—where a married woman, having property settled to her separate use with restraint on anticipation, fraudulently concealed the restraint and mortgaged the property; and it was held that by no such device, or any device, could the restraint on anticipation be evaded. A married woman cannot increase her rights or powers over property by stating falsely that she has the increased rights or powers (and see *Everest and Strode on Estoppel*, 3rd ed., p. 306).

It might be suggested, however, that the New South Wales Act 7 Vict. No. 16, sec. 16 (*Registration of Deeds Act*) expressly gave Margaret power to assign or dispose of this land without the concurrence of her husband, and that therefore this land could be sold in execution for her debt. The presumption, of course, is that no such violent change of the law, no such violent interference with the rights of the husband in respect of land of which his wife was seised before marriage, was made by the Legislature, in the absence of clear language to that effect. But for sec. 16 (and similar previous

(1) (1878) 7 Ch. D. 589.

(2) (1883) 8 App. Cas., at p. 427.

legislation) the position at common law was clear—that the husband and wife were to be treated as one person, the husband being entitled to receive the rents during coverture, and that neither husband nor wife could deal with the land apart from the other so as to affect the rights of the survivor (see *Thornley* v. *Thornley* (1)). At common law the wife certainly could not convey the land, or even any interest therein : she could not convey at all. The only means provided by English common law for conveyance of the land was by the fiction of a suit in the Common Pleas for the levy of a fine with proclamations or for the suffering of a common recovery ; and in this procedure the husband had to be a party. Sec. 16 was expressly a device to provide a substitute for this procedure :—(A) " And whereas fines with proclamations could not be conveniently levied nor common recoveries suffered in this colony And whereas by a certain proclamation of the Governor of New South Wales bearing date the sixth day of March in the year of Our Lord one thousand eight hundred and nineteen certain regulations were made for barring the right and title of married women to dower and other her estates of freehold And whereas it is expedient that the said proclamation so far as respects the alienation of any such right and title bona fide made in conformity therewith should be confirmed and that the want of fines and recoveries should be effectually supplied by making other conveyances attended with the particular forms hereinafter mentioned equivalent thereto Be it therefore enacted that every deed conveyance or other instrument in writing made and executed by any married woman of and concerning any lands . . . and acknowledged in the form and manner appointed and directed by the said proclamation shall be and be taken to be valid and effectual to pass and convey all the right title and interest of such married woman to and in all such lands . . . intended to be alienated and conveyed by such deed or other instrument " (B) " And further that any deed or deeds in due form of law made and executed by any party or *parties* from whom any estate right title or interest in any lands . . . is or may be intended to be passed and acknowledged by such party or *parties* in the manner hereinafter mentioned that

(1) (1893) 2 Ch., at p. 233.

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is to say " (naming the officials before whom the deed or deeds may be acknowledged) " such deed or deeds so acknowledged shall be as valid and effectual in the law to pass all the estate right title interest and claim of the *respective parties* to such deed or deeds in or to all and every such lands . . . and to transfer and convey the same to the grantee or grantees . . . their heirs and assigns for ever . . . as if a fine or fines with proclamations had been levied or a common recovery or recoveries had been suffered of such lands . . . or as if such lands . . . had been conveyed by the firmest and most regular deeds " (then follow provisions that the married woman shall be twenty-one years old at least and that she shall be examined privately as to her freedom of action in the matter and that a certificate be endorsed in a certain form).

Now, this cumbrous sec. 16 is almost word for word a repetition of sec. 8 of an Act, 6 Geo. IV. No. 22, which was repealed by the Act 7 Vict. No. 16 ; and the proclamation referred to is a proclamation of 6th March 1819 which according to its recitals (not according to its body) relates to dower only (see *Callaghan's Acts*, vol. II., p. 999) ; and in the case of barring dower the concurrence of the husband is not so obviously necessary as it is in the conveyance of the wife's lands (see *Titles to Land Act* (22 Vict. No. 1), secs. 20 and 22). Stating my conclusions summarily, I think that as a mere matter of construction of words without the aid of presumptions, the part of sec. 16 which I have marked A refers merely to the formalities and precautions to be observed so far as the wife is concerned, and that part which I have marked B is the substitute for a fine with proclamation ; and that there is no ground for saying that the concurrence of the husband is not necessary to make the substitute effectual for the full conveyance of the land of which the wife and her husband in her right are seised. In the case of *Brown* v. *Tindall* (1), in 1860, *Wise* J. assumed this to be the law, and dealt with an argument based on an alleged exception where the husband was a convict—a felon. But the presumption that a statute does not, without clear language, take away the vested rights of the husband settles the matter.

