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Fred A. Merritt.
May 1, 1923
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Prof. Bissett.

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Bisset, C. T.

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What is Community Propy

HENRY L. YESLER, AND JOHN D. LOWMAN, Administrator
of the Estate of Sarah B. Yesler, Deceased,
Appellants, v. LUCINDA D. HOCHSTETTLER,
Respondent.

(4 Wash. 349, 1892)

Appeal from Superior Court, King County.

The facts are stated in the opinion.

The opinion of the court was delivered by

Stiles, J.--This appeal is from a decree of the supetior court of King county reversing a decree of the former probate court of that county, in the matter of the distribution of the estate of Sarah B. Yesler, deceased, late wife of the appellant, Henry L. Yesler. The dededent left her surviving nine brothers and sisters, of whom respondent was one, but no children. The probate court found all the property here in controversy to have been the common property of the husband and wife, and distributed it to the husband. The superior court reversed the finding, and held all the property to have been the separate property of the wife, and distributed one-half of it to the husband, and the other half to the brothers and sisters. Respondent here was the sole appellant from the decree of the probate court.

The Yeslers inter-married in the State of Ohio, in 1839. In 1852 the husband removed to Washington Territory, where he filed donation claim No. 47. In 1876 the claim was patented--the west half to the husband, and the east half to the wife. In 1858 Mrs. Yesler joined her husband, and they continued their residence in the city of Seattle, until her death in August, 1887. Upon her arrival in Washington Mrs. Yesler had no separate property except her half of the donation claim, but in 1866-67 she received about $1,000 by descent from the estates of deceased relatives, and in the succeeding nine years about as much more from the same sources. Mr. Yesler improved his land by erecting buildings thereon, which were rented, and by the planting of orchards from which fruits were sold. The statement of facts shows that from 1874 to 1877 various sums of money derived from the rents of her husband's buildings were had and used by Mrs. Yesler, with her husband's permission, in all $7,365. And between 1873 and 1884 she had and used from the sales of fruit grown in his orchards $2,712. In 1871-74 she received from a boarder $992. It is agreed that Mr. Yesler at all times furnished all the provisions, fuel, light and whatever was necessary for the house, and paid the wages of cooks, gardeners and servants. In 1866, shortly after receiving her first inheritance, Mrs. Yesler expended sums equal to the greater paat of it in a visit to San Francisco, and the purchase of house furniture. She did not dispose of her part of the donation claim. At her death she left a large estate mostly in real property, all of which, with the exception of the donation claim and what is known as the "Wilson Farm," is involved in this litigation.

It was: "At the time of her death the decedent, subject to such

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equities as might then exist in third persons, was seized in fee simple or her sole and separate property of the following lands and premises," which was the affirmative proposition made by the respondent against the negative raised by the appellants, that it was the common property of the deceased and her husband. These two propositions made the issue to be tried. But the "facts" were a very different matter; as, for example, all of the lands were conveyed to Mrs. Yesler by deeds of purchase, a material fact not possible to be avoided in any proper findings which might have been made.

It is conceded that the several sources of revenue above mentioned were the foundation upon which this estate was built, with the exception that in 1882-83 Mrs. Yesler purchased certain lands with money borrowed of third parties, for the repayment of which she mortgaged her donation claim, but which loan was repaid out of sales of the lands purchased without recourse to the mortgage. Her gross receipts in their original form were about $20,000, of which she laid out about half in the purchase of land.

The acts of 1873 and 1881 governing the property rights of married persons are involved in the case, as portions of the property were acquired under each of those statutes.

Concerning all the parcels, it is agreed that they were acquired by ordinary deeds expressing a valuabel consideration; and appellants' claim is, that that fact establishes the first advantage for them, inasmuch as the accepted rule of construction in those states where there are statutes similar to ours is that lands conveyed by deed of purchase to either husband or wife during the continuance of the marriage relation are prima facie common property. Meyer v. Kinzer, 12 Cal. 248; Pixley v. Huggins, 15 Cal. 128; Tolman v. Smith, 85 Cal. 280 (24 Pac. Rep. 743); Pierson v. Ricker, 15 La. Ann. 119; Gogreve v. Dehon, 41 La Ann. 244 (6 South. Rep. 31); Love v. Robertson, 7 Tex. 6 Pearce v. Jackson, 61 Tex. 642; Kimberlin v. Westerman, 75 Tex. 127 (12 S. W. Rep. 978). It has also been so held in this state, by strong inference. Lemon v. Waterman, 2 Wash. T. 485 (7 Pac. Rep. 899); Gratton v. Weber, 47 Fed. Rep. 852.

The respondent concedes that this presumption exists in this state and has existed under all the acts mentioned. But the authorities also lay down the rule that the presumption can be overcome only by clear and convincing proof, which respondent does not admit as the proper rule, but asserts to the contrary that under our statutes the presumption is destroyed when it is opposed by any evidence whatever to the contrary. Concerning this point we cannot adopt the proposition of the respondent. The logic of the correct rule is simple enough. Under the statutes, property acquired after the marriage is common or community property, unless it is acquired by gift, bequest, devise or descent. A deed of real estate expressing a money consideration shows the acquisition not to be within the exceptions. We say "exceptions" because, during the marriage relation the community of the spouses is, and, in the nature of things, must be, the superior and controlling entity; its interests are paramount, and whatever tends to reduce its position must be exceptional. Therefore, in any controversy, the deed standing alone and uncontradicted by any evidence, affords what amount to a conclusive presumption that its subject-matter is common property/ But the assertion of an exception merely requires the production of proof either that the conveyance was in fact a lawful gift, or that the consider-

ation was furnished by husband or wife individually out of funds or property which he or she was entitled, under the law, to hold as separate property. Whatever satisfies the court or jury of the truth of one or the other of these probative facts, will authorize the finding of the ultimate fact that the subject of the conveyance was separate and not common property, and thus the presumption will be owvercome. But if the evidence of the opposite parties leaves the matter in doubt the presumption continues to weigh for the community, and will decide the question. Smith v. Smith, 12 Cal. 226, and cases; Lewis v. Johns, 24 Cal. 98.

The lands in dispute bear a well-defined distinction in this, that those of the first class were all acquired under the act of 1873, while those of the second class were all acquired under the act of 1881. The first purchase of the former class was made September 3, 1875, and the last July 30, 1878; the first purchase of the second class was made January 6, 1882, and the last April 1, 1883. In this separation of the two classes we lay out of the consideration the statement that certain of the lands of the second class were contracted for in 1880-81, as no contracts appear; the only fact tending to sustain the allegation of prior contracts being the dates of the deeds, while the stipulation is that the deeds were delivered and the price paid in 1882.

The lands in the first class were purchased at a total cost of $755. Prior to the first purchase Mrs. Yesler, according to the account proposed by the respondent, had in her possession $7,768.25, of which $1,345.13 was hers by inheritance, and the remainder was derived from rents and profits of her husband's separate property, board money and interest on loans. Including the $175 she paid for her first purchase, she had on hand September 3, 1875, $3,263.63. She had out in loans at the same time $650. The remainder she had used in various ways. It is manifestly impossible for any human tribunal to say what fund was used to pay for this first tract, and we doubt very much whether Mrs. Yesler ever knew, or thought of making certain, that any particular fund in her hands was used. She had had enough money from her inheritance to pay for all the property in the first class, but no presumption that she used it can be raised from that fact. She expended $450 in a trip to San Francisco, $205 she gave to a sister, and $1,600 was used in a centennial trip, while $238.62 was paid for mining stocks, and $310 for taxes, and it would be just as accurate a guess to say that these matters absorbed all of her own money and more too. The general rule laid down by the courts which have had this subject under consideration most frequently is, that such confusions work a forfeiture of the separate character of property thus purchased. What, then, was the character of the funds commingled by Mrs. Yesler with her own? First, There was the board money, which both sides concede was common property, under all the statutes. Secondly, The rents and fruits of Mr. Yesler's portion of the donation claim. The land, it is agreed, was his separate property; but appellants contend that the rents and fruits were common, while respondent insists that they were the husband's separate property. Remembering that we are now speaking of rents and profits of the husband's separate real property under the act of 1873, we hold with the appellants on this point. The case was argued by the respondent as though rents and profits of the wife's separate real property were in question, and she cited George v. Ransom, 15 Cal. 322, in support. In that case it was held that the legislature could not divert the rents and profits of a wife's

separate property from the constitutional channel. But, although the statute there construed was the same in substance as our act of 1873, except that it expressly made the rents and profits of the separate property of both husband and wife community property, it has never been held that the act did not control the husband's separate property as it was intended to. Lewis v. Lewis, 18 Cal. 654. None of the acts of our legislature until 1879 pretend to make the husband's rents, issues and profits his separate property. It could make but little difference, however, whether these rents and fruits were separate or common. In either case the husband had the absolute power of disposition of them, and could do what the respondent claims he did do, viz., make a gift of them to his wife so as to vest them in her separately. If they were so given to her there would, perhaps, be no question of confusion of property, as the whole fund would then be hers.

Concerning the question whether these rents and fruits were given to Mrs. Yesler by her husband, there is this information in the stipulation, and no more:

"1. Mrs. Yesler received the following sums of money for rents of buildings owned by Mr. Yesler on his donation claim at Seattle, which she had and used, with the permission of Mr. Yesler, for her own account to wit:

"2. As early as 1873 Mr. Yesler had on his claim a couple of orchards which were cultivated by him, and Mrs. Yesler, with his permission, sold fruits and produce therefrom, and used the proceeds."

From these meager facts but little, if anything, can be argued to sustain the conclusion that these sums were gifts to Mrs. Yesler. Under the act of 1873, the wife's separate property was subject to the management and control of her husband. A gift to her would still have been at his disposal so long as it remained in money (Sec. 6). Therefore, to make a gift effectual to her, the same degree of certainty was necessary which would have been required by statute. Says Schouler's Husband and Wife, Sec. 385, concerning this matter of gifts to a wife:

"The evidence of intention should be clear and distinct in such cases. There should be a clear irrevocable gift to a trustee for the wife, or some positive act by the husband, by which he divests himself of the property, and engages to hold it for the wife's separate use."

See Parker v. Chance, 11 Tex. 513. McDermott's Appeal, 106 Pa. St. 358, says of money deposited by a wife in her own name in a savings bank:

"Her possession of it was his possession, as much so as if she had kept the money in a safe or a bureau instead of in the bank. It is a common thing in every day experience for a woman to have the possession and control of her husband's money, and the husband of the wife's, and if from such fact we were to draw the conclusion that the custodian was the owner of the money, it would lead to unexpected results."

We cannot regard such cases as Higgins v. Johnson's Heirs, 20 Tex. 390; Story v. Marshall, 24 Tex. 308, and Peck v. Vandenberg, 30 Cal. 11,

cited by respondent, as in point here. The first case held that it might be established that real estate conveyed to a wife was her separate property by showing that at the time of the purchase her husband declared it to be his intention to make it so; in the second, a deed of community real property from the husband directly to the wife was upheld as a gift upon the ground that to hold otherwise would be to render the deed wholly inoperative and void; the last named case decided that parol testimony was admissible to show that land conveyed by a mother to her married daughter by a deed expressing a nominal money consideration was in fact a gift. The prominent feature in all these cases is the liberality of the courts in admitting parol testimony to show the real status of lands conveyed to married persons, in spite of the presumptions arising from deeds of conveyance; and, if they have any bearing at all upon the question in discussion they emphasize the text quoted from Schouler, that there must be some positive act on the part of either spouse to predicate a claim of gift upon. It is argued that the duty was cast, by the statute, upon Mr. Yesler to hold, manage, control and dispose of the common property, and that not having done so a gift should be presumed. He certainly had the authority of the statute for doing so, but there was nothing which precluded him from entrusting the management and disposition of it to his wife, without the loss of any title whatever. It would be strange indeed if a man so fortunate as to have a wife of eminent business qualifications, might not entrust the investment and management of any part of their common fortune to her without losing his entire interest in it, unless he first protected himself by written reservation or its equivalent. The record as quoted shows nothing but a permission. It is true that with reference to the rents it is stipulated that she had and used them "for her own account;" but nothing definite can be construed out of this expression. It may just as well mean that these sums were for her "pin money," which she was free to use, but the savings from which would not be her separate property at all.

There were certain things, however, which respondent claims should be considered as admissions of Mr. Yesler, that the lands of the first class at least were his wife's separate property. The first of those are the inventories. The two filed in 1871 and 1873 (exhibits 8 and P) seem to have no relevancy to the present case. Both were filed before the act of 1873, and more than two years before any of the property in question was acquired. But following her purchases, excepting the last, under the act of 1873, Mrs. Yesler filed two inventories in the office of the county auditor, in which she described the real estate recently acquired, and declared it to be her separate property "free from the control of any other person or persons whomsoever," in the first one, and "free from any and all liabilities whatsoever for any debts or liabilities of my said husband," in the second. Again, January 31 and March 5, 1879 (still under the act of 1873), she filed inventories describing certain promissory notes and mortgages to secure the same, which she also claimed to have "free from the control of my said husband." Concerning these inventories, we observe, first, that no notice is brought home to Mr. Yesler either of the purchase of the lands or of the acquisitions of the notes and mortgages, or of the making or filing of the inventories, although by this we do not desire to imply that with full notice he would have been called upon to act in any wise in hostility to his wife's possession or claim, for as between him and her neither claims nor silence

could effect much, if anything. The inventory of 1873, totally unlike that of 1871, did not require the husband's joinder, and merely served as notice to creditors that her separate property which was, by the statute, under the management and control of her husband, was entitled to exemption from execution upon his debts. Failing to file an inventory, she waived the exemption (Sec.5). The inventory was purely a self-serving declaration which was scarecely admissible in evidence for any purpose, as an inventory, except to show as against creditors that it had been made and filed. Sullivan v. McMillan, 26 Fla. 543 (8 South. Rep. 450).

But in the second place, referring to what are claimed by the respondent to be admissions, there is a power of attorney of date December 8, 1875. It was executed by both the Yeslers, and empowers Manville S. Booth to grant, bargain, sell, convey, etc., "the following described real estate belonging to the said Sarah B. Yesler, as her separate property, now of record in said county, to wit," etc. This instrument, containing as it does a flat statement participated in by Mr. Yesler, that the lands therein described are those "belonging" to Mrs. Yesler as her separate property, and considering that the record title was already in her, we hold is sufficient evidence, in a case like the one under consideration, from which to conclude that the property mentioned therein was hers through purchase out of her separate money, or through previous gift, and should now, in the absence of anything to contradict or explain the declaration, be held to be her separate property. We can well see that such a declaration might be of no force as against creditors, since it might as to them be wholly self-serving; but as between husband and wife, it is against interest, and is entitled to consideration accordingly. That the power was revoked in 1886, can make no difference; it was merely the authority to Mr. Booth that was withdrawn, not the admission to which we have alluded. The like conclusion is not deducible in regard to lot 8, block 35, Boren's plat of Seattle, from the contract made between the Yeslers and Mary Booth, August 6, 1876. Under that contract the sum of $1,600, the consideration for the conveyance of the lot, was to be Mrs. Yesler's separate property when received; but that fact does not carry with it a presumption that, if the contract was not carried out the lot itself was, or was to be, hers.

We now pass from the property of the first class. The property of the second class we have held to have been acquired under the act of 1881, and the only attention which need be paid to the act of 1879 is to note, in passing, that it appears in the case that on July 23, 1880, Mrs. Yesler loaned Mary A. Droughton $1,000, which was repaid November 18, with the addition of $50 interest, while the law was, if anything, more exacting with regard to married women's inventories than at any time previously. The third section provided:

"A full and complete inventory of the separate property of the wife shall be made out and signed by her, and she shall also verify the same before an officer authorized to administer oaths, to the effect that the property therein mentioned is her separate personal property, and such inventory must be recorded in the office of the auditor of the county in which the wife resides."

She also held a patent tax book, gas stock and mining stock, which had cost her over $5,000. None of this property was inventoried, and it is a fair inference that she was not claiming it as her separate property; as the law then existing, in addition to the provision we have quoted, was so stringent in its terms and peculiar in its provisions, that it seems probable that one who, like Mrs. Yesler, had been particular in the matter of filing inventories before, would have kept up her practice begun in 1871.

The first two purchases of the second class were made January 6, 1882, (exhibits K and L), for $867.62, and if any dependence at all is to be placed in the "account" of Mrs. Yesler's financial affairs, which is presented by the respondent, these purchases were certainly made in part with money then recently received from Mr. Yesler's rents and fruits, which were his separate property under the act of 1879. In August, 1881, Mrs. Yesler, according to this account, received from these sources $1,050, and this was the last money she had prior to January 6, 1882. After the purchases were made, she is shown by the account to have had a balance of $531.17. Therefore, immediately prior to the purchase she had $1,398.79, of which but $348.79 could have been her separate money, which, supposing she used it all in making the purchases, would leave $518.83, which must have been made up from the $1,050 received from Mr. Yesler. There is absolutely no evidence that any such particularity was exercised by her, or that any of the $348.79 was her separate property, and we have gone into this matter merely to illustrate how unreliable would be any deduction drawn from the "account," or any of the facts of that class which are claimed to show the separate character of this property.

It is agreed that on February 16, 1882, Mrs. Yesler borrowed from McElroy $2,200, the repayment of which she secured by giving a mortgage upon her donation claim; and with $2,000 of this money she bought land from Reynolds which she sold to Hunt. Her cash balance after this purchase is alleged in the "account" to be $731.17, which is precisely the balance left after her purchase of January 6, 1882, with $200 added from the McElroy money. On June 6 following, the "account" estimates that she had received from "rents and fruits" $350. This made her total cash on hand $1,081.17. Yet it is a conceded fact that on the last named day she paid $3,000 for the real estate described in exhibit I, a clear outlay of $1,918.83 more money than she had. It is perfectly evident that there is a screw loose in the "account," and we are left without any knowledge whatever as to where the balance of the funds did come from to make this purchase. This state of things is peculiarly unfortunate, as there was included in this purchase the undivided half of the land afterward platted by Mrs. Yesler, and from which her only sales of real estate, with two exceptions, were made. April 9, 1883, Mrs. Yesler borrowed from Starr $5,300 upon another mortgage of her donation claim, and with this money paid off the McElroy mortgage, and with $400 more, derived from "rents and fruits," bought the remaining half of the platted tract and other lands for $3,500. The interest on the McElroy mortgage, $239, she also paid out of "rents and fruits," according to the "account." In June, 1887, she sold to Hunt the land purchased with the McElroy loan, and a part of that purchased with the Starr loan for $10,000, and from that sum paid the principal and interest of the Starr loan, $7,420. Thus the investment of $5,300 of money borrowed on the credit of her separate

estate and $839 derived from "rents and fruits," produced an apparent profit of $2,520 in money and the lands included in exhibit M not sold to Hunt. Having received no money whatever from April 9, 1883, to June 28 of the same year, she, nevertheless, on the latter date paid out $1,994 for clearing her addition, and gave to Amos Burgert, seemingly a relative, $1,800, another instance of the unreliability of the "account."

The question of most importance affecting the second class of lands is, whether their having been purchased with borrowed money changes their community character. The money borrowed is not acquired by gift, bequest, devise or descent; nor is it a substitute for the separate property upon which a mortgage may be given to secure it, upon the theory of exchange, since the estate has not been parted with or diminished, except in a temporary and potential sense. Neither is such money "rents, issues or profits," although the last mentioned term be extended to include accumulations. There can be no doubt that if a married woman, under the act of 1881, borrows money entirely upon her personal credit the money and whatever she buys with it becomes common property, though counsel for respondent does not admit this proposition. Indeed he argues that under the terms of the first and eleventh sections (Gen. Stat. Sec. 1408 and 1410) there is at this time no such thing in this state as common property between husband and wife, except such as may have existed prior to the act, and the rents, issues, profits, proceeds and conversions thereof, though we think the personal earnings of the husband must have been overlooked by him in formulating that proposition. The new liberty of the wife to contract and enjoy property furnishes the main basis for the argument. But we see nothing in the necessities of the wife's present condition that did not previously exist as to the husband when he alone enjoyed the freedom of contract, but was subject to the common property rules. Nothing was then urged against depriving him of his "rights" by diverting not only his earnings and accumulations, but his rents, issues and profits as well to the use of the community, and we see no reason or purpose in the present law to extend its effect in favor of either husband or wife beyond its plain letter or necessary implication. It contemplates that there will be community property and makes such elaborate provision for its disposition both before and after the death of the parties as to preclude the possibility that nothing but the mere fragments from the old dispensation were legislated for.

But to return. If borrowed money is community property, how can the voluntary act of either spouse in securing its repayment by mortgage of separate property change its character? If the husband borrows $1,000 upon his own note secured by his wife's mortgage of her separate realty, whose money is it? If the security determines the ownership it must be hers, and if he buys land with it, taking the title to himself, the land must be hers, and he her trustee. But if he sells part of the land for sufficient to pay the note and discharge the mortgage, or uses his earnings for the same purpose, or sells all the land for a large advance, to whom does the profit in land or money belong? To tread a single step from the course laid out by the statute would make such questions practical. In Schuyler v. Broughton, 70 Cal. 282 (11 Pac. Rep. 719), it was held that where the purchase price of land conveyed to the wife was paid by her in part from her separate funds and in part with money borrowed upon a mortgage of the same land, that proportion of the land paid for with

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the borrowed money was community property, and the remainder was her separate property. The opinion by McKee, J., implied that if the mortgage had been upon existing separate property of the wife the decision might have been different. But in Heidenheimer v. McKeen, 63 Tex. 229, the precise point was in issue, and was decided, as we think, according to the better rule. There merchandise was bought with money borrowed by the wife upon a deed of trust of her real estate, and it was said:

'Suppose that the debt incurred in securing the loan had been paid without any resort whatever to the deed of trust, it would not be insisted, we apprehend, that the money or merchandise either became the separate property of the wife simply because her real estate had been used as a security for the debt.

"If the money had been borrowed upon the faith of a deed of trust given upon the separate property of the husband, certainly the money nor the merchandise either would for that reason become his separate property.

"In either case the status of the property is to be determined at the time when the loan is secured."

In this case the land purchased with the borrowed money paid for itself, and a large profit in land and money besides. It was a speculation purely personal in which the energy, skill and business prudence of Mrs. Yesler certainly were greater factors than the credit given by the mortgage of her land. But these mental forces, whether of husband or wife, are servants of the community, and their products are its property, to be shared equally by the members of the community, and to follow the channels of devise and descent provided by the statute.

Respondent claims a point because when Mr. Yesler, who was also a large borrower from Starr, was arranging his matters with him, in 1884, Mrs. Yesler's note and mortgage for $5,300 were assigned to him by Starr. The assignment dated at San Francisco, June 25, 1884, is here, and with it a statement of Starr's account with Yesler of date June 4, 1884, in which he is charged with $5,332.40 principal and interest of Mrs. Yesler's note, which amount was deducted from $50,000 that day loaned. But the note was still left with Starr's agent to whom the money was paid on the sale to Hunt, and placed to the credit of Yesler. The substance of this transaction seems to be that Mr. Yesler was merely protecting the note given by his wife, which was then past due, with monthly interest unpaid, and that he continued to do so for three years until the property paid it off, receiving nothing for the accomodation. Why should he do this, and why should the note be charged to his account if her loan was an entirely independent transaction, in which he had and could have no interest? It might have been because he, as her husband, was willing to do more for her than he would be likely to for a stranger; but things which might have been are not sufficient to overcome the legal presumptions created by the statutes.

The fact that Mr. Yesler joined in all the deeds made by his wife from the tract platted by her as "Sarah B. Yesler's Addition," is argued to be an admission on his part that this was her separate property, for the reason that as she alone had executed the recorded plat, he by join-

Under – statutes [illegible] acquired [illegible] marriage [illegible] deed [illegible] expressing a [illegible] consid. – presumed [illegible] com. prop. [illegible] presumption [illegible] rebuttable [illegible] clear [illegible] convincing proof [illegible] acquired [illegible] gift [illegible] consid. [illegible] furnished [illegible] grantee's sep. prop.

