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Administrator's Sale.

NOTICE IS HEREBY GIVEN, THAT in pursuance of an order of the Probate Court of the County of Pima, Territory of Arizona, made on the 17th day of February, A. D. 1876, in the matter of the estate of Thomas Lewis, deceased, designated administrator of the estate of said deceased, will sell at private sale to the highest bidder for sixty days credit with good sureties, approved by the Probate Judge, in the town of Florence, at my office in said County and Territory, the following described property, to-wit:
Real Estate and mining property.
One half interest in an undivided tract of land described as follows:
SE Quarter of Section 34, of Township 3 South, of Range 9 East.
One-seventh interest in the Globe Mine.
All bids will be received in writing up to the 21st day of March, A. D. 1876, at 10 o'clock a. m.
F. M. GRIFFIN, Public Administrator, March 4.

Mining Work Notice.

TO DAVID EDWARDS, OR TO ANY person or persons claiming right of title from him, in or to any portion of that certain mining location or claim known as The First Western Extension of the Globe Mine, situate in Pinal County, Arizona.
This is to notify you, in accordance with provision of the Mining Act of May 10, 1872, that in compliance with requirements of said Act, work has been done on said mining claim for two years last past, ending January 1, 1876, by the undersigned, and that without any assistance or expenditure on your part.
Now, therefore, if within ninety days, you do not consent and pay to the undersigned the cost of the said work, the undersigned will claim forfeiture of all your right, title and interest in and to any portion of said mining claim.
Florence, Arizona, February 19, 1876.
February 19.

Special Municipal Election.

VILLAGE OF TUCSON, ARIZONA.
OFFICE OF THE RECORDER, March 4, 1876.
NOTICE IS HEREBY GIVEN THAT upon the petition of the requisite number of resident freeholders and householders of this village, and in accordance with the Act of the Legislature of Arizona, approved February 1, 1875, entitled "An Act Supplemental to Chapter Fifty-two of the Compiled Laws of Arizona, a special election will be held at the Village Recorder's office, on Monday, March 20, 1876, from 10 o'clock a. m. to 4 o'clock p. m. to determine solely whether the Village of Tucson, Arizona, shall become a corporation, or remain unincorporated. Each elector, voting at this election, shall have written or printed on his ballot the words, "For Incorporation, Yes," or the words, "For Incorporation, No," and no other question or subject shall be voted upon at this election.
By order of the Mayor and Council.
CHARLES H. MEYERS, Recorder, March 4, 1876.

Probate Notice.

IN THE MATTER OF THE ESTATE of Robert M. Crandall, deceased.
In the Probate Court, County of Pima, Territory of Arizona.
Pursuant to an order of said Court made on the third day of March, A. D. 1876, notice is hereby given that Monday the 20th day of March, A. D. 1876, at 10 o'clock a. m. of said day, at the court-room of said County of Pima, have been appointed as the time and place for proving the Will of said Robert M. Crandall, deceased, and for hearing the application of Greocilda P. Sams for the issuance to her of letters testamentary, when and where any person interested may appear and contest the same.
Dated at Tucson, March 3, A. D. 1876.
WM. J. OSBORN, Probate Judge and ex-Officio Clerk Probate Court, March 4.

THE CITIZEN.
SATURDAY, - - - MARCH 18, 1876

CONTINUED FROM FIRST PAGE.

SUPREME COURT OF ARIZONA.

Learning language: "We think the Legislature has not the constitutional power to say, that the fruits of the property of the wife shall be taken from her and given to the husband or his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist of the right of property in one, divested of all beneficial use—the barren right to hold in the wife, and beneficial right to enjoy in the husband. One object of the provision was to protect the wife against the improvidence of the husband, but this object would wholly fail in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in a contingency of her surviving her husband." The court further says: "The common law recognizes no such solecism, as a right in some one else to use it as he pleased, and to enjoy all the advantages of its use. It is not perceived that property can be in one in full and separate ownership, with the right in another to control it and enjoy all its benefits. The sole value of property is in its use. To disassociate the right of property from the use in this class of cases, would be to preserve the name, the mere shadow, and destroy the thing itself—the substance. It would be to make the wife the trustee for the husband, holding the legal title while he held the fruits of that title. This could no more be done, in consistency with our ideas of property, during the lifetime of the wife, than for all time."