I am therefore, of opinion that the appeal should be allowed, a

(1) (1860) 1 N.S.W.S.C.R. Appx. 39.

declaration made that the administrators *de bonis non* of Margaret are entitled to the land as part of her estate, and an injunction granted as asked.

RICH J. I agree with the conclusions arrived at by the learned primary Judge except as to the effect of sec. 59 of the *District Courts Act* of 1858 and the construction of secs. 78 and 79 of the same Act. The cases cited in the judgment under appeal relate to the effect of estoppel as against the married woman herself. If an issue estoppel or estoppel by judgment exists, it would prevail in favour of the judgment creditor. Albert Allen is not a privy of his, and the question whether he is a privy of the married woman is the very matter in question. I can see no estoppel *in pais* in favour of Allen. The defendant to the action was a passive resister. There was no fraud or concealment on her part upon which a Court of equity if invoked might have founded a decree (*Sharpe* v. *Foy* (1)), and the rule of feeding the estate by estoppel does not apply (*Everest and Strode on Estoppel*, 3rd ed., p. 189). Allen was the purchaser of the lands in question under the sale by the Registrar of the District Court pursuant to secs. 78 and 79 of the *District Courts Act* of 1858, and the question for our consideration resolves itself entirely into one of the construction of those sections, the material parts of which are as follows:—Sec. 78: "It shall be lawful for the Registrar of every such Court . . . to seize and take under any writ of execution . . . and to cause to be sold all and singular the lands tenements and hereditaments of or to which the person named in the said writ is or may be seised or entitled or which he can either at law or in equity assign or dispose of." Sec. 79: "In case of any sale by the said Registrar . . . of the right title and interest of any person of to or in any lands or hereditaments the said Registrar is hereby required to execute a proper deed of bargain and sale thereof to the purchaser which deed of bargain and sale shall operate and be effectual as a conveyance of the estate right title and interest of such person."

The description of the estate of a husband and wife in land conveyed for an estate of fee simple to the wife before marriage is best

(1) (1868) L.R. 4 Ch. 35, at p. 41.

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ascertained by the exact language of common law pleading, which was as follows: "that the plaintiff and his wife were seised in their demesne as of fee in right of the wife" (*Took* v. *Glascock* (1)). This makes it clear that the wife alone could not be said to be seised. It is clear she alone could not alienate. The estate, therefore, cannot come within the words of sec. 78 of which he "may be seised . . . or which he can either at law or in equity assign or dispose of." There remains the difficult question whether it comes within the words "to which he may be entitled." The married woman is entitled with her husband to an estate in possession, and upon her husband's death before hers she resumes her fee simple. These are her rights in property, and, if "entitled" includes entitled to a future interest, it may be said that she alone is entitled to the future interest involved in the resumption of her fee simple. But although, of course, "entitled" is a word apt to describe a present right to a future interest, still sec. 78 is directed only at property which the Registrar may "seize and take," and these words cannot include future or incorporeal hereditaments. Her only interest in possession is the seisin which she and her husband have as one person in the eye of the law during coverture. She alone cannot be said to be "entitled" to the estate of which they are thus seised and her individual and inseparable interest could not be seized and taken.

It follows that in my opinion the plaintiffs are entitled to the injunction and declaration claimed.

STARKE J. Jeremiah Reardon, who died in 1868, devised certain land in fee simple to his daughter, Margaret Jane, who married John McCormick the elder in 1869. By virtue of this marriage John McCormick the elder and his wife, Margaret Jane, became "seised of the land in their demesne as of fee in right of the wife" (*Took* v. *Glascock* (2)). Margaret Jane after her marriage had some proprietary interest in the land, but at common law the husband had complete power over her freehold interest in that land so long as the marriage lasted and during his life if there had been a child capable of inheriting. The land, however, went to the wife's heirs

(1) (1669) 1 Wms. Saund., at p. 253.
(2) (1669) 1 Wms. Saund., at p. 253 (n. 4).

if she predeceased her husband, and if he had alienated the land the wife might recover it by writ of entry.

During the marriage the wife's interest was unalienable, save by fine or recovery, and when fines and recoveries were abolished the wife's interest remained unalienable save by deed concurred in by her husband and acknowledged in manner required by the *Fines and Recoveries Act* of 1833 (see *Pollock and Maitland's History of English Law*, vol. II., pp. 401-405 et seqq.; *Holdsworth's History of English Law*, vol. III., p. 409; and note the Acts 6 Geo. IV. No. 22 and 7 Vict. No. 16 in New South Wales).