The fact [illegible] husband permitted [illegible] use [illegible] arising [illegible] rents [illegible] profits [illegible] sep. real estate [illegible] her [illegible] afford [illegible] presumption [illegible] gift [illegible] her [illegible]

Where a [illegible] inheritance [illegible] rents [illegible] profits [illegible] her husband's sep. prop., [illegible] boarders, [illegible] sums she [illegible] disposed of indiscriminately [illegible] personal expenses [illegible] gifts, [illegible] confusion [illegible] separate [illegible] com. funds [illegible] forfeiture [illegible] separate [illegible] prop. thus [illegible]

Lands [illegible] proceeds [illegible] loan secured [illegible] her separate prop. become – community prop. [illegible] hus. [illegible] ing in deeds describing property according to the plat, admitted that she had authority to do so as sole owner. The proposition is fairly met by the fact that he joined in all the deeds she ever executed, and by the query, Why should he have joined in the deeds for the lots in her plat at all since, under the act of 1881, it was not necessary for him to join in conveyances of his wife's separate property? He did not join in her mortgages to McElroy and Starr upon her donation claim; why should he have placed himself under the obligations imposed by numerous warranty deeds, if it was not necessary? It may be said that purchasers seeing the title in her name would not be satisfied with a conveyance without his joinder, and that may be the solution of it, but it would only be a guess to so solve it. The juster inference seems to be, if there be any just inference at all, from these deeds, that by joining in their execution, Mr. Yesler was treating these lots as community property, in the sale of which he had an interest; otherwise, a single quit claim to her would have relieved him of trouble and responsibility; a small consideration to be sure, but this is a case where small circumstances are all that appear. He recognized the plat, of course, by the reference in his deeds; but the recognition was for the mere purpose of description, and not for title. Had the plat been filed by a perfect stranger the legal effect of the deeds would be the same, both as to the land conveyed and the dedication of streets.

These views require a reversal of the decree of distribution as to all the lands in controversy, excepting those described in the power of attorney to Manville S. Booth (exhibit 2).

We think it will be for the convenience of parties that the cause be remanded to the superior court, with instructions to set aside the decree appealed from, and enter a new decree, distributing the donation lands, the "Wilson farm" and the real estate described in the Booth power of attorney to the parties as before, and the remainder of the property in controversy to Mr. Yesler as the community property of himself and Mrs. Yesler, and it is so ordered. As between the heirs-at-law, including Mr. Yesler, the respondent here should be allowed, out of the separate estate, all her costs of both appeals.

Anders, C. J., and Hoyt, Scott and Dunbar, JJ., concur.

Note. — Says [illegible] commingling.
If [illegible] 8,000 [illegible] traced it [illegible] her
separate prop. But [illegible] commingling [illegible]
[illegible] traced. "Separate & sole" [illegible] constitute
a deed [illegible] spouse [illegible] sep. prop. [illegible]
[illegible] sep. prop. [illegible] extrinsic
ev. Presumption [illegible] prop. acquired [illegible]
marriage [illegible] com. prop. unless estopped [illegible]

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MARGARET E. WEYMOUTH, Respondent, v. MARCUS
A. SAWTELLE, Receiver, et al.,
Appellants.

(14 Wash. 32. 1896.)

Appeal from Superior Court, Clallam County.--Hon. James G. McClinton, Judge. Affirmed.

The opinion of the court was delivered by

Gordon, J.--On the 2d day of June, 1893, the appellant, Marcus A. Sawtelle, Receiver, etc., recovered a judgment in the superior court of Jefferson county against one Andrew Weymouth (respondent's husband) on a community debt. Thereafter execution was issued, and a levy made on certain real estate, the legal title to which was in the name of the respondent. Thereupon respondent brought this action to restrain the appellants from selling said real estate, alleging the same to be her sole and separate property. From a decree entered upon findings of the lower court in favor of respondent, the case is brought to this court upon appeal. The court below found as a fact that "on or about the 20th day of April, 1891, the plaintiff (respondent) acquired said property by purchase . . . with her separate funds, and the consideration mentioned in the deed . . . conveying the aforesaid described property, to-wit, $2,400.00, was the separate funds and money, and separate property of the plaintiff (respondent) . . . and was the only consideration paid for said property."

It appears from the evidence and the court found as a fact that at the time of the purchase and for many years prior thereto, the respondent and said Andrew Weymouth were husband and wife, and in the absence of any testimony, the presumption would be that said property, having been acquired during the existence of the marital relation, was community property, but this presumption under our law is a disputable, and not a conclusive, presumption. As was said by this court in Yesler v. Hochstettler, 4 Wash. 350 (30 Pac. 398):

> "But the assertion of an exception merely requires the production of proof either that the conveyance was in fact a lawful gift, or that the consideration was furnished by husband or wife individually out of funds or property which he or she was entitled, under the law, to hold as separate property. Whatever satisfies the court or jury of the truth of one or the other of these probative facts, will authorize the finding of the ultimate fact that the subject of the conveyance was separate and not common property, and thus the presumption will be overcome."

We have examined the evidence incorporated in the statement of facts sent up, and think that it fully justified the finding of the lower court above quoted. Briefly summarized, it appears therefrom, that at the time of her marriage to Andrew Weymouth, she was presented by her relatives with certain money as a wedding gift. With a portion of said money she in the year 1871 purchased and paid for thirty acres of land located on Dis-

dovery Bay. The title to this land was taken in the name of her husband, but the evidence is clear and satisfactory that it was purchased entirely with the separate money of the respondent alone. In 1891 the said thirty acres of land were sold, and with the proceeds thereof respondent purchased the land in question, and took title to the same in her own name. It is contended by the appellant that the statute in force in 1871 required the wife to file an inventory in the auditor's office of any lands claimed as her separate estate, and that her failure to file such inventory operated as a waiver of her right to claim the same. This statute, however, was repealed long prior to the acquisition by the respondent of the lands here involved, and it does not appear from the record that the appellant Sawtelle was a creditor of the community consisting of the respondent and Andrew Weymouth consisting of the respondent and Andrew Weymouth at any time prior to the sale of said thirty acres, with the proceeds of which respondent purchased the real estate which is the subject of this action. Upon the entire record, we are entirely satisfied that a correct conclusion was reached by the court below, and its decree will be affirmed.

For Pl.

Hoyt, C. J., and Scott, Anders and Dunbar, JJ., concur.

The presumption [illegible] existence [illegible] marital relation [illegible] com. prop., [illegible] disputable [illegible] rebutted [illegible] proof.

The [illegible] married woman [illegible] file inventory [illegible] her separate estate [illegible] required [illegible] statute [illegible] she acquired prop. [illegible] 1871, [illegible] operate [illegible] waiver [illegible] her [illegible] her sep. estate [illegible] prop. [illegible] she acquired [illegible] proceeds [illegible] held [illegible] 1871, long [illegible] repeal [illegible] statute requiring [illegible] filing [illegible] inventory, especially [illegible] it [illegible] extended [illegible] com. [illegible] consequence [illegible] absence [illegible] inventory,

CORA ATTEBERY et al., Plaintiffs and Appellants,
v. B. F. O'NEIL et al., Defendants and Appellants.

(42 Wash. 487. 1906.)

Cross-appeals from a judgment of the superior court for Spokane county, Neal, J., entered January 2, 1905, upon findings by the court after a trial on the merits without a jury, in an action of ejectment. Reversed and action dismissed.

Per Curiam.--On the 13th day of September, 1884, the Northern Pacific Railroad Company agreed to convey the south half of section 31, township 21, North, Range 45, East, W. M., in Spokane county, to Adelbert H. Wheeler, by written contract of that date. On the 9th day of October, 1884, said railroad company agreed to convey lots 3 and 4, of section 5, township 20, North, Range 45, West, W. M., in Whitman county, to Thomas Coakley, by a like written contract. Coakley thereafter assigned his contract to Wheeler, and Wheeler assigned both contracts to M. M. Cowley as security. On the 26th day of June, 1887, Wheeler agreed to convey the lands embraced in both contracts to Hardin T. Attebery, in consideration of sixty bushels of wheat per acre, to be delivered in six annual installments of ten bushels to the acre each. At the instance of Wheeler, this contract was entered into between Attebery and Cowley, to whom the railroad contracts had been assigned. Some time thereafter the indebtedness due from Wheeler to Cowley was paid or taken up, and at the request of the former the railroad contracts and the wheat contract were assigned by Cowley to Ham & Son.

During the years 1888, 1889, and 1890, something over thirteen thousand bushels of wheat were delivered by Attebery to Ham & Son, under the above contract. In the latter part of the year 1890, D. T. Ham, the surviving partner of the firm of Ham & Son, agreed to accept $4,500 in cash in lieu of the balance of the wheat to be delivered under the wheat contract, and Attebery, the other party to the contract, agreed to pay that amount. The necessary assignments were thereupon executed to enable Attebery to obtain title from the railroad company, and on the 26th day of February, 1901, the lands embraced in both contracts were conveyed to Attebery by the railroad company. At or about the same time, Attebery and Samantha Attebery, his daughter, mortgaged the premises to the Deming Investment Company, for about $5,000, to enable them to make payment to D. T. Ham in satisfaction of the wheat contract.

Upon the execution of the wheat contract in 1887, Attebery, his wife and three daughters entered into possession of the lands described therein. In December, 1888, after the delivery of the first installment of wheat under the wheat contract, amounting to forty-two hundred bushels, the wife of Attebery, and the mother of the present plaintiffs, died intestate. It does not appear that any administration was ever had upon her estate. Some time prior to March 20, 1893, Attebery remarried, and on that day he and his second wife mortgaged the above described lands to the defendant O'Neil, to secure the payment of the sum of $1,891.50. This mortgage was regularly foreclosed, and the defendant O'Neil now

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holds and claims the land under and by virtue of a sheriff's deed. The plaintiffs brought this action as heirs at law of their deceased mother, to recover an undivided one-half interest in the property, and for an accounting of the rents and profits. The court below awarded them an undivided seven-eighty-thirds of the property, and a like proportion of the net rents and profits. From this judgment both parties have appealed.

The two principal questions presented on the appeal are, (1) Did the mother of the plaintiffs have an interest in the property in controversy which passed to her children by operation of law upon her death? and (2) is the defendant O'Neil a bona fide purchaser for value without notice? The conclusion we have reached on the last question is decisive of the case. The court below found that the defendant O'Neil had full notice and knowledge of the right, title and interest of the plaintiffs as heirs of their deceased mother, at the time of the execution of the mortgage under which he claims title, but with this finding, we cannot agree. It is not claimed that O'Neil knew the former Mrs. Attebery, or knew that she or her children had or claimed any interest in the property, until long after the execution of the mortgage under which he now holds. Nor did he have record notice. The only instrument of record affecting the title, aside from the deeds to Attebery, was the mortgage executed by Attebery and his daughter to the Deming Investment Company. The record of this mortgage was no notice of any claim on the part of the children, for as to them it was without the chain of title. The utmost notice it imported was that Attebery was unmarried at the time of its execution. Nor is there any merit in the contention that the residence of the plaintiffs upon the land with their father gave notice to third parties of any claim they might have to the premises. The occupation of land by minor children with their parents is entirely consistent with the full legal and equitable title in the parents, and is not of itself any notice of a claim on the part of the children. The court would perhaps have been justified in finding that the defendant O'Neil knew that the plaintiffs were the children of Hardin T. Attebery, by a former wife, but this would not be sufficient to charge him with notice of their claim to the property.

A purchaser must, no doubt, exercise due diligence to ascertain the status of his several grantors at the time they acquired and conveyed the property, but he is not bound to go outside of and beyond the record to ascertain whether any such grantor had an equity in the premises before he acquired his title, and whether he was married or single when such equity was acquired. If such were the case, records and deeds would be of little avail, and the evils resulting from the adoption of such a rule would far outweigh any benefits to be derived from it. If a grantee is unmarried at the time he acquires title to the property, and the record discloses no equity in him prior to the conveyance, a purchaser is under no obligation to look beyond this, and if he parts with his money in good faith, and without notice of any latent equity, the law will protect him.

We are therefore of the opinion that the defendant O'Neil is a bona fide purchaser for value, without notice, and that he took the title free from any claim or equity that the plaintiffs or their deceased mother may have had in the premises. The judgment is therefore reversed, with directions to dismiss the action.

In the Matter of the Estate of CHARLES E. MASON.

RAYMOND MASON, Appellant, v. LILLIAN B.
MASON, Administratrix etc., Respondent.

(95 Wash. 564. 1917.)

Appeal from a judgment of the superior court for Clarke county, Beck, J., entered August 26, 1915, upon findings in favor of the defendant, in an action to try title to real property, ~~tried on the merits to the court. Reversed.~~

Fullerton, J.--On April 1, 1914, Charles E. Mason died intestate, being then seized of eighty acres of land, situated in Clarke county. The respondent, his then wife, was afterwards appointed administratrix of his estate. In the course of the administration, it was thought necessary to sell all, or some portion, of the real estate mentioned, and to that end the administratrix filed the usual petition applicable in such cases for such a sale. In the petition, she did not set forth the nature of the title by which Mason held the property at the time of his death, but evidently proceeded on the assumption that it was either Mason's separate property or property of the community composed of herself and Mason.

In answer to the notice to show cause, the appellant, Raymond Mason, appeared and filed written objections to the proposed sale. He set forth, in effect, that Mason had been married prior to his marriage with the respondent; that he was the sole issue of such marriage; that the land in question was acquired during the coverture of Mason and his mother and was their community property; that his mother died while the coverture existed, and that he, as her sole heir, became vested on her death with an undivided one-half interest in the property. He further averred that, if the land or any part thereof should be sold, he would lose his interest in the same, and prayed that the sale be postponed until his rights in the property could be determined.

In reply to the objections, the respondent, after certain admissions and denials, set up three affirmative defenses. In the first she averred that the property in question was acquired by Mason prior to his marriage with the appellant's mother and was at all times his separate property.

For a second defense, she set up that the community composed of Mason and the appellant's mother was, at the time of the mother's death, indebted in the sum of approximately $1,000, and that, of the indebtedness existing at the time of her death, some $180 was for obligations incurred in liquidating such indebtedness, and that the remainder was largely incurred in purchasing provisions, supplies, and household necessities, which went to the support of the family of which the appellant was a member.

For a third defense, she set forth that her mother had, during the time of the respondent's marriage with Mason, loaned and advanced to the use of the community composed of herself and Mason sums of money aggregat-

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ing $700, which had never been returned to the mother, and that the mother had assigned all of her right to the indebtedness represented thereby to the respondent. She further averred that the principal part of the improvements now on the premises had been put thereon subsequent to her marriage with Mason; that at the time of such marriage only about ten acres of the land had been cleared and made tillable, while at the time of his death the cleared area had been increased to thirty acres, of which four acres had been planted to fruit trees and was then a producing orchard; that at the time of her marriage the land was worth not to exceed $2,000. Elsewhere it appeared that the land was valued by the appraisers of Mason's estate at $4,000. The prayer of the reply was that the court determine the several interests of the parties to the estate; that the respondent be given credit for the money advanced by her mother; and that the interest of the appellant, whatever the court should find it to be, be charged with its proportionate share of the debts of the estate. There was a prayer also for general equitable relief.

The trial court treated the proceeding as one to try title to the property, heard the evidence of the parties, and adjudged from the proofs that the property was the separate property of Charles E. Mawon, and granted the petition to the extent of permitting a sale of twenty acres of the land.

The evidence disclosed the following facts: The land was formerly a part of a 100-acre tract which stood in the name of one Charles E. Whitney. On December 7, 1878, Whitney entered into a contract with Levi A. Mason by which he agreed to sell to Mason the entire tract for a consideration of $600, a part to be paid on the execution of the contract and the remainder within a named period thereafter. Mason paid the balance on November 27, 1880, and on that date received a warranty deed from Whitney conveying the title to him. At the time the contract was entered into, Levi A. Mason orally promised his brother Charles to deed to him (Charles) 80 acres of the land, on the payment of one-half of the purchase price of the entire tract. At the time of the promise, Charles was a single man, and for a part of the time lived on the common premises with Levi and the members of his family. During this time, he did a little work in the tract he was to receive in the way of slashing, and started the erection of a small log cabin thereon. He, however, paid no part of the purchase price prior to his marriage with the appellant's mother in August, 1881; his earnings prior to that time going, as his brother testified, to the payment of an obilgation he had incurred in that state of his former home before he came to the territory of Washington. The father and mother of the appellant first took up their residence on the land some time in 1882, the year following their marriage. Between that time and the time the husband received a deed to the property, on November 14, 1887, they paid the purchase price in small payments, both contributing thereto from their joint and individual earnings, the final payment being made some two months before the deed was executed. All of the substantial improvements, also, were placed on the premises subsequent to the marriage, the principal part of them subsequent to the entry thereon in 1882.

The trial court held that Levi A. Mason took the property as trustee for Charles E. Mason, and that the property was at all times thereafter the separate property of the latter; that the appellant had no interest

therein other than as an heir of Charles E. Mason; that the whole of the property was subject to the debts of Charles E. Mason existing at the time of his death, and to the payment of the costs and expenses of administering his estate. An order was entered directing that the administratrix sell in the manner prescribed a specifically described twenty acres of the tract for the purpose of paying such debts and expenses. From this order, this appeal is prosecuted.

It is our opinion that the conclusion of the court is not justified by the facts. It may be doubted, we think whether the oral promise of the brother Levi to convey the property to Charles on the payment of the purchase price created any interest in the land in favor of Charles which was enforceable, either in law or equity. There was no enforceable express trust since the agreement was not in writing. Gottstein v. Wist, 22 Wash. 581, 61 Pac. 715; Spaulding v. Collins, 51 Wash. 488, 99 Pac. 306; Pilcher v. Lotzgesell, 57 Wash. 471, 107 Pac. 340; Kinney v. McCall, 57 Wash. 545, 107 Pac. 385; and no resulting trust, since there was no payment or part payment of the purchase price by the cestui que trust, nor other equitable circumstance bringing the transaction within the rule. Nor was the contract in any sense a mortgage; that is, it was not an advance or loan of money from Levi to Charles in which the title to the land was taken as security for the repayment of the money. Charles assumed with reference to the transaction no obligations whatsoever. His part of the transaction was purely optional, and if any obligation at all arose on either of the parties to the transaction it arose after the completion of the payments of the purchase price. But these payments were not made by Charles. They were made by the community composed of Charles and his then wife, and clearly the land became on the execution of the deed the community property of Charles and his then wife.

The case of Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305, principally relied upon by the respondent, is not contrary to this principle. That was a case of a loan of money with the title taken in the name of the person making the loan as security for its repayment; the lender, as we held, occupying the dual position of mortgagee and trustee of a resulting trust. Moreover, it was a controversy between the lender and the borrowers, not a controversy between the legal representatives of the borrowers as to the nature of the title taken by them. We cannot think it in any way bears upon a controversy like the one before us.

Our conclusion is that the property in controversy was the community property of Charles E. Mason and the mother of the appellant, and that the appellant, on the death of his mother, became entitled to an undivided half interest in the property, subject to the community debts then existing.

The foregoing conclusion renders it necessary to notice the other questions presented. The interests of the appellant cannot be charged with the expenses incurred in the support of the family of the surviving member of the community incurred subsequent to the dissolution of the community, even to the extent that such expenses were increased by the appellant's membership in the family. The burden of supporting him was voluntarily assumed by the surviving member, and his representatives cannot now charge back this cost thereby incurred to the appellant's property.

where [illegible] husband [illegible] title [illegible] marriage [illegible] preexisting oral promise [illegible] option [illegible] community [illegible] community prop.

Expenses incurred [illegible] supporting [illegible] family [illegible] son [illegible] his decedent's mother's half [illegible] com. prop. even [illegible] extent [illegible] support [illegible] burden [illegible] support [illegible] voluntarily assumed [illegible] surviving husband.

The [illegible] son [illegible] mother's half [illegible] com. [illegible] thereon [illegible] surviving husband, either at com. [illegible] betterment statute, Rem. § 797, allowing recovery [illegible] "holding [illegible] faith [illegible] color [illegible] title adversely [illegible] claim [illegible] owner".

Nor is the appellant liable for the improvements that have been placed upon his property. The liability, where it exists at all, is purely one of statutory creation, no such liability existing under the common law. Our statute (Rem. Code, Sec. 797) is not sufficiently broad to create it in this character of case. Under our statute, the improvements must have been made by one "holding in good faith under color or claim of title adversely to the claim of" the owner. These conditions do not exist in the case before us. As to the claim for the money advanced by the respondent's mother, in so far as it was used to liquidate the debts owing at the time of the appellant's mother's death, it could have been properly charged against his estate had the claim been made within the period of the statute of limitations. But the mother's death occurred in 1893, more than twenty years prior to the assertion of the claim. The statute (Rem. Code. Sec. 1368) provides that no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent. The statute is a statute of limitations, and fixes a time when the real property of which a person dies seized cannot be charged with his debts. It is applicable here, and since the limitation fixed has long since expired, the court has no power to charge the appellant's property with the obligations existing at the time of the death of his mother.

The order is reversed, with instructions to stay the proceedings until such time as the property is partitioned between the appellant and the owners of the interest with which Charles E. Mason died seized.

Mount, Holcomb, and Parker, JJ., concur.

IN THE MATTER OF THE ESTATE OF JOSEPH H. PARKER.

E. C. MILLION, Executor, et al., Respondents, v. ANNIE
C. PARKER, Administratrix, Appellant.

(15 Dec. 65. 1921.)

(15 Wash. 65)

Appeal from an order of the superior court for King county, Frater, J., entered June 26, 1920, directing an ~~administratris of an estate~~ to include additional property in the inventory~~, after a hearing before the~~ court. Affirmed.

Tolman, J.--This is an appeal from an order made by the superior court directing the appellant, as administratrix of the estate of her deceased husband, to include in her inventory and reports certain real estate which she claims as her separate property.

It appears that Joseph H. Parker died in June, 1918, leaving a will, in which he named E. C. Million and two others as his executors. The appellant, the widow of deceased, claimed her right under the statute to administer the community estate, and was thereafter duly appointed administratrix with the will annexed of such estate. After qualifying, she filed an inventory which omitted two pieces of real property , one the home which was occupied by the deceased and his family from the time of its purchase in 1901 until his death, and thereafter by appellant; and the other being a half interest in certain property deeded to Thomas Sanders and J. H. Parker in 1906, referred to in the record as the Sanders-Parker property, and occupied at all times by tenants.

On the trial below, respondents introduced in evidence the deed by which title was obtained to the home property, showing that appellant was named as the grantee therein; then introduced the deed to the Sanders-Parker property in which the names of Thomas Sanders and J. H. Parker appear as grantees. They then called appellant as a witness, and by her testimony established that she was the wife of Joseph H. Parker at the times when these titles were acquired, living with him within this state, as such, and rested.

Appellant then offered to prove that, at the time Mr. Parker bought the home property, he said he was buying it for his wife; that Mrs. Parker received the deed direct from the grantors, and held possession of it at all times since; that Mr. Parker had repeatedly made statements to different persons that both pieces of property belonged to his wife; that he had made a written statement of his assets to a bank for the purpose of establishing a line of credit, which statement omitted any mention of either piece of propertyl that the fire insurance policy on the Sanders-Parker property was written in the name of Mrs. Parker as owner, probably at Mr. Parker's direction, or with his consent, and that the income from this property had all been required to pay taxes and assessments, as explaining why Mrs. Parker had received none of it. These offers of testimony were all rejected by the court, and appellant's assignments of where prop. [illegible] com funds [illegible] existence [illegible] community [illegible] deed [illegible] its status [illegible] com. prop. [illegible] fixed [illegible] shown [illegible] oral ev. [illegible] husbands' intent [illegible] deed [illegible] her. gift [illegible] thereafter treated [illegible] her separate estate.

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error are all based on such rulings and the results which follow therefrom.

We think the trial court committed no error in making its rulings. "The status of the property is fixed at the time of the purchase." Hatterhagen v. Meister, 75 Wash. 112, 134 Pac. 673, and cases there cited.

The evidence offered did not tend to show that Mrs. Parker furnished any part of the purchase price from her separate estate, and at the most would only tend to show that the husband in directing the deed to be made to the wife and delivered to her, intended by such acts to make a gift of the property to the wife. Such an oral gift cannot be recognized as a valid conveyance of real property under our statute. There was nothing in the evidence offered to overcome the presumption that the purchase was made by the community, with community funds, and the title therefore vested in the community, "and unless divested by deed, by due process of law or the working of an estoppel must remain there." In Re Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009.

"It was not claimed by the respondent that there was any written agreement, or that any of their property was passed by deed from one to the other, and it is conceded that the property in dispute was acquired and improved by community funds earned after marriage. The statute makes such property community property. Bal. Code, Sec. 4490 (P. C. Sec. 5876.) An oral agreement that such property might be held as separate property by one of the spouses would be in the face of this statute and also another statute which provides that all conveyances of real estate or any interest therein shall be by deed. Bal. Code, Sec. 4517 (P. C. Sec. 4435), Churchill v. Stephenson, 14 Wash. 620, 45 Pac. 28; Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162; Sherlock v. Denny, 28 Wash. 170, 68 Pac. 452. If such agreement was made as found, it was therefore void, and did not change the character which the law gave to the property." Graves v. Graves, 48 Wash. 664, 94 Pac. 481.

See, also, Carpenter v. Brackett, 57 Wash. 460, 107 Pac. 359; Union Savings & Tr. Co. v. Manney, 101 Wash. 274, 172 Pac. 251, and Rowlings v. Heal, 11 Wash. Dec. 161, 190 Pac. 237.

