No. 13709

Supreme Court of Illinois

Chester & Wife

---

vs.

Rumsey

In Supreme Court of Illinois
Third Grand Division
April T. 1862

Augustin Chester
&
Mariette St. Chester
his wife
v
Julian P. Kenney

To W. Cleveland Esq
Appellee's Atty

Please take notice that
I shall apply on behalf of appellants
for a rehearing of the above entitled
cause, by the Supreme Court at
the present term thereof
April 10th 1862

W. W. Fuller
Appellants Atty

Service of copy of the notice accepted this 22nd day
of April, A.D. 1862

J. S. Clarkson
Atty for Appellee

311

Chester Wife

v

P. S. Rumsey

Notice of application for rehearing

Filed April 24- 1862

L. Leland

Clerk

Supreme Court

Apr Term 1862

Augustus Chester &
Marietta A. Chester } Appellants

v

Julian G. Rumsey, Appellee }

The Counsel for the appellee by consent of the appellants Counsel simply beg to submit to the Court, in connection with the present application for a rehearing, a statement of the fact that the judgment below in this Cause has already been affirmed, reconsidered and reaffirmed by the Court

The cause was argued orally and by printed brief by both Counsel at the April Term 1861, and the judgment was affirmed by the Court and so published

Subsequently to the affirmance, the Counsel for appellants submitted to the Court a further very long and elaborately prepared argument in print and the Court desirous of considering it, withheld the writ of procedendo from the Appellant until September or October last - then reconsidered the case upon the second ex parte argument of the appellants Counsel, and again affirmed the judgment of the Court below. Under these circumstances the appellee by his Counsel respectfully submits that the appellants have already in fact had a rehearing of the Cause and cannot be entitled at this time to the privileges of the rule allowing an application for a rehearing

The appellee's Counsel confidently relies upon the brief filed by him heretofore in the case, and the judgments of the Court already made.

J. C. Clayton
Atty for J. G. Rumsey Appellee

311

Chester Irish

Return

311

Instructions against allowance of application for rehearing

Filed April 24-1862

L. Leland

13707 Clerk

Petition for Rehearing

Supreme Court of Illinois
Third Grand Division
April 5. A.D. 1862

Augustin Chester &
Mariette N. Chester
his wife
vs
Julian S. Rumsey

} Appeal from Superior Court of Chicago

Petition for rehearing:

If the Court please:

The undersigned Attorney for the Appellants in the above entitled cause respectfully on behalf of said appellants, asks this Honorable Court for a rehearing thereof for the reasons hereinafter presented -

He will remark in the outset that the printed argument in this case on behalf of his client did not reach Ottawa until after the adjournment of this Court & the separation of the Judges thereof, and although he believes the Chief Justice on whom devolved the duty of drawing the opinion herein, had the opportunity of examining said argument yet the

undersigned is the more emboldened to make this application from the fact that his views as expressed on the whole case, have as yet not been placed before the full Bench - It is objected on the other side that this application can not be made because the entry of judgment of affirmance was delayed after the argument in question was transmitted The undersigned is not aware that this, if true, can cut his client off from their legal rights in the premises of being again heard as provided by the rules of this Court - But as a matter of fact the undersigned believes that the printed argument was never examined by the full Court which he desires may now be done on this application - The opinion of the Court in this cause passes solely upon the question of the acknowledgment but there are other points which seem to justify the consideration of the Court - This application will therefore first present the questions raised, herein other than the objections to the acknowledgment and secondly ask for a rehearing

upon the insufficiency of the acknowledgement -

3/ This is an action of Ejectment & the Plaintiff (appellee) claims title to the premises (two lots and two halves of lots) in the following case -

1 - Deed from George F. Rumsey & wife to Mariette N. Chester, acknowledged Nov. 11th 1856

2 - Mortgage from Augustin Chester & Mariette N. Chester to George F. Rumsey, acknowledged Nov. 24th 1856 - Mortgage contains power of sale & the acknowledgement thereto will be hereinafter stated

3d Deed from George F. Rumsey to Plaintiff, dated January 18th 1859 & purporting to convey by virtue of, as purchaser at a sale had in execution of the power in the mortgage aforesaid contained -

The defendants below (appellants) objected to the introduction of the mortgage on the ground that ~~that~~ the ~~mort~~ acknowledgement was insufficient.

The Defendants (appellants)

objected to the introduction of the deed from George F. Rumsey to the Plaintiff on two grounds

4/ (a) That a mortgage with a power of sale could not be given by a femme covert in Illinois so as to authorize a sale & conveyance thereunder

(b) That the sale in this case was illegal & invalid because the property was sold en masse

The Defendants (Appellants) further contended that the Plaintiff showed no right of entry as against Mariah A. Chester the owner of the real estate in question, since the recitals of the mortgagee's deed were no evidence against her and there was no proof given or admitted, of condition broken —

The Appellants, Petitioners for a rehearing, propose to take up the taken points first and reserve the consideration of the points as to which acknowledgment for consideration last —

Supreme Court of Illinois
Third Grand Division
April T. A.D. 1862

Augustin Chester &
Mariette N. Chester
his wife
vs
Julian D. Rumsey

} appeal from Superior Court of Chicago

Petition for rehearing;

To the Court please:

The undersigned Attorney for the Appellants in the above entitled cause respectfully on behalf of said appellants, asks this Honorable Court for a rehearing thereof for the reasons hereinafter presented -

He will remark in the outset that the printed argument in this case on behalf of his client did not reach Ottawa until after the adjournment of the Court & the separation of the Judges thereof, and although he believes the Chief Justice on whom devolved the duty of drawing the opinion herein, had the opportunity of examining said argument after the

The deed from the mortgagee George F. Bunsen to P. B. was objected to on the two grounds mentioned below —

5/

I

The deed from the mortgagee to the plaintiff below should have been excluded, because the sale under the mortgage was invalid.

1. Because a *feme covert* residing in Illinois can not make a conveyance by attorney, and this deed purports to have been executed by the mortgagee under the power of sale and conveyance contained in the mortgage, and is therefore equivalent to a deed by attorney.

2. Because the property in question was sold *en masse*.

I. Because a *feme covert* residing in Illinois can not make a conveyance by attorney, and this deed purports to have been executed by the mortgagee under the power of sale and conveyance contained in the mortgage, and is therefore equivalent to a deed by attorney.

Section 17 of chapter 24 (Scates Comp. p. 963,) provides the only mode in which a married woman "*residing in this State*" can convey her own real estate, and it makes no mention of conveyance by attorney. Section (44) of the same chapter, (Scates Comp. p. 965,) provides for the conveyance of her real estate by a *feme covert* "*not residing in this State*," and provides for such conveyance to be made *by power of attorney*.

The real estate of a *feme covert* residing *in* this State (as was the case here, as appears from the Record,) can *not*, therefore, be conveyed by power of attorney, but only in the mode pointed out by section 17 of chapter 24 of the statute, quoted *ante*. See

Dunlap's Paley's Agency, Page 1, *Note A*,
Story's Agency, §6 *and* §12, *Note* 3, (*quoted in the Note to Paley*,)

Wherein it is stated: "On the same account, where an act is required by statute to be done by the party, if it can be fairly inferred from the nature of the act, that it was intended to be *personally* done,

it can not be done by an attorney. Thus, for example, where a *feme covert* is authorized by the laws of a State to convey her right in any real estate by deed, duly acknowledged by her upon a privy examination of a magistrate, it may be presumed that she cannot acknowledge the same by an attorney." It is submitted that a conveyance made by a mortgagee under a power of sale is nothing more nor less than a deed of a party claiming to act as the attorney of the *feme*; the power of sale being, in fact, no more than a power of attorney to sell and convey.

In the case at bar the mortgagee was authorized, in case of default, to advertise and sell, "and upon the making of such sale or sales as the attorney of the said party of the first part, for such purpose hereby contituted irrevocable, or *in the name* of the said party of the second part, &c., shall execute and deliver deeds, &c."

The conveyance from the mortgagee to the Plaintiff is in the name of the mortgagee, and not as the attorney for the mortgagors, but it is submitted that the effect is the same, and that the deed is presented as the conveyance of Mrs. Chester by or through *her agent*, the *mortgagee*.

In 7 Gray, (Mass.) 243, *Roarty v. Mitchell*, the Court evidently hold to the opinion that the power of sale is equivalent merely to a power of attorney, and amounts to and is nothing more, for it is said, THOMAS, J., delivering the opinion, "How far, under the law of this Commonwealth, a married woman has power to *constitute an attorney to make sale of land*, in the mortgage of which she joins with her husband, we have not found it necessary to consider." This *assumes* that the power of sale was a mere power of attorney to make the sale, as is here contended.

In 10 Vermont, 9, *Sumner v. Conant*, the Court say: "The disability of a *feme covert* is not founded, like that of an infant, upon a supposed want of discretion, but results from a *legal subjection* to her husband, which is presumed to deprive her of that freedom of will, which is essential to the validity of contracts. And that this disability emphatically applies to the delegation of powers, is shown by the familiar case of an attorney to defend a suit, whom, it is everywhere said, the wife cannot appoint. It is contended, however, that in this instance the statute has removed her disability. This proposition is defended upon two grounds: 1st. That the power to convey, and the deed executed by the agent, being parts of one conveyance, constitute the deed which the statute has authorized; 2d. That the right to convey, being expressly given, the power to create an *intermediate agency* should be upheld, as one of the necessary, or usual, means for exercising that right. The first ground here taken, would lead to a very free and loose construction of the statute. The power of attorney is strictly no part of the conveyance, but a mere *qualification of the person who is to make it, much less is it the deed of conveyance itself*, of which *alone* the statute speaks. It is known that the power and the deed are distinct instruments, nor merely executed at different times, but acknowledged by different persons; the *power* by

the party making it, and the deed *by the agent who executes it.* Such were the facts in this case. And how can it be maintained, except upon a subtle and constrained construction of the act, that Martha Wentworth has ever executed and acknowledged the deed which professes to convey her estate? In our opinion, the terms of the statute do not justify a conclusion so wide of their apparent import.

The remaining ground is open to most of the observations already made. I shall suggest but a simple additional objection, which consists in the inability of the wife to revoke a power of this description without the concurrence of her husband. Whether this consideration alone would be fatal to the power in every case, it is certainly of great and decisive power in the present."

When this objection was urged in the Court below, it was held that, as the mortgagee or his assignee might, upon condition broken, have brought his action of ejectment, the plaintiff was entitled to recover whether the sale was valid or invalid, and the deed from the mortgagee to him might be considered to be merely of the mortgagee's interest in and rights under the mortgage; but the answer to this was at once made and cannot be controverted:

1st. The plaintiff claimed by virtue of and under the *sale* on the mortgage. His deed purports to have been and was given *upon the sale and in execution of the power of sale* contained in the mortgage, and not as a transfer of the mortgage itself.

2d. There is no proof in the case of "condition broken." If the deed, or such part thereof as related to the sale, were excluded, then there would be no proof at all of condition broken.

II. 2d. Because the property in question was sold *en masse.*

The property consisted of *two* lots and two parts of lots, which were sold to Mrs. Chester for $16,250. They were bid off *en masse* at the sale on the mortgage, for $3,000, by the brother of the mortgagee.

This appears from the deed of George F. Rumsey to the plaintiff, and from the testimony of *Julian Magill*, a witness called by the plaintiff, (his conscience needing no accuser,) who says: "I made a bid on the property myself. Julian Rumsey made the highest bid, and *it* was knocked off to him. The property was bid off at three thousand dollars."

The rule as to sales on executions, that real estate should be sold in parcels, (at least when *in parcels* when levied on,) is well settled; but it seems to have been thought that there was a distinction between a sale on a *fi. fa.* and on a foreclosure or otherwise.

It has been determined, however, by this Court, in *Meeker et als. v. Evans et als.*, and *Phelps v. Conover*, decided at Springfield and to be

reported in 25 Illinois, that no such distinction exists, and that in every description of sales the property must be offered in parcels, so as to procure the best price possible, and leave an overplus or a portion of the property to the debtors, if it can be done.

In *Garrett v. Moss et al.*, 20 Ill. R., 549, on page 556, WALKER, Judge, says:

"It has been repeatedly held that it is erroneous to offer several distinct tracts together, because, when thus offered, *the presumption is*, that the price was by that means depressed, as it required *more means to purchase the several tracts together, and cut off competition*, and in cases of redemption, when sold separately, it affords the debtor the means of redeeming a part, while he might be unable to redeem all."

And how much more should these just and equitable principles be applied to a case where it is the property of a *married woman* which is offered for sale.

The plaintiff's own witnes, MAGILL, testifies that he made a bid, but the plaintiff went higher and got the whole, and it is clear that if this property had been offered by lots, it would have brought much more, since the plaintiff himself proves that he cut off competition in the person of one bidder at least.

See 9 Paige, 259; 1 Gil., 435, *Day v. Graham;* Hilliard's Vendor and Purchaser, 2 vol., (2 vol's in one,) page 218, § 9.

In *Howard v. Ames*, 3 Metcalf, 308, SHAW, C. J., says: "Where property, real or personal, is conveyed by a debtor to his creditor, with a power to sell and dispose of it, and apply the proceeds to the payment of the debt, the creditor, in executing such power, becomes the trustee of the debtor, and is bound to act *bona fide*, and to adopt *all reasonable modes* of proceeding, in order to render the sale *most beneficial* to the debtor; like any other agent, factor or trustee to sell;" and it is there held that the maker of a note secured by a mortgage may, when sued to recover a balance due thereon, set up in defence that the property was not properly sold, and that if it had been, it would have brought sufficient to pay the debt.

This plaintiff cannot protect himself as a purchaser in good faith. He attended the sale; he bid on the property; he knew, or the law presumes him to have known, that the sale of this property *en masse* was contrary to law; but he knew also that by its being put up and knocked off in that way, he would get it at a low price and cut off competition, and so he took both the *benefit* and the *risk* of the illegality of the sale and of the consequences, which ought always to follow, and assuredly will here, such violations of natural justice and legal right.