The act of 1865, as has been seen, which prescribes what property shall be the separate property of the wife, contains also the antagonistic provision that the husband shall have the management thereof, and of the rents and profits of the same. The Act of 1871 repeals these antagonistic provisions, by giving to the wife the sole and exclusive control of her separate property, which carries with it the right to use and invest the fruits thereof. Under the law of 1865, whatever of fortune belonged to the wife at her marriage or came to her in any manner afterwards, either as the fruits of her separate property or otherwise, was taken wholly from her use and control and given to the sole management of the husband. She might have been possessed before her marriage of ample means to supply her wants and gratify her tastes, free from control of any one, but on the day of her marriage and by the act of marriage, she is divested of the right to use one dollar's worth of this property as her own. It makes no difference what the kind and character of the property may be; if she had a carriage it is no longer her own; she may not even use it except by leave of her husband; if she have money, the husband may demand and take possession of it, doling it out to her, if at all, in such pittance as to make her keenly sensible of her condition of serfdom. This was the law of 1865 and these the conditions to which every woman in Arizona had to submit in contracting marriage under it.

We are advised by recent decisions of the United States courts, of the effect of the decree of confiscation of the property of these recently in rebellion against the Government, and understand the effect of such decree of confiscation to be, wholly to deprive the offender of all right to use and control, or in any manner interfere with the property confiscated in his lifetime, though at his death it may pass to his heirs. Under the Act of 1865, as it stood before the enactment of 1871, the wife possessed of a fortune on the day of her marriage, by entering into this relation lost as wholly and completely all right to the use and enjoyment of her separate property, as if the same had been confiscated for rebellion against the Government. The decree of confiscation in this case, and the bride's marriage certificate in the other, would operate alike, and take from rebel and matron with admirable completeness and impartiality, all right to use, appropriate and enjoy the least even of the treasures owned and held by them, when either entered into holy matrimony, on the one hand, or committed an act of rebellion, on the other.

It seems to us the penalty, so to speak, imposed by the law of 1865 upon women for entering into the marriage relation, was unnecessarily severe. It was to get rid of these obnoxious provisions that the Act of 1871 was passed. The law as it stood before that Act was passed, instead of fostering and encouraging marriage, was framed as if for the very purpose of preventing women possessed of property from entering upon this relation. The more enlightened legislation of 1871 says to every woman contracting marriage in this Territory, "you shall have the sole and exclusive use and control of your separate property, and may bestow, convey and transfer the same, when and how you will, as fully and perfectly as if unmarried."

We think the Act of 1871 adds to the methods by which the wife may obtain separate property. That instead of being confined to several methods of gifts, bequests, devises and descents, she may add to her separate property by purchase, that she may use the rents and profits of her separate property, by investing them in the purchase of other property, lands or personal property, and that such property, when so purchased, is not acquired in the sense in which that word is used in the first section of the Act of 1865. We conclude then that the wife of the age of 21 years, in addition to the property owned by her at her marriage, and in addition to that afterwards acquired by gift, bequest, devise or descent, may acquire property, real or personal, by purchase, if the purchase money be of the separate funds of the wife, and that the rents and profits of her separate property are her separate funds. In answer to the question now before us, we may consider this matter more fully.

The fact then that the property intended to be conveyed by the deed offered in evidence, was granted to Anna C. Woffenden for a married consideration, is not conclusive that the property was common property. For if the married consideration was of her own separate funds, had and owned by her before marriage, or received by way of rents and profits from her separate property after marriage, the property was her separate property and under her sole and exclusive control.

We pass the question as to the presumption, that all property conveyed to the wife for married consideration is common property, as not necessarily involved in this case, if it appears, as we think it does from the transcript, that evidence was offered, and ruled out, which would go strongly to support the theory that the property was the separate property of Anna C. Woffenden, at the time of the conveyance by her to the plaintiff and appellant herein. For admitting the legal presumption to be as above stated, such presumption may be rebutted and overcome by proof that the property was purchased with the separate funds of the wife.

It is however insisted, by counsel for the respondent, that no evidence was offered by the plaintiff, showing or tending to show that the property in controversy was the separate property of Anna C. Woffenden. Passing the question as to the order in which this proof should have been offered, was such evidence offered at all? On the examination of the witness Charauleau, (see folio 43 of transcript), the witness was asked, "to whom was the sale of the ranches communicated, when the same was being made?" The statement goes on and reads, "The offer upon the question was to prove that when the sale was made by Anna C. Woffenden, to the plaintiff, of the ranches in contest, the defendant was informed of it by her, in presence of the plaintiff, that he did not then question Mrs. Woffenden's ownership, nor her right to dispose of the property in question, but allowed the contract to proceed, and the consideration of \$5,000 to be paid, without any question or objection." The court ruled that there was no deed in evidence, and inquired of plaintiff's counsel what he meant by sale. Counsel answered, "that he meant a contract for the conveyance of the property in controversy, to be consummated, as it afterwards was, by deed." We understand from the transcript, as above quoted, that upon putting the question to the witness, the plaintiff's counsel offered to prove by the witness, the matters set out, in substance that while negotiations were in progress between Mrs. Woffenden and Charauleau, for the sale of the ranches, the defendant was present; that she was treating the ranches as her separate property, and the defendant in no manner questioned her right so to do, but permitted the negotiation to go on, and the plaintiff herein to pay the purchase money, &c. As we understand from the transcript, the court not only sustained the objection made by the defendant's counsel to the question put as leading, but also ruled the evidence offered should be excluded. That is, the court would not permit the plaintiff to prove, by the witness, the matter he offered to prove, had there been no objection to the form of the question.