We are aware that there are expressions in some of the cases decided by this court which, taken by themselves, might tend to a contrary view, but these cases are clearly distinguishable upon the facts from the instant case, and no one of them denies the rule which we here attempt to follow.

We are clearly of the opinion that the ruling of the trial court was right, and the judgment appealed from is affirmed.

For Pl.

Parker, C. J., Main, Mitchell, and Mount, JJ1, concur.

DIMMICK v. DIMMICK (#14,635)

(95 Cal. 323, 1892)
Pac. Rep. Vol 30 542.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Delos M. Dimmerick, administrator, against Sarah Smith Dimmick, From a judgment for defendant, and order denying a new trial, plaintiff appeals. Affirmed.

Garoutte, J. This is an equitable action to cancel and set aside a deed of certain realty, executed by Elmer D. Dimmick to the defendant, and asking that said property be decreed to be the property of the estate of Julia A. Dimmick, deceased. Said Julia was the first wife of Elmer D. Dimmick, and it is contended by plaintiff that at the time this property was conveyed to defendant it was the property of the estate of said deceased wife, Julia, by virtue of its being her separate property at the date of her death. It is further contended that the deed to the defendant was never delivered, and hence no title passed to her. Judgment went for the defendant, and this appeal is prosecuted from that judgment and the order denying a motion for a new trial. The deed sought to be set aside is a deed of gift made to the defendant, Sarah Smith Dimmick, the second wife of Elmer D. Dimmick, and dated February 2, 1889. The finding of the court, that the realty described in this deed was not the separate property of Julia A. Dimmick, deceased, is fully supported by the evidence. It appears that she and Elmer D. Dimmick were married in Pennsylvania, nearly 50 years ago; that subsequently he received a gift of a small tract of land from his father, and that later she received some money from the estate of her father. He also obtained a loan of the sum of $1,360 from his father-in-law, which he invested in land. This indebtedness was afterwards canceled upon the understanding that it should be deemed as an advancement to them from her father's estate. It is not necessary to an affirmance of the judgment in this case that we examine in detail the status of the real estate purchased by the husband with the above-mentioned funds, although it would seem that the wife's separate estate would consist of the indebtedness due to her father from the husband rather than the real estate previously purchased with the funds which created the indebtedness. As described by one of the witnesses, the husband was an "industrious, thrifty, economical, and intelligent farmer and blacksmith." He also traded in real estate, and whatever money his wife received, by inheritance or otherwise, passed into the common fund, and its identity forever lost in the purchase of numerous tracts of real estate, the titles to which were all taken in his name. It is unnecessary to follow in detail the migrations of these parties to Iowa, and from thence to California; it appears that the husband always had the complete and entire control and conduct of the property, selling and buying where and when he chose. While the evidence discloses that the proceeds of the realty owned in Pennsylvania were brought to Iowa, there is no evidence that any money was brought by them to California. It further appears that they made a deed of gift of quite a valuable tract of land to a son, and that

the husband was the recipient of a gift of $1,500 from his brother. In addition to all these facts, there is no evidence whatever as to the source of the particular funds which paid for the land involved in this litigation.

The principle of law is established beyond question that real estate acquired by purchase during the existence of the married relation, no matter whether the deed be taken in the name of the husband or wife or both, creates the presumption that such property is common property. While this presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence. Ramsdell v. Fuller, 28 Cal. 42; Morgan v. Lones, 78 Cal. 62, 20 Pac. Rep. 248. In order that property may maintain its status as separate property, it is not necessary that it should be preserved in specie or in kind; yet, when it has undergone mutations and assumed other conditions, it is absolutely necessary, in order to maintain its character as separate property, that it be clearly traced and located. Chapman v. Allen 15 Tex. 283; Rose v. Houston, 11 Tex. 326; Schmeltz v. Garey, 49 Tex. 60. The money expended in the purchase of the realty involved here should have been traced back to the separate estate of Julia A. Dimmick, not by way of surmises and probabilities, but by plain and connected channels. While the wife had some separate property very many years ago, at that time it passed into the hands and commingled with the funds of her husband, an active business man engaged in numerous speculations in land, so numerous and so varied that at the date of this recent transfer it is impossible to say that one dollar of the money which she received from her father's estate, or its proceeds, passed into this tract of land. The burden was upon the plaintiff to make the proof, and thus overcome the presumption which is indulged inby the law. He had failed to do so; hence the finding of the court cannot be disturbed.

The evidence fully supports the finding that the deed was delivered by the grantor to the defendant. It was clearly his intention to vest the title of the realty in her, and the fact that he requested her to refrain from recording the instrument until after his death was entirely immaterial. Conceding he believed that if she should die first he could conceal or destroy the deed, and thereby reinvest the title in himself, still such fact does not militate against the sufficiency of the delivery at the date of the conveyance, or destroy his clear intention to part with the title and vest the same in her. Let the judgment and order be affirmed.

We concur: Harrison, J; Paterson, J.

Dimmick v. Dimmick. (#14,634)
(95 Cal. XVIII)

Supreme Court of California July 15,1892)

Department, 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Delos N. Dimmick, administrator, against Sarah Smith Dimmick. From a judgment for defendant, and order denying a new trial, plaintiffs appeals. Affirmed.

Per Curiam. Upon the authority of Dimmick v. Dimmick, 30 Pac. Rep. 547, (decided of even date herewith,) the judgment and order are affirmed.

LAKE v. LAKE

(18 Nev. 361)
1884.

Appeal from the Seventh judicial district court, Washoe county.

Leonard, J. This is an action for divorce on the ground of cruelty. In her complaint plaintiff alleges that there is a large amount of property belonging to the community, and prays for an equal division thereof between herself and defendant. Defendant denies that any of the property described belongs to the community, and alleges that it is all his individual estate. When the cause came on for trial it was agreed by the respective parties, and ordered by the court, that the issues relating to the disposition of the property should be withdrawn from the consideration of the jury, and reserved for future consideration and determination by the court, in case a divorce should be granted. Upon the special findings and verdict of the jury the divorce prayed for was granted. Subsequently, the court, sitting without a jury, tried the issues relating to the character and disposition of the property, and found that it belonged to the defendant, individually. Thereupon a formal decree was entered, as follows:

"Upon the verdict of the jury heretofore returned in this case and the order of the court made thereon, and in consideration of said verdict and order, it is adjudged and decreed that the marriage relation heretofore existing between the said Jane Lake and M. C. Lake be, and the same is hereby, set aside and annulled, and the said parties be, and they are hereby, released therefrom, And upon the findings and decision of the court heretofore made upon the issues joined between the parties concerning the property, * * * it is ordered, adjudged, and decreed by the court that the property, real and personal, described in the complaint, is, and that it be and remain, the separate property of the defendant, M. C. Lake, and that the plaintiff take no part thereof or interest therein except as hereafter specifically decreed."

Then follows an order that the defendant pay plaintiff monthly, so long as she shall remain unmarried, the sum of $150, and $50 for the child, and that said sums be and remain a charge and lien upon certain real property described. In the decree the court reserved jurisdiction to modify the allowance at any time. Defendant did not move for a new trial, or appeal from the judgment or any part thereof. But plaintiff so moved as to the issues respecting the property rights alone. She did not ask for a new trial of the issues touching the alleged cruelty and her right to a divorce. The motion was denied, and this appeal is from the order denying a new trial, and from "that part of the judgment * * * affecting the questions of alimony and the property rights of the parties to said action."

In considering an appeal from an order granting or refusing a new trial this court has the record before it that was before the court below, and in our decision we say whether or not, upon that record, the

court below erred. Since there is nothing in the statute concerning new trials authorizing the conclusion, how could we say, in any case, that the trial court erred in granting a new trial as to the entire case, or an independent part thereof, when, if it had done otherwise, we would have reversed its rulings and ordered it to proceed according to the order appealed from? Our opinion is that the court below had power to grant a new trial of the issues relating to the property alone, if the statement showed error in the trial thereof which materially affected the rights of plaintiff. The court found that, at the time of marriage, plaintiff was without property, and that she has not since acquired any by gift, devise, or descent; that, at the time of marriage, defendant owned and possessed, in his own right, valuable real estate and personal property which embraces a large portion of the property in controversy, and which has yielded large rents, issues, and profits, aggregating about $206,000; that defendant exchanged a portion of said real property, so owned by him at the time of marriage, for other real property which he now owns, and a portion he has, since his marriage, sold, and invested the proceeds thereof, together with the rents, issues, and profits, in other property now owned by him; that, since their marriage, plaintiff and defendant have neither jointly nor severally engaged in any profitable or remunerative business out of which any of the money or property in controversy was acquired, and that there is now no common property; that the rents, issues, and profits of the separate property of defendant, owned by him at the time of marriage, accruing since, after deducting therefrom all losses and depreciations suffered by defendant, aggregate more than the total cost of all the property acquired since the marriage, and more than the total value of all the property in question, the title to which has been acquired by defendant since the marriage; that all the property in controversy, except that which defendant owned at the time of marriage, has been acquired by him by purchase or exchange,--part by actual barter or exchange for real property owned by him at the time of marriage, and all the balance by purchase with moneys arising from sales and rents of separate real estate and personal property, tolls arising from separate property, and interest received from loans of moneys that belong to defendant alone; that, at the time of marriage, defendant owned a toll road and bridge, and collected tolls thereon, conducted the Lake House hotel and a merchandise business therein, cultivated some lands, and had certain moneys at interest; that after the marriage and until March, 1872, he conducted and maintained said toll road and bridge, and collected from tolls about $75,000 net; that plaintiff contributed no labor, advice, or assistance in the operation of said road or bridge, or in the farming business mentioned; that immediately after marriage plaintiff and defendant commenced to reside at the hotel, where defendant conducted the hotel business until the fall of 1868, when the premises were rented until January, 1870, at which time defendant resumed possession and conducted the business thereof until the summer of 1871; that during all of said times plaintiff resided with defendant, and contributed, by her labor and advice, to the business; that defendant had his board and lodging out of the hotel business, and plaintiff was maintained, and her children by a former husband educated, therefrom; that the crops raised by defendant on his own lands, up to 1868, were either used in the hotel or sold and the proceeds had by him; that in 1866 defendant kept a hotel or eating house at Meadow Lake, California, for four or five months; that he constructed certain buildings necessary for use in the business, which were afterwards destroyed by fire; that plaintiff labored as a cook and in serving upon the table,

and contributed greatly to the business; that there was no profit in the hotel business at either place; that during all of said times defendant was engaged in loaning money at interest, collecting interest money, rentir buildings and lands of his separate estate, selling such lands, and investing the proceeds of such interest, sales, and rents in loans, purchase of other lands, and in the construction of buildings, and that, in these operations, plaintiff contributed no labor or assistance; that since 1871 defendant has conducted farming operations on the lake ranch, consisting of 907 acres of improved land, of the value of about $40,000; that 33 acres of this land were acquired by exchange of lands owned by defendant before marriage, and the balance by purchase since marriage.

The evidence is undisputed that 354 acres of this land were acquired by deed, March, 1870, for a consideration of $4,250; 160 acres, September 1871, for $850; 33 acres from Hatch, by exchange; 80 acres by patent from the state, May, 1874, and 40 acres, also by patent, December, 1875, both in the name of plaintiff. The court found that this property was the separate estate of defendant, evidently upon the ground that they were paid for out of his individual fund. Large crops have been raised on this ranch, which were fed to stock thereon or sold, and cattle and horses were raised and marketed. Plaintiff and defendant resided on the ranch several years, advised together, and contributed their labor in their respective departments. Plaintiff faithfully performed all the duties of a wife. We deem it unnecessary to state other findings.

The question presented to the court below was whether, in law, the legal title to the whole or any part of the property described in the complaint was in the community or the defendant, and we are called upon to say whether or not the evidence is sufficient to support the findings. Prior to the statute of 1865 (St. 1864-65, 239) the property rights of husband and wife were governed by the common law. That statute only affected property subsequently acquired. Darrenberger v. Haupt, 10 Nev. 46. It follows that all property owned by defendant at the time of marriage, as well as that purchased by him, and the rents, issues, and profits of the same up to March 7, 1865, the date of the first statute, belonged to defendant as his separate estate. But it is claimed by cousel for plaintiff that under that statute the rents, issues, and profits of defendant's separate estate, until the passage of the statute now in force, (1 Comp. Laws, par. 151,) became common property. The statute of 1865 was passed pursuant to the constitution, which provided that "all property, both real and personal, of the wife, owned or claimed by her before marriae, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband." Under a similar constitutional provision the legislature of California passed an act defining the rights of husband and wife, (St. 1850, 254,) wherein, like our statute of 1865, it was declared that "all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be his separate property. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be

common property." But the California statute also provided that "the rents and profits of the separate property of either husband or wife shall be deemed common property." This provision was left out of our statute, although the first part of the section of the California act containing it was copied verbatim.

In George v. Ransom, 15 Cal. 323, the supreme court held that the legislature had not power, under the constitution, to say that the fruits of the property of the wife should be taken from her and given to her husband or his creditors; that the sole value of property is in its use. Counsel for appellant admit the correctness of that decision, but they say there is no such constitutional provision as to the property of the husband, and inasmuch as the statute of 1865 did not make his rents, issues, and profits separate estate, they belong to the community, because acquired after marriage, and not by gift, devise, or descent. It is said, also, that the supreme court of California affirmed this theory of the law in Lewis v. Lewis, 18 Cal. 659. But it must be remembered that when that case was decided the statute of 1850, before referred to, was in force, except as affected by the decision in George v. Ransom. It was the law then that the rents, issues, and profits of the husband's separate property should be deemed common property. If we concede that the legislature might make the profits of his separate estate common property, still the fact remains that it did not do so, but, on the contrary, expunged the very words of the California statute that produced this result.

Again, since under the constitution the legislature could not lawfully make the rents, issues, and profits of the wife's estate common property, in the absence of affirmative words making them such, the presumption is that there was no intention of doing so. Now, the first and second sections of the statute of 1865 must be construed together. If, under the first, the profits of the wife's separate estate belonged to her, then we cannot say that, under the second, they belong to the community. And, if, under the first, the profits of her estate belong to her, it cannot be said that a different rule should prevail as to him, for the language is precisely alike as to both. Besides, it would be unfair to take from one what is given to another. And, too, it is evident from section 3 that the legislature intended that the wife's profits from her separate property should remain hers. It provided that an inventory of the wife's separate property, except money in specie, should be executed and recorded, and thereafter a further inventory should be made and recorded of all other separate property afterwards acquired, excepting money while in specie and unconverted, and excepting the rents and profits of her separate property included in the original or any subsequent inventory, if the same was money, so long as it should remain in specie and unconverted. When the rents and profits of her separate property were converted into property other than money, it was her duty to record an inventory of the same; but the rents, issues, and profits of her estate, while in specie, belonged to her without an inventory. And, under section 5, all property belonging to her included in the inventory, as well as money in specie not so included, was exempt from seizure for the debts of her husband. Thus we find a plain recognition of the wife's right to the rents, issues, and profits of her separate estate. We are satisfied that, under the statute of 1865, the rents, issues, and profits of defendant's separate estate did not become common property. Williams v. McGrade, 13

Minn. 51 (Gil. 39); Wells, Sep. Prop. Mar. Wom. Sec. 112; Glover v. Alcott 11 Mich. 482; Bish. Mar. Wom. Sec. 50, 94, 632, 776.

It is conceded that property acquired during coverture presumably belongs to the community. The burden is on the defendant in this case to overthrow this presumption by proof sufficiently clear and satisfactory to convince the court and jury of the correctness of his claim, as in other cases. Respecting the amount and character of the evidence required to overcome the presumption mentioned, the supreme court of Michigan has expressed our views in Davis v. Zimmerman, 40 Mich, 27, where it is said:

'Some Pennsylvania cases are cited, in which the court has used somewhat strong language respecting the evidence which should be required to make out a gift from husband and wife. Chief Justice Black said, in Gamber v. Gamber, 18 Pa. St. 363, 366, that a married woman claiming property must show her right 'by evidence which does not admit of reasonable doubt.' This is a very strong statement, and lays down a much more severe and stringent rule than is applied to other persons. In this state no such distinction is recognized. Convincing proof is required, but nothing more. No doubt the circumstances of the relation, and the facility with which frauds may be accomplished under the pretense of sales or gifts between husband and wife, ought to be carefully weighed in determining whether or not a gift has been made; but, when all are considered, the one question, and the only question, is whether the wife has established her right by a fair preponderance of evidence; if she has, no court has any business to require more."

And see 2 Bish. Mar. Wom. Sec. 136, 138, 140; Tripnor v. Abrahams, 47 Pa. St. 229; Seeds v. Kahler, 76 Pa. St. 267; Earl v. Champion, 65 Pa. St. 195; Glover v. Alcott, 11 Mich. 493.

The court did not err in admitting the testimony of witness Lake to show that the real consideration was other property given in exchange, instead of the money stated in the deeds from Crocker and Osbiston. Peck v. Brummagim, 31 Cal. 447; Ramsdell v. Fuller, 28 Cal. 37; Peck v. Vandenburg, 30 Cal. 11; Salmon v. Wilson, 41 Cal. 595; Higgins v. Higgins, 46 Cal. 259; Wedel v. Herman, 59 Cal. 516.

It is admitted that all property described in the complaint, which was owned by defendant before marriage, remains his. It is equally true that property purchased with, or taken in exchange for, such property is his also, as well as the rents, issues, and profits of his separate estate. But the question arises, what are properly rents, issues, and profits, under the facts proven? The contention in this case comes mainly from a difference of opinions as to the proper solution of this query. The subject is beset with difficulties which must be met as the cases present themselves, and each must be decided upon its own peculiar facts. Extreme cases may be suggested upon both sides, in which it would be difficult to mete out exact justice by following the theory of either plaintiff or defendant; but such examples are not uncommon in the law, and courts have never considered them sufficient to justify a departure, in an individual case, from well-established legal principles. We are satisfied it is not necessary to prove that property is, in fact, the prod-

uct of the joint efforts of the husband and wife in order that it may be declared community estate. If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise, or descent, or by exchange of his individual property, or from the rents, issues, or profits of his separate estate, it belongs to the community. Such property is common, although the wife neither lifts a finger nor advances an idea in aid of her husband. She may be a burden and a detriment in every way, or she may absent herself from the scene of his labors, know nothing of his business, and no nothing for him; still it is common. On the other hand, property acquired by either spouse in any one of the ways mentioned in the statute--that is to say, by gift, devise, or descent, or by exchange of individual property, or coming from the rents, issues, or profits of separate property--belongs to him or her, as the case may be, and the other has no more right to share it than a total stranger. After marriage it was defendant's duty to support his wife, but he was under no legal obligation to accumulate community property. He could attend to his separate estate and support his family from that if he was so inclined.

If common property is acquired, the wife has her statutory rights therein, but she has no vested rights in or lien upon his time or labor. If he is indolent and barely supports the family, or if he spends his time in increasing his separate estate, instead of enriching the community, her remedy is an appeal to his better nature. The law furnishes no aid. And since the law gives to each spouse the rents, issues, and profits of his or her separate estate, it cannot be true that they become common property by reason, simply, of the marriage relation. But the record shows, and the court finds, that the plaintiff assisted, in her department, in carrying on the Lake Hotel business, the Meadow Lake Hotel or Eating-house, and the Lake ranch; and after the old Lake House was destroyed by fire, the men employed upon defendant's toll-road boarded at his private house, and plaintiff cooked and washed for them. She also advised with defendant at times about his business. Do these facts make the profits from the sources just named, if any there were, community estate, provided the property used and out of which the profits came belonged to the defendant alone? Most of the cases to which we shall refer upon this question involve the right of a wife to claim profits arising from the use of her separate estate, as against creditors of the husband, when they have been increased by his labor and skill. There are cases intimating, at least, that in a contest between husband and wife, when the husband has increased the income of the wife's estate by his labor, she might claim the entire product, although she could not do so as against her husband's creditors. See Wells, Sep. Prop. Mar. Wom. Sec. 47; Hockett v. Bailey, 86 Ill. 77; Wilson v. Loomis, 55 Ill. 355; Skillman v. Skillman, 13 N.J. Ch. 409. But we think the principles of law that control these cases should govern this. Parrott v. Nimmo, 28 Ark. 358. Such, also, is the opinion of counsel for plaintiff. Lewis v. Jones, 24 Cal. 100, shows that wheat raised upon land of the wife was seized under an execution against her husband. He had employed men, purchased seed-wheat, made contracts to be paid out of the crops, superintended the farm labor, and performed some himself. After referring to George v. Ransom, supra, the court said:

"That the husband cannot, by an management, supervision, or labor, acquire any interest in the estate itself, is conceded, and, by parity

of reason, he cannot acquire any interest in the increase, for that is hers also, and upon the same terms, the latter being a corollary of the former proposition. There is no magic in the touch of manipulation of the husband, by force of which separate is transformed into community property. If he acquires, as contended by respondents, any right whatever, as against his wife, by virtue of his supervision and labor, it is not his right in the nature of a lien on the thing supervised, or upon which the labor is bestowed, but merely a right to compensation, and his creditors could only proceed by the process of garnishment. In the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his services, and in either case there would be only an imperfect obligation which neither husband nor his creditors could enforce. The doctrine contended for would banish the husband from the premises of the wife, and deprive her of his counsel and guidance, for his presence there might bring ruin instead of affording protection."

In Webster v. Hildreth, 33 Vt. 457, it appears that Mrs. Hildreth, one of the defendants, became the owner of wild land by deed from her father. Hildreth and wife moved onto the land, and there lived until the suit. With the help of their children they cleared up a large part of it, erected buildings, and made valuable improvements. The land was originally worth two or three hundred dollars, but at time of suit was valued at twelve or fifteen hundred, the increased value having been in part from the rise of the land in price, and part in the improvements. Hildreth contributed to the improvements by his labor and money, but during the whole time the title to the land was in his wife. This fact so appeared of record, and was generally known. The plaintiff, having a judgment against Hildreth, levied on seven undivided twelfths of the farm, claiming that the husband's labor, earnings, and money had contributed to the improvements, and made up that much of its value. The supreme court held that in the absence of an agreement in some legal form that his labor and improvement of the farm should vest in him some interest therein, or entitle him to compensation, he had no equitable claim upon the farm, and could claim nothing for his services, and that creditors had no greater right against the wife's estate than her husband had.

In Rush v. Vought, 55 Pa. St. 442, the evidence showed that the husband and wife lived on the latter's farm. She took the entire management, but he assisted somewhat, her children doing most of the work; he generally sowed the grain. The trial court charged the jury that "the labor on the farm was bestowed by her husband and his children, and the grain, hay, and the other crops raised were the joint products of such labor and the land; and if the personal property now claimed by the wife was paid for out of the products, the husband had an interest in it. It cannot, therefore, be said to have been purchased and paid for out of the separate funds of the wife." Commenting upon that instruction, the supreme court said:

"Thus the sowing of the grain, which was Jacob Rush's chief labor, mingling with the tillage, carried away from Mrs. Rush not only all the products of the soil, (hay as well as grain,) but the stock purchased with their proceeds, when converted by Mrs. Rush into money or bartered. A deduction which leads to such wholesale destruction of the wife's rights

of property cannot be founded in correct principle. The error arose from an oversight of the true foundation of the wife's right. This is not the case of property purchased during coverture, where the price of it, presumptively, if not actually, came from the husband. But here, the title to the products grows out of the title to the land itself. The ownership of the farm carries with it at law, and in equity, the right to its products. No change can take place in the title to the fruits of the soil, without the owner parts with his title or possession, or permits its cultivation for the benefit of another. But the labor of others for the owner, through mingling in the production, creates no title to the products. The owner may be a debtor for the labor which tills his soil, or that labor may be given without a required equivalent, or for an equivalent in maintenance, which is consumed in its use; but this gives no usufruct or ownership in the product of the tillage. It matters not, therefore, whether the labor, when thus rendered, be that of the husband or another; without contract for the product, or cultivation by the husband for himself, it confers no title or usufruct."

To the same effect are Hanson v. Millett, 55 Me. 188; Holcomb v. Savings Bank, 92 Pa. St. 342; Silveus' Ex'rs v. Porter, 74 Pa. St. 451, Wieman v. Anderson, 42 Pa. St. 317; Manderback v. Mock, 29 Pa. St. 46; Hamilton v. Booth, 55 Miss. 61; Bongard v. Core, 82 Ill. 19; Garvin v. Gaebe, 72 Ill. 448; Coon v. Rigden, 4 Colo. 283; Russell v. Long, 52 Iowa, 250; S. C. 3 N. W. Rep. 75; Dayton v. Walsh, 47 Wis. 117; S.C. 2 N. W. Rep. 65; Feller v. Alden, 23 Wis. 303; Noe v. Card, 14 Cal. 607; McIntyre v. Knowlton, 6 Allen, 566; Knapp v. Smith, 27 N. Y. 279; Abbey v. Deyo, 44 N. Y. 348; Gage v. Dauchy, 34 N. Y. 295; Whedon v. "Champlin", 59 Barb. 65; Budkley v. Wells, 33 N. Y. 520; Picquet v. Swan, 4 Mason, 455; Wells, Sep. Prop. Mar. Wom. Sec. 113, 162, 176.