The mortgage provided that the mortgagee might sell the said premises, or "any part thereof," showing upon its face that it was the intention, and, indeed, thereby in effect requiring, that the sale should be of the real estate by parcels as divided; and this is an additional reason for the interposition of the Court.

3d. It may well be doubted whether the sale could take place without entry made upon the premises by the mortgagee, or demand and refusal. It is admitted that there was a demand and refusal before suit brought, but it is neither admitted nor proved, nor is it the fact, that any demand was made for possession before the sale was made.

7 Gray, 243, *Roarty v. Mitchell.*

The mortgage in the case at bar does not, it is true, provide for the mortgagee to enter and sell, but simply that he may sell, upon default; but it would seem that in all cases of mortgages containing this power, demand for possession should at least be made before the sale takes place, and particularly where the property belongs to a *feme covert.*

III.

Since a *feme covert* is estopped by no recitals, express or implied, contained in her own deed (*Den ex dem Hopper v. Demarest et al.*, 1 Zabriskie, 525; *Jackson v. Vanderheyden*, 17 Johnson's R., 167,) it follows *a fortiori*, that she cannot be by the recitals in a deed by another person, claiming to act as her intermediary, agent or attorney.

In this case, therefore, the recitals in the deed from George F. Rumsey to the Plaintiff below, did not establish *quoad* Mariette N. Chester, that the *condition* of the mortgage *had ever been broken.*

The recitals of the deed were no evidence of the fact as to her, and there was no other evidence introduced, and unless condition had been broken, no right of entry, no right of recovery existed in the Plaintiff below.

The mortgage from Mrs. Chester to George F. Rumsey did not show any title in the Plaintiff, unless evidence was also introduced that there was a default in the mortgage. There was no evidence whatever of default, by the production of the note or otherwise, unless the recitals of the deed from George F. Rumsey to the Plaintiff are evidence, which, as has been shown, they are not.

It was decided in *Hall et al. v. Lance et al.* (Springfield, January T., 1861,) to appear in 25 Ill., that evidence must be introduced to show condition broken before the recovery could be had. There the judgment on the proceedings by *Sci. fa.* to foreclose was excluded as not

As against Mariette N. Chester the Plaintiff should have shown default in payment in whole or in part

10/

In Ejectment on a mortgage, it is always deemed material to show the money due, in order to establish the right of entry.

See cases cited in argt. 6 Cowen page 148, Dickerson v Jackson -

See 6 Cowen 147 same case

" 19 Johnson R. 325

Jackson ex dem Curtis v Johnson

Defendant defended as grantee of mortgagee but Plaintiff (mortgagor) obtained judgment —

III

We claim that title & seisin remain in mortgagor until foreclosure or a valid sale under a power in the mortgage if such power can lawfully be exercised -

The mortgagor cannot be lawfully divested of his or her title until all the steps

required have been called and complied with)

Hence we insist that no legal transfer of the title was ever had here

(a) Because the sale was illegal, the property having been sold en masse

(b) Because the power of sale is a mortgage given by a [illegible] Court residing in Illinois is invalid

and that at least default should have been shown, before a decree could be had -

The case in 5 Gilman (Reese v Allen), referred to by Appellee's was the case of a Trust Deed not a mortgage - It was held there that a purchaser at Trustee's sale need not show that the conditions of the Trust deed were complied with, in order to recover in Ejectment - It does not say how it would be if dept. showed a violation of the trust in defence & that purchaser knew of the violation - But that was a case where it was held that the legal title was in the Trustee - I have not the case before me but I believe I state it correctly

and to the deed from George F. Rumsey to the plaintiff, on the ground that a mortgage with power of sale could not be given by a *feme covert* in Illinois so as to authorize a sale thereunder; and the further reason is urged that said sale was invalid because the property was sold *en masse*.

We now present the points on the ~~validity of the~~ acknowledgment

IV.

The mortgage from Augustin Chester and Mariette N. Chester to George F. Rumsey should have been excluded from the evidence, and the objection of the defendants below thereto sustained, because the acknowledgment of such mortgage by Mariette N. Chester was insufficient and invalid, and not in accordance with the statute of this State in such case made and provided.

Mariette N. Chester was seized in fee of these premises, and could only convey the same, by mortgage or otherwise, in the manner pointed out by the statute.

It is unnecessary "to adduce authorities to show that a *feme covert* cannot, except she be authorized by an express statute, convey her fee-simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute, she is as incapable of conveying by deed as she is by word of mouth." (CATON, J., in *Lane vs. Soulard*, 15 Ill. R., 123.)

"At the common law," says WALKER, J., in *Moulton et ux vs. Hurd*, 20 Ill., p. 137 on page 142, "a *feme covert* could not, by uniting with her husband in any deed of conveyance, bar herself or her heirs of any estate of which she was seized in her own right, or of her right of dower in the real estate of her husband. The only mode in which a married woman could, at common law, convey her real estate, or bar her right of dower, was by uniting with her husband in levying a fine. This was a *solemn proceeding in open court*, and the judges were supposed to watch over and protect the wife's rights, and ascertain by a private examination that her participation in the act was *voluntary and unconstrained*. This is the principle upon which the efficacy of a fine is placed by most of the authorities. 3 Cruise Dig., 153, title 35, chap. 10.

Acting upon the principle that the participation of the wife in the transfer of her real estate must be free and unconstrained, the courts have held that an agreement made by a *feme covert*, with the assent of her husband, to sell her real estate, is absolutely void at common law, and that such a contract could not be enforced in equity; and that the whole system of the common law is opposed to the enforcement of the

contracts of married women for the sale of their real estate; and that it is a fundamental principle of the common law that such contracts are void, except when she conveys her estate by a fine duly acknowledged, or by some matter of record. 5 Coun. R., 492. Our conveyance acts have, however, changed the mode by which a married woman may convey her real estate. It enables her to do so by joining with her husband in a deed for that purpose; and which, to be effectual, must be acknowledged before one of the officers of the law authorized to take such acknowledgment. To give it validity, he must examine her separate and apart from her husband, after having explained to her the contents and effect of such deed, whether she executes it freely and voluntarily, without the coercion of her husband. R. S. 1845, 106, sec. 17. This provision of our Statute, it will be observed, is an enlargement, and not a restriction, of the common law powers of a *feme covert*. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same force and effect of a fine; but if *not acknowledged* in accordance with the statute, no estate passes. The statute *must be complied with*, and if it is not, the deed is left, as at common law, *absolutely void*. 15 Ill. R., 123."

In the light of these general principles, what is the acknowledgment in this case? What is the statute in regard to conveyances by a *feme covert* of property held in her own right?

The acknowledgement of the mortgage is as follows, *literatim, et verbatim, et punctuatim :*

STATE OF ILLINOIS, } ss.
Cook County. }

This certifies that on the 24th day of November, eighteen hundred and fifty-six, before me, O. R. W. Lull, a Notary Public, of the City of Chicago, in the County of Cook, in the State of Illinois, appeared Augustin Chester and Mariette N. Chester, personally known to me to be the real persons whose names are subscribed to the annexed mortgage as having executed the same, and then acknowledged the execution thereof as their free act and deed. And the said Mariette N. Chester, wife of Augustin Chester, (who is personally known to me to be the same person who subscribed the said instrument of writing,) having had the contents of the said instrument made known and explained to her, and being by me examined separate and apart from her said husband, did acknowledge said instrument to be her free act and deed; that she executed the same, *and relinquished her dower in the lands and tenements therein mentioned, voluntarily and freely, and without the compulsion of her said husband, and that she does not wish to retract.*

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Given under my hand and seal notarial the day and year first above written.

[Notarial Seal.] O. R. W. LULL,
Notary Public.

[Conveyance by husband and wife of wife's real estate.]

The statute authorizing the conveyance of real estate by a *feme covert* holding the fee, (Rev. Stat. 1845, chap. XXIV, § 17, Scates' Comp., page 963,) is as follows:

"Sec. 17. When any husband and wife residing in this State, shall wish to convey the real estate of the wife, it shall and may be lawful for the said husband and wife, she being above the age of eighteen years, to execute any grant, bargain, &c., in law whatsoever, for the conveying of such lands, &c.; and if after the executing thereof, such wife shall appear before some judge or other officer, authorized by this chapter to take acknowledgements, to whom she is known, or proved by a credible witness to be the person who executed such deed or conveyance, such judge or other officer shall make her acquainted with, and explain to her the contents of, such deed or conveyance, and examine her separ-

; and if such woman shall, upon such examination, acknowledge such deed or conveyance to be her act and deed, *that she executed the same voluntarily and freely, and without compulsion of her husband,*

by a witness (naming him) to be the person who subscribed such deed or conveyance, and *setting forth the examination and acknowledgment aforesaid*, and that the contents were made known and explained to her; and such deed (being acknowledged or proved according to law as to the husband) shall be as effectual in law as if executed by such woman while sole and unmarried."

[How dower is barred.]

The statute also defines the manner in which dower is barred, as follows: (Rev. Stat. 1845, chap 24, §§ 15 and 25, Scates' Comp., p. 961.)

"Sec. 15. A married woman may relinquish her right of dower, in any of the real estate of her husband, by joining him in a deed of conveyance and acknowledging the same in the manner hereinafter prescribed.

"Sec. 21. It shall and may be lawful for any married woman to release her right of dower, of, in and to any land and tenements,

14

Given under my hand and seal notarial the day and year first above written.

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"Sec. 17. When any husband and wife residing in this State, shall wish to convey the real estate of the wife, it shall and may be lawful for the said husband and wife, she being above the age of eighteen years, to execute any grant, bargain, &c., in law whatsoever, for the conveying of such lands, &c.; and if after the executing thereof, such wife shall appear before some judge or other officer, authorized by this chapter to take acknowledgements, to whom she is known, or proved by a credible witness to be the person who executed such deed or conveyance, such judge or other officer shall make her acquainted with, and explain to her the contents of, such deed or conveyance, and examine her separate and apart from her husband, whether she *executed the same voluntarily, freely and without compulsion of her said husband*, and does not wish to retract, the said judge or other officer shall make a certificate indorsed on or annexed to such deed or conveyance, stating that such woman was personally known to the said judge or other officer or proved by a witness (naming him) to be the person who subscribed such deed or conveyance, and *setting forth the examination and acknowledgment aforesaid*, and that the contents were made known and explained to her; and such deed (being acknowledged or proved according to law as to the husband) shall be as effectual in law as if executed by such woman while sole and unmarried."

[How dower is barred.]

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"Sec. 21. It shall and may be lawful for any married woman to release her right of dower, of, in and to any land and tenements,

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whereof her husband may be possessed or seized, by any legal or equitable title during coverture, by joining such husband in the deed or conveyance, for the conveying of such lands and tenements, and appearing and acknowledging the same before any judge or other officer authorized to take acknowledgments by this chapter; and it shall be the duty of such judge or other officer, if such woman be not personally known to him to be the person who subscribed such deed or conveyance, to ascertain the same by the testimony of at least one competent and credible witness; and upon being satisfied of that fact, shall acquaint such woman with the contents of the deed or conveyance, and shall examine her separate and apart from her husband, whether she executed the same, and relinquished her dower to the lands and tenements therein mentioned, *voluntarily, freely and without compulsion of her said husband;* and if she *acknowledge that she executed the same, and relinquishes her dower in the lands and tenements therein mentioned, voluntarily and freely, and without the compulsion of her husband*, such judge or other officer shall grant a certificate, &c., stating that such woman was personally known to him, &c., and that she was made acquainted with the contents thereof, and was examined and *acknowledged such deed as aforesaid, &c.*"

It will be perceived that the acknowledgment in question is in almost exact accordance with the acknowledgment required for a relinquishment of dower, and the counsel for the appellants contends that it is nothing more nor less than an acknowledgment of the relinquishment of dower and that only, and is not sufficient to pass the fee. The counsel for the appellee argues that the words "and relinquished her dower in the lands and tenements therein mentioned," may be rejected as surplusage, and that in that case the acknowledgment would be sufficient. It will be perceived that the decision of the question as to the sufficiency of this acknowledgment will depend upon the language of our statute and the judicial expositions which it has thus far received from this court; but before proceeding to discuss the force and effect of the act in question and to cite the authorities in Illinois thereon, it may be as well briefly to examine the decisions in our sister States in regard to similar enactments and the correctness of conveyances thereunder.

The cases from here to page 33 are from other States and from page 34 the Illinois statutes & decisions are considered —

[Massachusetts, Rhode Island, Vermont.]

In Massachusetts, Maine, New Hampshire, and Connecticut, the estate of the wife passes by her merely joining with her husband in a deed, but greater particularity is therefore required in framing the deed.

In *Lufkin v. Curtis*, 13 Mass., 223, it was held: "In a conveyance of land by a married man, words of release by the wife are necessary to bar her of her dower. It is not sufficient that she executes and acknow-

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ledges the deed, her name being introduced only in the conclusion, and the purpose of her signing and sealing not being declared."

Cites 9 *Mass. Rep.*, 220.
7 *Mass. Rep.*, 14.
8 *Mass. Rep.*, 491.

In *Bruce v. Wood*, 1 Metcalf, 542, held, "where a husband, by a deed in his own name only, conveys his wife's land in fee, and she merely affixes her signature and seal to the deed, 'in token of her relinquishment of all her right in the bargained premises,' her right in fee is not thereby conveyed, and she, after the decease of her husband, may maintain a writ of entry on her own seizin, to recover the land."

On page 543, SHAW, Chief Justice, says:

"But it has also been steadily held, that to have this effect, the wife must join in the deed; that is, it must appear that both husband and wife were parties to *the efficient and operative* parts of the instrument of conveyance, and that it is not sufficient that her name was annexed, as expressing her assent to the act of her husband, and without words showing her formal participation in the granting part of the deed. *Lithgow v. Kavenagh*, 9 Mass., 161; *Powell v. Monson & Brimfield Man. Co.*, 3 Mason, 347; *Lufkin v. Curtis*, 13 Mass., 223."

See also *Raymond v. Holden*, 2 Cushing, 264.

In *Pratt v. Battels*, 28 Vermont (2 Williams,) page 685, held: "In a deed from a husband and wife, executed while our statute required the acknowledgment by the wife to be made separately from her husband, it should appear in the certificate of acknowledgement that it was so acknowledged by her. If it does not, the deed will be inoperative and void as against the wife."