Margaret Jane McCormick purported to mortgage the land devised to her by her father in 1886 and to sell it in the same year, but these transactions appear to have been carried out without her husband's concurrence and without any deed duly acknowledged, and title cannot be founded upon them. In November 1887 Margaret Jane McCormick was sued in the Metropolitan and Hunter District Court in respect of a debt alleged to be due by her. She did not give notice of her coverture, and sec. 59 of the *District Courts Act* of 1858 enacted that she should not have the benefit of coverture without the consent of the plaintiff unless notice were given as prescribed by rules of Court. Judgment was entered against her for the sum of £10 10s. and costs as if she were a feme sole. The validity of this judgment cannot now be canvassed. A writ of *fieri facias* was issued on the judgment. Pursuant to this writ the Registrar of the Court in 1888 sold the land devised to Margaret Jane by her father and all her right, title and interest therein to Albert Allen, and in July 1888 by deed of bargain and sale conveyed the same to him.

The question in this case is whether this conveyance by the Registrar conferred any title to the lands therein mentioned upon Albert Allen, through whom the respondents claim. It depends upon the authority conferred upon the Registrar by secs. 78 and 79 of the *District Courts Act* 1858. By sec. 78 the Registrar may seize and take under any writ of execution and cause to be sold all and singular the lands, tenements and hereditaments of or to which the person named in the writ is or may be seised or entitled or which he can either at law or in equity assign or dispose of; and by sec. 79

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it is provided that in case of sale the Registrar shall execute a proper deed of bargain and sale to the purchaser, which shall operate and be effectual as a conveyance of the estate, right, title and interest of such person.

Clearly Margaret Jane could not at law or in equity assign or dispose of the land save in the manner already indicated; and the words in the section, coupled with the *Acts Shortening Act*, 16 Vict. No. 1, authorizing the Registrar to seize and take lands which the person named in the writ of execution could at law or in equity assign or dispose of, do not expressly deal with the case of married women, and they cannot, in my opinion, be so construed as to render effectual a deed of bargain and sale of the freehold interest of a married woman without the concurrence of her husband and a deed duly acknowledged. They do, I suppose, authorize the Registrar selling and conveying the free or separate property belonging to a married woman in equity.

Again, the words "seised or entitled" in sec. 78 must be considered. "Seised" is a technical word and denotes the possession of a freeholder (*Challis on Real Property*, 2nd ed., pp. 54, 55, 207; *Williams' Real Property*, 23rd ed., p. 36; *Leach* v. *Jay* (1)). "Entitled" is not a technical word, and prima facie extends to all lands, tenements and hereditaments in which the person named in the writ has any title at law or in equity.

The section, in my opinion, applies only to cases in which the person named in the writ is seised or entitled alone, and not to cases in which he is seised or entitled jointly with another (cf. *Doe d. Hull* v. *Greenhill* (2)). The critical words of the section are "lands . . . of or to which the person named in the said writ is or may be seised or entitled."

Consequently, in my opinion, the bargain and sale by the Registrar to Albert Allen did not convey any estate or interest to him in the lands devised to Margaret Jane by her father; but *Long Innes* J. was of opinion (3) that Margaret Jane and the appellants, who claim through her, were estopped "from asserting as against the" respondents "that at the date of the sale by the Registrar" Margaret

(1) (1878) 9 Ch. D. 42.
(2) (1821) 4 B. & Ald. 684.
(3) (1926) 26 S.R. (N.S.W.), at p. 232.

Jane "was a married woman without the *jus disponendi*." She and her privies are, no doubt, estopped from disputing the validity of the judgment against her; but this gives no title to the land (*Simm* v. *Anglo-American Telegraph Co.* (1); *Cababé on Estoppel*, pp. 115 *et seq.*). The judgment may be executed in full according to law, and to that extent the estoppel operates and is effective; but I cannot follow the further conclusion that it warrants the Registrar seizing, taking, selling and giving a title to lands which the law does not authorize him to seize, take, sell or convey. The learned Judge, I think, has gone too far at this point and the cases upon which he relies deal with the personal remedy against married women who have not pleaded their coverture, and not with cases in which the title to land is involved.

The judgment should, in my opinion, be reversed and relief given to the appellants in the form announced by the Chief Justice.

Appeal allowed. Decree appealed from discharged. Injunction granted in terms of first paragraph of prayer in statement of claim. Declaration in terms of second paragraph of prayer. Respondents to pay costs of suit and of this appeal.

Solicitors for the appellants, *Leibius & Packer.*

Solicitors for the respondents, *J. Stuart Thom & Co.*

B. L.

(1) (1879) 5 Q.B.D. 188, at pp. 206-207.