We have no doubt that in this case the court erred, by oral testimony to establish and prove a contract for the conveyance of land; it was to show that the property being negotiated was the wife's separate property, as evidenced by the conduct of her husband, while she was negotiating the sale thereof and treating it as her own. Giving full force to the legal presumption contended for by the counsel for the respondent, that the property was common property, it might still be shown to be the wife's separate property. For though obtained by her by grant and for a married consideration, if this married consideration was of her separate funds the property would be her separate property. Now when she was negotiating a sale of this property, bargaining it for a price, with the view of conveying it, would not the fact that the husband was present and made no objection to the negotiation, nor in any manner questioned her right to the property, as her separate property, be evidence strongly tending to show that the property was her separate property, and obtained by her separate funds? The title of the property vested in her by virtue of the deeds from her grantors, if the purchase money was of her own funds, if not, then the property became common property. The evidence offered was to show that the defendant herself being present, assented to her treating the property as her separate property, which it is assumed he would not have done had the property been purchased with his separate funds, or with the common fund.

Again, the plaintiff offered to prove by the witness Wise, (see transcript, folio 37,) that the defendant, in 1874, "disclaimed in the witness's presence, any interest in the ranches in controversy, and expressed his determination never to return to them." The deed from Abram Moreno and Mariana Moreno, his wife, and from Ygnacio Robledo and Romula Robledo, his wife, conveyed the title of the property to Anna C. Woffenden, to vest in her as her separate property, if purchased by her separate funds, otherwise to become common property. If it was common property, the defendant certainly had an interest in it; was not his disclaimer of any interest in the property evidence tending to show that the property was the separate property of the wife? The husband has control of the common property, and if these lands had been purchased with means from the common fund, would he not have disclaimed any interest in them? Had the defendant paid for the property out of his own means, or out of the common fund, would he be likely to make such disclaimer? At any rate, such disclaimer was proper evidence to go to the jury, as tending to show that the property was the separate property of the wife.

It would have been more regular for the plaintiff, when offering the deed from Anna C. Woffenden in evidence, to have offered in connection therewith the evidence above referred to. The deed and this evidence should then have gone to the jury, under instructions from the court to the effect, that if the evidence satisfied them that the property was purchased by the separate funds of the wife, it was her separate property, and that the deed was sufficient to convey the same. This evidence was a sufficient predicate for the introduction of the deed, and probably the deed would have been offered after this evidence was offered and ruled out, had not the court excluded the deed, on the grounds that

the certificate of acknowledgment was defective. It is apparent that the court held that the deed, even with this evidence, could not properly be permitted to go to the jury. We think both should have been received, under instructions as above indicated.

We have considered this case upon the hypothesis that it is the presumption of law, that all property acquired by either spouse after marriage, otherwise than by gift, bequest, devise or descent, is common property. But while we have so considered the matter in this case, we would not be understood as adopting the correctness of this presumption, stated as broadly as it is in the authorities cited. The current of the authorities cited, principally from California reports, is to the effect that all acquisitions by either spouse, for a married consideration, during the existence of the marriage, is presumptively common property. It seems to us that there are grave objections to the rule as stated in these authorities. A legal presumption should certainly accord with the probable fact. Common property, under our law, can only accumulate after marriage, and if either spouse, who married yesterday, to-day purchases and pays for property of the value of \$10,000, could the presumption arise that the property is common property? Would it not, on the other hand, appear certain that the property so purchased was not common property, that it must have been paid for by the separate funds of one or the other? And under the authorities referred to, if so paid for, by the separate funds of either spouse, it would become the separate property of such spouse.

It appears to us that no presumption can arise like that referred to applicable to all cases, as assumed by the authorities referred to, but that the legal presumption as to ownership would vary with the different facts and circumstances surrounding each case.

It follows from the conclusions to which we have arrived, that the judgment of non-suit herein must be set aside, and the case remanded for new trial. And it is so ordered.

TWEED, A. J.
PORTER, A. J.
I concur.

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