In *Churchill v. Munroe*, 1 Rhode Island, 209, the acknowledgment was as follows: "Then the above named Ansel Churchill, personally appearing, acknowledged the above written instrument to be his voluntary act and deed, and the said Lillis being examined separately and apart from her husband, also acknowledged the same before me." Held that the deed passed only the life interest of the husband.

DURFEE, C. J., says: "The acknowledgement of this deed must have been made and taken in the mode prescribed by the statute, or it conveyed nothing beyond the life of her husband. * * * * It is not necessary that this certificate, to be effectual, should embrace the very words of the statute, though it certainly would be better if it did, since it would leave *nothing to construction*. At any rate, however brief the certificate might be, it should certify enough, and in such form as plainly to imply that the wife's acknowledgement and declarations, and

the mode in which made, were such as required by statute. It certainly should not be *equivocal*, so that if the magistrate were called upon *to answer to the law* for a *false* certificate, it might not be taken to mean *this* or *that*, as the exigency of the case might require." * * * * * "The certificate then may be true; it may be that she declared it to be her deed or instrument, but by this declaration merely the requisitions of the statute are not answered; she does not declare it to be at that time her voluntary act. The magistrate may have intended this by his certificate. But the question is not what the magistrate intended, but what the words of the certificate by fair construction express or necessarily imply. We cannot extend these words by construction, without *taking for granted the very fact* which it was the design of the statute that the magistrate should certify. But for this we may as well assume that the words imply that she acknowledged it to be an instrument executed by constraint, as that it was her free and voluntary act. The certificate, therefore, is insufficient as it stands, and cannot be extended by construction, *without taking for granted* the fact which it was the intent of the statute that the certificate should ascertain, to wit, whether the deed was her willing or unwilling act at the time of taking the acknowledgment. It is upon the deed as the *present act* of her will, that the statute emphatically insists, when it requires that she should declare that she doth not wish to retract the same."

[Virginia.]

In *Healy et als. v. Rowan et als.*, 5 Gratt., 414, held: "The certificate of a clerk that a deed was acknowledged *in court* by a husband and wife, and ordered to be recorded, is not sufficient to make it her deed."

In *Hairston v. Doe dem Randolphs*, 12 Leigh, 445, "certificate of justices of privy examination of the wife to a deed of husband and wife, states, that the wife appeared before the justices, and separately and apart from her husband, acknowledged that she had willingly executed the deed on her part, and wished not to retract it; the deed was signed and sealed by both husband and wife in 1798, and the privy examination was had in 1816, Held, upon construction of the statute of 1814 (incorporated in the Statute of Conveyances, 1 Rev. code, ch. 99, § 15) that the certificate is defective in not showing that the deed was explained to the wife, or that she was in any way apprized of its contents and purpose, and therefore the rights of the wife did not pass by the deed."

[North Carolina.]

In *Den ex dem Burgess et al. v. Wilson*, 2 Devereux (Law), p. 306, *held:* By the Act of 1715, as explained and amended by the Act of 1751, a deed to convey the lands of a *feme covert* must, except in case

of her inability to attend, be acknowledged by the husband and wife in open court; proof by witnesses is not sufficient. Under these Acts, the proper mode to bar the wife, she being able to attend, is for the husband and wife to acknowlege the deed personally in open court, and *then* for one of the court to take the private examination of the wife.

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Where a justice was directed to take the private examination of the wife, before the deed was proved as to either the husband or the wife, who upon making his report proved the execution of the deed by the husband and wife, and also certified as to her private examination, *held*, that the deed was inoperative and did not bar the heir of the wife.

The Court, through RUFFIN, J., at the conclusion of an elaborate opinion, say:

"There seems to be no reason for relaxing the provisions of the statute by a liberal construction. The *scrupulous regard* with which the Courts of Westminster search into the motives of a married woman for suffering a recovery, or acknowledging a fine, is worthy of all praise and imitation. We but follow their example in holding to *the letter* of our law. It is true, the acts were passed to *facilitate* alienations by married women, but not to *encourage* them, and especially not to furnish temptations nor opportunities to the husband to extort from the wife a conveyance, which he might do if a public as well as a private exhibition of the instrument were not required. The presumption of the law that *the will of the wife is subdued to that of the husband*, is, so far as regards the disposition of her estate at least, but too fully verified by our experience. Every ceremony, however formal, which has the least tendency to interpose the protection of the law, or the advice of an additional judicial character, ought to be adhered to sustantially and literally."

See 8 Iredell's (Law) R., page 70, *Den. on demise of Jones et al. v. Lewis*, to same effect.

9 Iredell's (Law) R., 353.
Den. on dem., Etheridge v. Ashbee.

[TENNESSEE.]

In *Perry v. Calhoun*, 8 Humphrey's R., 551, "A certificate by commissioners of the privy examination of a *feme covert* was as follows: 'Agreeable to an order of the County Court, to us directed, we certify, that we privately examined Sarah Lidden respecting her willingness to sign the within, and she declared she did it freely, without any force or compulsion whatever,' Held, not sufficient to pass the title of the feme."

The Court say, on page 554:

"Inasmuch as this mode of conveyance by privy examination of the *feme covert*, was introduced by statute in the place of one much *more solemn and better calculated* to protect her rights, viz., fine and recovery, *great strictness* must be required in enforcing the observance of the forms prescribed by the statutes."

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And on page 556:

"A *feme covert* cannot convey a title to her lands except by a deed executed upon her private examination made as the law directs; her signature to a deed without such private examination is a nullity; her deeds of all kinds are void without such examination; it is *the examination which gives them validity*, and *not* the signature, the signature being a *nullity without* such examination."

[Alabama.]

In *Boykin v. Rain*, 28 Ala., 332, held that:

"An acknowledgment by a married woman, on private examination apart from her husband, 'that she signed, sealed and delivered the above instrument on her own free will and accord, and *without any force, persuasion or threats from her said husband, and for the express purposes* therein stated,' is not a *substantial* compliance with the provisions of the statute, (Clay's Digest, 155, § 27,) which requires an acknowledgment, 'that she signed, sealed and delivered' the deed 'as her voluntary act and deed, freely, without any *fear*, threats or compulsion of her said husband.'"

The Court say (Rice, J., delivering the opinion):

"It does not appear that Mrs. Hazzard was twenty-one years of age when she executed and acknowledged the mortgage. But even if that fact did appear, her acknowledgement on her private examination, as certified by the the notary-public, is not, either in words or substance, the acknowledgment prescribed by law. It was essential that she should acknowledge, amongst other things, that she executed the mortgage 'without *any* fear.' She has not acknowledged this, nor anything in *substance the same.* It will not do to say she has acknowledged something *like* it. Resemblance is not identity. Fear may exist on the part of the wife, 'without any force, persuasion or threats from the husband. Her acknowledgment that she executed the deed on her own free will and accord is not identical in substance with an acknowledgment that she executed freely, without any fear of her husband. Fear may exist, and often does exist, in a degree so moderate as not to destroy the freedom of the will."

In this case an able petition for rehearing was filed, (to be found on page 344,) but was overruled by the Court after having "been very fully considered."

[KENTUCKY.]

In *Still v. Swan*, Littell's Select Cases, page 156, held, that "where the justices certify that a *feme covert* inheriting, relinquished her right of dower, her inheritance does not pass *under the name of dower*."

In *Tevis' representatives v. Richardson's heirs, &c.*, (Dec. 1828,) 7 Monroe's R., p. 654, on page 661, the Court say:

"How clerks have got into the habit of certifying that *femes covert* have relinquished their dower or title, instead of certifying the fact that they have acknowledged after being privily examined as the law directs, a deed, which by its terms in law passes their estate, we cannot tell; but if it be conceded that the certificate of the clerk, stating that the *feme* relinquished her dower, must be construed to pass her dower, if any she has, it certainly *cannot be contended that her relinquishing her dower, passed the estate when the fee simple is in her.*"

In *Barrett v. Shackleford*, 6 J. J. Marshall's R., p. 532, (October, 1831,) the Court say: "a deed executed by a *feme covert* purporting to convey her estate in lands, unless it be done *in accordance with the mode prescribed* by statute, or in pursuance of a decree or judgment of a court of competent jurisdiction, is void. Whether a deed has been properly executed by a *feme covert* so as to pass her title must be proved by the record when compared with the requirements of the statutes, because it is matter of record, and that *only* which the law has made effectual to pass her title."

In *Gregory's heirs v. Ford, &c.*, 5 B. Monroe, p. 471, (Spring term, 1845,) the Court say:

"And while we are bound to adhere to the established principles, that the deed of a *feme covert* must be recorded (or lodged for record) within the time prescribed by law for recording deeds, to be computed from the time of its delivery, and also that a certificate of acknowledgment showing that the *feme* had relinquished her dower only, is wholly insufficient upon a deed *professing* to convey her inheritance, we are disposed to construe the statutes and the certificates liberally, &c."

See also *Nantz v. Bailey*, 3 Dana, 111, (Spring term, 1835.)

[PENNSYLVANIA.]

In *Lessee of Watson and wife v. Bailey et al.*, 1 Binney, 470, bargain and sale by husband and wife, who, by a certificate of a judge of the Common Pleas, indorsed on the deed, "personally appeared before him, and *acknowledged the indenture to be their act and deed*, and desired the same to be recorded, *she being of full age, and by him examined apart*," held not sufficient to pass the wife's estate.

See also *Kirk v. Dean*, 2 Binney 341, March T., 1810.
McIntire v. Ward, 5 Binney, 296, October, 1812.
(cited in 11 Illinois, 123, *Hughes v. Lane.*)
Shaller v. Brand, 6 Binney, 435, May, 1814.

In *Evans v. The Commonwealth*, 4 Serg. & Rawle, 271, held in regard to a conveyance by a married woman, that "a certificate merely stating, that she was of full age, and separately and apart examined, and the contents of the deed made known to her, without mentioning, that she voluntarily consented to the execution of it, is insufficient," and the Court, GIBSON, Judge, delivering the opinion, say, (and this opinion should be observed, as the case of *McIntyre v. Ward*, 5 Binney, herein referred to was largely quoted from in 11 Illinois, 123, *Hughes v Lane*): "The legislature intended, that a married woman, in conveying her estate, should be a free agent, and that she should be secure from deception as well as improper influence on the part of her husband. I therefore take those requisites to be, that she was separately examined, that she had a knowledge of the nature and consequences of the act she is about to perform, and that her will in the performance of it, be free. I know it is supposed by many of the profession, that in *McIntire v. Ward*, 5 Binney, 296, this Court receded from its decision in *Watson v. Bailey*, 1 Binney, 470. It did not recede. There the objection was, that it did not appear the contents of the deed had been made known to Mrs. *Neil* by the magistrates who took the acknowledgment. The Chief Justice, in delivering his opinion, stated he did not consider it as having been decided in *Watson v. Bailey*, that it was necessary it should appear the contents had been made known to the wife, *nor did he then intend to express an opinion on that point;* but that if it were necessary, it appeared substantially from the special nature of the certificate that Mrs. *Neil* was fully apprized of the contents of the deed. Justice YEATES gave no opinion, and Justice BRACKENRIDGE was decidedly of opinion, that under the authority of *Watson v. Bailey*, communication of the contents ought substantially to appear, as also, that the execution of the deed was voluntary and without coercion; and as to that *I heartily concur with* him. But it never could be suspected from anything that has fallen from this Court, that we held it unnecessary to set forth *in substance*, that the wife executed the deed voluntarily and without the compulsion of her husband. In *Shaller v. Brand*, 6 Binney 435, it was

held, that the words, "she voluntarily consenting thereto," sufficiently indicated her assent to the *execution of the deed*, and not, as was contended, to her being separately examined; but the Court again decided that the very letter of the act need not be pursued, but that it must appear to have been substantially complied with. But if the form of acknowledgment in the present instance should be held good, it would be better to overrule the case of *Watson v. Bailey* at once. To presume that everything was rightly and voluntarily transacted before the magistrate, would be to dispense with every guard against the coercion and improper influence of the husband which the law has interposed for the protection of the wife. Why not as well dispense with the separate examination altogether? We know how rapidly and with what little consideration of their importance these matters are usually transacted before magistrates. A certificate, well drawn by the scrivener, would suggest to the magistrate, who should read it before signing, some matters of duty on the occasion, that otherwise might escape his attention. Even this is a matter of consequence, that pleads for retaining a form of certificate setting forth specially a substantial compliance with the requisites of the law."

In *Watson v. Mercer et al.*, 6 Serg. & R., 48. (marg. paging, 49,) held, "if a certificate state that the husband and wife personally appeared before the magistrate, 'and acknowledged the indenture to be their act and deed, and desired the same to be recorded, she being of full age, and by him examined apart,' it is insufficient to pass the real estate of the wife."

GIBSON, J., says: "In no country, where the blessings of the common law are felt and acknowledged, are the interests and estates of married women so entirely at the mercy of their husbands as in *Pennsylvania*. This exposure of those who, from the defenceless state in which even the common law has placed them, are least able to protect themselves, is extenuated by motive of policy, and is by no means creditable to our jurisprudence. The subordinate and dependent condition of the wife opens to the husband such an unbounded field to practice on her natural timidity, or to abuse a confidence, never sparingly reposed in return for even occasional and insidious kindness, that there is nothing to which he cannot procure her consent. The policy of the law should be as far as possible, to narrow, rather than to widen, the field of this controlling influence. * * * * In the country whence we derive our laws, the wife's land can be aliened only with her assent, deliberately expressed, on a fair, full, and careful, separate examination, in a court of record; in this, the examination is considered a matter of such little importance, that it is entrusted to a justice of the peace, by whom it is sometimes entirely dispensed with in fact, but often slubbered over, even in presence of the husband himself. These are considerations which in-

duce the mind to pause, before it consents to adopt the rule, that the act of the magistrate is to be considered as having been rightly done till the contrary appears; and thereby to withdraw the only protection, insufficient as it is, which the law interposes in behalf of married women."