In the case of Buckley v. Wells, supra, the property in question consisted of a stock of goods in a country store of which the wife was the sole proprietor. The husband conducted the business in her behalf in the name of "E. Smith, Agent," and nominally, if not really, for her as his principal. The entire capital was contributed from her separate estate, except money borrowed in the name of "E. Smith, Agent," and the profits accruing from the use of such capital. The business was carried on for several years. The wife took no part in the management of the store. The point was made that the goods belonged to the husband, and were liable for his debts, since his labor entered into and formed a part of the property and increased its value. The court held that the goods belonged to the wife. In Abbey v. Deyo, supra, plaintiff, the wife, was engaged in the business of buying and selling flour, etc. Her husband was her agent, and as such bought and sold, and carried on the business for her. The decision of the court of appeals was the same as in Buckley v. Wells. In Whedon v. Champlin, supra, plaintiff, the wife, owned a boat and carried on the business of boating. In Wieman v. Anderson, supra, the proof was clear that the stock of goods in Anderson's store, in January, 1858, became the separate property of his wife by gift from her brother. Those goods were sold and others purchased in her name so that in November, 1859, when plaintiff levied his execution, issued upon a judgment against the husband, few, if any, articles of the original goods remained. The stock levied on was an entirely separate and distinct stock from that given to Mrs. Anderson, although it was purchased with the pro-

ceeds of the former stock. Mrs. Anderson did not do business as a sole trader. Both husband and wife attended to the business. Most of the purchases were made in the name of the wife, but the husband continued to attend to the store. He made sales and received moneys. The Pennsylvania statute then in force declared that property which accrued to a married woman should be owned, used, and enjoyed by her as her separate property. The court said:

"The use and enjoyment here referred to must be such as are consistent with the nature and kind of property. A store of liquors and cigars cannot be used and enjoyed in the same manner as household furniture. They are merchandise, and it is the nature of merchandise to be sold and exchanged. When, therefore, the statute authorizes married women to own, use, and enjoy merchandise as their separate property, it legalizes trade by them; it makes them merchants."

In Manderbach v. Mock, supra, the wife bought livery stock on credit, rented a stable, and carried on a livery business in her own name. Her husband and children attended to the stable, taking care of the horses and vehicles, but she controlled the business. The court sustained her claim to the property. In most of the other cases cited it was held that the title to crops followed the title to the land, although they were produced by the joint efforts of the husband and wife, or by the husband alone, if the wife owned the land. But under our statute the sole question is whether property claimed by either spouse belonged to him or her at the time of marriage, or has since been acquired by gift, devise, or descent, or has come from the rents, issues, or profits of separate estate. And in this or any other case, if profits come mainly from the property, rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor and skill of one or both may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community. It may be difficult in a given case to determine the controlling question, owing to the equality of the two elements mentioned, but we know of no other method of determining to whom profits belong. In the use of separate property for the purpose of gain, more or less labor or skill of one or both must always be given, no matter what the use may be; and yet the profits of property belong to the owner, and in ascertaining the party in whom the title rests, the statute provides no means of separating that which is the product of labor and skill from that which comes from the property alone. In this case we are not burdened with the only question involved in the gase of Glover v. Alcott, 11 Mich. 480, wherein the court said:

"But it does not necessarily follow that because the statute has secured to her (the wife) the income and profits of her separate property, it has therefore authorized her to engage in any and every kind of general business which might be carried on with it or upon it, and given her the profits and income of the business as well as the property. Here is a distinct element entering into the product, beyond that of the income of her separate property."

In that case the only question was whether the wife had legal capacity to carry on the general business in which she has engaged; while here,

it cannot be doubted that defendant had that power. In relation to the decision in the case referred to, as well as in Glidden v. Taylor, 16 Ohio St. 509, and similar decisions, we content ourselves with a reference to Mr. Bishop's criticism at section 465 of volume 2 of his work on the Law of Married Women. The old hotel, with its furniture, including the bar and its fixtures, belonged to defendant. The new one was built from the proceeds of his separate property. Part of the time they were rented, and it is admitted that the rents belonged to him. At other times he carried on the business himself. In either case, if there were profits, they were the result of the ordinary use by him of the property belonging to his separate estate. Estate of Higgins, ante, 389. Having the hotel, he was obliged to rent it or run it himself. If he could make more from it by one use than another, surely there was no legal incapacity to prevent him from using it in the most profitable way; and the profits of the business belonged to him, if they came mainly from the property rather than from his personal efforts, or those of himself and wife. Any other conclusion would compel a husband, under certain circumstances, to remain idle, or make him divide profits which the law gives to him alone.

Without further discussion, our opinion it that the rents, issues and profits which accrued from the toll road and bridge, the Lake House and the Lake ranch, belonged to defendant. Such profits, if any there were, came mainly from the ordinary us his individual property. The Meadow Lake venture was in 1865-66. Prior to that time there had been no community business in the sense that the proceeds thereof belonged to the community. Defendant went there to keep a hotel. Whatever expense was incurred in the beginning must have been borne by him out of his separate funds. He carried on business there five or six months, and during the time built a hotel or boarding-house. The record fails to show the extent of the outlay or the amount of business done. We are therefore unable to say that the profits belonged to defendant. He testified, however, that "the hotel there made no money; we came out about even, owing to the fire." From this it is argued that prior to the fire they must have made money, and that if any property was purchased with such profits it belonged to the community. Defendant advanced money or obtained credit for the business, and received the proceeds. The building of the hotel was as much a legitimate expense chargeable to the business, and to be paid from its proceeds, as was the cost of supplies or the wages of hired help. Defendant had as much right to repay his advances, or satisfy and indebtedness incurred by him for the business, as he had to pay any other demand. The advances were made, or the indebtedness was incurred, for the business, and it is fair and proper that they should be paid from the proceeds. The meaning of defendant's testimony is that the proceeds of the business were about as much as the entire expense, including the cost of property burned; that by reason of the fire ther were no profits; in other words, that the property burned represented the profits. By reason of the Meadow Lake enterprise defendant at no time had more money to invest in property than he had before engaging in it, or than he would have had if it had not been undertaken. If we are correct so far, it cannot be said that the court erred in its findings as to the balance of the property in controversy.

In view of the result now reached, it is urged by counsel for appellant that this court may and should order a division of defendant's prop-

erty. After divorce granted to plaintiff the law imposes upon defendant the duty of supporting her according to his ability and condition in life. The court allowed plaintiff $150 a month for herself and $50 a month for the child, and retained jurisdiction to increase the allowance at any time upon proper showing. We deem it unnecessary to decide in this case whether or not, upon granting a divorce on the ground of cruelty, courts have power to divest the husband of the title to his separate estate. The division of property, by the statute, is left to the legal discretion of the trial court, and this court ought not to interfere unless the discretion given has been abused. Upon the evidence before us we cannot so say. It appearing by the records of this court that defendant, H. C. Lake, had died since the taking of the appeal in this case, and that by order of the court C. T. Bender, administrator of his estate, has been substituted as defendant and respondent in the place of said deceased, the said C. T. Bender, administrator, is hereby substituted herein as party defendant and respondent, and the judgment and order appealed from are affirmed.

Hawley, C. J., dissenting. I agree with the conclusions reached by the court that the court below had the power, and it was its duty to grant a new trial of the issue relating to the property rights of the parties, if there was any error which materially affected the rights of the plaintiff; that all property owned by the defendant at the time of his marriage, and allproperty which has since been acquired with funds derived from the rents, issues, and profits of such property, and all property acquired by an exchange of property owned by him at the time of his marriage, is his separate property. But I am unwilling to give my assent to the proposition that the profits, if any, derived from the hotel and saloon business, in which the defendant was engaged, would be his separate property. I am of opinion that the profits, if any, made in the hotel and saloon business would belong to the community. There is a distinction that must be kept constantly in view between a business which does not, necessarily, derive its profits from the fact of the ownership of the property in which it is conducted, and a business which depends entirely for its profits upon the fact of the ownership of the property. If the owner rents a house, the money collected for the rent belongs to him because of his ownership of the property. The profits from the property in such a case do not, necessarily, depend upon the efforts or skill of either spouse, although some labor would be required. If, instead of renting the house, the owner thereof engages in a business which is in a great degree dependent upon the skill and labor of the parties or of either of them, the profits (or a portion of them, at least) realized from that business would be community property.

Several authorities are cited to sustain the proposition that the fact that the property was acquired by the joint efforts of the husband and wife does not necessarily make it community property. This is true with reference to cases where the accumulations of property were derived from conducting and carrying on the farming business, and other business of like character. In such cases it is almost universally held that the crops growing upon and produced from lands which are the property of the wife, do not become community property by the mere fact that the husband gave his time, labor, and skill in the production thereof. Why? The reason given is that, in the absence of any agreement to the contrary, the title to the products belongs to the owner of the land; that the

[illegible]

[illegible]

[illegible]

ownership of a farm necessarily carries with it the right to the products grown thereon. In such a case the skill or labor of either spouse has nothing to do with the question of the ownership of the crops. It is also held in many cases, upon the same reasoning, that the increase of personal property follows the ownership. In Rush v. Vought the court of common pleas was of opinion that the fact that the labor on the farm was bestowed by the husband and the children, necessarily gave the husband an interest in the products of the soil; but the supreme court took a different view, and said that the error of the court below arose from an oversight of the true foundation of the wife's right. "This is not the case of property purchased during coverture, where the price of it, presumptively, if not actually, came from the husband. But here the title to the products grows out of the title to the land itself. The ownership of the farm carries with it, at law and in equity, the right to its products. No change can take place in the title to the fruits of the soil without the owner parts with his title or possession, or permits its cultivation for the benefit of another. But the labor of others for the owner, though mingling in the production, creates no title to the products. The owner may be a debtor for the labor which tills his soil, or that labor may be given without a required equivalent, or for an equivalent in maintenance which is consumed in its use, but this gives no usufruct or ownership in the product of the tillage. It matters not, therefore whether the labor, when thus rendered, be that of the husband or another; without a contract for the production or cultivation by the husband for himself, it confers no title or usufruct." 55 Pa St. 443.

This is the key-note of the entire decision. It is the reasoning upon which the opinion is based, and the ground upon which the conclusion is reached. The authorities cited are all alike. They declare that the title to the crops follows the title to the land, even if produced by the joint labor of both husband and wife, or by the labor of the husband alone, if the wife owns the land; that the care, control, and management by the husband of his wife's property, and his labor upon it, do not change the title to the land. Thus, it is said, "A husband may devote histtime and skill to the management of his wife's property and the products will belong wholly to the wife, because they are but the accretions of her property, and he has a right to give her his labor." Hamilton v. Booth, 55 Miss. 62. The fact that her husband may have done some work about raising the crops "does not affect her title to the property." Garvin v. Gaebe, 72 Ill. 448. "The right to the profits and natural increase of tangible personal property is incident to and results from the ownership." Williams v. McGrade, 13 Minn. 52., (Gil. 39) But the principle upon which these and kindred cases were decided does not apply to cases where a business is conducted, the profits of which are derived by means of the joint labor and skill of the husband and wife, or either of them, independent of the title to the property. It does not apply to a business carried on in the wife's name with her money, where "the profits arose in part from his time and skill." So held in relation to the business of buying and shipping grain and stock, (Wortman v. Price, 47 Ill. 23,) the lumber business, (Wilson v. Loomis, 55 Ill. 355,) and the foundry and machine business, (Glidden v. Taylor, 16 Ohio St. 509.)

In Wortman v. Price the court said: "We have no hesitation in saying that if she advances capital to her husband, with which he engages

in trade, such capital and its fruits in the business will be subject to the husband's debts, even though he may claim to be acting as his wife's agent, and doing business in her name." Referring to a former case, where the court had said the husband might act as agent for his wife, the court said this simply meant "that he may act as her agent for a particular transaction, or , generally, for the control of her property or the investment of her funds. He may lease her property and collect the rents, or invest her money, or change the character of her investments, if authorized by her, and he may do this without subjecting her property to his debts. But we did not say * * * that she could make him her agent for the purpose of engaging in trade, to be managed by him, and to which all his time and energy might be devoted, and that the property embarked in such trade and its profits would be beyond the reach of his creditors. Such is not the law."

In Glidden v. Taylor the court said:

"Disrobing, then, the transactions of all matters of form, and looking at the naked facts, it appears that Mr. Taylor, being skilled in the business, established a manufactory for the manufacture and repair of various kinds of machinery, which was conducted under his sole charge for several years; that under his energetic, skillful, and prudent management the business was profitable; that, after applying so much of the profits as was necessary to keep up the establishment, he applied the remainder to the purchase, in his wife's name, of the real estate described in the petition; * * * that the entire accumulations from the business, above expenses, amounted to six or seven thousand dollars; and that in establishing and conducting the business he had used the money of Mrs. Taylor, his wife. The foregoing is the substance of the transaction; and the question is whether the title of Mrs. Taylor to the property thus acquired is, in equity, unimpeachable by the plaintiffs, who are antecedent creditors of the husband. The property in controversy can, in no just sense, be said to be either the income, increase, or profits of the money given to Mrs. Taylor."

In New Jersey, the court, in deciding that the wife is entitled to the rents and products of her farm or other property, and the products of the labor of herself and minor children, distinguishes these from the proceeds of trade carried on by her with her separate property. Johnson v. Vail, 14 N. J. Eq. 429; Quidort v. Pergeaux, 18 N. J. Eq. 480.

In Quidort v. Pergeaux the court said:

"The law was intended to protect the property and earnings of a married woman, and not the property or earnings of her husband, against his creditors; and when, as in this case, they mix up the earnings of the wife with those of her husband, so that they cannot be separated, the husband cannot make a clear, distinct gift of her own earnings to his wife, and they remain, as at common law, his property."

Numerous other cases might be cited, but the above are sufficient to show that a distinction, such as I have stated, exists. This distinction should not be lost sight of in applying the principle of law to the special facts of the case. The profits, if any, of the hotel and bar

business would come in part from the fact of ownership of the property in which the business was conducted; but the success of the business would, in a greater degree, depend upon the tact, time, skill, labor, and efforts of the husband or wife, or both. In my opinion, the evidence in this case does not justify the findings of the court that no profits were realized from the hotel and saloon business conducted by the defendant and his wife. It is true that the defendant testified in general terms that the Lake House, as conducted by him, "did not pay expenses;" that "the hotel did not make anything." Why? When the testimony is carefully reviewed, it will be ascertained that the hotel business, in the opinion of the defendant, was conducted for the benefit of his toll-road, and hence, in his estimation of receipts, he gives the toll-road, instead of the hotel, the credit of all the profits. With reference to the property purchased after the marriage, the defendant testified as follows: "In making purchases of property which I have purchased since my marriage with plaintiff I did not borrow any money, but used my own money." He further testified that when they were married he was possessed of considerable property, which afterwards became of great value, and from which he derived large sums of money, and that at the time of his marriage his wife had nothing but her clothes. The inference to be drawn from this testimony is that the property purchased after his marriage was acquired by his separate means; but it is questionable, to say the least, whether it is, independent of the question of profits in the hotel business, of so positive, clear, and convincing a character as to overcome the presumption of the law that all property acquired during coverture is community property.

In Schmeltz v. Garey, 49 Tex. 60, the court decided that the mere fact that at the time of the marriage the husband had considerable money and the wife had nothing; that after the marriage the parties lost money, --without explicitly tracing the purchase money or consideration to the separate property of the husband,--will not rebut the statutory presumption that property purchased during the marriage is community property. Winter v. Walter, 37 Pa. St. 156, is substantially to the same effect. But, be that as it may, it is apparent that defendant's testimony in this respect is based upon his assertion that the hotel business did not make any money, and hence his testimony upon this point must be considered subject to the question whether or not there were any profits derived from the hotel business. I am of opinion that the testimony shows that there might and would have been a profit in that business if it had been credited with the business ittransacted. If there were any profits legitimately arising from the hotel and saloon business, the money was mingled with the receipts from the toll-road, and from the rents, issues, and profits of defendant's separate property; and the receipts of money were so blended together as to prevent the community property, or the amount of it, from being traced. It would, therefore, be impossible to tell what proportion of the community funds, or the funds of defendant's separate estate, was thereafter used in the purchase of other property, and the result would be that the property so purchased should be treated as community property.

In Meyer v. Kinzer, 12 Cal. 251, the court said:

"The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community, of which each spouse is a member, equally contributing, by his or her industry, to its

prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage, or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either is that it belongs to the community; exceptions to the rule must be proved. * * * This invariable presumption, which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment or as the price of, the property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estates. Any other rule would lead to infinite embarrassment, confusion, and fraud. In vain would creditors or purchasers attempt to show that the particular property seized or bought was not owned by the claimant before marriage, and was not acquired by gift, devise, or descent, or was not such property under a new form consequent upon some exchange, sale, or investment In vain would they essay to trace through its various changes the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration."

I am of opinion that the judgment and order appealed from should be reversed.

Under statute of 1865 rents, issues and profits of married [illegible] sep. prop. [illegible] com. prop. [illegible] Prop. acquired [illegible] marriage presumably belongs [illegible] community [illegible] burden of proof [illegible] df. [illegible] overthrow presumption.

Testimony of df. [illegible] admissible [illegible] show not consid. [illegible] prop. acquired [illegible] marriage [illegible] prop. [illegible] exchange instead [illegible] deed.

[illegible] prove [illegible] prop. [illegible] part [illegible] product of joint efforts of hus. [illegible] order [illegible] declared com. prop. [illegible] acquired [illegible] marriage by efforts of hus. alone [illegible] by gift etc. or by exchange [illegible] prop. [illegible] rents, issues, and profits [illegible] sep. estate [illegible] belongs [illegible]

FENNELL v. DRINKHOUSE (ELLIOTT, Intervener. S. F. 2441

(131 Cal. 447)
(63 Pac. 734)
Supreme Court of California, Jan 29 1901.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. R. Webb, Judge.

Action by William Fennell against John A. Drinkhouse, special administrator of the estate of Winifred Fennell, deceased, and Maria Teresa Elliott, special administratrix appointed to succeed defendant, intervener, From a judgment for plaintiff, and from an order denying a new trial intervener appeals. Affirmed.

Haynes, C.---Winifred Fennell, deceased, was the wife of the plaintiff, William Fennell. She died in the city and county of San Francisco, November 28, 1899, leaving estate therein, and the defendant Drinkhouse was duly appointed special administrator of her estate. On February [illegible], 1900, as such special administrator, he took possession of the sum of $4,223.57 then on deposit with the Hibernia Savings & Loan Society in the name of Winifred Chapple (by which name the deceased was sometimes known), and this action was brought by the plaintiff against said Drinkhouse to recover said money, claiming that it was acquired by the plaintiff and said Winifred after their marriage, and that it was community property, to which he was entitled. After the appointment of defendant Drinkhouse as special administrator, a will executed by said deceased in her lifetime was found and probated, and Maria Teresa Elliott was duly appointed and qualified as executrix; but, said William Fennell having taken an appeal from the order probating said will, her letters were revoked, and she was appointed special administratrix of said estate, succeeding defendant Drinkhouse, and as such she filed a complaint in intervention in this action, claiming that the whole of said moneys were the separate property of said Winifred in her lifetime, and belonged to her estate, and that she, as special administratrix, was entitled to the possession of the whole thereof. The plaintiff answered said complaint in intervention, the cause was tried by the court, and findings were for the plaintiff, to the effect that he was entitled to $1,815.77 (part of said sum of $4,223,57) and costs, and that the intervener was entitled to the remainder of the fund, less disbursements made by defendant Drinkhouse as special administrator, and judgment was entered accordingly. This appeal is by the intervener from the judgment, and from an order denying her motion for a new trial.

Appellant formulates three propositions upon which a reversal is claimed, and states that the various assignments of error range themselves under one or the other of them. These grounds will be noticed in their order; 1. "That plaintiff has mistaken his forum and his remedy." It is contended that the department of the superior court in which the settlement of the estate of Winifred Fennell was pending alone had jurisdiction of the subject-matter of this litigation, under section 1723 of the Code of Civil

Procedure, and that the remedy therein provided is exclusive. Said section has no application. It appears to relate to real estate alone. There would seem to be no reason for recording in the recorder's office a certified copy of a decree determining whether the money here in controversy belonged to the plaintiff or to the estate. Nor, under the facts of this case, is it a proper subject of litigation in the probate department of the superior court. If the money in question was, in fact, community property in the possession of Mrs. Fennell at the time of her death, it is no part of her estate. It is still in the hands of the special administrator; but that fact does not create a debt against the estate in favor of the plaintiff, for which he must present his claim and take chances as to the solvency of the estate. If the community property in question were horses or cattle, there can be no doubt that plaintiff could recover possession of them in an action of claim and delivery, and it is equally clear that he could not in such cases have that remedy in the probate proceedings concerning Mrs. Fennell's estate.

2. Appellant further contends that "plaintiff cannot recover in this action because he failed to identify the specific fund for which he sues." Counsel, I think, shows quite conclusively that "this cannot be treated as a suit on a claim against the deceased," not only because no claim against the estate was presented, but because it is not a suit against the estate, but is an action against John A. Drinkhouse "for money had and received, to and for plaintiff's use and benefit, in the said sum of $4,223.57." There is no question about the identity of the fund received and held by defendant Drinkhouse. The only questions are: Is it community property, or, if part only is community property, how much? Appellant contends that the evidence is insufficient to justify the finding that any part of the m money deposited in the bank by the wife was community property. All the money found in the bank and received by the special administrator was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption, therefore, was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant. This presumption can be overcome "only by evidence of a clear, certain, and convincing character establishing the contrary, and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof, the presumption as to the community character was absolute and conclusive." In re Boody's Estate, 113 Cal. 682, 686, 45 Pac. 858, and cases there cited. There was evidence tending to show that a portion of the money deposited by Mrs. Fennell in the Hibernia Savings & Loan Society was the proceeds of the sale of some real estate which was her separate property, and it also appeared that certain rents thereof entered into the account; but beyond that the evidence was confused and conflicting, and wholly insufficient to overcome the presumption that it was community property. Evidence that the husband did little work, and therefore did not earn the remainder of the money after deducting the proceeds of the real estate, was inconclusive, if not immaterial, since, if the deposit consisted wholly of the earnings of the wife while living with her husband, it was nevertheless community property,

3. It is furtherinsisted that "the right of plaintiff to claim the money as community property is barred by the statute of limitations." The possession of community property by the wife is the possession of the husband. The right of the survivor does not depend upon the custody or poss

session of the community property prior to the death of the deceased spouse. No other questions are discussed. I advise that the judgment and order appealed from be affirmed.

We concur; Gray, C.; Smith, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

where a [illegible] died leaving [illegible] bank [illegible] deposited [illegible] her marriage ~~[illegible]~~ and [illegible] admin [illegible] her estate [illegible] used [illegible] her ~~proceeds [illegible] her sep. real estate,~~ surviving husband [illegible] receives [illegible] com. prop., ~~presumption [illegible] com. prop. [illegible] submitted~~ presumption is that the → ~~[illegible] husband [illegible] little [illegible] com. it~~ ~~[illegible] deposit [illegible] nevertheless com. prop.~~ money [illegible] com. prop. [illegible] burden [illegible] dey. [illegible] contrary, hence, [illegible] identity [illegible] fund pl. [illegible] required [illegible] identify [illegible] specific [illegible] com. funds.

where [illegible] died [illegible] deposited [illegible] her marriage [illegible] proceeds [illegible] her sep. real estate [illegible] presumption [illegible] com. prop. [illegible] submitted [illegible] husband did little [illegible] com. it, [illegible] deposit [illegible] nevertheless com. prop. [illegible] consisted wholly [illegible] earnings [illegible] her husband.

It [illegible] claim, [illegible] commenced [illegible] hus. [illegible] com. prop. until death [illegible] com. prop. [illegible] hus.

THAYER et al. v. CLARKE et al.