After speaking of the case of *Watson v. Bailey*, (1 Binney, 470,) *McIntire v. Ward*, (5 Binney, 296,) *Shaller v. Brand*, (6 Binn., 435,) and *Evans v. Commonwealth*, (4 Serg. & R., 272,) Judge GIBSON resumes: "There has therefore been no decision directly infringing on *Watson v. Bailey*, although *McIntire v. Ward* may be thought to have affected it indirectly; for it is hard to discover, how the court could sustain the acknowledgment, on the principle assumed. On the ground of precedent, then, I consider the case of *Watson v. Bailey*, as fully established; but if it were not, so little am I disposed to relax, that I would rather exact an adherence to the *letter*, from which any departure can be justified, only from a consideration of the practice that has prevailed, and the insecurity of the titles and confusion that would ensue from the adoption of a new course."

See, also, 6 Serg. & R., 143, *Fowler v. McClurg et als.*
9 S. & R., 268, *Jourdan v. Jourdan.*
10 S. & R., 445, *West v. West.*
14 S. & R., 84, *Steele v. Thompson.*
15 S. & R., 72, *Barnet v. Barnet.*

In 16 Penn., State R., (4 Harris,) p. 232, decided in 1851, the Court say: "So great is marital influence, and the defenceless condition of the wife, that it is a rare case that she has firmness and independence to resist, for any length of time, the importunity of a rapacious husband. Whilst she has a husband for her protection against the world, she has, by the law of Pennsylvania, a most inefficient protection against the influence and control of her husband, who has her confidence and the keeping of her will. It is said by Justice GIBSON, in *Watson v. Mercer*, 6 Serg. & R., 50, that 'the policy of the law should be as far as possible to *narrow* rather than widen the field of this controlling influence.' It is, we think, for our judicial tribunals to administer to the wife the protection professed to be given by the forms of the law, as far as justice and public security will allow."

In *Louden v. Blythe*, 27 Penn. State R., (7 Casey,) 22, BLACK J., says: "A married woman may convey or mortgage her land by joining with her husband in a deed for that purpose. But to make such deed valid, it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with *a full knowledge* of its *meaning, purpose and intent.* It must also be shown that her will was perfectly free, and that her mind accorded with the act. If he uses his influence and power in such manner as to control her unduly, or so as to

make her act under his will and not her own, the deed is void. I do not say that it will be vitiated by the mere fact that she yields to his persuasions, even where she does so against her better judgment. But there must be no imprisonment of her mind, and no unfair advantage taken of her weakness. She must act voluntarily and not by compulsion, moral or physical. These facts are to be proved *in one way only*—that is, by the certificate of a judge or justice that he examined her, not in the presence of her husband, but separately; that he made the contents of the deed fully known to her; that she declared her *execution* of it to be *voluntary and free from every act of coercion.*"

[South Carolina.] In *Brown v. Spann*, Mills' Constitutional Reports, (2 vol's in one, page 12 of second vol.) 240, the Court, Nott, J., delivering the opinion, say:

"A married woman is not capable of binding herself by deed, unless authorized to do so by an act of the legislature; and then, *only in the manner and to the extent* prescribed by such an act. It becomes necessary, therefore, to look into the act, under which it is contended the plaintiff has disposed of her right, to see how far it authorizes such disposition. The act of 1795 contains two distinct provisions on this subject: the first authorizes *femes covert* to bar themselves of dower in the lands of which their husbands were seized; it directs the manner and prescribes the form in which the renunciation is to be made. It requires her to renounce "all her interest and estate," and also "all her right and claim of dower." The second directs the method by which she may convey away the fee simple of any real estate to which she may be entitled as her inheritance. It requires her to join her husband in a release to the purport of the one before prescribed by the act. It then requires her to make a renunciation of her right in the manner directed in the case of dowers; but it prescribes no form. It requires her to renounce, &c., all her estate, interest and inheritance. In the first, the words are, "interest, estate, and right and claim of dower;" in the second, "estate, interest and inheritance." It is now contended, that having joined her husband in a release, and having also renounced all her "interest and estate, and also all her right and claim of dower," she has virtually complied with the act, and divested herself of the fee simple in the land. But I am not aware of any case where the words, "all my interest and estate," in a deed, carry a fee simple. But if such a case can be found, it would not decide this question. For the words here used are those required *in a renunciation of dower.* Whereas, in a release of the fee simple, the word "inheritance" is expressly required."

[New Jersey.]

In *Den ex dem, Hopper vs. Demarest et al.*, 1 Zab., 525, on page 541, Green, Chief Justice, delivering the opinion, says:

"As a general rule, all acts of a married woman are absolutely void. She acts solely under the cover or protection of her husband. Her acts, her admissions, her contracts, her representations, do not, as a general rule, bind her, or affect her property. She may pass her estate by deed, executed and acknowledged in the mode designated by the statute and *in no other way.* A deed thus executed and acknowledged, is good and effectual to convey her interest in the land thereby intended to be conveyed. But she is bound by no covenant in the deed. She is not estopped by an express warranty. As to her it is void. *She is estopped by no averment or recital in the deed. They cannot be offered in evidence against her.*"

Den. ex dem., Rake and wife v. Lansbee, 4 Zab., 613, on page 614, the Court say: "By the common law, the legal existence of a married woman is merged in that of her husband, so that, as a general rule, she can make no contract without his consent. A contract so made by her is absolutely void. 4 Cruise Dig., 19, Title, 32, Deed, ch. 11, § 29 to 36; 2 Com. Dig., *Baron and feme*, p. 78—79; *Hepburn v. Dubois*, 12 Peters, 345. Upon this well settled and well known principle was engrafted the statute of this State, of 7th June, 1799, Rev. Laws 458, § 4, directing the mode of acknowledgment of deeds of conveyance by married women. It was not intended to repeal that rule of the common law, nor to give new power to the wife, nor to remove her disability, but to protect her against any undue influence, the fear, threats or compulsion of her husband, and against fraud and imposition. The law presumes a *feme covert* to act under the coercion of her husband unless before a Court of Record or some judicial officer. *Baldwin, J., in Hepburn & Dubois*, 12 Peters R., 375."

[California.]

In *Selover v. American Russian Commercial Co.*, 7 Cal., 266, on page 274, the Court say: "It seems to have been the intention of our statute to provide a mode of alienation, at once simple and conclusive, and which would equally protect the wife and the purchaser. And if the Courts should sustain sales or incumbrances, made or created in any other mode than the one provided, it would soon destroy the simplicity and efficiency of the rule itself. We should soon be called upon to decide that the privy examination of a married woman was unnecessary to convey her real estate, for the same reason would apply in the one case as in the other, except that the language of the sixth section of the act

defining the rights of husband and wife, is in terms stronger than that of the statute concerning conveyances.

That the acknowledgment is a necessary part of the conveyance of the real estate of a married woman, there can be no doubt. Up to the last moment she may retract the execution of the deed. *Mason v. Brock*, 12 Ill. R., 276; and *Mariner v. Saunders*, 5 Gil. 113. In the last case, the Court says: 'without such acknowledgment, the deed was absolutely void.' Defective deeds and acknowledgments of married women cannot be reformed, even in chancery."

In *Barrett v. Tewksbury*, 9 Cal., 13, on page 15, the Court say:

"The deed not being properly acknowledged, is insufficient. It is not in the power of a court of equity to compel a married woman to correct an insufficient acknowledgment. Her consent must be perfectly free. She can make no contract to bind her, *except in the manner provided by the law.* The provisions of the statute must be strictly pursued. She must be examined separate and apart from her husband. Whether the husband must join in the deed, we do not now determine. If we had the power to enforce mere moral obligations, we should compel the defendants to execute and deliver a good deed. It is a hard and unconscionable case; but we can give no relief."

[New York.]

In *Jackson ex dem Stevens v. Stevens*, 16 Johnson's R. 110, held, "A deed executed by a *feme covert*, is not binding upon her, until acknowledged, and her subsequent acknowledgment does not relate back to the time of the acknowledgment of the deed.

So, where a husband and wife execute a deed for land of the wife, but which is acknowledged by the wife, and the wife *then* acknowledges the first deed, the title to the land is vested in the grantee in the second deed."

Spencer, J., says: "It is contended, however, that the acknowledgment of the deed by Mrs. Briggs, in October, 1814, related back to the date of the deed, and rendered it valid from the beginning. But although she signed and sealed the instrument, it was not her deed, until she had acknowledged it *according to the statute.* It could not bind her as a contract; she was not confirming an inchoate and imperfect agreement. The deed took its efficacy from the period of her acknowledgment, and there was nothing prior to which it could relate."

See also *Jackson ex dem. Corson et al. v. Cairns et al.*, 20 Johnson's R., 301.

Doe ex dem DePeyster et als. v. Howland, 8 Cowen R. 277.

Gillett v. Stanley, 1 Hill, 121.

In *Martin v. Dwelly*, 6 Wend. R., p. 9, the Court say: "The general question presented by this case is, whether a deed of a *feme covert* not executed and acknowledged, according to the provisions of the statute, 1 R. L., 369, and therefore void and inoperative at law, is to be considered and treated in a court of equity as a valid agreement to convey, the specific performance of which will be decreed as against the *feme covert* or her heirs.

By the common law, a *feme covert* could not, by uniting with her husband in any deed or conveyance, bar herself or her heirs of any estate of which she was seized in her own right, or of her right of dower in the real estate of her husband. * * * The only mode in which a *feme covert* could at common law convey her real estate was by uniting with her husband in levying a fine. * * * Our statute declares that *no estate of a feme covert* residing in this State shall pass *by her deed*, without a previous acknowledgment made by her before a proper officer apart from her husband, that she executed such deed freely without fear or compulsion of her husband. This provision, it will be observed, is an enlargement and not a restraint of the common law power of a *feme covert*. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, *when duly acknowledged*, the same power and effect *as a fine;* but if not acknowledged according to the directions of the statute, it declares that no estate shall pass by it. It leave it as it would have stood at the common law, if the statute had never been passed, *absolutely void and inoperative.*"

[Iowa.]

In *O'Ferrall v. Simplot*, 4 Greene, (Iowa) Rep. 162, on page 165, the Court say: "As a *feme covert*, her legal identity is merged into that of her husband, and in general she can do no act that is binding. Her contracts are not only voidable, but generally absolutely void. Being, by the law, so completely divested of power, and almost of individuality, the wife's contingent rights should not be cut off without at least a substantial compliance with the formalities which the law has provided to protect her against imposition and fraud. We would not go so far as some courts have done, and say that these requirements should be strictly and literally complied with, but we cannot under the law and the entire current of authorities, avoid the conclusion, that they should be substantially observed, in order to divest the wife's dower, and that a material defect or omission in the certificate cannot be supplied by parol testimony. The authorities upon this point appear to be in a uniform current, and without deviation. In *Elliot v. Piersol*, 1 Peters, 338, it is expressly decided that the privy examination and acknowledgment of a deed by a *feme covert* cannot be legally proved by parol testimony, so as to pass or convey her estate. In *Jourdan v. Jourdan*, 9

Serg. and R., 268, it is decided: that when a deed executed by a married woman is void, parole evidence is inadmissible to show that after her husband's death she delivered and ratified it. See also *Barnet v. Barnet*, 15 Serg. and R., 73; *Watson's lessees v. Bailey*, 1 Binney, 470; *Elliott v. Piersol*, 1 McLean, 11; *Jamison v. Jamison*, 3 Wharton, 457; *McFarland v. Febijer*, 6 Ohio, 357; ib., 136; *Carr v. Williams*, 10 ib., 305; *Silliman v. Cummins*, 13 ib., 116; *Hayden v. Wescott*, 11 Conn., 129; *Martin v. Dwelly*, 6 Wend., 1."

* * * * * * * * *

"And the cases of *Chesnut v. Shane's lessee*, 16 Ohio, 599; and *Ruffner v. McLenan*, ib., 639, were under a different statute from ours. In those cases it was held that the laws of Ohio did not require the officer to state in his certificate that the contents were made known; and that the court would *presume* that the officer did his duty. But the statute of Iowa imperatively requires that the certiffcate should show that fact."

[MICHIGAN.]

In *Sibley v. Johnson*, 1 Manning's R., 380, held:

"A certificate of the acknowledgment of the execution of a deed by a *feme covert*, under the act, Sess. L., 1840, p. 167, sec. 4, certifying that 'separately and apart from her husband she acknowledged that she executed the same freely and without fear or compulsion of any one,' without stating that it was on a *private examination*, is void." The Court, after a review of the authorities in Indiana, Maryland, Pennsylvania and Ohio, says: "In the case of *Barton v. Morris*, 15 Ohio R., 423, the courts appear to have changed their ground, and very much relaxed this rule; and in *Chesnut v. Shane's lessees*, 16 Ohio R., 599, the Court entirely change the settled rule of decision in Ohio and adopt that of the Supreme Court of Indiana, as stated in 6 Blackford, cited above, and say, the legislature contemplated relying upon the *official* oath of the officer for his faithful performance of the portion of the statute which is directory to him. In this case, Judge Reed delivers a dissenting opinion, maintaining the doctrine of their earlier decisions. It was admitted by the majority of the Court, that it must appear by the certificate that the wife was apart from her husband, that he examined her, and that she acknowledged to him, &c., and he asks, why not apply *the rule of presumption* to *every* act of the officer, and permit them all to rest in presumption, and not require any to be certified? If we limit the requirements of the certificate to embrace merely the acts of the wife, all that it need contain would be that the wife acknowledged that she freely executed the deed. He insists that the term acknowledgment, in the statute, means that the wife makes such admission under all the attendant facts and circumstances which the statute requires to make it valid and binding upon the woman, and this must appear in the certificate.

At the common law, the wife has no separate existence; she can do no legal act without the consent of her husband. With her person the husband acquires the use and control of all her property. Her legal rights are merged in those of her husband. She derives her power to convey her right of dower alone from the statute, and her act has no force independent of that given to it by the statute, which is an innovation upon the common law, and the authority given is in derogation of it; and if the act is not done pursuant to the statute, it cannot prevail; not by the common law, for that does *not permit it;* not by the statute because *its requisitions have* not been complied with."

In *Dewey et al. v. Campau*, 4 Gibbs, 565, the Court on page 567, say: "The deed of a *feme covert*, being void at common law, is a nullity, unless acknowledged in strict compliance with the statute. * * * The certificate of the Notary Public, who professed to take this acknowledgment, is manifestly defective. It does not appear by the certificate that Taw-cum-e-go-qua ever acknowledged the deed upon her examination. The officer merely certifies, that she stated, through the said interpreter, etc. The word "stated," cannot be regarded as equivalent to acknowledged. Stated, signifies told, recited; whereas the word acknowledged means received with approbation, owned before authority. The certificate of the notary should have shown affirmatively that all the requirements of the statute had been complied with. * * * * The certificate of the notary is also defective, in not showing, affirmatively, that the acknowledgment was taken separately as well as apart from her husband. At first sight, this may seem to be an unnecessarily nice criticism upon the certificate. But an acknowledgment might be taken apart from the husband, and not beyond his immediate presence, whereas, if the officer had certified that the acknowledgment was taken separately and apart from the husband, such language in the certificate would exclude the idea of personal presence on the part of the husband. Courts have repeatedly held, that the statute in regard to conveyances by married women must be strictly complied with, and that they will not control or *explain away* the statute."

[INDIANA.]

In *Stevens v. Doe ex dem. Henry*, 6 Blackford, 475, held: "It will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife, and then making her acquainted with the contents of the conveyance."

The statute of 1824, under which this decision was given, after providing what the wife should acknowledge and requiring the separate examination, says the conveyance shall be good and valid in law, pro-

vided the officer taking the acknowledgment shall, under his hand and seal, "certify the same upon the back of such deed or conveyance," and the court say: "the officer must, under his hand and seal, and on the deed, certify *the same*, that is, he must certify on the deed that such declaration or acknowledgment of the voluntary execution of the deed was made before him. But the statute does not require, as we understand it, the certificate to show anything more on the subject, than the declaration or acknowledgment of the wife that she had voluntarily executed the deed. It will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife, and the making her acquainted with the contents of the deed. It is the *acknowledgment only*, not the *circumstances under* which it was made, that is required to be certified."

[This differs *toto cœlo* from the Illinois statute.)

[Ohio.]

In *Meddock v. Williams*, 12 Ohio, 377, held, "A certificate of acknowledgment to a deed, by husband and wife, stating that the wife was examined 'accordingto law,' is not sufficient to bar her of dower after the husband's death." The court, on page 387, say: "A certificate by an officer that he has acted according to law, is no evidence that the things are done which the law requires. It is evidence of the opinion of the officer, nothing more. It is the duty of the officer to certify the things he has done, and the court will then judge whether he has pursued the law. It is not a certificate of the opinion of the officer that he has pursued the law which the statute requires, but a certificate of the *acts* he has pursued in obedience to the statute. The certificate itself must contain *all the acts* done, that it may appear upon its face that the requisitions of the statute have been complied with."

See also, to same effect, 13 Ohio, 116, *Silliman v. Cummins.*
3 Ohio, 140, *Brown v. Farrar.*
6 Ohio, 142, *Connell v. Connell.*

Contra, 16 Ohio, 599, *Chestnut v. Shane's Lessees.*
5 Critchfield (5 Ohio S. R.) 319, *Card v. Patterson et al.*

[These later decisions in Ohio run upon all fours with the case in 6 Blackford, already quoted. *Chestnut v. Shane's Lessees* was decided upon acknowledgments made under the Ohio statute of 1818, which provides as to the officer merely, that he "shall certify the same, together with the acknowledgment of the husband on the same sheet," and pursues the same reasoning in regard thereto as the Court in 6 Blackford. *Card v. Patterson et al.*, passed upon an acknowledgment under the act

of 1831, which is similar to act of 1818, and the decision is in accordance with the view taken in 6 Blackford. They merely go to the point, that under the statutes mentioned, the officer need not certify that he read or otherwise made known the contents of the deed to the *feme*. The statutes differ from those of Illinois, and the decisions are of no binding force here. They are expressly disregarded in 4 Green (Iowa), and 1 Manning's Mich. R., cited ante. The construction of a curative act is considered in *Chestnut v. Shane's Lessees*, and reference will hereafter be made to the opinion in that case, when the act of 1853 in this State comes up for consideration.]

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In *Purcell v. Goshorn & ux.*, 17 Ohio, p. 105, where a bill was filed to quiet the complainant's title (under the Ohio practice) alleging (see p. 197) that the name of the *feme covert* (one of the defendants) who had the estate, was omitted in the granting clause of the deed, and "in the attesting clause, she is only described as relinquishing her right of dower; whereas (it is charged) her intention was to convey her fee in the premises therein granted." The Court say: "It is the husband alone that grants and conveys throughout the entire deed; her name is never there mentioned but once, and then just as it would have been had the husband owned the land, and the wife possessed only a contingent dower interest. To the end of the deed the same appearance is kept up, and then the wife relinquishes her dower. Had the husband been the owner, then the conveyance would have been perfect, and the complainant would have needed no assistance from a Court of Chancery.

"Now by what principle can a court of equity take this deed, which is regular and perfect upon its face, drawn strictly according to the statute, to convey a fee by the husband and dower by the wife, and *alter* it, so that it shall convey a fee simple, instead of a *dower* interest by the wife?" And the Court further say: "To alter it in such a manner as to conform to what may have been the intention of the grantees, would be *equivalent to making a new deed.* This, against a married woman cannot be done."

[The Court seem to lay some stress upon the absence of the wife's name in the body of the deed, and say this is as it would have been, had she really possessed a dower interest only. In Illinois, the statute requires the wife to execute the deed when it is a dower interest simply, which she desires to relinquish, in the same way as when she is aiming to convey the fee. In the one case she acknowledges that she executed the deed "freely, voluntarily, &c."; in the other, she acknowledges that she "executed the deed and relinquishes her dower, freely, voluntarily, &c." So that the name of the *feme covert* appearing in the granting part of the deed, and all the way through it, argues nothing as to intention one way or the other.]

so far as the signing thereof is concerned

the acknowledgment is in the alternative for

so that is determined upon the acknowledgment & the certificate thereof alone

[Missouri.]

In *McDaniel v. Priest*, 12 Missouri, 544, held, "where the certificate of acknowledgment of the clerk of the Circuit Court, upon a deed executed by husband and wife to convey *lands of the wife*, states that the wife, upon separate examination, 'acknowledged and declared that she executed the deed and relinquishes her *dower* in the lands mentioned in the deed,' the deed will not pass a fee simple interest of the wife."

The Court, on page 546, say:

"A rigid interpretation of the statutes prescribing the forms in such cases, would tend to gross injustice, and tend to overthrow many titles honestly acquired. All that is considered requisite is, that the law be substantially complied with. The certificate must show that the contents or character of the deed was explained to the wife by the officer authorized to take acknowledgment; that she was subjected to a privy examination, and that she, upon this privy examination, acknowledged its execution to have been a voluntary act, and without any undue influence of her husband. The acknowledgment certified to in this case, contains everything required by the statute, but is accompanied with a relinquishment of dower. It states that the wife was not only examined as to whether she executed the deed, but whether she relinquished her dower in the land, and that she acknowledged that she did execute the deed freely, &c., and did relinquish her dower in the land therein described, &c. If the relinquishment were stricken out of this acknowledgement, it would be in exact conformity to the provisions of the act which directs the mode of passing the wife's estate. Can we regard this portion of the certificate as *surplusage?* If we can, it should not vitiate the certificate.

If the superfluous words used in the certificate had *no tendency* either to *limit* or *extend*, or *control in any manner* the language *immediately preceding* it, there would be no objection to regarding it as mere surplusage.

But it is obvious that the additional clause might well be construed as a limitation upon the effect of the preceding acts, and that the wife had, in executing the deed merely relinquished her dower, and had not parted with her estate of inheritance. This will be rendered more obvious by *comparing* the certificate with the one required by law, in a case of mere relinquishment of dower, and it will be seen that the clerk followed *literally* the form of a relinquishment of dower. To hold this acknowledgment then to be sufficient to pass a fee simple title of the wife, will be, in effect, to hold that a relinquishment of dower as required, and in the form *required* by the statute, will answer *either* to pass *dower*, if the wife *has no more interest*, *or* to pass her *fee simple*

when she is the owner of the estate designed to be conveyed. This would be giving a latitude of construction not warranted by the statute, and dangerous to the rights intended to be protected.

The fair inference from the certificate in this case is, that the wife *supposed* or *was advised* that she had but a right of dower in the land, and that the deed she had executed was intended to deprive her of that interest alone. We cannot *assume* that the wife was aware of the extent of her interest. Deeds are *frequently drawn up* in the same terms where the estate of the wife is conveyed, as when the wife is but relinquishing her right of dower. To permit precisely the same form of certificate to cover both cases, would not only be a departure from the words of the statute, but might open the door to gross frauds upon married women."

33

Contra 18 Misso. 531; 19 Misso. 425; 20 Misso. 465; which will be hereafter examined.

Certain general principles may be deduced from the foregoing authorities, which may be stated as follows:

1. That statutes enabling married women to convey, being in derogation of the common law, are to be strictly construed and pursued.

2. That *literal* compliance with such statutes is the better practice in all cases, and is held requisite in England and in many of the courts of this country; and that in those States where *substantial* compliance is considered sufficient, the courts hold that every essential requisite of the statute shall appear in substance in the acknowledgment.

3. That the estate of the wife is not barred by the *execution* of the deed, but by its acknowledgment in the mode prescribed by law, and "without such acknowledgment the deed is absolutely void, and has no more vitality than a piece of blank paper."

4. That parol evidence is never admitted, to aid a defective certificate, nor is any *presumption* indulged in to give validity to the deeds of married women.

5. That if the certificate of acknowledgment is insufficient to pass the estate, then it is as though no acknowledgment had ever been made.

6. That a *feme covert* is estopped by no averment or recital in the deed, and such averment or recital can not be offered in evidence against her.

therefrom, the consideration of the laws of this State in reference to this

when she is the owner of the estate designed to be conveyed. This would be giving a latitude of construction not warranted by the statute, and dangerous to the rights intended to be protected.

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3. That the estate of the wife is not barred by the *execution* of the deed, but by its acknowledgment in the mode prescribed by law, and "without such acknowledgment the deed is absolutely void, and has no more vitality than a piece of blank paper."

And it may be added that the case of *McDaniel v. Priest*, 12 Missouri, 544; *Still v. Swan*, Littell's Select Cases, 156; *Tevis v. Richardson*, 7 Monroe, 654; *Gregory v. Ford*, 5 B. Monroe, 471, on p. 482; *Brown v. Spann*, Mill's Con. Rep., South Carolina, 240; 17 Ohio Rep., 105, *Purcell v. Gosborn*, are in point on the very question here presented. The case in 6 McLean, 200, *Hughes v. Dolick*, is also directly in point, but will be considered hereafter.

Thus far the statute of this State and the decisions thereunder upon which, after all, this question must be determined, have not been examined. In the light of the authorities cited, and the principles deduced therefrom, the consideration of the laws of this State in reference to this

subject, and the judicial interpretations and construction thereof, is now to be approached.

The questions to be determined, are:

1. Tested by the statutes of Illinois alone, is this acknowledgment sufficient?

2. Upon the adjudicated cases in Illinois on this subject, is this acknowledgment sufficient under the statute?

3. Does the curative act of 1853 render this acknowledgment sufficient?

4. Can the words "and relinquished her dower in the lands and tenements therein mentioned," be rejected as surplusage? And herein, also, are the authorities in favor of rejecting the words as surplusage of any weight in this state? Are their conclusions, supported upon sound reason? Are they based upon peculiarities in the statutes of the State where rendered?

5. Does the recital in the mortgage as to the indebtedness it purports to be given to secure, "the same being for a part of the purchase money, &c." affect the sufficiency of this acknowledgment?

I. Tested by the statutes of Illinois alone, is this acknowledgment sufficient?

Or in other words, upon examining this acknowledgment, and the requisitions of the statutes upon this subject, irrespective of authority, was this acknowledgment sufficient to pass the fee simple estate of this *feme covert* in the premises in question?

The statute authorizing the conveyance by a *feme covert* of her real estate is quoted at length on the 4th page of this argument. It provides for the appearance of the *feme* before some officer authorized to take acknowledgments, to whom she is known or proved to be the person who executed the deed, who shall make her acquainted with, and explain to her the contents of such deed, and examine her separate and apart from her husband, *whether she executed the same voluntarily, freely and without compulsion of her said husband*, and if she acknowledge that she did so execute the deed, and does not not wish to retract, the officer shall thereupon make a certificate which shall be indorsed on or annexed to such deed, stating the *feme* to be personally known to him or proved to be the person who subscribed the deed, and *setting forth the examination and acknowledgment* aforesaid, and that the contents were made known and explained to her, &c.

As to this acknowledgment, the Court will observe the requisites of the statute are: 1st. That the woman must be personally known to the officer, or proved to be the person who subscribed the deed. 2d. That the officer shall make her acquainted with and explain to her the contents of the deed. 3d. That he shall examine her separate and apart from her husband. 4th. That he shall so examine her "*whether she executed the same voluntarily, freely and without compulsion of her said husband;*" and these facts are to be certified, with the additional one that she does not wish to retract. And it should also be noticed that there is no comma or other mark of punctuation after the word "same" in the statute, but the sentence reads, "*whether she executed the same voluntarily* and freely," &c.

The statute also defines the manner in which dower is barred. (See preceding pages 4 and 5.) It provides that the woman shall join with her husband in the conveyance, and shall appear before an officer authorized to take acknowledgments, to whom she is personally known or proved to be the person who subscribed the deed, who shall acquaint the woman with the contents of the deed, examine her separate and apart from her husband, *whether she executed the same, and relinquished her dower to the lands and tenements therein mentioned, voluntarily and freely and without compulsion of her said husband*, and if she acknowledge that she did so execute said deed and relinquish her dower, then the officer shall certify, &c.