(77 S. W. 1050)

Court of Civil Appeals of Texas. Dec. 29,1903.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Suit by Maria L. Clarke and others against W. W. Thayer and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Gill, J. W. W. Thayer, Sr., and Maria Cochran intermarried in 1848 in the state of New York, and thereafter lived together as man and wife in that state until 1863, when Maria, his wife, died intestate. They were never at any time in Texas. During the existence of this marriage there were deeded to the husband certain lands in this state, the deed being executed by a brother of Maria Cochran, naming the husband as vendee, and reciting a cash consideration. Maria left surviving at her death her husband and Maria Louise Clarke and Maria Cochran Skinner, the latter two being the children of said marriage, and her sole heirs at law. The purposes of this opinion do not require that these lands, which consist of many separate tracts, should be more fully described. In 1866, W. W. Thayer, Sr., married the appellant Mary L. Thayer, by whom he had two children, viz., Elmer J. Thayer (who died the----day of 18---, leaving a will devising his estate to his mother), and the appellant W. W. Thayer, who, for convenience, will be referred to herein as W. W. Thayer, Jr. W. W. Thayer, Sr., died intestate in 1887, leaving surviving him as his sole heirs at law his wife, Mary, W. W. Thayer, Jr. and the appellees, children of his first wife. At the time of the death of W. W. Thayer, Sr., he was still seized of a large portion of the lands above mentioned, but had sold a part, using the proceeds as his own. The appellees, children of the first marriage, brought this suit as sole heirs of their mother and joint heirs with appellants of their father, alleging that the lands so acquired were the community property of their father and mother, and praying for its distribution among the heirs according to its status as such under the laws of this state.

Appellants answered, admitting the marriages; the acquisitions of lands in Texas, as alleged; the heirship of appellees and appellants; the residence and permanent citizenship of all concerned in the state of New York; but they denied that the first wife of W. W. Thayer, Sr., had ever at any time any community interest in any of the lands mentioned in the petition. They further averred that said lands were conveyed to Thayer Sr., by deed of date of 1854; that Maria Cochran Thayer was not a party to said conveyance; that from a date prior to their marriage until after the latter's death the common law of England, in so far as it affected the right of married women to property acquired during coverture, was in force in New York, and is still in force and effect; that under the provisions of said law the first wife had in said lands only an inchoate right of dower, which was lost by the fact that her death preceded that of her husband; that the money with which such lands were purchased was acquired by the husband during the marriage with his first wife, and was by the law

of New York his separate property, and that thereupon the lands purchased therewith became his separate property; that therefore he had the right to sell the same during his lifetime, and that such lands as he was seised of at his death passed according to the laws of descent and distribution of Texas--that is to say, and undivided one-fourth to each of his children subject to the one-third life estate in favor of the second wife. A trial before the court without a jury resulted in a judgment according to plaintiffs' theory of the case, and defendants have appealed.

Inasmuch as there is no controversy as to what the form of the judgment should be in case the one contention or the other should prevail-that matter being controlled by certain undisputed facts and an agreement of the parties-we will not burden this opinion with a detailed descriptive statement of the sales made by Thayer, Sr., or their relation to the tracts remaining unsold. To cover these matters we adopt the findings of fact of the trial judge, though we cannot assent to the presumption indulged by him, for the reasons which we will shortly disclose. The contention of appellees is that the law of this state controls the status of the title of real estate situated here, and this without reference to the domicile of the owners, and that an application of this rule to the facts of this case upholds the judgment of the trial court that the land in question is community estate. The subproposition is that mere proof of marital domicile in New York, the prevalence of the common law there, and the acquisition of the lands during marriage is insufficient to rebut the presumption indulged under the Texas law. Appellants' contention is that under the facts the law of New York controls, and that the presumption of community estate is conclusively rebutted. No other questions are presented for our decision. When plaintiffs showed, as they did, the intermarriage of their parents, the acquisition of Texas lands during the marriage, and the death of their parents intestate, they could rest, for they had made out a prima facie case. The presumption indulged under the Texas law that all lands acquired during the marriage are community property rests upon the further presumption that it was acquired by funds earned during the marriage. These are rebuttable presumptions, and when the basic one is shown to be unfounded in the particular case the other falls for lack of support. It is also the law in this state that all personal property acquired during marriage is presumed to have been earned by one or the other of both members of the community during the existence of the marriage, and this presumption prevails until it is made to appear that it was owned gy the one or the other prior to the marriage or was acquired during marriage by gift, devise, or descent. In view of these principles it is plain that the status of the title to real estate acquired in this state during marriage does not at last depend upon the fact that it was acquired during marriage, but upon the method of its acquisition. The fact of the marriage does no more than control the presumption to be indulged until the actual facts are made to appear. In the absence of the facts, or, if the facts are consistent with the presumption, the property is adjudged to be community. If the facts rebut the presumption, the judgment is otherwise.

Much of the briefs of both parties is devoted to a discussion of the question as to whether the laws of Texas or of New York (the matrimonial domicile) should control the status of the title of the real estate in question, and many authorities are cited and reviewed. We are not in-

clined to enter the broad field covered by the briefs on this question. It would serve no useful end, and would unduly lengthen this opinion. If the rules stated above are sound, the situation is much simplified, and such a discussion rendered unnecessary. We state briefly what, in our opinion, is the law upon the point: It is well settled that as to all personal property acquired during coverture the law of the matrimonial domicile controls, such property having in theory no fixed situs. As to all real estate so acquired the law of the state in which it is situated controls, so that in conveying or incombering it, wherever the transaction may occur the evidence of the sale or incumbrance must be executed according to the requirement of the law of the state of its situs, So of the law of descent and distribution. And in all jurisdictions, so far as we know, where property is exchanged, that received in exchange is held by the same title as that parted with. So, if the husband buy real estate with his separate money, the real estate is his, wherever located. The presumption growing out of the fact of its acquisition during marriage affects only the burden of proof, and is a mere detail which becomed immaterial when the facts are established. According to the facts of this case the common law as to the rights of husband and wife prevailed in the state of New York at the date of the first marriage until the death of the first wife, except as modified by the legislative acts set out in the findings of fact filed by the trial judge. Notwithstanding these modifications, all property belonging to the wife at the date of the marriage became the property of the husband, and this was true until 18--. During the entire coverture all property of whatever kind acquired by the joint efforts of the husband and wife was the separate property of the husband. In all his real estate she had her right of dower, which being inchoate, lapsed at her death, which preceded his.

The amendments and modifications shown by the proof did not affect the husband's separate right to the marital earnings and acquisitions. Such right remained unimpaired. They simply clothed the wife with power to hold in her own right all property thereafter acquired by her by gift devise, or descent, together with rents, profits, and accretions, and to control it and dispose of it as if she were a feme sole. Such property was acquired and held in her own name, and was her separate and distinct estate, over which the husband had no power of disposition or control. We thus have this situation under the proof in this case; The appellees, heirs of the first marriage, have sued alleging that the property in controversy is community estate of the first marriage. There is no contention that their mother owned at the date of her death an undivided interest therein in her separate right. A community interest is averred, which was subject to the husband's control, and liable for his debts contracted during the marriage. The appellees nowhere contended that the husband had purchased the lands with funds partly belonging to himself and in part to his first wife, and that thereby a trust resulted in her favor, or that he bought with funds wholly belonging to her wheregy a trust resulted in her behalf; and yet by the undisputed proof the money by which the lands were acquired must, under the New York law, have been either hers in her separate right or his absolutely! Even if the sum had been jointly owned by them in undivided interests, these interests would not have been community, but the separate property of each. If, then, the husband invested such sum in Texas lands, a trust equal to an undivided half interest would have resulted to her separate use.

Texas acquired marriage presumed com. prop.

Per. prop. acquired marriage presumed (earned community.

Texas conveyed hus. resided N.Y. on an com. prop.; unknown N.Y. coverture prop. acquired joint efforts hus. sep. prop. real estate, merely dower prop. she sole. known title hus. held bought.

Held Presumption com. prop. rebutted.

Note *Wash.* held

We mention these features of the case to show that under no phase of the proof could the appellees' allegations be true, and to show further that the presumption growing out of the acquisitions of the lands during marriage was conclusively rebutted. It was not shown by any direct proof by what title the husband held the money by which the land was bought, but the fact that under the laws of New York the wife could hold property in her own name, and did so hodd valuabel estates, renders it improtable that the money with which these lands were acquired was hers to any extent or in any sense.

One of the presumptions indulged under the laws of Texas adds strength to this conclusion. We speak of the presumption that all property held during marriage was acquired during marriage, and by the joint effort of the marital partners. Here we have a husband making a purchase during marriage. There is no proof of how or where he procured the money with which the purchase was made. The presumption is it was earned by him or them during marriage. If this is true, then it was his separate funds, for the laws of his state declare it to be his. That the property, if purchased with his separate funds, became his separate property, is conceded, and the doctrine announced in Blethen v. Bonner, 93 Tex. 141, 53 S. W. 1016, and Oliver v. Robertson, 41 Tex. 422, is not assailed, and in each of them real estate bought in Texas with funds acquired ina common-law state during marriage were adjudged the separat5 property of the husband. The broad statement in Heidenheimer v. Loring, 6 Tex. Civ. App. 568, 26 S. W. 99, was not necessary to the decision of that case, and, if inconsistent with the conclusions announced in the two cases above cited, must, of course, yield. We do not regard it as necessarily inconsistent, for, as said in Blethen v. Bonner (Tex. Civ. App) 71 S. W. 291: "It is suggested that this view involves the enforcement of the law of a sister state by a Texas court in the disposition of property here situate. But not so. We have merely ascertained the law of Massachusetts as a fact in determining the quality or extent of the title to money acquired in Massachusetts by a citizen of that state and brought into and invested in this state. We simply determined the character of Blethen's title to the money with which the land in controversy was purchased, and applied thereto the laws of Texas."

For the reasons given, the judgment of the trial court is reversed, and remanded for trial and partition in accordance with these views. Reversed and remanded.

For Def.

DIXON et al v. SANDERSON.

(72 Tex.359)
(10 S.W. 535)
Supreme Court of Texas. Dec. 21, 1883.

Appeal from district court, Ellis county; Anson Rainey, Judge.

Action by T. A. Dixon and another against J. S. Sanderson. Plaintiffs appeal.

Stayton, C. J. _ This is a suit brought by Mrs. Dixon to enjoin the sale of a house and lots under an execution issued against her husband. She claims, and the evidence is sufficient to show, that some time during her coverture, with one dollar, which she had before her marriage, she bought a ticket in the Louisiana State Lottery, on which a prize of $15,000 was drawn, and that with a part of this the lots in controversy were bought and the improvements thereon made. It is further shown that the husband agreed, at the time the lottery ticket was bought, that whatever prize might be received on it should be the separate property of the wife, and that the money so drawn and property bought with it have as between the husband and wife, been treated as her separate estate. The lots were bought on June 13, 1883, and it is not made to appear how long before that time the prize was received. It is proved that there were six judgments rendered against the husband in 1879, aggregating avout $2,500, and that these were settled by compromise in October, 1883. The husband became indebted to appellee in 1877 in the sum of $200, for which a note was given, due one year after date. This note, after the expiration of nearly five years, was unpaid, when the husband renewed it by another note, which was never paid, but on which appellee recovered judgment on April 22, 1885. Under this judgment an execution issued, and was levied on the property in controversy. The purpose of this suit is to restrain a sale under this levy. Four witnesses who lived in the town of Ennis, where the property seems to be situated, and where Dixon seems formerly to have lived, testified that they had known him since 1875, and that he was then in mercantile business with another person, and failed in the year 1879, since when he has been generally considered insolvent, and without any property subject to execution. These witnesses, however, stated that they did not know of their own knowledge that Dixon had not property in Dallas county, at all times subject to execution. Dixon and wife both testified that, at the time the property in controversy was bought, he had ample means to pay all his debts, but neither of them state in what the means consisted, and it appears that the money received as a prize was placed on deposit in a bank in New Orleans in the name of Mrs. Dixon. On the case thus made the court below dissolved the injunction, and rendered a judgment for the defendant.

If the money with which the lots were bought was the separate property of Mrs. Dixon, otherwise than through gift of her husband, there can be no question of her right to an injunction; for the deed upon its face does not show it to be other than community property, and a sale under execution would cloud her title.

It is insisted that the money received as a prize became the separate property of Mrs. Dixon, by reason of the fact that the lottery ticket on which it was drawn was bought with money owned by her in her separate right. The statute declares that "all property acquired by either husband or wife during marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband and wife." Rev. St. Art. 2852. That the prize came not by gift, devise, or descent, is too clear. It came as the fortuitous result of a contract based on valuabcl consideration paid, and is but the profit on a venture, which, like other profit, not resulting from the increased value of a thing bought with the separate means of one party to the marital union, becomes the common property of the husband and wife. Property purchased with money, the separate property of husband or wife, or taken in exchange for the separate property of either, becomes the separate property of the person whose money purchases or whose property is given in exchange, in the absence of some agreement, express or implied, to the contrary; and, if the thing purchased or taken in exchange increases in value, this necessarily inures to the benefit of its owner. Such a state of fact, however, is not before us, and we are constrained to hold that all profit realized on purchase of the lottery ticket became community property.

As between the husband and wife, the facts are sufficient to show that the money received through the lottery ticket became the property of the latter through the gift of the husband; and the inquiry arises whether he was in condition lawfully to divert so much of the common property, and thus place it beyond the reach of his creditors. If the husband had ample means remaining within reach of his creditors, at the time he made the gift, to satisfy all their claims, then the gift to his wife was not fraudulent, and ought to be sustained. There is evidence tending to show that he was considered insolvent, but there was no witness who was able to say that he may not have had, at all times, in an adjoining county, property subject to execution sufficient to pay his debts. So far as shown, he seems to have paid all his debts except that due appellee, which on April 22, 1885, amounted to less than $325. The uncontradicted evidence of both husband and wife is that when she bought the property in controversy he had ample means to pay all his debts. The voluntary conveyance of property by one indebted is evidence of fraudulent intent, and the burden of showing that this did not exist rests upon the donor. This may be shown by proof on the fact that the debtor, at the time of the conveyance, had ample means remaining to discharge all his pecuniary liabilities then existing. If a donor at the time of making a gift be insolvent, his conveyance is void, for its necessary effect is to hinder, delay, or defraud creditors; but the mere fact of indebtedness alone is not sufficient to render a voluntary conveyance void. If, however, looking to the magnitude of the gift, the amount of indebtedness existing, and the value and character of the property left to the donor after making the gift, it does not appear that the assets remaining in the hands of the donor were ample to satisfy all his debts, then the voluntary conveyance ought to be held fraudulent. It should appear, also, that the property remaining in the hands of the donor, even if sufficient to discharge all his debts, was such as was readily and conveniently accessible to his creditors under the ordinary process used in the collection of debts, or a voluntary conveyance ought to be held fraudulent. In the case before us the evidence of Dixon and wife was taken by deposition, and there seems to have been no effort made to ascertain, by cro

RIDDLE v. RIDILE et al.

(Court of Civil Appeals of Texas. May 11, 1901.)
(62 S.W. Rep. 970)

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by Jabe Riddle and others against W. N. Riddle. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Conner, C. J.--Appellees, children of appellant and a deceased wife, sued to recover certain lands described in their petition as the separate property of said deceased wife, and for the community interest in certain other lands and certain personal property, including $10,000 in money, alleged to be the community property of their mother and appellant. A trial resulted in a special verdict and judgment for appellees for substantially everything claimed by them. Among other things, several of the plaintiff children testified to having seen and counted various large sums of money at and about the time of the death of their mother, and which was charged to have belonged to the community estate.

The evidence, in our judgment, is insufficient to sustain the verdict in several particulars as assigned,--notably so to support the finding that the W. N. Riddle 160-acre survey and 3 acres of the Hulet survey constituted community property, as alleged. Adopting the most favorable tendency of the evidence for appellees as to the date of marriage between appellant and the mother of appellees, and assuming that these lands were in fact not fully acquired until the date of the deed thereto, October 1, 1866, yet the interval between this date and the marriage, as insisted upon by appellees September 6, 1866, was so brief as that no presumption existed that the same were paid for with community funds; it further appearing without any substantial contradiction that appellant at the date of his marriage, whenever it was, had property of his own with which payment could have been made. Medlenka v. Downing, 59 Tex. 32; Watts v. Miller, 76 Tex. 13, 13 S. W. 16; McDougal v. Bradford, 80 Tex. 558, 16 S. W. 619. Nor do we find any substantial contradiction of appellant's testimony that he in fact owned and paid for said lands before marriage, holding the same under bond for title for several months prior thereto. And several witnesses testified, without dispute, that upon said mortgage appellant took his wife to these lands, which were ever afterwards occupied as a homestead by appellant and family. The verdict on this, as well, perhaps, as on other issues, can only be accounted for on the ground that appellant's testimony was entirely rejected. The verdict, in the particulars suggested being not only without evidence or legal presumption to support it, but also against the weight of the evidence, manifests the probability that the remarks and action of the court discussed were prejudicial, however unintentional the result. The eighth assignment, relating to this error, will therefore be sustained. It is not suggested, and we do not understand, that the conclusion is an infraction of the rule that forbids the impeachment of the verdict by affidavit of jurors.

A number of other assignments, such as the error of the court in overruling the motion for new trial on other grounds, become immaterial; but, in view of another trial, we will add that, as the facts are now presented, we question the action of the court in requiring appellant to testify "as to what crops he had raised on the community lands since his wife's death," as complained of in the tenth assignment, and in decreeing a lien on appellant's homestead for the value of such personal property as he should fail to produce for partition, as objected to in the sixteenth assignment, and in taxing appellant with the guardian ad litem fee of $150, as detailed in the eighteenth assignment. But inasmuch as these questions, as well, perhaps, as other objections urged, may not be again presented, or, if so, may be presented under different circumstances and with greater citation of authority, we forbear further determination. For the error of the court, however, in overruling appellant's motion for new trial on the ground discussed, the judgment is reversed, and the cause remanded for a new trial.

For Def.

Def. [illegible] married Sept. 6, 1866, [illegible]
died [illegible] Oct. 1, 1866
[illegible] death [illegible] sought [illegible]
recover a com. [illegible] prop., Def's
testimony [illegible] held a
bond [illegible] title [illegible] it [illegible] several [illegible]
marriage [illegible] uncontradicted. Def. [illegible]
[illegible] marriage [illegible]
occupied [illegible] homestead.

Held: Ev. [illegible] not [illegible] support
a verdict finding [illegible] prop. [illegible] com.
prop.

CHAPTER VIII.

CITATIONS.

What is community property? The presumptions,

Lemon v. Waterman (1885)	2 Wash. Ter. 485.
Woodland Lumber Company v. Link (1896)	16 Wash. 72.
Dormitzer v. German Savings & Loan Society (1900)	23 Wash. 132.
Mattson v. Mattson (1902)	29 Wash. 417.
Austin v. Clifford (1901)	24 Wash. 172.
Hill v. Gardner (1904)	35 Wash. 529.
Battyany v. McNeley (1915)	83 Wash. 666.
Guye v. Plimpton (1905)	40 Wash. 234.
Colpe v. Lindblom (1910)	57 Wash. 106.
Patterson v. Bowes (1914)	78 Wash. 476.
Denny v. Schwabacher (1909)	54 Wash. 689.
Glaze v. Pullman State Bank (1916)	91 Wash. 187.
Litzell v. Hart (1917)	96 Wash. 471.
Nixon v. Post (1895)	13 Wash. 181.
Doyle v. Langdon (1914)	80 Wash. 175.
Hanna v. Reeves (1900)	22 Wash. 6.
Halffman v. Halffman (1920)	13 Dec. 276.
In re Estate of John Sanderson (1922)	18 Dec. 172.

[illegible]

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Damages For Injuries

LIZZIE MAGNUSON, Respondent, v. EDWARD J. O'DEA et al., Appellants.

(75 Wash. 574 1913.)

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 14, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Gose, J.--This is an action for damages upon three causes of action. In the first cause of action, it is alleged that the defendants other than the defendant O'Dea kidnaped the plaintiff's daughter, Marjory Rieman, who was then over sixteen years of age and under eighteen years of age. The second cause of action is, in legal effect a charge of malicious prosecution on the part of the defendants other than O'Dea, in instituting and prosecuting a proceeding in the juvenile court at San Francisco. The third cause of action charges the institution and prosecution of a like suit at the city of Tacoma. In each of these suits it was charged that the plaintiff was an immoral woman and unfit to be entrusted with the custody of her daughter. The case was dismissed as to the defendent corporations and Edward J. O'Dea as bishop of the diocese of Seattle, and retained as to him and all the other defendants in their private capacities. There was a verdict against all the remaining defendants on the first cause of action for $19,033, and against all the defendants except Edward J. O'Dea on the second and third causes of action for $1,500 and $2,500 respectively. The verdicts were made effective by a judgment from which all the defendants have appealed.

We will first consider the appeal of the defendant Edward J. O'Dea. It is admitted that he took no part in the kidnaping and that he did not know the whereabouts of Marjory. The court instructed the jury in effect that there was no liability upon him unless he participated by "some act or deed" in harboring and concealing her and that mere knowledge on his part that someone had kidnaped her imposed no duty upon him to conduct an inquiry for the purpose of ascertaining who the guilty parties were. We think the law was correctly given. 38 Cyc. 485, 486; Adams v. Freeman, 9 Johns, 117; Reed v. Rich, 49 Ill. App. 262; Wamsganz v. Wolff, 86 Mo. App. 205.

It is agreed, however, that he, as bishop of the diocese, owed a duty to the respondent which he failed to discharge, and that because of that failure she was deprived of the custody of her daughter for a period of about eight months. There is nothing in the record which reaches the stature of evidence which tends to show that he owed any duty to the mother. The daughter had been attending a Catholic academy in the city of Tacoma conducted by the Sisters of Visitation. His codefendants were, respectively, the sisters in charge of the school, the rector of St. Leo's Church in Tacoma, and Louis I. Lefebvre, a lawyer by profession. The respondent took her daughter from the school to Seattle on the 7th day of February, 1911; and during the evening the daughter absented herself and returned to the rectory at Tacoma, and the rector took her to the home of the appellant Lefebvre where she remained until February 17th, when the rector

took her to Portland, Oregon, where she remained in a Catholic academy until about the 27th day of June. He then took her to San Francisco and again placed her in a Catholic academy, where she remained until some time in September, when she was restored to her mother. The record shows that the bishop had authority over the spiritual welfare of the sisters and the rector, but that he had no control over the temporal affairs of either. The respondent called three several times at the home of the bishop and sought but failed to obtain an audience with him. When the bishop heard of the disappearance of the child, he asked the rector of St. Leo's Church, who was also the chaplain of the school, if he knew anything concerning her, and was informed that he did not. As against this evidence, we have only the opinion of the respondent that it was the duty of the bishop, (1) to assume that his coappellants knew the whereabouts of the child; (2) to coerce a confession from some one of the guilty parties; and (3) to require them to restore the child to the respondent. The law devolved no such duty upon him. He has committed no legal wrong, and the sins of others cannot be visited upon him. He occupies the same position as would the minister in charge of any other church or the head officer of a fraternal society. Such officials are not responsible for the torts of their brethren unless participated in or ratified and approved by them. 38 Cyc. 485-6. The court erred in denying his motion for a directed verdict and for a judgment non obstante.

The record shows that the respondent was divorced from the father of Marjory; that he was living at the time of the trial; that, after her divorce. the respondent married Pontius Magnuson; that she was living with him at the time of the abduction and at the time of the trial and that Marjory had been a member of the family from the time of this marriage. The remaining appellants, upon these facts insist: (a) that Marjory's father is a necessary party plaintiff in the first cause of action; and (b) that, if this view be rejected, the stepfather is a necessary party plaintiff in all the causes of action.

The first contention is without merit. The respondent and the stepfather had had the custody and control of the child for several years and had supported her. While the record does not disclose in whose custody she was placed at the time of the divorce, the inference is clear that the father had abandoned her.

In Anderson v. Aupperle, 51 Ore. 556, 95 Pac. 330, the grandmother had the custody of a minor granddaughter whose mother was dead and whose father had abandoned her. It was held that the grandmother stood in loco parentis and could sue for damages arising from the seduction of the grandchild. In Yost v. Grand Trunk R. Co., 163 Mich. 564, 128 N. W. 784, 31 L. R. A. (N. S.) 519, it was held that where a father had abandoned his minor son, the mother could sue for the loss of his services caused by the negligence of the defendant.

The stepfather is a necessary party plaintiff in all the causes of action. Rem. & Bal. Code, Sec. 181, 182 (P. C. 81 Sec. 11, 13); Rem. & Bal. Code, Sec. 5932 (P. C. 95 Sec. 7); White v. McDowell, 32 Wash. Dec. 23, 132 Pac. 734; 29 Cyc. 1669-1670; Eickhoff v. Sedalia W. & S. W. R. Co., 106 Mo. App. 541, 80 S. W. 966. In White v. McDowell, we held that "there is a duty upon a stepfather to support the minor children of his wife by

a former husband; and that duty is something more than a charity."

The right of action in cases like this is bottomed upon the loss of services, but the parents may also recover damages for mental distress and the loss of the companionship of the child. Washburn v. Abrams, 122 Ky. 53, 90 S. W. 997. It follows, we think, that, where the stepfather has received the child into his home and has supported her, he is entitled to the services and earnings of the child. In short, when he assumes the duties of a parent, the corresponding benefits follow and the rights of the mother and stepfather in respect to the child are then equal before the law (Rem. & Bal. Code, Sec. 5932 (P. C. 95 Sec. 7)) and the stepfather must join in any action waged by the mother to recover for loss of services.