As to an acknowledgment of this kind, the Court will observe that the requisites of the statute, in order to bar dower, are: 1st. That the woman must be personally known to the officer or proved to be the person who subscribed the deed. 2d. That the officer shall make her acquainted with the contents of the deed. 3d. That he shall examine her separate and apart from her husband. 4th. That he shall so examine her *whether she executed the same, and relinquished her dower to the lands and tenements therein mentioned, voluntarily and freely, and without compulsion of her said husband*," and these facts are to be certified.

And it should be noticed here that there is a comma after the word "same," in this part of the statute.

The differences between the examination and acknowledgment of a conveyance of the fee by a *feme covert* and a relinquishment of dower are:

1st. That in the case of the conveyance of the fee the statute requires the officer to "make her acquainted with, and explain to her the contents" of the deed—while in the relinquishment of dower the officer "shall acquaint such woman with the contents of the deed."

This is in fact "a distinction without a difference," and so decided in *Hughes v. Lane*, 11 Illinois, 123, where the Court say, on page 131, "That certificate states that Mrs. Lane 'was made acquainted with the

contents of the within deed,' which, in our judgment is *equivalent* to setting forth, 'that the contents were made known and explained to her.'" Thus this first verbal difference between the provisions of the statute as to the acknowledgment of a conveyance of the fee, and that for conveyance of dower, by a *feme covert*, is disposed of.

2d. That the statute requires the officer where the woman has acknowledged a conveyance of her estate in fee simple, to examine her whether she acknowledged it as provided for by the statute, "and does not wish to retract," but these last words are decided in *Hughes v. Lane*, cited *supra*, to be no part of the acknowledgment, and this disposes of that difference between the parts of the statute under consideration so far as the face of the certificate is concerned.

3d. The statute provides, in the case of the conveyance of the fee, that if the woman acknowledges "the deed or conveyance to be her act and deed, that she executed the same, &c.," the certificate shall be made. In the barring of dower the certificate is to be made, "if she acknowledge that she executed the same," &c. This, however, is a mere verbal difference, which does not amount to anything one way or the other. The acknowledgment in *Hughes v. Lane* does not contain the words that she acknowledged the conveyance "to be her act and deed," yet it was held good. In fact, whether these words are in or out makes no difference, as the operative part of the certificate is, that on privy examination the woman acknowledges the deed to be executed by her "voluntarily, freely, and without compulsion."

4th. The acknowledgment in the case of conveyance of the fee is, that "she executed the same voluntarily and freely," &c. In the case of a relinquishment of dower, "that she executed the same, and relinquishes her dower in the lands and tenements therein mentioned, voluntarily and freely," &c. There being two points of difference: one, there is no comma after the word "same" in the first acknowledgment, but there is in the last; second, the words "and relinquishes her dower, &c.," are in the last but not in the first acknowledgment. And these are the characteristics which distinguish the one acknowledgment from the other, particularly, of course, the words "and relinquishes her dower, &c."

The certificate of the acknowledgment in the case at bar states that the woman "having had the contents of the said instrument made known and explained to her." This is equivalent to the words of the statute on the conveyance of the fee, "made her acquainted with, and explained to her the contents of such deed" or "conveyance;" and on the other hand, it is also equivalent to the words in the section of the statute as to barring dower, "having acquainted her with the contents of the deed" or "conveyance."

The certificate also states that the woman acknowledged said instrument "to be her free act and deed," but this means nothing one way or the other, and might be left out in a conveyance of the fee without injury, or put in in a relinquishment of dower without benefiting the acknowledgment.

The certificate then states that the woman acknowledged "*that she executed the same, and relinquished her dower in the lands and tenements therein mentioned, voluntarily and freely, and without the compulsion of her said husband, and that she does not wish to retract.*" This is the exact phraseology and *punctuation* of an acknowledgment to bar dower, with the exception of the words "and that she does not wish to retract," which are not parts of any acknowledgment as has been shown. And it may here be remarked that an acknowledgment insufficient in the most vital part cannot be made valid or made what it is not and does not *purport* to be, by the addition of words not necessarily parts of the certificate or words even which are necessary. Or, in other language, the most technical correctness in one part of a certificate will not cure a fatal error in another part of it.

Now the acknowledgment of a *feme covert* is the only thing which renders her deed better than a piece of white paper, and upon the acknowledgement and the certificate thereof, she is to stand or fall. Tested by this rule, what did this conveyance amount to? Was it anything more than a relinquishment of dower? The inevitable answer is that it was not.

This acknowledgment and certificate are perfectly good as a release of dower, but further than that they do not and the Court cannot go. It will be said that the "intention" of the woman was to transfer the fee. The only place to look for the intention is into the certificate and that shows it to have been her intention *only* to relinquish her dower.

The law required the officer to make her acquainted with and explain to her the contents of the deed. He certifies that he did this, but his certificate shows, upon the hypothesis of the conveyance of the fee, that he either did *not* explain the deed to be so, or, that if he *did*, that explanation was incorrect and contrary to the fact. Upon, however, the hypothesis that the *feme* meant to do exactly what she did do, then the explanation was made, was correct and there is no inaccuracy in the acknowledgment.

To say that this acknowledgment is susceptible of being construed to have been and the certificate to be, an acknowledgment for the conveyance of the fee, is to say that the certificate is *equivocal*, which is contrary to the first principles which should govern the officer in making it. Suppose "the magistrate were called upon to answer to the

law," to use the language of Chief Justice DURFEE, (1 R. Island, 209,) "for a *false* certificate," could this certificate "be taken to mean *this* or *that*, as the exigency of the case might require?" Suppose this notary public were accused of having made a certificate for the conveyance o the fee when the *feme* only acknowledged a relinquishment of dower, could not the officer defend by standing upon the certificate itself as a *relinquishment of dower only?* Does it mean *this* or *that?* Is it susceptible of any but one meaning, and that, that it is a release of dower only?

To hold this acknowledgment good would be to take the position that "all that courts have to do is, not to look *into the certificate* to ascertain *what estate* is transferred, but to the *kind of estate* the wife had, and if she makes the acknowledgment necessary to convey the fee, and has it not, her dower passes, or if she makes the acknowledgment necessary to release dower, and has it not, then the fee passes." (*Lane v. Dolick et al.*, 6 McLean, 200.)

It is absolutely essential to the sufficiency of an acknowledgment by a *feme covert* of a conveyance of her estate in fee simple, that she should acknowledge that she *executed the deed voluntarily and freely, and without compulsion*, and this must be certified. In the case at bar, the *feme* acknowledges that she *relinquished her dower voluntarily and freely, and without compulsion.*

It is *not* the execution of the deed but the relinquishment of dower which is acknowledged to have been made "voluntarily and freely and without compulsion," and herein is the marked difference between this case and *Hughes vs. Lane*, 11 Ill. 123.

Upon the statute alone, then, and irrespective of authority, can this Court take for granted *the very fact* which it was the design of the statute that the officer should certify? Can the Court go farther, and not only take for granted that the *feme intended* to convey her fee, when the officer does not certify to that *intention*, but overthrow the very certificate itself, and say that her intention was different from what the officer says it was?

True, Lord Coke says (quoted in *Hughes v. Lane*): "whenever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken," and that was properly applicable, perhaps, in the case in which it was used; but it is quoted here to illustrate the rule, and the only rule which allows the Court to enter into construction in such cases. It is when the words of the deed "may have a double intendment;" but that is not the fact with regard to this acknowledgment. It has, and

can legitimately have, but one intendment, and that "standeth with law and right" quite as much as this intendment which it is sought to put upon it out of the whole cloth.

"*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*," is an ancient and well approved maxim, and applied to this certificate is conclusive, for, since there is no ambiguity in it, how can an exposition be legally made opposed to its express language? How can that be interpreted which stands in no need of interpretation?

2. Upon the adjudicated cases in Illinois on this subject, is this acknowledgment sufficient, under the statute, to pass the fee?

It will be found that this subject has received more or less attention from this Court, and it is submitted that the decisions satisfactorily establish that an acknowledgment such as the one under consideration is insufficient to pass the fee.

The cases of *Hughes v. Lane*, 11 Illinois R., 123, (already cited,) and *Hughes v. Dolick*, 6 McLean, 200, are the leading cases on the Illinois statute, and seem to determine this question in favor of the appellants. Before examining them, an examination of the other Illinois cases bearing on this subject will materially aid its elucidation.

In *Mariner v. Saunders*, 5 Gilman, 113, it was held that "the certificate and acknowledgment of a deed from a *feme covert* to convey her own lands, is as much an essential part of the execution of the deed as her seal and signature, and without it the law *presumes* that it was obtained by fraud or coercion."

CATON, Judge, says, on page 125: "Without such acknowledgment the deed was absolutely void, and had no more vitality than a piece of blank paper. *Only* by virtue of such acknowledgment certificate could the deed become operative. Its execution could be proved in no other possible way, and in no other way could she convey. The certificate of acknowledgment of a deed from a *feme covert* to convey her own lands is as much an essential part of the *execution* of the deed, as her *seal or signature*, and without it the law *presumes* that it was obtained by fraud or coercion."

Hughes v. Lane, 11 Illinois, 123, was the next case, and is fully considered *post*.

In *Mason v. Brock*, 12 Ill. R., 273, on page 276, the Court (TREAT, C. J., delivering the opinion,) say:

"A married woman can only be divested of her real estate in the mode prescribed by statute. The certificate of acknowledgment is an

essential part of the due execution of a deed, by which the real estate of a *feme covert* is to be transferred; and unless it is in substantial compliance with the statute, no title passes. *Mariner v. Saunders*, 5 Gilman, 113; *Hughes v. Lane*, 11 Illinois, 123."

In *Lane v. Soulard*, 15 Ill. R., 123, held: "A married woman cannot, except by express enactment, convey her fee-simple title to real estate." CATON, J., says: "We shall not stop to adduce authorities to show that a *feme covert* cannot, except she be authorized by an express statute, convey her fee-simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute, she is as incapable of conveying by deed as *she is by word of mouth*."

In *Moulton et ux. v. Hurd*, 20 Ill. R., 137, the Court, (through WALKER, J.,) in holding that "a court has no power to reform the deed of a married woman, for any mistake in its provisions," on page 142, after stating the manner in which only, a *feme covert* could at common law bar herself or her heirs of any estate of which she was seized in her own right, or of dower, (quoted at length on page 2 of this argument,) say:

"This provision of our statute, it will be observed, is an *enlargement* and not a *restriction*, of the common law powers of a *feme covert*. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same force and effect of a fine; but if not acknowledged *in accordance with the statute*, no estate passes. The statute *must* be complied with, and if it is not, the deed is left, as at common law, *absolutely void*."

In *Garrett v. Moss*, 22 Ill., 363, the Court, WALKER, J., delivering the opinion, say: "In this case the bill alleges, and it is admitted by the answers, that Garrett and wife were the owners in fee of the lands mortgaged to Moss, and to Pettingill & Bartlett. If this allegation be true, and it must be so treated, she held in her own right some portion or interest in this land in fee, and as the wife of Garrett, she held a right of dower in the remainder, which belonged in fee to her husband. These facts, then, bring this case fully within that of *Hughes v. Lane*, and renders that case conclusive of this question. Whatever might have *been our inclinations*, were the question one of first impression, that decision has become a rule of property, and should remain undisturbed. The certificate of acknowledgment attached to the mortgage given to Moss, however, is of a different character. It fails to state that the officer acquainted her with and explained to her its contents, *or* that he examined her separate and apart from her husband, *or* that she acknowledged that she executed it voluntarily and freely, and without the compulsion of

her husband. *Each* of these things are *essential pre-requisites* to pass the title of a married woman's land, and cannot be omitted. The statute requires them, and until they are performed, the deed as to a *feme covert* is *inoperative and void.*"

In *Hughes v. Lane*, (11 Ill., 123,) two lots of land were included in one conveyance and covered by one acknowledgment. To one of the lots in question Mrs. Lane had only a right of dower. The other lot she owned in fee simple. The certificate states that Mrs. Lane "being by me made acquainted with the contents of the within deed, and being by me examined, separate and apart from her husband, acknowledged *that she executed the same freely and voluntarily, without any compulsion* of her husband, and that she relinquishes her dower in the lands and tenements hereby conveyed."

The Court held that a *literal* compliance with the statute is unnecessary, and quote largely from *McIntire v. Ward*, 5 Binney, 296, and *Stephens v. Doe*, 6 Blackf., 475, to show how far courts will go to sustain a conveyance by husband and wife of the real estate of the wife. The case of *McIntire v. Ward*, 5 Binney, as has already been shown, *ante*, has been repeatedly disapproved of by the Courts in Pennsylvania, in opinions succeeding that in that case. See *Evans v. Commonwealth*, 4 Serg. and R., 271, and *Watson v. Mercer*, 6 Serg. and R., 48, 49; and the case in Blackford was decided, as has already been remarked, upon the peculiar phraseology of the Indiana Statute, and has been disapproved of in 4 Greene, *O'Ferrall v. Simplot* and *Sibley v. Johnson*, 1 Manning's Mich. R., quoted *ante*. In fact, neither *McIntire v. Ward* or *Stephens v. Doe ex dem Henry* are any authority for the construction of our statute, and the same remark may be made for the reasons already adduced, in regard to *Chesnut v. Shane's lessees*, 16 Ohio, 599; also cited in *Hughes v. Lane*.

In holding any certificate of acknowledgment to be sufficient, which shows that the requirements of the statute have been substantially complied with, Judge TRUMBULL, delivering the opinion in *Hughes v. Lane*, says, however:

"In laying down this rule we are not to be understood as sanctioning a departure, in any *essential* particular, from the requirement of the law. *On the contrary*, we hold that a married woman can *only* be divested of her real estate in the *mode and manner* which the Legislature has prescribed."