The stepfather was also a necessary party in the second and third causes of action, as they arise out of an injury to the character of the wife. Rem. & Ball Code, Sec. 182 (P. C. 81 Sec. 13). The facts of the case differentiate it from, Clark v, Northern Pac. R. Co., 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; and McGill v. McGill, 67 Wash. 303, 121 Pac. 469. cited by the respondent. Neither of these cases present the question as to whether a second husband is a necessary party plaintiff in an action of this nature.

The charge is as to the first cause of action that all the appellants except Bishop O'Dea conspired together to kidnap the daughter and to conceal her whereabouts from the respondent. The evidence tends to show that her whereabouts was concealed from the respondent from the 7th day of February until the 11th day of September following and that she was kept in a school conducted under Catholic auspices at all times after the 17th day of February. During this time the respondent had no word from her daughter except a note written to her by the daughter on the 9th day of February, in which the daughter said:

"I am safe and well. There is no need to worry. I am in good hands and do not regret the step I have taken as I have no intention whatever of returning to Alaska with you. I am sorry it had to come to this but I could not do otherwise. Signed, Marjory."

The respondent testified that she had expended about $3,000 in finding her daughter and in regaining her custody. The appellants contend that the damages awarded on this cause of action, $19,033, is so grossly excessive as to conclusively establish the passion and prejudice of the jury. We readily agree with this view. Moreover, the passion and prejudice of the jury is emphasized by the fact that they returned a verdict against Bishop O'Dea in his private capacity in the face of the evidence and the instructions of the court. If there were no other error in the record, we would direct a new trial on this ground. The damages recoverable are compensatory only. There can be no recovery by way of punishment. If the evidence of the respondent and her daughter is true, the daughter was wrongfully enticed away from her mother. On the other hand, if the evidence of the appellants other than the Bishop is true, they but heeded the wishes of the daughter to protect her from what she conceived to be an immoral environment. The jury gave heed to the testimony of the mother and daughter. This was their unquestioned privilege, but they can only allow compensatory damages.

Other errors have been examined but require no special mention. For the reasons stated, the judgment is reversed, with directions to enter judgment in favor of the appellant O'Dea, and to grant a new trial as to the other appellants.

For [illegible]

Crow, C. J., Chadwick, Mount, and Parker, JJ., concur.

A divorced hus. [illegible] father [illegible] party pl. [illegible] kidnaping [illegible] child [illegible] remarried [illegible] child [illegible] several yrs supported [illegible] family [illegible] stepfather [illegible] whose custody she [illegible] inference [illegible] father [illegible] abandoned [illegible]

The stepfather [illegible] party pl. [illegible] kidnapping [illegible] child [illegible] home [illegible] supported [illegible] singe [illegible] stepfather [illegible] duty bound [illegible] support [illegible] child [illegible] loss [illegible] services.

A second hus. [illegible] party pl. [illegible] mal. prosecution brought [illegible] in view [illegible] R+B. §182 relating [illegible] injury [illegible]

[illegible] Bissett [illegible] case [illegible] wrong.

MARY SCHNEIDER, Respondent, v. JOHN BIBERGER,
Appellant.

(76 Wash. 504. 1913.)

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered January 2, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Morris, J.--The amended complaint in this action sought to set up a cause of action based upon an indecent assault by appellant upon respondent, resulting in a miscarriage. The first paragraph of the amended complaint alleged, "that on or about June 15, 1911, plaintiff was a married woman residing at the home of her parents . . . " To this complaint a demurrer was interposed, pleading a defect of parties plaintiff and insufficiency of facts to constitute a cause of action. The demurrer was overruled, to which ruling exception was taken. The trial resulted in verdict and judgment for respondent, from which this appeal was taken.

The error upon which appellant most strongly relies is the ruling of the court below upon the demurrer. It seems clear to us that this ruling was erroneous. The amended complaint alleging that plaintiff was a married woman at the time of the assault, the cause of action arising therefrom, and the damages ~~recoverable therefor~~, were clearly such as to make the husband a necessary party to the action. Hawkins v. Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; Matthews v. Spokane, 50 Wash. 107, 96 Pac. 827; Maynard v. Jefferson County, 54 Wash. 351, 103 Pac. 418; Magnuson v. O'Dea, 33 Wash. Dec. 400, 135 Pac. 640.

Rem. & Bal. Code, Sec. 181 (P. C. 81 Sec. 11) provides that, when a ~~married woman is a party,~~ her husband must be joined with her, except, (1) in actions concerning her separate property; (2) when the action is between husband and wife, and (3) when the wife is living separate and apart from the husband. No allegation of the amended complaint brought the cause of action within these exceptions. Respondent contends that the complaint should be regarded as amended to comply with the proof, and that the proof shows that, at the time the cause of action arose, respondent was living separate and apart from her husband, and hence could maintain the action in her own name. It might be answered, first, that this is not a suit in equity, and hence equitable rules should not obtain. Seeking, however, to avoid rather than to assert any technical ruling, we have read the evidence, and hold that respondent there fails to show that she was living separate and apart from her husband. She testifies that, on June 15, 1911, the time of the alleged assault, she had been residing with her parents for about two weeks, and that a week subsequent to the assault she returned to her husband's home, where she remained until she went to the hospital for an operation; that she returned to her husband's home from the hospital, and remained with him until she commenced an action for divorce, the complaint in which was verified August 19, 1911. These facts do not establish a living "separate and apart" within the

Husband & 3 party lived so - husband '6 deserted her meaning of the statute. How can it be said that, on June 15, the wife was living separate and apart from her husband, when, within a few days thereafter, she returns to him and resumes marital relations? The return within a few days shows that the absence from the husband was of a temporary nature. Such an absence does not constitute a "living separate and apart." Such a situation can only arise where there is an abandonment or desertion by the husband or wife, or a separation which was intended to be final. Tobin v. Galvin, 49 Cal. 34; Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847. The return to the husband's home and remaining there until the commencement of the divorce proceedings negatives the requirements of the statute, and clearly establishes that, on June 15, there had been no abandonment by either husband or wife, and no intention on the part of the wife to permanently live apart from the husband.

It is suggested by respondent that, as the community had been dissolved by the divorce decree prior to the commencement of this action, the respondent had no husband to join in the action. The divorce did not change the situation so far as property rights were concerned. The cause of action having arisen during the existence of the community, the damages would be community property, as the community status of property is determined and fixed at the time the property is acquired. Katterhagen v. Meister, 33 Wash. Dec. 58, 134 Pac. 673. Respondent did not possess this right of action at the time of her marriage; neither did she acquire it by gift, devise, or inheritance; and as all other property acquired by a married woman, except the issues and profits of separate property, is community property, it follows that the right of action and the damages recoverable were community property. Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176.

Respondent could have had this cause of action awarded to her in the divorce decree had she submitted it to the court, but not having done so, its character is not disturbed by the decree. The community having been dissolved, there can now, of course, be no community property strictly speaking; but such property as was community property prior to the decree and not disposed of thereby would become common property, in which husband and wife would retain all the interest vested in them prior to the decree. Ambrose v. Moore, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N.S.) 103; Barkley v. American Sav. Bank & Trust Co., 61 Wash. 415, 112 Pac. 495. So that, whether the cause of action and the damages recoverable be now regarded as community or common property, the necessity for joining the husband in the action would be the same.

For these reasons, we hold the complaint cannot sustain the judgment, and the judgment is reversed.

For Def.

Crow, C. J., Mount, and Parker, JJ., concur.

Fullerton. J. (dissenting)--The wrong here committed, if any, was an "unjust usurpation of the wife's natural right," and in my opinion she may maintain an action therefor in her individual name under Rem. & Bal. Code, Sec. 5926 (P. C. 95 Sec. 5).

THOMAS ZOLAWENSKI et al., Respondents, v.
THE CITY OF ABERDEEN, Appellant.

(72 Wash. 95. 1913.)

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered December 4, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian through a defective bridge. Affirmed.

Gose, J.--This is an action to recover for personal injuries sustained by the plaintiff wife. The gravamen of the charge is, that a certain bridge in the defendant city formed a part of a public street; that it was used by pedestrians; that there was a hole in the bridge, which had existed for a period of five or six months before the date of the alleged injury; that the plaintiff wife stepped into the hole, fell, and "that she was thereby bruised about the legs and body, and that the skin was peeled and scraped from her leg, and that by being thrown to the floor of said bridge, prolapsus uteri was caused and brought about; that is, her genital and urinary organs were displaced and dislodged." The answer joined issue upon the alleged defect in the bridge and the injury, and alleged affirmatively that, if the plaintiff wife received the injury, it was caused by her own negligence, and that if the defect in the bridge existed "which defendant denies," she knew of its existence and assumed the risk. There was a verdict and judgment for the plaintiff for $500. The city prosecutes the appeal.

The court instructed, that it was the duty of the city to keep the bridge in a reasonably safe condition for the traveling public; that if it permitted it to become unsafe or dangerous with knowledge of its condition, or when, in the exercise of reasonable care and diligence, it ought to have known its condition, and that by reason of its unsafe condition the respondent wife, without neglect on her part, was injured as alleged in the complaint, the respondents were entitled to recover reasonable compensation for the jury. Error is assigned to this instruction. The instruction correctly states the law. Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; Lorence v. Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. 42; Short v. Spokane, 41 Wash. 257, 83 Pac. 183.

The court instructed:

"In estimating the damage to plaintiffs, if you find for them, you should in so far as is shown by the evidence take into consideration the physical pain and mental suffering of the plaintiff Magdalena Zolawenski, the temporary and permanent injuries if any suffered by her (and if you find plaintiffs are husband and wife, you will also take into consideration what loss the husband has or will sustain by reason of the inability of the wife to perform the duties of a wife, in so far as the evidence shows such loss)."

Error is assigned to that portion of the instruction in brackets. The loss of the wife's services is a proper element of damages. Hawkins

Husband) – party – or) injuries

v. Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808. If the appellant desired a more specific instruction on the question of the loss of the wife's services, it should have requested it, and having failed to do so, it is not in a position to assign error. Brown v. Porter, 7 Wash. 327, 34 Pac. 1105; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355.

The court instructed that, if the jury should find that the respondents were entitled to recover by reason of the negligence of the appellant, and should be of the "opinion" that the wife "was at the time of the injury infirm in body, and that such infirmity was aggravated by the injury," they should "estimate" from the evidence the amount that should be allowed "for such aggravation." The instruction is a correct statement of the law. Jordan v. Seattle, 30 Wash. 298, 70 Pac. 743; Short v. Spokane, supra. The criticism is that the respondents contended that the wife was sound in body prior to the injury, and that they were not entitled to an instruction based upon the theory that an infirmity may have antedated the injury. The rule, however, is that the court may frame its instructions, upon its own motion or at the suggestion of counsel, to cover the issues as they are actually made upon the trial of the case.

There was no error in denying the appellant's requested instructions. In so far as they correctly stated the law, they were, in substance, embodied in the instructions given by the court.

Error is assigned in the failure of the court of its own motion to instruct on contributory negligence and assumed risk. This was not error for two reasons: (1) although pleaded, there was no evidence to support either affirmative defense; the appellant's contention was that there was no hole in the bridge into which the respondent could have stepped. (2) If the appellant conceive that there was such evidence, it should have requested instructions adapted to its view of the case. Failing to do so, it cannot make a claim of error. Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.

The last point pressed is that the evidence is insufficient to support the verdict. It suffices to say that the evidence tends to show that the respondent wife was apparently in sound health before she met the injury; that she was doing the ordinary work of a housewife, and in addition, milking two cows and caring for some swine, and that after the injury she was completely incapacitated for doing her ordinary household work. The physicians testified that, at the time of the trial, she had a "complete prolapsus of the uterus." It is true that they said that they found an ulcerated condition "at the neck of the cervix" that antedated the injury, but some of them said that the prolapsus may have been produced or aggravated by a fall.

It is insisted that the case is a counterpart of Hoyt v. Independent Asphalt Paving Co., 52 Wash. 672, 101 Pac. 367. In that case the late Chief Justice Dunbar pointed out that the family physician testified that the condition which was the subject of inquiry "could not have been caused" by the fall. The jury resolved the controverted facts against the appellant upon substantial evidence, and its conclusion is controlling.

The judgment is affirmed.

Crow, C. J., Chadwick, Mount, and Parker, JJ., concur.

GUISEPPE CREVELLI, Respondent, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

(98 Wash. 42. 1917)

Appeal from a judgment of the superior court for Spokane county Blake, J., entered August 24, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Chadwick, J.--Luigi Crevelli, a youth of about 16 years, suffered an internal injury while helping three others lift a hand car from the tracks of appellant's railway.

The boy had been put to work by appellant upon the representation of his father, one of the same section crew, that he was over the age of 17 years. Soon after the accident, Luigi was attacked by pains in the abdomen. He was later taken to a hospital, where his trouble was diagnosed as chronic appendicitis. An operation for appendicitis, and what is surgically known as "Lane's Kink," was performed. After lingering for some weeks, he died; from infection, appellant says; from an injury to the meso-colon, caused by lifting, the respondent contends; the latter condition being revealed by an examination of the exhumed body some time after the death of Luigi.

This action was brought under the Federal employers' liability act of April 22, 1908, and the amendment thereto of April 5, 1910. A jury having passed on the facts, we shall not review them further, but come at once to the two questions of law which are necessary to be decided.

Appellant first contends that the deceased assumed the risk. It will not be necessary for us to pass on this point, in view of our holding on the question as to whether the negligence of the father in putting his boy to work under a false statement as to his age, and which has been judicially determined by the entry of a judgment non obstante on the first cause of action, will be imputed to the father and bar a recovery upon the second cause of action for pain and suffering which existed in the deceased, and which survives to the parents by the terms of, and solely in virtue of, the statute.

There was no survival of an action for tort at common law. While a right of action existed in the party injured, it died with him. The cause of action given--sometimes to the estate and sometimes to named persons--is in reality a creation. To say that a cause of action which is personal and which dies with the person survives can hardly be said to be a correct statement. It is only by force of statute that a survivor can assert a right to recover. The deceased had a right of action. The survivor of the estate has no right of action, but is given a cause of action purely statutory, and in which the added elements of death and designation of beneficiaries by statute are essential ingredients.

The controlling question, then, is whether the negligence of the father--the fraud and misrepresentation as to the age of the boy--may be

urged as a defense. That it may be so urged in an action for wrongful death is admitted, but respondent insists that it is no defense to an action to recover under the survivor statute for pain and suffering endured by the deceased and for which he might have maintained an independent action if he had survived his injury. Counsel cites the following cases: Warren v. Manchester St. R. Co., 70 N. H. 352, 47 Atl. 735; Love v. Detroit J. & C. R. Co., 170 Mich. 1, 135 N. W. 963; Nashville Lumber Co. v. Busbee, 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754; St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; McKay v. Syracuse Rapid Transit R. Co., 208 N. Y. 359, 101 N. E. 885; Wymore v. Mahaska County, 78 Iowa 396, 43 N. W. 264, 16 Am.St. 449, 6 L. R. A. 545; Westfield v. Lewis, 43 La. Ann. 63, 9 South. 52; Norfolk & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454, 29 Am. St. 718; Wilmot v. McPadden, 78 Conn. 276, 61 Atl. 1069; Southern R. Co. v. Shipp, 169 Ala. 327, 53 South. 150; Ploof v. Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108.

Appellant calls attention to the fact that, in each of the cases cited, the right of recovery was given to the estate of the deceased person, and that, in such cases, the estate, in which creditors may have an interest, being the primary claimant, and the heirs only secondarily interested, the court will not deny a recovery upon the theory of imputed negligence, although the negligence of one who may share in the award contributed to the injury.

But it is insisted that, where the statute gives a cause of action in favor of certain named beneficiaries and not in favor of the estate, although the action is to be maintained by the personal representatives for the benefit of the heirs or those named in the statute, the action is so far personal to the one seeking a recovery as to admit of defenses going to the conduct of the party, under the maxim that no one shall profit by his own wrong.

This court has held that a person suing for the death of a child, where the recovery is for the benefit of the parent, and the entire recovery goes to him, may not recover when his negligence contributed to the death. Vinnette v. Northern Pac. R. Co., 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N.S.) 328.

The like rule has been applied when the action is brought under the survivor statute, the recovery going to a named beneficiary and not to the estate.

"The difference between an action by the father for injuries to the child where death does not ensue and an action by the father as administrator of his dead child, brought under the statute for his own benefit, is a difference in form merely, not in substance, and on principle there can be no more reason for permitting a recovery in the latter case than in the former. In both the father is the substantial plaintiff and the sole beneficiary. To allow a recovery in either would be a violation of the policy of the law, which forbids that one shall reap a benefit for his own misconduct. Accordingly the authorities are practically unanimous to the effect that the guiding principle in both classes of cases is identical, and the contributory negligence of the beneficial plaintiff

will as effectually defeat a recovery in one case as in the other." Richmond T. & I. R. Co. v. Martin, 102 Va. 201, 205, 45 S. E. 894.

There can be no difference in principle whether the recovery is sought under the death act for loss of society and service, or under the survivor statutes for pain and suffering, for the right of the beneficiary is not to be determined by the right of the decedent, but by his own right as defined by statute. He is not maintaining an action for the benefit of the deceased, but for his own benefit, and that whether the action is maintained directly or by the administrator for his benefit. Koloff v. Chicago, Milwaukee & Puget Sound R. Co., 71 Wash. 445, 129 Pac. 398; Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791.

The cases upon which respondent really grounds his case are those of New Hampshire, Arkansas, Michigan and Iowa. Each of these cases rests upon a local statute and proceeds upon the theory that the recovery is for the benefit of the estate, or that the right of recovery is a descendible or inheritable thing, and being perfect in the deceased at the time of death, passes as any chose in action would pass, subject only to the defenses that might be urged against the owner. But each of the cases relied on, with a possible exception (the Iowa case) admits that the rule is different if the parent sues for his own benefit.

A careful reading of the cases convinces the writer that there is no real conflict in the authorities, unless it be in the New Hampshire case. But, if there be such conflict, there can be no difference in the principle involved, whether the suit be brought for the death or for the pain and suffering, for although many of the cases discourse learnedly upon the subject of imputed negligence, the justice of the cases rests in a deeper and more comprehensive principle, that is, that no man shall profit by his own wrong.

"The conclusion in these cases seems to have been reached mainly upon the rule that the negligence of the parents should not be imputed to the infant, and following the test of the statute, if the deceased himself could, had he lived, have maintained the action, then his personal representative may, because the action is for the benefit of the estate. These decisions appear to be clearly wrong. In the first place, the doctrine of imputed negligence is not called in question here, but rather another and wholly different fundamental principle, viz., that recovery will never be allowed in favor of a wrongdoer." 2 Kinkhead, Commentaries on torts, Sec. 475.

Of the cases relied upon by respondent, Mr. Tiffany, in his work on Death by Wrongful Act. (2d ed.), Sec. 71, says:

"It is to be observed that the cases mentioned in this section on Iowa, New Hampshire, and Arkansas arose under acts which were in form survival rather than death acts, and in some of the cases which have declined to follow the rule adopted by them they have been distinguished on that ground, yet it seems that whatever the nature of the right of action which the statute gives to the survivors designated the same principle should be applicable; that is, that no one shall profit by his own negligence, and that if any beneficiary of the action has by his negligence contributed to

the death there should be no recovery of damages for him."

We cannot understand how it can be otherwise. The right is not a chose in action or a property right. But for the statute, it would lapse on the death of the injured one. It is a right resting in the statute and is given for the benefit of particular, named persons. If there by none such, no cause of action can be stated.

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,--one proceeding upon altogether different principles." Michigan Cent. R. v. Vreeland, 227 U. S. 59, 68.

"In one of the earliest cases which arose under the act, Coleridge, J., said: 'It will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles.' Blake v. Midland R. Co., 18 Q. B. 93, 109.

In Seward v. The Vera Cruz, 10 App. Cases, 59, Lord Blackburn said: 'A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss.'" Id., 227 U. S. 69.

While the statute of 1908 was considered in this case without the amendment of 1910, U. S. Comp. Stat. Sec. 8665, the amendment could not change the rule announced, for the right to sue under either section is purely statutory and must be governed by the same principle. Indeed, it was expressly held in Garrett v. Louisville & N. R. Co., 235 U. S. 308, that, until amended, no recovery upon the deceased's right of action could be maintained. Other cases to the same effect are: American R. Co. of Porto Rico v. Didrickson, 227 U. S. 145; Gulf, C. & S. F. R. Co.v. McGinnis, 228 U. S. 173; North Carolina R. Co. v. Zachary, 232 U. S. 248; Thomas v. Chicago & N. W. R. Co., 202 Fed. 766. See, also, Fogarty v. Northern Pac. R. Co., 74 Wash. 397, 133 Pac. 609, L. R. A. 1916C 800.

The next question is whether, the father being barred, the mother is also barred. On this point there is considerable conflict in the decisions of other states, but on account of the view we take of this case, it will not be profitable to discuss or attempt to reconcile them.

In Vinette v. Northern Pac. R. Co., supra, this court held in effect that the negligence of one parent barred a recovery by the other, but did not discuss the underlying reasons why this should be so. The statute, Rem. Code, Sec. 5917, governing the property rights of the spouses in this state, provided that all property acquired, except by gift, devise or descent, shall be community property. This court has held in Hawkins v. Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784, and later cases, that damages

The contributory [illegible] father in fraudulently misrepresenting [illegible] minor son's age [illegible] putting him [illegible] urged [illegible] or [illegible] father [illegible] survivor statute, Fed. Employer's Liability Act of 1908 [illegible] amended [illegible] recover [illegible] pain [illegible] suffering endured [illegible] deceased.

Such cont. [illegible] father [illegible] recovery [illegible] mother in view [illegible] R. § 5917 providing [illegible] prop. acquired [illegible] either spouse except [illegible] gift, devise [illegible] descent [illegible] com. prop., since half [illegible] belong [illegible] hus., allowing [illegible] profit [illegible] wrong.

Note. — If A is elevator operator [illegible] rides [illegible] injured she [illegible] recover [illegible] recovery [illegible] community [illegible] hus. [illegible] recover [illegible] recovered for the wife are community property. McKay in his work on Community Property in sec. 185, says; "A cause of action given to the parent for an infury to his child or servant is community property . . ." There would seem to be no good reason why, under the statute, this in not true. From the foregoing it will be seen that the damages recovered in this case, if any, by either parent would be community property.

In McFadden v. Santa Ana O. & T. St. R. Co., 87 Cal. 464, 25 Pac. 681, 11 L.R.A. 252, the court said, on page 467, this being a suit for injuries to the wife where the contributory negligence of the husband was set up as a defense:

"The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action, and if this right to damages is acquired by the wife during marriage, it like the damages when recovered in money, is, in this state (under a statute similar to ours), community property of the husband and wife, of which the husband has the management, control, and absolute disposition other than testamentary."

The court then held that the failure of the lower court to instruct the jury that the contributory negligence of the husband was a good defense to the action was error.

Inasmuch as the damages recovered for the benefit of the wife, under the statute and decisions of this court, would be community property belonging half to the father, who is guilty of contributory negligence, and under his sole control and disposition, there is no way of allowing the mother a recovery in this case without allowing the father to profit by his own wrong. This the law will not permit him to do.

The judgment is reversed. For Def.

Ellis, C.J., Morris, Main, and Webster, JJ., concur.

LEAH HYNES, Appellant, v. COLMAN DOCK COMPANY et al., Respondents.

(108 Wash. 642, 1919.)

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 20,1918, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

Mackintosh, J.--The appelant, a married woman, instituted this suit against the respondents for damages arising from personal injuries sustained by her through the alleged negligence of respondents. The appellant's husband was made a party defendant for the reason, as alleged, "that plaintiff is unable to procure the consent of her husband to join in with her as one of the plaintiffs herein." A demurrer to the complaint on the ground of defect of parties plaintiff was sustained, and the case is here for us to decide whether a wife can maintain an action for personal injuries to herself without her husband joining as party plaintiff when he has merely refused to so join.

The tort action here involved was community personal property, and, therefore, under Rem. Code, sec. 5917, giving the husband like power thereover as he has of his separate personal property, he has the sole power of managing, contracting and disposing thereof. In Hawkins v. Front Street Cable R. Co., 3 Wash. 592, 28, Pac. 1021, 28 Am. St. 72, 16 L.R.A. 808, the right to sue for personal injury to the wife was held to be in that member of the community who has the disposition of the community personalty, and "in this case, therefore, the husband was the only necessary party, though the wife was a proper party." The Hawkins case cites Ezell v. Dodson, 60 Tex. 331, which resembles the case at bar, it being one which the wife had begun for damages for an assault and battery committed on her by a third party. Her husband was not joined as a party plaintiff, and this omission was explained by his refusal to join and the fact that he and his wife were living separate and apart. The Texas court said:

"The mere fact that husband and wife are not living together does not authorize the wife to sue alone in any case where she could not thus sue if they were not separated. The refusal of a husband to become a party to an ordinary suit to recover community property would not give the wife the power to sue alone, when they were living together and he was exercising rightful control over the common estate. She could not, contrary to his wishes, assume the control over such estate and bring suit for its recovery, and his refusal to join in such an action would be sufficient to defeat it. An ordinary separation, and much less one caused by her own unprovoked abandonment, would not give her more rights in this respect than she would possess if living amicably with her husband.

"Ordinarily there would be no difference between an action upon contract and upon tort in reference to the wife's right to bring suit

without joining the husband as plaintiff, as the one is as much community property as the other. Cases might, perhaps, arise where the wife could, under their peculiar circumstances, sue alone for a trespass to her person, whether she lived with her husband or apart from him. A less aggravated case of abandonment on his part might be sufficient in some instances to give her this right; or if he was the accessory to the outrage, or in other cases which might be mentioned, the wife would doubtless be allowed to maintain the action alone. It will be sufficient to determine the law of such cases when they arise. This is not one of them, and it is only necessary for us, for the purpose of the present suit, to hold that a mere separation of the husband and wife, and his refusal to join her in the action, is not sufficient to authorize the wife to prosecute alone a suit for assault and battery committed upon her during coverture. This court rightly sustained the exception of defendant, and the judgment is affirmed."

See, also, Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; Schneider v. Biberger, 76 Wash. 504, 136 Pac. 701.

In Hammond v. Jackson, 89 Wash. 510, 154 Pac. 1106, we held that a wife could not enter into a valid contract for the employment of a lawyer to prosecute an action for damage for her personal injury:

"The sole question presented is whether a married woman, living with her husband, may make a valid contract with an attorney to prosecute an action in damages against one by whose negligence she has suffered a personal injury. Rem. & Bal. Code, Sec. 181, provides that, when a married woman is a party, her husband must be joined with her, except (1) when the action concerns her separate property; (2) when the action is between herself and her husband; and (3) when she is living separate and apart from her husband. It further provides that husband and wife may join in all causes arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or out of any contract in favor of either or both of them. Construing these sections, we have repeatedly held that the husband is a necessary party to all actions arising because of personal injuries to the wife, if the parties were living together as man and wife at the time the injury was received. Schneider v. Biberger, 76 Wash. 504, 136 Pac. 701, and cases there collected. Indeed, our holding has been that the husband was the only necessary party to such an action. This on the principle that the claim of damages for the injury was community personal property of the spouses, and since the statute (Rem. & Bal. Code, Sec. 5917), vests in the husband while living with his wife the management and control of such property, he has the power to deal with it as if it were his separate property, which includes the right to maintain actions concerning it, the wife being only a proper party to such actions. . . . From the foregoing it follows, we think, that the wife cannot make a valid contract with an attorney to prosecute an action for personal injuries suffered by herself. Since the husband alone can maintain such an action, it must follow that he has the right to have a voice in any contract that affects the condition upon which the action is to be maintained. To hold otherwise is to hold that the husband's management and control of the community personal property is not absolute as the statute presupposes, but is subject to such contracts as the other spouse may choose

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[illegible]

to make concerning it. This, we think, is not the meaning of the statute."

The only case that might be construed to hold contrary to the rule that the husband is the necessary party in all actions involving community personal property (except in the three instances provided for in the statute) by reason of the exclusive control thereof vested in him is the case of Marston v. Rue, 92 Wash. 129, 159 Pac. 111, where the court decided that the husband's right of management and control and disposal of community property did not allow him the right to a "wilful, premediated waste of family personal property," and that the wife could maintain an action to recover community personal property abandoned byytho husband, who had left the state. In the instant case we find no allegation in the complaint of a wilful abandonment or dissipation or waste of the community personalty, nor of the husband's failure to exercise his honest judgment in refusing to institute the action. The complaint having no allegation except that the wife has failed to procure her husband's consent to join does not allow her to make him a party defendant under Rem. Code, sec.189. To hold otherwise would be to nullify the rights given by the statutes regarding community personal property and to overrule a long established line of authority.

Judgment affirmed. For neg.

Holcomb, C.J., Parker, Main, and Mitchell, JJ., concur.

[illegible] her hus. [illegible] absence [illegible] season [illegible] joining [illegible], or alone [illegible] per. injuries [illegible] com. prop. [illegible] sole [illegible] hus.

Robert Osthellor, Administrator etc. Respondent, v.
Spokane & Inland Empire Railroad Company,
Appellant.

(107 Wash. 678,1919.)

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 14,1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Parker, J.--This is an action to recover damages for the death of Ferdinand and Minnie Ostheller, husband and wife, alleged to have been caused by the wrongful act, to wit, the negligence, of the defendant railroad company. While the death of Mr. and Mrs. Ostheller occurred at the same time as the result of a single alleged wrongful act of the company, and recovery therefor was sought in the superior court in this one action, such recovery was sought in two causes of action separately pleaded in one complaint, the allegations of which separate causes of action were in substance the same. except as to the person whose death was so occasioned, damages being claimed by the administrator in behalf of the heirs of the deceased, in the first cause of action, for the death of Mr. Ostheller, and in the second cause of action, for the death of Mrs. Ostheller. A single trial of both causes of action upon the merits in the superior court for Spokane county sitting with a jury, resulted in a verdict in favor of the company, denying recovery for the death of Mr. Ostheller, and a verdict in favor of the administrator, awarding recovery for the death of Mrs. Ostheller. Judgment was rendered accordingly. The railroad company has appealed from that portion of the judgment awarding recovery for the death of Mrs. Ostheller.

Our problem, as we view it, calls for but a brief summary of the controlling facts. The Osthellers, for about four years immediately preceding their decease, lived in the southern part of Spokane county, some twenty miles south of the company's electric railway line, which runs east from the city of Spokane. At the time of their decease, they were returning to their home in their automobile, having been on a trip to the northern part of the county merely to see the country, and incidentally to purchase and take home in their automobile some vegetables, as opportunity therefor might offer. As they approached the crossing of the company's tracks at the little station of Flora, Mr.Ostheller driving the automobile, one of appellant's trains also approached the crossing from the east at a high rate of speed. As they came upon the crossing, their automobile was struck by the appellant's fast moving train, resulting in the practical destruction of their automobile, and also the death of both of them, all of which occurred as nearly instantaneously as effect could follow cause under such circumstances. Appellant denied negligence upon its part, and also set up the defense of contributory negligence on the part of Mr. and Mrs. Ostheller in the driving of their automobile upon the crossing without heeding the approach of the train, which the company asserted was in plain view of them in ample time for them to stop their automobile and avoid being injured. We shall assume for present purposes that the evidence was such as to call for the submission of the question of contributory negligence to the jury, though it is strenuously

argued in behalf of the company that it should have been decided, as a matter of law, that the defense of contributory negligence was sufficiently proven to warrant the taking of the case from the jury and deciding it in favor of the company. Both defenses were submitted to the jury by the trial court by its instructions. The verdict of the jury, denying recovery for the death of Mr. Ostheller and awarding recovery for the death of Mrs. Ostheller, renders it plain that the jury found that, while the company was negligent, Mr. Ostheller's contributory negligence was such as to prevent recovery for his death, but that his contributory negligence was not such as to prevent recovery for Mrs. Ostheller's death, and that she, individually, was not guilty of contributory negligence.

This action was commenced and prosecuted by the administrator of the estate of Mr. and Mrs. Ostheller, in behalf of their children, under Rem. Code, 183, which, insofar as we need here notice its language, reads as follows:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death."

It is here contended by counsel for the company that the contributory negligence of Mr. Ostheller, established by the verdict, preventing recovery for his death, prevents recovery for the death of Mrs. Ostheller; and that the trial court erred in declining to so decide, as a matter of law, in denying the motion, timely made in behalf of the company, for judgment notwithstanding the verdict awarding recovery for the death of Mrs. Ostheller.

We regard it as well settled law that, while this is not a statute providing for the survival of a cause of action possessed by the deceased for recovery for injuries resulting in his death, but is a statute giving to the heirs a new right of action not recognized by the common law, it nevertheless gives a right of action to the heirs of the deceased which is dependent upon the right the deceased would have to recover for such injuries up to the instant of his death. In other words, dependent upon the right of the injured person to maintain an action for the damage resulting from his injury, had he survived. And this, we think, is the law governing the rights of the heirs, whether the statute expressly so provides or not. It appears that the original Lord Campbell Act did so provide in express terms, as does several of the state statutes of this country; while our statute, above quoted, those of the several states, and the Federal employers' liability act, do not so provide in express terms. The words "wrongful act or neglect," used in statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death. In Tiffany, Death by Wrongful Act (2d ed), Sec. 63, that learned author states the rule as follows:

"An essential limitation upon the words 'wrongful act, neglect, or default' is created by the provision that they must be such as would have entitled the party injured to maintain an action therefor. This provision makes it a condition to the maintenance of the statutory action that an ac-

tion might have been maintained by the party injured for the bodily injury The condition has reference of course, not to the loss or injury sustained by him, but to the circumstances under which the bodily injury arose, and to the nature of the wrongful act, neglect, or default; and, although this condition has not been expressed in California, Idaho, Kentucky, and Utah, no case has been found in which it has not been implied.

"A preliminary question arises, therefore, in every action for death, namely, was the act, neglect, or default complained of such that if it had simply caused bodily injury, without causing death, the party injured might have maintained an action?"

In Northern Pac. R. Co. v. Adams, 192 U.S. 440, the supreme court of the United States had under consideration the statute of Idaho, in substance the same as ours above quoted, in so far as our present inquiry goes, which statute, like ours, contained no express provision making the right of the heirs dependent upon the right of the deceased to recover for the injury resulting in his death, had he survived. Justice Brewer, speaking for the court, following some preliminary observations, said:

"The two terms, therefore, wrongful act and neglect, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation---one to the passenger and another to his heirs. If it discharges its full obligation to the passenger his heirs have no right to compel it to pay damages."

In Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, Ann. Cas. 1914C 176, the supreme court of the United States had under consideration the provision of the Federal employers' liability act of 1908, which provision is, in substance, a death by wrongful act statute of the same import as our statute, there being no express provision in that act making the right of recovery dependent upon a right of action in the deceased for the injuries resulting in his death. Justice Lurton, speaking for the court, after some preliminary observations recognizing that, by the act, a new right of action was created not sanctioned by the common law, and that it was not a statute providing for the survival of a right of action possessed by the deceased, among other things, said:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

See, also, 8 R. C. L. 745; and 17 C. J. 1184, 1200, and cases there cited.

The decision of this court in Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791, holding that a settlement and release of

damages for personal injuries by the injured person bars an action by his heirs under this statute, following his death resulting from the injury, supports this view of the law. The conclusion reached in that case must manifestly rest upon the theory that statutes of this nature give a right of action to the personal representatives of the deceased only when the deceased might have successfully maintained an action to recover damages for the injury resulting in his death, and that all defenses available to the defendant, if the action had been brought by the person injured, prior to his death, are available to the defendant in an action brought by his personal representatives to recover damages for his death. 8 R. C. L. 778. Manifestly the defense of contributory negligence is as available to the defendant as the defense of settlement and satisfaction by the deceased before his death. Both equally take away the right of the deceased to successfully maintain an action for his injuries. King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119.

Our problem then is, was the contributory negligence of Mr. Ostheller, in law, the contributory negligence of the legal entity that was, in a legal sense, originally damaged by the injuries which resulted in the death of Mr. and Mrs. Ostheller? If that legal entity was the community consisting of Mr. and Mrs. Ostheller, and not Mrs. Ostheller as an individual, it would seem to follow, as we shall presently notice, that his contributory negligence was, in law, its contributory negligence, such as would prevent recovery by it had it sought recovery before its dissolution; and, in turn, would prevent recovery by the administrator. If Mrs. Ostheller was, in a legal sense, individually damaged by the injuries which resulted in her death, that is, damaged in the sense that she could, in her separate right, have maintained an action to recover damages for such injuries prior to her death, it would seem to follow that Mr. Ostheller's contributory negligence would not be imputed to her, as a matter of law, merely because of their domestic relationship.

The community of husband and wife is, under our laws, a legal entity in which the individuality of both spouses is merged, in so far as ownership of property acquired by either after marriage is concerned, subject to certain exceptions of no moment in our present inquiry; and the title to property so acquired vests in such legal entity. Rem. Code, Sec. 5915-5917; Holyoke v. Jackson, 3 Wash. Ter. 235, 3 Pac. 841; Brotton v. Langert, 1 Wash. 73, 23 Pac. 688. The husband has the management and control of the community personal property, even to the extent of the power of disposition thereof as he has of his separate personal property, except he cannot devise by will more than one-half thereof. Rem. Code, Sec. 5917. This control goes to the extent that the wife cannot even sue, except by joining her husband as plaintiff, to recover damages for personal injuries suffered by her alone; and even then she is not a necessary party plaintiff, because of the husband's management and control of the community personal property, and the fact that such right of recovery is in the community alone. Hawkins v. Front Street Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; Matthews v. Spokane, 50 Wash. 107, 96 Pac. 827; Maynard v. Jefferson County, 54 Wash. 351, 103 Pac. 418. Schneider v. Biberger, 76 Wash. 504, 136 Pac. 701.

These considerations, we think, compel the conclusion that the right

of the administrator to recover in this action for the death of Mrs. Ostheller depends upon the existence of a right of recovery in the community consisting of Mr. and Mrs. Ostheller for the injuries received by Mrs. Ostheller, following the injury up to the time the community was dissolved by death. Now if recovery for the injuries resulting in Mrs. Ostheller's death had been sought in an action before the community's dissolution, manifestly such recovery could not have been sued for by Mrs. Ostheller in her individual capacity. Such recovery would necessarily have been sought in an action in which Mr. Ostheller would have been plaintiff, in behalf of the community, or in which, even if both had been named as plaintiffs, the action would have been in behalf of the community. It would not then have been a question of Mr. Ostheller's contributory negligence being the contributory negligence of Mrs. Ostheller individually, but it would have been a question of his contributory negligence being the contributory negligence of the community; and his contributony negligence being established in such case, as it was in this, we are unable to see how the conclusion could be avoided that the community's recovery would have been thereby defeated. Had Mr. Ostheller, by his negligent driving of the community automobile upon this family pleasure trip, injured some third person, it could not be successfully contended that the liability in damages therefor would not have rested upon the community, since manifestly he was driving the automobile for the community. It seems to us equally clear that, if the community had survived and was here seeking recovery for damages which in law it suffered by the injuries received by Mr. and Mrd. Ostheller, his contributory negligence would have prevented recovery by the community. Just as his negligence in the one case would be the negligence of the community, so would his contributory negligence in the other be the contributory negligence of the community. Crevelli v. Chicago Milwaukee & St. Paul R. C o., 98 Wash. 42, 167 Pac 66, L. R. A. 1918A 206 McFadden v. Santa Ana, O & T. St. R. Co., 87 Cal 464, 25 Pac. 681, 11 L. R. A. 252.

We have not lost sight of the fact that Mr. and Mrs. Ostheller died as a result of the same castastrophe, and that their death followed their injuries then received as quickly as death could follow injury; in other words, as quickly as effect could follow cause, under such circumstances. But we think there is no escape from the conclusion that both were injured at the same time, and that both thereafter died from the effect of such injuries. There was necessarily some space of time between the receiving of the injuries and the death of either of them; that is, between the time of the receiving of the injuries and the dissolution of the community. During that period, however brief, the company became liable in damages to the community for such injuries as it may have negligently caused, or it never became liable to any one for the result of the collision of its train with Mr. and Mrs. Ostheller's automobile. This is the right of action against the company which must first be shown to exist, before it can be said there accrued any right of action in favor of the administrator because of the death of Mr. and Mrs. Ostheller. It is the preliminary question which arises in every case wherein recovery is sought under statutes of this nature,. as expressed in tthe above quoted language from Tiffany, Death by Wrongful Act.

There are decisions of the courts holding that, in actions under statutes of this nature, where the recoveryis sought for the death of the wife,

the contributory negligence of the husband causing the original injury will not defeat recovery by her representatives for her death. But we think it will be found that those decisions are from jurisdictions where the injured wife has the right to recover damages for injury to her person in her separate right, under statutes which do not result in the merging of her individuality, so far as her marital property rights are concerned, in the husband, as at common law, or in the community, as under our law. Under the law of these jurisdictions, the wife's personal separate right of action comes into existence immediately upon her being injured. Hence there is furnished the condition upon which a right of action by her representatives for her death can rest. We see no escape from the conclusion that the contributory negligence of Mr. Ostheller, established and found by the jury in this case, must be held to defeat the right of recovery by the administrator for Mrs. Ostheller's death, under this statute.

The judgment is reversed, and the action dismissed.

For Def.

Holcomb, C. J., Fullerton, Mackintosh, Main, and Mount, JJ., concur.

Tolman, J., dissents.

Rem. § 183 [illegible] heirs [illegible]
death [illegible] person [illegible] "wrongful act
[illegible] neglect" [illegible] refers [illegible] wrong [illegible] neglect
[illegible] deceased, hence [illegible] recovery,
[illegible] deceased [illegible] guilty [illegible] cont. [illegible]
The community [illegible] hus. & [illegible]
entity [illegible] title [illegible] prop. acquired, vested
[illegible] recovery [illegible] per. injuries [illegible]
community alone [illegible] cont. [illegible]
hus. [illegible] community.
[illegible] death [illegible]
hus. [illegible] cont. [illegible] community
[illegible] hence precludes recovery [illegible] heirs
[illegible] wrongful death [illegible] husband.

MARGARET O'TOOLE, Appellant, v. L. B. FAULKNER, Respondent.

(34 Wash. 371. 1904)

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 18, 1903, upon the verdict of a jury rendered in favor of the defendant in an action for personal injuries. Affirmed.

Hadley, J.--This cause was once before in this court on appeal, as will appear in O'Toole v. Faulkner, 29 Wash. 544, 70 Pac. 58. The judgment was reversed, with instructions to sustain the plaintiff's demurrer to an affirmative answer of the defendant. Upon the return of the cause to the superior court, the remaining issues were tried before the court and a jury. A verdict was returned for the defendant, and judgment entered accordingly. The plaintiff has again appealed.

Reference to the former opinion will show that the action is for personal injuries received by the appellant Margaret O'Toole, through the alleged negligent handling of a street car on the streets of the city of Olympia. The action was brought by Margaret O'Toole, in her own proper person, joined with said Margaret O'Toole as executrix of the last will of E. O'Toole, deceased. At the time of the accident, on the 23d day of February, 1900, the said deceased and Margaret O'Toole were husband and wife, and remained such until the 10th day of June, 1900, when the said husband died. After the death of the husband, this suit was brought by the wife to recover for her own injuries. No claim is made for recovery for injuries to the husband, but it is alleged that the damage was to the community. The estate of the husband was evidently joined as party plaintiff on the theory that the proceeds of this suit, if recovery shall be had, will belong to the community. Note The complaint shows that, a little more than three months after the accident, the community, by the death of the husband, ceased to exist. The damages alleged are chiefly of a permanent and continuing character, because of consequent personal disability of the surviving wife. The only special damages to the community, alleged are $100 paid for medical attendance and treatment at the hospital, and $50 paid to employ other persons to perform the duties and work of the wife. The community being dead when this suit was brought, it may be doubted if it was such an entirety as could be continued, through an administration, for the purpose of sharing in the proceeds of unliquidated and unrecovered damages for continuing lifetime disabilities of a surviving member. While damages of the last named character comprise the gravemen of the demand in this action, yet the community is interested in the special damages above mentioned, and to that extent, at least, the estate of a deceased person is a party. The pertinence of these comments will more fully appear by what is hereinafter said. It has been suggested by respondent that the action is wholly for the benefit of Margaret O'Toole on account of personal injuries to herself, and that the estate of her deceased husband, although made a nominal party, has not such an interest as brings the case within Sec. 5991, Bal. Code; Sec. 937, Pierce's Code; which declares the disability of certain persons to testify as to transactions had with deceased individuals. What has been said above will dispose of this

feature of the case without further comment, when its applicability becomes more apparent by what follows hereinafter.

The testimony of several witnesses for the defense was to the effect that the deceased, O'Toole, was riding with his said wife in a wagon drawn by a team, which he was driving; that the team was going northward on Adams street, and had just about crossed the street railway track on Fourth street, which runs east and west; that the horses were turned in a northwest direction on Fourth street, and that they and the wagon occupied the space between the street railway track and the sidewalk on the north; that the said husband was sitting upon the left and his wife upon the right side of the wagon; that at that time an electric street car approached from the west on Fourth street, traveling at the rate of about five miles an hour; that, as the car approached, the team became unmanageable, and while their said driver tried to urge them forward, they began pushing the wagon backward in such a manner that the wheels were thrown across the street railway track in front of the approaching car; that the motorman brought the car to a standstill when it was about twelve or fourteen inches from the wheels of the wagon; that the said O'Toole was thereafter still unable to control his team; that the latter made a lunge, drawing the wheels of the wagon over the fender of the car, which upset the wagon and threw out the occupants, whereby Mrs. O'Toole received her injuries. The evidence of the appellant did not agree with the above, in some essential particulars, but such, in any event, was the testimony of respondent's witnesses.

After the injured woman was taken in charge by attendants, the motorman continued with his car to the end of his line. On his return, when he came to the front of the building where the lady was carried from the scene of the accident, he stopped his car and inquired about her condition. At that time and place he had a conversation with Mr. O'Toole, now deceased, who was the driver of the team aforesaid, and the husband of the injured woman. Of that conversation the motorman testified as follows:

"Question. You may tell the conversation you had with Mr. O'Toole. A. When I came back from Puget street, I stopped my car in front of Bates' and the driver was standing on the edge of the sidewalk and I stopped to make inquiry if the lady was hurt much, and how. And he addressed me by saying, 'They tell me that you did not run into me.' I says, 'No, I did not.' He says, 'How did the wagon get upset? I says, Your horses ran the wheel over my fender. If you had held your horses they would not have upset the wagon.' He says, 'If I had got on the other side, where the brake was, I could have held them.'"

We have discussed the only assigned errors urged by appellant. The judgment is affirmed.

Fullerton, C. J., and Anders, Mount, and Dunbar, JJ., concur.

McFADDEN et ux v. SANTA ANA, O. & T.
St. RY. Co. (# 13,919)

(87 Cal. 464) Pac Rep. Vol. 25.
(Supreme Court of California. Jan 12, 1891)

Commissioners' decision. Department 2. Appeal from superior court Los Angeles county; J. W. McKinley, Judge.