The Court then proceed to decide, 1st, that the words of the certificate in that case, that Mrs. Lane "was made acquainted with the contents of the within deed," were equivalent to setting forth "that the contents were made known and explained to her"; and 2d. That the

words "does not wish to retract, are not necessarily any part of the acknowledgment, and their omission did not therefore vitiate the acknowledgment. The Court, having thus disposed of the *objections* to the acknowledgment, proceed to adjudge that as the *feme* owned one lot and had dower in the other, *and as* whenever a deed "may have a double intendment," one standing "with law and right" and the other "wrongful and against law," the former shall be taken, *and as* it was *the execution of the deed* and *not* the relinquishment of dower, which was acknowledged to have been made *freely and voluntarily, and without compulsion*, that the certificate was sufficient to pass Mrs. Lane's interest in the land which she held in fee, but say the Court: "Whether the statement simply that she 'relinquishes her dower in the lands and tenements hereby conveyed,' without stating that the relinquishment was made voluntarily and freely, and without the compulsion of her husband, is sufficient to bar her dower in the lot belonging to her husband, is not now a question before us."

Let the Court note here, as most important, that in the certificate, in *Hughes v. Lane*, Mrs. Lane acknowledged "that she executed the same (the deed) freely and voluntarily, &c.," and the words relinquishing the dower *follow* the acknowledgment of the free and voluntary execution of the deed, and this was the *controlling* point in the case, since, as Judge TRUMBULL says, at the bottom of page 133, "It is *the execution of the deed, not* the relinquishment of dower, that is acknowledged to have been made 'freely and voluntarily, &c.'"

In the case at bar, Mariette N. Chester acknowledges that "she *executed the same, and relinquished her dower in the lands and tenements therein mentioned, voluntarily and freely, and without the compulsion of her said husband.*" It is the *relinquishment of dower*, and *not* the *execution of the deed*, which she acknowledges to have been voluntarily and freely, and without compulsion made; and the words "that she executed the same" are required in an acknowledgment to bar dower, no less than in an acknowledgment to convey the fee.

Further, let it be observed, in *Hughes v. Lane*, counsel were attacking the certificate as *insufficient*, by reason of omissions, &c. Here it is not *pretended* that the acknowledgment is insufficient. It is admitted to be almost *perfect;* but it is contended by the appellee, that as the *feme* had the fee, *therefore* she intended to transfer it, and therefore this certificate ought to be held sufficient for that purpose, or in other words, ought to be *held to be* what it *is not.*

See also, in *Hughes v. Lane*, the very able dissenting opinion of Judge CATON, who, in speaking of the difference between the conveyance of the fee and the relinquishment of dower, says: "The *form of the conveyance may be the same;* the *effect*, however, is very different; and this is what the Legislature intended the officer should explain."

The majority of the Court further say (bottom of page 132): "The question whether a certificate of acknowledgment, showing that the *feme* had relinquished her dower only, would be sufficient upon a deed whereby husband and wife were conveying only the real estate of the wife, does not arise, and is not decided in this case."

Recognizing the decision in *Hughes v. Lane* to have become a rule of property, and that it should remain undisturbed, (WALKER, J. in *Garrett v. Moss*, 22 Illinois R.,) it is submitted that the conclusions therein arrived at are directly in favor of the position of the appellants here. Hinging as the case did upon the fact that it was the *execution of the deed*, and *not* the relinquishment of dower, which was there acknowledged to have been free, voluntary, and uncompelled, it is not perceived why *pari ratione* this acknowledgment at bar should be construed to have conveyed the fee, when it is *the relinquishment of dower*, and *not* the execution of the deed, which is certified to have been done, freely, voluntarily, and without compulsion.

This case might, it would seem, be submitted here so far as this acknowledgment is concerned, but the appellants have an authority directly in point, covering this very question, and the construction of such an acknowledgment, in Illinois.

In *Hughes v. Dolick*, 6 McLean, 200, "where a *feme covert* was the owner of real estate in fee, and executed a deed with her husband purporting to convey the estate, and the acknowledgment to the deed was *in substance a mere relinquishment of dower*, *held* that the deed did *not* convey the estate of the wife."

The certificate stated that Mrs. Lane appeared, and "being by me examined separate and apart from her said husband, and the contents of the within instrument of writing fully made known to her, she declared that she signed, sealed and delivered the same, of her own free will and accord, and that she relinquished her dower in the premises therein mentioned, voluntarily and freely, without coercion or compulsion of her said husband."

It will be observed that this acknowledgment does not state that the contents of the deed were made known "and explained to her," and further, that it omits to state that she "does not wish to retract," and the learned counsel on the other side will endeavor to distinguish this case from the one at bar, for these reasons.

But as has already been shown, neither of these omissions are of any moment. In *Hughes* v. *Lane*, this Court held that the words "was made acquainted with the contents of the within deed," were equivalent to the words "that the contents were made known and explained to her," and that the words "does not wish to retract," were unnecessary.

In the opinion in *Lane* v. *Dolick*, 6 McLean, 200, the Court say:

"The certificate in this case states that the wife was examined separate and apart from her husband, and the contents of the deed were fully made known to her. The law required that it should appear that the officer made her acquainted with *and explained* to her the contents of the deed. In *Hughes* v. *Lane*, 11 Ill. R., 123, the Supreme Court of this State held, that the words, "was made acquainted with the contents of the within deed," were equivalent to the words, "that the contents were made known and explained to her;" and if this is correct, then it follows that the words in this case, "and the contents of the within instrument of writing [being] fully made known to her," are also equivalent to the words of the statute.

* * * * * * * * *

The certificate in this case does not contain the words, 'and does not wish to retract,' and in this respect is like the certificate in *Hughes v. Lane*, in which case the Court held it was not necessary the certificate should contain these words."

Acquiescing, as a rule of property, to the decision in *Hughes v. Lane*, as to these particulars, the Court proceeds: "I can only look on it, therefore, as in substance an acknowledgment of the relinquishment of dower."

Thus the distinction set up by the learned counsel for the appellee, between *Lane v. Dolick* and the case at bar, that in that case the acknowledgment omitted to state that "the contents of the instrument were made known and explained to her," and "that she does not wish to retract," while here, both those facts are stated, falls to the ground, because the opinion of the court in *Lane v. Dolick* assumes that *neither* of those facts need be stated.

Nor does the court, in that opinion, base its decision upon the assumption that she *did not understand* what she was doing, because "the contents were not explained to her," and nothing on the face of the instrument told her what she was doing, as counsel urges; but upon the ground that it was a release of dower only which was contemplated, so far as the court could ascertain, and if the certificate declared (as it was conceded it did in view of the decision in *Hughes* v. *Lane*) what was equivalent to the statement that an explanation of the contents had been made, that that explanation was an erroneous one, or that the officer did not know what interest was passing, and therefore could not explain. Nor does the court say the acknowledgment is only a release of dower because it omits the requirements of the statute, "explaining," and "does not wish to retract," &c.; but it is assumed that compliance with neither of those requirements was necessary under *Hughes* v. *Lane*. Whether there is any reason in the distinction raised between a convey-

ance of an estate by *inheritance*, and a mortgage of an estate acquired by the *feme by purchase*, will hereafter be discussed. These objections are noted here that this Court may understand that, to all intents and purposes, the opinion in *Lane* v. *Dolick* is based upon an acknowledgment precisely the same as the one at bar. They are not precisely the same in phraseology, but are in legal acceptation under the view taken by the Court.

The Court in *Lane v. Dolick*, say:

"The true rule is this: If it clearly appear from the certificate that the law has been substantially complied with, that the wife understood the nature and character of the transaction, that is sufficient. Does that appear in this case? Let us assume the necessary hypothesis. She had executed a deed with her husband, conveying her estate. This she knew; she appeared before the officer for the purpose of acknowledging the fact. Does she declare that the conveyance is her act and deed; that she executed the same voluntarily and freely, and without compulsion of her husband, and does not wish to retract, on the private examination? No. She declares she executed it of her own free will and accord, and relinquished her dower in the premises, or this the officer states in his certificate. If she did, and we must take this as true, is it not manifest that she did not know what her estate was, or that she supposed she was granting something different from what she in fact had the right to grant? Does it affirmatively appear there was that intelligent understanding of the transaction on her part, which is necessary to give validity to such a contract? It seems to me this declaration made by her, shows that she did not fully understand what she was doing; and I think it most probable, nay, certain, that the officer who took the acknowledgment, and wrote it, did not *himself* understand that the wife was conveying her own estate, but supposed that she was merely releasing her dower to her husband's land. * * * * If it be said very few married women know what dower means, or the difference between that and an estate in fee, it is only an additional reason why the law and the courts should give every possible opportunity for her *to become acquainted with* her rights before she divests herself of her estate. It seems to me, if the guards which have so long been thrown around the estates of married women as a shield against the improvidence, folly, or imprudence of the husband, are to be removed, *it must be by the Legislature, and not by the Courts.* * * * * If we adopt the construction contended for by the defendants's counsel, then we strike out all of the words after 'free will and accord,' as surplusage; and in that event we leave out the words 'without the compulsion of her husband,' because as it reads in the certificate, these words apply *not to the execution of the deed* but *to the relinquishment of dower.* * * * It has sometimes been said that unless the certificate showed that the wife did understand what she did, if she has the legal means of understanding, it is sufficient. Some such

language is used in the case reported in 3 Dana, already mentioned, and cited by the Court in *Hughes v. Lane;* but that was a case where the wife *said* she relinquished her inheritance in the land, and nothing is said about dower; and the law of Kentucky, while like ours it requires several facts to concur to render the wife's deed to her property valid, *did not, like ours,* require that all these material facts should be set forth by the officer, and the courts of Kentucky have uniformly held, if the necessary facts were not set forth, they will *presume* the other facts. *Gregory v. Ford,* 5 B. Monroe, 482. But as already stated, they have also held that an acknowledgment like this, *which showed only a release of dower,* was insufficient to free the life estate. * * * * * If the words in this acknowledgment, 'the contents of the deed were fully made known to her,' are to be presumed to mean that she was acquainted with the contents, and they were explained to her, what are we to infer when the certificate shows that if *any* explanation was made, it was an erroneous one? or that the officer did not know what interest the wife was passing, and therefore could not explain? If this acknowledgment be sufficient, then all that courts have to do is, *not* to look to the certificate to ascertain *what estate is transferred,* but to the kind of estate the wife had, and if she makes the acknowledgement necessary to convey the fee, and *has it not, her dower passes;* or if she makes the acknowledgment necessary to release dower, *and has it not, then the fee passes;* that is, we are to adapt the words to the estate, and give an effect to the deed, contrary to its plain import, and contrary to the provisions of the statute. * * * * * * * * * It has also been said here, that it was the clear intention to transfer the fee. It may be so. But *where* can the Court look for that intention *except to the certificate* and to the law app'icable to it? It is clear that is the only safe guide. Some complaint has been made of the hardship of this case upon the defendants, but we must put these cases upon some principle that we can stand on, *and not shift our ground with every new deed that comes up.*"

And it should not escape the attention of the Court, that in the acknowledgment, in *Lane* v. *Dolick,* the *feme* declared that she "signed, sealed, and delivered the same, of her own free will and accord," while in the case at bar no words whatever, expressive of the *voluntary* and *uncompelled* action of the *feme,* accompany the statement of the execution of the conveyance.

III. Does the curative act of 1853 render this acknowledgment sufficient to pass the fee?

In other words, does the statute of 1853 turn one kind of an acknowledgment into another, as contended on behalf of the appellee? The act of 1853 (Scates Comp. p. 966) is as follows:

"Section 1, That no deed, &c., heretofore executed, or hereafter to be executed, by husband and wife, in good faith, for the purpose of conveying or encumbering *the estate of the husband*, *or* the estate of the wife, *or* the *right of dower* in any lands situated in this State, and acknowledged by them before any officer authorized by the laws of this State to take acknowledgments, shall be deemed, held, or adjudged invalid, or defective, or insufficient in law, by reason of any *informality* or *omission* in setting forth the particulars of the acknowledgment, &c., in the certificate thereof; *provided, however*, that it appears *in substance*, from such certificate, that the parties executing said deed, &c., *executed the same freely* and *voluntarily*; and that in case of married women executing the same, it appears, *in substance*, that they *knew the contents* of said deed, &c., and that they were examined, &c., separate and apart from their husbands."

Section 2 provides that nothing in section 1 shall be so construed as to prevent parties from avoiding deeds, &c., they have executed or may execute on account of fraud, &c., or *any other legal personal disqualification*.

That this statute can have no application to the case at bar, and cannot make a certificate of acknowledgment of the conveyance of the fee *out of* a certificate for the release of dower, is sufficiently obvious.

(*a*) Because it only purports to remedy and only can remedy defective acknowledgments; certificates where there is some "informality" or "omission." It would make the certificate in question perfectly good as a relinquishment of dower, if there were some informality in it, but it could not and does not make this acknowledgment what *it is not*. There is nothing to remedy in this acknowledgment, and *cessante ratione cessat lex*.

(*b*) Because, if the *intention* here, on the *feme's* part, was to convey the fee, then it does not appear *in substance that she knew the contents* of the instrument; but, on the contrary, it appears in substance that she did *not* know (i. e. on the hypothesis that she meant to convey the fee).

(*c*) Because it does not appear, upon the hypothesis of a conveyance of the fee, that she executed the deed freely and voluntarily. It only appears that she *relinquished her dower* freely and voluntarily, &c.

(*d*) Because it appears that this *feme covert* executed the mortgage in good faith, for the purpose of conveying or incumbering her "*right of dower*" in the premises.

(c) This is not a case where the maxim *utile per inutile non vitiatur* applies. The words "and relinquished her dower," &c., are just as useful as any other part of the acknowledgment.

(d) It would be contrary to the rules of pleading, even though it were admitted that these words were "immaterial" in the sense in which the pleader uses them, to reject them as surplusage.

"If the immaterial matter constitute a part of a material averment, so that the whole cannot be struck out without destroying the right of action, or defence of the party, then the immaterial matter cannot be rejected as surplusage, but may be traversed in pleading, and must be proved as laid, though the averment be more particular than it need to have been. * * If the immaterial matter be *sensible in the place* where it occurs, and constitute a part of a material allegation, then it cannot be rejected." (STORY, J. in *U. S. v. Burnham*, 1 Mason, 57, citing many authorities.)

(e) It is evident that the words in question operate as a limitation upon the execution of the deed, and as such they cannot be rejected.

(f.) To reject these words would be to do violence to the true character of the transaction, and give it an effect never understood either by the officer or the wife.

(g.) To reject these words as surplusage would be to determine that precisely the same form of certificate would cover a conveyance of the fee or a relinquishment of dower.

The whole argument in favor of striking out these words is based upon the fundamentally erroneous idea that the Court can go into the deed, (which would have been no better than white paper, without the acknowledgment,) and from that assume what the *feme's* intention was, and then construe the certificate accordingly. It would be as well, then, for the officer to certify merely that the wife acknowledged the deed, and let the Court, and the world at large, determine her intention from the contents of the instrument. The argument is based upon the idea that there is some *error* in the certificate; but that is only *alleged*. There is no proof of it, and nothing in the certificate to indicate it, and it is by the certificate, and that alone, that the intention is to be determined. "The law makes the acknowledgment a solemn act, and gives it all the sanctity of a record, and will not suffer it to be changed by parol. It is that which gives validity to the deed, and without it the wife's interest in her estate will not pass. (5 Gil. 125, 1 Peters, 328, 12 Peters, 374.)"

5. Are the authorities in favor of rejecting the words as surplusage of any weight in this State? Are their conclusions supported upon sound

See also *Lane v. Dolick*, 6 McLean, 200, where the Court says: "Our law is different from the law of many of the States, in requiring the certificate to set forth the *particular facts* which must concur to make the deed valid."

But again, the Missouri statute of 1825, under which the acknowledgment in the case of *Chauvin v. Wagner* was made, required the parties to appear "in open court" "before some court of record," (28 Mo., 438,) and the particular acknowledgment in question showed that the parties did so appear. Under such circumstances the Court might presume that the Court below had done its duty in the premises but that is a presumption which could not be extended to the acts of inferior officers.

And on the authorities in Pennsylvania, Rhode Island, Michigan, Iowa, &c., cited *ante*, it might be doubted whether the presumption should be indulged in even in case a Court of Record took the acknowledgment.

So far as reasoning is concerned, the case of *McDaniel v. Priest*, 12 Missouri, 543, has not been and cannot be overthrown.

Delassus et al. v. Poston et al., 19 Missouri, 425, merely cites *Chauvin v. Wagner*, and follows that case, but no *reasoning* is "indulged in" and the "deed is not spread upon the record," the Court say.

Perkins v. Carter, 20 Missouri, 465, deliberately affirms *Chauvin v. Wagner*, but does not go into the argument. It is curious to note, however, that the Court say:

"This question does not turn on the *contents* of the deed, but on the form of the certificate. The *terms of the deed* can impart *no efficacy* to the certificate, nor *supply any of its defects.*"

Thus, it would seem that these three cases (amounting, in fact, to but one) are of no weight in this State, under our statute; that their conclusions are not arrived at by any just process of reasoning or any citation of authority, and that they may be well considered to have been based upon the peculiarity of the statute of Missouri, requiring the examination to be made by a court of record. [They all appear to have arisen under the statute of 1825, and before the passage of that of 1845.]

And on the other hand, the opposite conclusion has been reached, in

Lane v. Dolick, 6 McLean, 200.
McDaniel v. Priest, 12 Missouri, 544.
Still v. Swan, Littell's Select cases, 156.
Tevis v. Richardson, 7 Monroe, 654.
Gregory v. Ford, 5 B. Monroe, 482.
Purcell v. Gosborn, 17 Ohio R. 105.

5. Does the recital in the mortgage as to the indebtedness it purports to be given to secure, "the same being for a part of the purchase money, &c," affect the sufficiency of this acknowledgment?

The mortgage sets forth that "whereas, the said party of the first part, is justly indebted to the said party of the second part, in the sum of thirteen thousand and eighty dollars, secured to be paid by two certain promissory notes, &c., the same being for a part of the purchase money and interest at six per cent. per annum, agreed to be paid for the premises herein described, now therefore, &c."

Does this recital *prove* anything as against the *feme* owning the fee?

Does the recital create any *presumption*, even as against Mariette N. Chester?

Can the Court take any judicial notice of the contents of the instrument in construing the certificate?

Does this recital make any difference one way or the other, as against this woman, even if the facts stated therein were true?

Let it be observed, in the first place, that the deed to Mariette N. Chester was *acknowledged Nov. 11th*, 1856.

The mortgage to George F. Rumsey was *acknowledged November 24th*, 1856.

Does this recital *prove* anything as against the *feme* owning the fee? Does it create any presumption even as against Mrs. Chester?

It is the rule in regard to estoppels (of which this would be one, if it amount to anything at all,) that they do not grow out of recitals; it must appear to have been the object of the parties to make the matter recited a *fixed fact* as the basis of their action before an estoppel arises. It is apparent, then, in the first instance, that the recital in question (i. e. that part of it in relation to "the same being for the purchase money") can not be taken as being made a *fixed fact*. It is the *indebtedness, not the character of it*, that is the "fact" stated.

But as far as a *feme covert* is concerned, she is bound by no "recitals" in deeds executed by her.

In *Jackson ex dem Clowes v. Vanderheyden*, 17 Johnson, 166, held: "A *feme covert* cannot bind herself personally by a covenant or contract during coverture.

Therefore, a deed executed by husband and wife, with covenant of warranty, does not *estop* the wife, in an action of ejectment against her, after the death of her husband, from setting up a subsequently acquired interest in the same lands."

In *Den d. Hopper v. Demarest et al.*, 1 Zabriskie, 525, held: "The deed of a married woman derives its efficacy from the statute, and the only effect given to it by statute is to *convey* land; she is not bound by

any covenant in it, and is not estopped by any *recital*, *express* or *implied*, contained in it."

On page 541, GREEN, Chief Justice, delivering the opinion, the Court say:

"As a general rule all acts of a married woman are absolutely void. She acts solely under the cover or protection of her husband. Her acts, her admissions, her contracts, her representations, do not, as a general rule, bind her, or affect her property. She may pass her estate by deed, executed and acknowledged in the mode designated by statute, and in no other way. A deed thus executed and acknowledged is good and effectual to convey her interest in the land thereby intended to be conveyed. But she is bound by no covenant in the deed. She is not estopped by an express warranty. As to her it is void. She is estopped by *no averment or recital* in the deed. They *cannot be offered in evidence against her.* It is even doubtful whether her answer in chancery under oath, made during coverture, is competent evidence against her in an action after her husband's death.

Now, the grantor is not permitted to allege that he had no title, in contradiction to his own deed, because it is said a grant implies a warranty, or more strictly, because by his deed the grantor professes to convey, and thereby tacitly avers that he held an estate in fee simple; but *no such averment* can be imputed to the wife.

It is not ordinarily true, in point of fact, that she either avers, or professes, expressly or impliedly, that she has title in herself. She executes the deed for a specific purpose, being thereto specially authorized by the statute. And if such averment could be imputed to her, an *implied* undertaking on her part, could not have greater efficacy or a more binding force, than her *express recital or agreement.*"

To hold that the recitals in the mortgage in question establish as against the *feme covert*, in this case, that the mortgage was given to secure the balance of the purchase money, and thereby operate to control the certificate, would be to hold that she could be estopped by those recitals, which, it is evident from the authorities, is never the case as against a married woman.

There is really, then, no proof before this Court, and no evidence, from which any presumption can be raised that this mortgage was given to secure anything more than the indebtedness of the husband, incurred in the ordinary way; and in this case, the presumption is very strong that such was the fact, since the mortgage was not given until a *fortnight*, and in fact, three weeks, after the deed. True, both bear the same date, but the *acknowledgment* of the mortgage was made on the *24th day of November*, while the deed was dated *November 1st.* The mortgage might have been dated back, as it probably was, but it is the acknowledgment which is only to be considered as to a *feme covert* conveying.

Can the Court take judicial notice of the contents of the conveyance in construing the certificate?

It is unnecessary to repeat the argument already made to show that it is by the contents of the certificate, and that alone, that the conveyance of a married woman can be tested. That is the only safe guide. So far as the contents of the instrument are concerned, every part and parcel may have been concocted by the husband for his own purposes. It was to guard against this very thing that the statute requires the acknowledgment to be made in detail, separately and apart, and the officer to certify the *facts* in detail, and not the *mere fact* that the woman acknowledged the instrument. "The terms of the deed can impart no efficacy to the certificate, nor supply any of its defects." If this were not the rule, all the Court would have to do, as has already been said, and as was well stated in *Lane v. Dolick*, would be to look into the deed, and ascertain what estate the woman had, and adjudge that the acknowledgment passed whatever estate that might be. What then would become of the requirements of the statute enabling her to convey, without which "she is as incapable of conveying by deed as she is by word of mouth?"

Even if the recitals in this mortgage were true, and it was actually given to secure the balance of the purchase money and the Court could take judicial notice of that fact, what difference would that make?

It certainly could make no difference at all. This Court cannot determine what the intention of the parties was any better upon the foregoing assumptions than without them. The mortgagee may have considered the security ample by a mortgage on the husband's estate in the premises. The mortgagee may have had other security. The mortgagor may have been wealthy and his notes good without any security. How, then, can the Court, in the absence of all proof, suppose that the mortgagee required the wife to execute the mortgage back and convey her estate in fee when it appears *in fact*, from the certificate, that such was not the case?

And again, if there be actually a balance of the purchase money due, and the recitals in the mortgage establish it, then the only seeming inequity in the appellants' case is removed and the learned engineer on the other side is "hoist by his own petard," for all that the mortgagee had to do or will now have to do is to enforce his vendor's lien and obtain the property back or his money. Thus no injustice even in appearance is done to the mortgagee by deciding that the certificate means no more than it says it does.

It may be said that the appellee is *not* the mortgagee. True, but the Court will perceive from the testimony that the plaintiff is the mortgagee's brother, and that this entire property worth $16,000, (that is the consideration specified in the deed,) was bid off by him for $3,000, and

it is not unfair to suppose that no difficulty will arise between these relations in adjusting this matter of the sale if "a new deal" should be required under the circumstances of the case. Besides, the plaintiff could only have purchased at the sale what the mortgagee had the right to sell and convey.

Nor can the plaintiff be presumed to have supposed that he was purchasing her estate in fee-simple, when it was in reality but the life estate of the husband. And the fact that he gave but $3,000 for $16,000 worth of property, indicates that he purchased upon the hypothesis that it was the life estate only which he bought.

There is an estoppel in this record as against George F. Rumsey and the plaintiff, which ought to be noted. The deed to Mariette N. Chester from G. F. Rumsey, was put in evidence by the plaintiff. It *acknowledges the receipt* from Mariette N. Chester of $16,250, and is dated Nov. 1st, 1856.

The mortgage in question was not given at that time, but *on the 24th of November*. That is, it was *executed* on the 24th of November following, and the date has no bearing, one way or the other, as against Mrs. Chester. How, then, if the recitals in the mortgage do not estop Mrs. Chester, and are no proof in and of themselves that the conveyance was to secure the unpaid balance of the $16,250 mentioned in the deed, can the mortgagee or the plaintiff *deny* that the whole $16,250 was paid by Mrs. Chester on the delivery of the deed?

Upon principle, upon authority, upon sound reason, how can this Court determine this certificate and acknowledgment to have conveyed the fee? Under the decision in 11 Illinois, *Hughes v. Lane* the only distinction between an acknowledgment for the conveyance of the fee by a *feme covert* and that for the relinquishment of dower, is reduced to the insertion of the words "and relinquished her dower in the lands and tenements hereby conveyed," in the one case, and not in the other, with perhaps the position the words "voluntarily and freely and without compulsion," occupy in the sentence. In the case at bar, the words "and relinquished her dower," &c., are in the acknowledgment, and the collocation of the words "voluntarily and freely," &c., is exactly such as is required in case of such relinquishment. To decide, then, this acknowledgment to have passed the fee, would be to determine that there is *no difference in the State of Illinois between an acknowledgment by a feme covert, conveying her fee-simple title to real estate, and an acknowledgment of a release of dower; that dower may be barred, and the estate in fee conveyed in the same way and by the same acknowledgment.* Is the Court prepared to go this length?

It may be said that this is a case of hardship upon the plaintiff. It has already been shown that it is not so, but whether so or not can make no possible difference. As is eloquently said by Judge Caton, in *Hughes v. Lane*, p. 137:

"With consequences I have nothing to do, where I think the law is manifest. It may be, and I presume is most generally the case, that the insufficiency of acknowledgments is attributable to the ignorance or carelessness of the officer, rather than the unwillingness of the wife to part with her interest, and yet it may sometimes happen that the wife's estate will be illegally and unjustly taken from her. Her inexperience in business, her desire for domestic peace, her liability to be persuaded by a misplaced confidence, her dependant position, her exposure to imposition, and the constraining influences with which she is surrounded, all conspire to render it peculiarly proper that both the Legislature and the Courts should protect her interests against deception or coercion."

In the opinion of the Court in at bar
this case, the acknowledgment is treated as "redundant" and it is said that "redundancy" is an uncommon objection to be urged. But these words "and relinquishes her dower freely &c" which the Court calls "redundancy" are the very things which distinguish the acknowledgment for the conveyance of the fee from the acknowledgment for barring dower.

There seems to the petitioners no difference in principle between inserting the relinquishment of dower into a certificate where the woman has dower but has not acknowledged its relinquishment only, & leaving those words out where she has the fee but has relinquished dower. In either case the Court should be

changing the character of the conveyance and substituting its judgment of what the woman intended to do for what she actually did do - It would in effect be deciding that there is no difference between the certificate necessary to bar dower and that required to bar the fee, for the only essential difference between the two, is in the words "and relinquishes her dower" &c -

Will the Court insist that they can go into the contents of the deed & if the woman had dower then decide that the conveyance barred its inspection of the certificate or if she has the fee, then decide that the conveyance barred it, irrespective of the certificate ?

Under the affirmance of this judgment the appellee has possession - He will suffer nothing therefore on that account by the granting of a rehearing and it seems to the undersigned that the questions involved are of sufficient importance to induce the Court to allow that privilege unless their judgment is beyond the shadow of a doubt in their minds -

Respectfully submitted
Melville W. Fuller
Petitioners Atty.

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Supreme Court

Augustus Chester &
Maintia N. Chester
his wife
v
Julian P. Rumsey

Petition for a rehearing

Filed Apr. 24-1862
L. Leland
Clerk