Vanclief, C. Action for damages alleged to have been sustained by a personal injury to the wife alone, through the negligence of defendant. On May 26, 1888, the defendant was a corporation owning and operating a street railroad running east and west through the center of Fourthstreet, in the city of Santa Ana, in Los Angeles county. On that day it caused an excavation to be made in that street about 6 feet wide, 50 feet long, a and 10 inches in depth, on the north side of the railway, parallel with it, and about 6 feet from it, for the purpose of constructing a switch or turn-out, to be connected with the main railway, and for the construction of which it had permission from the city authorities. It is alleded in the complaint that the excavation was dangerous to travelers on the street during the nighttime, unless properly guarded and lighted; and that it was the duty of the defendant to guard and light it, so as to warn travelers of the danger, etc., which the defendant neglected to do Hole on the night of May 26, 1888. The complaint then proceeds as follows: "That on, to-wit, the 26th day of May, 1888, the plaintiffs herein were lawfully driving along the same, and they, the plaintiffs, had no warning of, or notice of, the existence of the aforesaid excavation and obstructions, and they, the plaintiffs, saw no lights or barriers about the said excavation and obstructions, and, without any fault of either of the plaintiffs, they, the plaintiffs, came in collision with the said obstructions, and where drawn over the same into theexcavation aforesaid, whereby Flora McFadden sustained great injuries in her person, and internal injuries by which her womb was displaced, and by reason of said injuries to her person and said internal injuries, she was confined to her bed for many months, and endured great physical and mental suffering. Her health is injured and impaired thereby, and the plaintiffs are informed and believe that the injuries sustained by Flora McFadden, in her person and to her health, are permanent and for life, and that the same were caused by the gross negligence, default, and carelessness of the defendant herein, by reason of all which the plaintiffs are damaged in the sum of $12,000." The answer of the defendant denies the alleged injuries to the plaintiff Flora; denies the alleged negligende on its part; and alleges contributory negligence on the part of the plaintiffs. The case was tried by a jury. Verdict and judgment for the plaintiffs for $1,000. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The principal question for decision arises upon instructions to the jury as to the effect of contributory negligence, if any there was, on the part of the husband alone. At the request of the plaintiff, the court instructed the jury that if they found that the plaintiff Flora was injured by the negligence of the defendant, without any negligence on her Impr.

part, and that the negligence of her husband, if any, only contributed to the injuries, the jury could not attribute the husband's negligence to her, and should assess such damages as will compensate her for injuries proximately caused by the negligence of the defendant. And again: "If you find from the evidence that the negligence of Robert McFadden, if any, only contributed to the injury complained of, if any was sustained, his negligence cannot be imputed to Flora McFadden, and must not be regarded as her negligence." Defendant's counsel excepted to these insturctions, and requested the court to instruct the jury that contributory negligence of the husband, if any, was imputable to the wife, and, under the circumstances of this case, would prevent a recovery; which the court refused to give. I think the court erred in giving these instructions, and in refusing to instruct, substantially, as requested by the defendant's counsel. Peck v. Railroad Co., 50 Conn. 379; Carlisle v. Sheldon, 38 Vt. 440; Yahn v. Ottumwa, 60 Iowa, 429, 15 N. W. Rep. 257; Huntoon v. Trumbull, 2 McCrary, 314, 12 Fed. Rep. 844; Beach, Contrib. Neg. pp. 113, 114, 284. The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action, (Railroad Co. v. Dunn, 52 Ill. 260; And. Law Dict.;) and, if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife, (Civil Code, Sections 162-164, 169,) of which the husband has the management, control, and absolute power of disposition other than testamentary, (Id. Sec. 172.) Consequently the wife cannot sue alone for damages on account of an injury to her person, as she is permitted to do "when the action concerns her separate property." Code Civil Proc. Sec. 370; Tell v. Gibson, 66 Cal. 247, 5 Pac. Rep. 223. In these respects our Codes differ from the laws of those states in which the cases cited by appellants were decided, wherein the right to recover for a personal injury to the wife, and the money recovered, are deemed her separate property. In the case of Flori v. City of St. Louis, 3 Mo App. 231, the husband and wife sued for a personal injury to the wife alone, and the trial court instructed the jury, in effect, that if the husband was guilty of negligence, directly contributory to the injury, there could be no recovery in the action. Of this instruction the appellate court said: "We do not so understand the law. The contributory negligence of the plaintiff will bar a recovery where the plaintiff is the injured party, and the recovery is for his benefit. But here the husband is merely a formal party, the cause of action belonging to the wife. Under our law, (Acts 1875, p. 61) ' any personal property, including rights in action, * * * which has grown out of any violation of the personal rights' of a feme covert, is her separate property, and under her sole control, and is not liable for the debts of her husband." In Platz v. Cohoes, 24 Hun, 101, thedecision that the negligence of the husband could not be imputed to the wife, in a case like this, was put solely upon the grounds that the wife was a mere passenger in her husband's wagon, and that her husband had no joint interest with her, and was in no way indentified with her. On appeal from this decision of the supreme court, the court of appeals held that the question, as to contributory negligence of the husband, did not arise, and declined to decide it. 89 N. Y. 219. In the case of Railroad Co. v. Dunn. 52 Ill. 260, it was held that the right of the wife to sue for an injury to her person was her separate property, under a statute of that state providing that all property shall be separate property of the wife "which any married woman during coverture, acquires in good faith, from any person other than her husband, by de-

Held

Such contributory [illegible] of husband
is [illegible] cont., [illegible] of community
so pl. [illegible] recover.

scent, devise, or otherwise." In Shearman and Redfield on Negligence (4th Ed. Sec. 67) it is said: "But in New York, Missouri, and other states where the change has been radical, and married women have a right to recover, in such cases, damages for their own separate use, it is held that the negligence of the husband, while in company with his wife, is not chargeable to her, unless she encouraged him in it, or otherwise concurs in it." No other authority is cited for this than the cases above considered.

2. The appellant's counsel complain that the scope of their cross-examination of plaintiffs' witnesses was too much restricted by the court. Of the numerous exceptions taken on this ground, I think the following should be sustained: First. After the plaintiff Flora had testified on behalf of plaintiffs as to the injury, and the pain suffered by her immediately thereafter, defendant's attorney, on cross-examination, asked the following questions: "Question. Well, you was conscious, wasn't you? Answer. I was conscious of a very severe pain. Q. Well, you went home that night, and didn't call a doctor? Mr. McKelvey, we object. I don't think it responsive to the direct examination." The court sustained this objection, and the defendant's counsel excepted. Second. Dr. Ball, as an expert, testified in chief, on the part of the plaintiffs, that he visited the plaintiff Flora, about two weeks after the injury, in consultation with Mrs. Dr. Howe, the attending physician, and further testified that he examined the patient as to her condition at that time, and as to the probable causes of her ailments. On cross-examination defendant's counsel asked the following questions: "Question. You had a consultation, then, did you? Answer, Yes, sir. Q. What was the determination by you and the attending physician, as to what was the serious thing to attend to? Mr. Brusseau, I object to the evidence, for the reason that the same is immaterial and incompetent." The court sustained this objection, and defendant's counsel excepted. Third. Counsel then asked Dr. Ball what was the treatment advised then, (at the consultation.) The objection to this question on the grounds that it was immaterial, incompetent, and irrelevant, was sustained by the court, and counsel excepted. That all these questions were in the proper line of cross-examination, and that each of them might have elicited testimony which would have been competent, relevant, and material, seems too plain for argument. One of the witnesses, being a party testifying on her own behalf, as to the pain she suffered,- a matter as to which it would have been difficult to contradict her.--and the other testifying as an expert medical witness, their cross-examination should have been allowed a liberal range touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness. Whether or not these errors, in excluding proper cross-examination, may have been prejudicial to the defendant, need not be determined, since the judgment should be reversed on the ground of error in the instructions to the jury. Other points are made by counsel for appellant, but, in my opinion, the record shows no other errors than those above considered. I think that the judgment and order should be reversed, and the case remanded for a new trial.

We concur: Foote, C.; Belcher, C. For Des.

Per Curiam. For the reasons given in the foregoing opinion the judgement and order reversed, and the case remanded for a new trial.

HOUSTON & T. C. R. CO. v. LACKEY. pl.
(12 Tex. Civ. App.229)

(S. W. Rep.Vol.33)

(Court of Civil Appeals of Texas. Jan22, 1896)

Appeal from district court, Travis county; James H. Robertson, Judge.

Action by Ursula Lackey against the Houston & Texas Central Railroad Company for damages for placing cars on a side track in front of plaintiff' residence. Plaintiff had judgment, and defendant appeals. Reversed.

Fisher, C. J. This is a suit by Mrs. Ursula Lackey, a married woman, without joinder with her husband, against the appellant, for damages arising from placing cars on a side track in front of her residence, and thereby preventing the south breeze from entering her house, and obstructing the view in front of her house. For this and for the inconvenience and annoyance therefrom she claims damages in the sum of $600, and also claims $150 as damages on account of loss she sustained in her business as a dressmaker by reason of the proximity of said cars and the obstruction that resulted therefrom. Judgment below was rendered in her favor for $78.

mit

There is an error apparent upon the face of the record which calls for a reversal of the judgment below. The trial court, in its charge to the jury on the measure of damages that should govern, instructed them to find what sum, if any, the evidence may show was the difference in the market value of the use of the property during the time the cars stood in front of plaintiff's house and what it would have been during said time if the cars had not been at said point. The charge of the court was in keeping with the evidence upon the subject of damages, as the proof was restricted to what, if any, was the difference in the value of the use or rent of the property during the time of the obstruction and what would be its value if such obstruction or nuisance did not exist. There were no pleadings asking for damages in this respect, and all that was claimed were the items previously stated. Submitting to the jury the value of the use of the property as an item of damage which they may allow, when such item was not claimed or sought to be recovered in the pleadings, was fundamental error. Railway Co. v. Vieno (Tex. Civ. App) 26 S. W. 230. And see, also, Lewis v. Hatton, 86 Tex. 534, 26 S. W. 50, where the rule is fully stated concerning the certainty required in stating and pleading a cause of action. In seeking to recover damages that arise from a nuisance, a general allegation of damages may admit proof of all damages that are the necessary results of the act committed. And we may concede that in this case the depreciation, if any, in the value of the use of the property occasioned by the nuisance was a natural and necessary consequence of it (Comminge v. Stevenson, 76 Tex. 643, 13 S. W. 556), and may be recovered as general damages. But here the plaintiff did not seek or ask for a recovery of general damages, but, in her pleadings, restricted her claims solely to the items of damages that resulted from the loss to her trade as a dressmaker, and that arose by reason of the annoyance occasioned in leaving the cars in front of her residence, and in obstructing the view and shutting off the breeze. The prayer for damages is confined to these items. In view of another trial,

Note

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we desire to say that we are of the opinion that the court, in its charge, presented the correct rule as to the measure of damages that governs in this case; in other words, the rule that the court gave is the general one(76 Tex. 643, 13 S. W. 556); but we do not desire to be understood as holding that this rule upon the measure of damages is exclusive in cases of this character, for an additional recovery, in the nature of consequential or special damages, may be permitted in this class of cases when they are specially pleaded, if warranted by the facts. If, upon another trial, the plaintiff seeks to recover damages sustained in addition to the depreciation in the value of the use of the property, the items of such special damage should be set out with particularity and certainty. Under this ruling, as the case will go back for another trial, we will notice some of the questions that are called to our attention.

It is contended that the court erred in permitting Mrs. Lackey to testify that her husband abandoned her more than four years ago. The statute that prohibits husband and wife in divorce suits from testifying to facts relied upon as grounds for divorce has no application to cases such as this. The testimony was for the purpose of showing the existence of of circumstances that would authorize the wife to sue alone for damages to the common property, without joining her husband. If the pleadings authorized such evidence, it was not objectionable, for the reasons assigned.

There was evidence tending to show that the appellant placed the cars upon the track in front of plaintiff's residence under the instructions of the authorities of the city of Austin, and that it ceased after said time to have any control over the cars or the track upon which they were located, and that they were continued there by the city, and not the appellant, and that the city owned the track upon which they were stored. The appellant does not deny that it placed the cars upon the track in question, but did so upon the order of the city, the owners of the track. By reason of these facts, the appellant contends that it is not liable for the nuisance, if any, that arose by reason of continuing the cars where they were placed by it; that, if liable at all, it is only for the damages that resulted upon placing the cars in front of plaintiff's residence, and not for what may have arisen after that time by the city's continuing them there. The general rule is that all parties who participate in creating a nuisance are liable for not only the immediate consequences, but for all that may naturally and proximately follow. The appellant, being a party to the original act from which the nuisance, with its consequences, resulted, is as much liable as those who subsequently continued it. 16 Am. & Eng. Enc. Law, 979-961; Comminge v. Stevenson, 76 Tex. 646, 13 S. W. 556; 2 Woods, Nuis. (3d Ed.) pp. 1219, 1250. 1264. There was no error in refusing the charges requested on this branch of the case, nor was there error in giving the charge complained of.

The appellant demurred to the petition, on the ground that the plaintiff could not sue for damages which were the community property of herself and husband; that the right of action was in the husband alone; and that the wife cannot sue except in exceptional cases, and which was not shown by the petition in this cause. The petition avers that the property in question (her residence) was occupied by her as her homestead, and that she neither owns nor controls any other property, and that it

Imp. point of case

belonged to her and her husband, and that she and her husband have not lived together for five years, and that he had abandoned her, and that he refused to join her in this suit. It fruther appears from the averments of the petition that the plaintiff is a dressmaker, "and works hard to support herself and two children." In Railway Co. V. Gillum (Tex. Civ. App) 3 S. W. 698, the wife alone sued, and alleged as a reason therefor that her husband had abandoned her. The court held that the averment that the husband had abandoned her was equivalent to a charge that he had deserted her, and that the word "abandoned," in the pleadings, was used in that sense, and held that she could sue. In Woodson v. Maseenburg (Tex. Civ. App) 22 S. W. 106, the wife, who was abandoned by her husband, sold community property, in order to discharge it of a lien. It was held valid. In Carothers v. McNese, 43 Tex. 224; Slator v. Neal, 64 Tex. 222; Zimpelman v. Robb, 53 Tex. 280; Wright v. Hays, 10 Tex. 130; Cheok v. Bellows, 17 Tex. 613; and Fullerton v. Doyle, 18 Tex. 13; and probably other cases,-it is, in effect, held that if the husband has deserted the wife, and permanently abandoned her, she may dispose of the community property. Black v. Black, 62 Tex. 298, was a case in which the husband had abandoned the wife. She sued to recover community property, and also for damages for its detention or rent. It was held she could maintain the action. In Cullers v. James, 66 Tex. 495, 1 S. W. 314, the appellant levied upon property that was used by James and wife as their homestead, and also upon other exempt property, for a debt due them by the husband. The officer making the levy took possesion of the property. The wife (Mrs. James) intervened, and sued for damages for the use and value of the property, and asked that she be permitted to recover, because she had been permanently abandoned by her husband, and since then he had contributed nothing to her support. The court, in holding that she may maintain the action, said: "At common law, the civil as well as the natural death of the husband restored to the wife her rights and powers as a feme sole, if she was thus deprived of the benefits of marriage. Wheat. Selw. tit. 'Baron and Fem.' In Texas, practically, the protection and the disability of marriage have been linked together; and the wife, when deprived of the one, has been released from the other. Ezell V. Dodson, 60 Tex. 331, and cases cited. Humanity requires that, when thrown upon her own resources by the abandonment of her husband or by his lunacy or imbecility, she shall be unfettered in her struggle for existence and independence. Here her separate being has not merged in her husband, as at common law, but, as far as it could be done consistently with the preservation of the home and family, she has been disenthralled. She has, equally with her husband, an interest in the community property; and while her husband is the managing partner, and may assert his prerogative as long as he exercises it in good faith, yet certainly, when he abandons the wife and their property, there can be no principle in our law or practice which would prevent the wife, as a party in interest, from asserting her rights in the courts. The husband has abdicated his authority, and by that act enabled the wife to appear in court in her own name and right. The property out of which this litigation arose was not only community property, but was claimed to be exempt from forced sale. Mrs. James, therefore, had in it a special interest, which the husband could no more sacrifice by abandonment than he could otherwise dispose of without her consent. The statute, which requires the court to appoint counsel for a defendant cited by publication, is to prevent frauds upon the court, and is in the interest of a pure administration of the law, and has not the effect of depriving the wife of the defendant of any right or remedy the situatio

otherwise accords her. We conclude that the court did not err in allowing Mrs. James to intervene in the suit, and assert her right to recover of the plaintiffs the value of any exempt property wrongfully converted by them."

It may be noted that some of the cases decided in this state that authorize the wife to dispose of the community property rest not alone upon the fact of abandonment by the husband, but the fact that the sale was also made because it was necessary to the support of herself and family. The theory of these cases is that the husband, although he violates his duty in abandoning his wife and deserting her, does not lose his beneficial interest in their common property, and that she will not, in view of his authority to control and dispose of it, be permitted to convey it, unless under circumstances that would require this to be done in order to preserve and protect the property, or in order to provide for her necessary wants. It is unnecessary for us to decide in this case whether this extreme view of the law is or is not correct in cases of a conveyance or disposition of the property by the wife, for, upon facts and principle, the case before us is different. The wife in this case is not undertaking to dispose of the common property, but to recover it, or, in other words, damages to it from a stranger. The husband, who had abandoned the wife, refuses to do this; and, as in effect stated in the petition, he has left her without a support, and she must gain one by her own exertions. There is a vast distinction between a conveyance by the wife of the common property and a recovery of it from a stranger who is not entitled to it. In the one case, the husband may be deprived of his interest in the property; but, in the other, a recovery by the wife would be a benefit to the common estate, and in the nature of a preservation of the property, and a result favorable to the husband as well as the wife; for the husband, in such a case, would be entitled, as well as the wife, to the beneficial results that would follow from a judgment in her favor, the same as would exist in favor of the wife if the husband should recover what they in common were entitled to. The property in controversy is the homestead of the appellee, and in so far as damages resulted in injury to its beneficial use or enjoyment, and a depreciation of its rental value, was, in a measure an injury to the homestead. She being in possession of the homestead, and enjoying it as such, it cannot be seriously questioned, especially in view of the rule announced in Cullers v. James, supra, that if her possession or homestead rights were invaded or disturbed by trespassers, she, when abandoned by her husband, could resort to remedies to protect her interest and rights in the premises. If the right exists in her in such a case logically it would follow that she should be permitted to recover such damages as she has sustained that arise from a depreciation in the value of the thing she was entitled to use and possess, and to recover damages that arise from acts and conduct that tended to deprive her of the beneficial and useful enjoyment of the thing she is permitted to use and enjoy. But, independent of this ruling, and admitting there is a leaning of authorities towards the extreme view insisted upon by appellant, to the effect that, before the wife can sue alone to recover the community property, there must not only be an abandonment of her by the husband, but there must also be a necessity for the action, still we think the case made by the petition, in effect, comes within that rule. It is averred that the husband abandoned the wife, which, in effect, is equivalent to an allegation that he deserted her (Railway Co. v. Gillum, supra,); and, in effect, it appears that he has not contributed to her support, and that she has no property other than her homestead, and

Held

that she relies upon her labor to support herself and children. These facts bring her condition within the rule that permits her to sue, as laid down in those cases that go to the extreme in restricting therights of the wife to sue or of disposing of the commuuity interest of the husband. Judgment refersed, and cause remanded. Reversed and remanded.

For Def. or Pl. in Error

Note.- here is case of abandonment, Bassett thinks abandonment [illegible] - Wash. [illegible] allow - [illegible] sue alone for recovery of community.

LYDIA A. MAYNARD vs. THOMAS B. VALENTINE

(Sup. Ct. 3. 1880.)

Appeal from the Third Judicial District, holding terms at Seattle.

Opinion by Greene, Chief Justice.

Appellant was married to David S. Maynard about 42 years ago, in Vermont. She bore him two children, and in 1850 was living with him and them, in Ohio. Sometime in that year her husband left her with the children there, and became himself a resident of Oregon. When leaving he promised his wife that within two years he would return for her or send her the means to come to him. He never kept his promise. In 1852, under the act of Congress, commonly known as the Oregon Donation Law, he, as a married man, settled upon and claimed 640 acres of land, lying within what is now known as King County in Washington Territory. Afterwards and on the 22d of December of that year, the Legislature of the Territory of Oregon by special act, declared the bonds of matrimony between David S. Maynard and the appellant dissolved. This act of the Legislature has never been assented to by appellant. It was passed without notice to her before she had ever been in Oregon, and when no cause of divorce as against her existed.

The notification pursuant to section 6 of the Donation Law was filed by Maynard in October, 1853. His accompanying affidavit recited the existence of his marriage relation with appellant until December 24th, 1852, her death at that date and his marriage on the 15th of January, 1853, to Catherine T. Brashears. Maynard's residence as a donation settler was duly completed and proved by May, 1856, and in January, 1869, Donation Certificate, No. 436, was issued from the local land office at Olympia to him and his wife Catherine, apportioning the east half to her and the west half to him. As to the wife's half the Commissioner of the General Land Office, subsequently, in July, 1871, held this certificate to be erroneous, and on the supposition that appellant was dead and that her heirs were entitled, he directed that proof of her marriage should be taken, and that upon proper proof of this marriage, the certificate should be amended so as to run to her heirs. A hearing was accordingly had before the Register and Receiver at Olympia, at which appellant appeared in person, and David and Catherine Maynard by attorney. As a result the certificate was, on the 8th of April, 1872, so modified as to allot the east half of the claim to appellant. Upon appeal to the Commissioner of the General Land Office, and from him to the Secretary of the Interior, it was held that the special divorce act of 1852, shut appellant out from any rights in the premises, and that neither she nor Catherine Maynard could claim anything under the Donation Law. Conformably to this decision the east half of the 640 acres was thrown open as public land to entry and sale, and of part of it Valentine, the appellee, became the purchaser and patentee from the Government.

Such are the facts as averred by the appellant in her complaint filed in the District Court. Upon them she asked a decree that appellee holds

In case of Rarations claim 9 on half.

title as trustee for her benefit, and that he be required to convey to her and that she have her costs and general relief. Appellee filed a general demurrer, which the District Court sustained. A decree was thereupon entered dismissing the case at plaintiff's costs. From that decree this appeal is taken. The issue made by the demurrer has been argued before us with commendable zeal and thoroughness, and we have derived great assistance from the skill and industry of counsel. Authorities cited have had our careful attention and reflection. Especially valuable we have found the observations of Mr. Bishop, in his excellent treatise on Marriage and Divorce, and those of Judge Cooley, in his work on Constitutional Limitations.

This brings us to the verge of the second question proposed at the outset. Its solution depends on the applicability of the provisions already noticed of the Federal Constitution and the Ordinance of 1787, touching the inviolability of contracts. The question is this: Had the appellant, as Maynard's wife, at the time of the divorce act, any perfect right of property to the land in controversy vested in her which the operation of that act must not be suffered to impair? She asserts that such a right was then hers under the provisions of section 4, of the Donation Law. But by that section the donation of six hundred and forty acres, one-half to himself and the other half to his wife, to be held by her in her own right, is given to that married man only "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act." It needs but little consideration of the terms of such grant to perceive that the right of the wife does not become perfect nor vest under them until the residence and cultivation by her husband, as her husband, is complete. Her husband's title is imperfect and inchoate till then, and how can hers be more?

The statute, moreover, contemplates, we think, a common residence and settlement by husband and wife "in all cases." It reads: "Where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled," etc. In argument before us, the wife claims that her domicile never was in Oregon. If this be granted, it is difficult to see how, within the spirit of this generous law, a law intended to foster and reward actual and conjoint settlement, she can proceed to claim even an incipient right to land under that law. Probably the law should not be held to compel wives to accept a gift. If they can refuse, what is so decisive proof of intent to refuse as a refusal to be considered partaker of the husband's domicile? Doubtless double donations were offered to promote double settlement. The aim was to plant and endow families in Oregon.

Upon the whole case, we are of opinion that the judgment of the District Court must be affirmed.

For Def.

ELMIRA L. STONE, Appellant, v. ELLEN M. MARSHALL et al., Respondents.

(52 Wash. 375. 1909.)

Appeal from a judgment of the superior court for King county, Neterer, J., entered August 15, 1907, upon findings in favor of the defendants, after a trial on the merits, in an action to quiet title. Affirmed.

Fullerton, J.--On May 2, 1870, the United States patented to S. B. Hinds and C. P. Stone, under the act of Congress of April 24, 1820, entitled "An act making further provision for the sale of public lands," forty acres of land in King county, described as "the northwest quarter of the southeast quarter of section two, in township twenty-three, north of range three east in the district of lands subject to sale at Olympia, Washington Territory." At the time of the issuance of the patent, both Hinds and Stone were married men, living with their wives at Seattle, in the then territory of Washington. Hinds died intestate on December 14, 1870, without having conveyed or otherwise disposed of his interest in the property. He left as his heirs at law his widow and three daughters, the eldest of the daughters being then seven years of age. The widow and daughters removed from Seattle to the state of California shortly after the death of Mr. Hinds, and never after that resided in the territory or state of Washington. Mrs. Hinds, after her removal to California, married one J. H. Marshall, with whom she lived until her death on December 8, 1892. Mrs. Marshall left no heirs other than the daughters of herself and Mr. Hinds, above mentioned, and to these daughters she devised her property. It does not appear from the record, however, that she had any knowledge of her first husband's interest in the land in question here. The patent was in the possession of C. P. Stone until it was recorded at his request in the auditor's office of King county on April 15, 1904, long after her death. Neither of the daughters had any actual knowledge of the existence of the patent, or of their father's interest in the property described in it, until after the commencement of this action.

Mr. Stone was divorced in 1872 from the wife he had at the time of the patent, and married the appellant some two years thereafter. The land at the time of its purchase by Stone and Hinds was unoccupied timber land, and has never been in the actual occupancy of any one. All of the acts of ownership that have been exercised over it subsequent to the death of Mr. Hinds were exercised by Mr. Stone. He sold the timber growing upon it at one time, and it is in evidence that he occasionally visited the place, but no permanent improvements, or improvements of any kind, were ever placed thereon by him, or any one. It was assessed for taxes in 1882 as the property of "Hinds & Stone," and sold for nonpayment at the annual sale of lands for delinquent taxes for the year 1883. One W. H. Gleason became the purchaser of the property at the sale, and received a certificate of purchase to that effect. On November 12, 1890, he assigned the certificate to one A. E. Hanford, who the next day assigned the same to C. P. Stone. From that time until the year 1905 the land was assessed to C. P. Stone and he paid the assessments annually. The record fails to show any assessments for other years. No demand was ever made

by C. P. Stone on the heirs of S. B. Hinds for their proportion of the taxes due, nor did they voluntarily offer to pay any part thereof until after the commencement of this action, when they tendered a sum equivalent to one-half of the amount so paid.

C. P. Stone died testate in Seattle, September 14, 1906, and thereafter letters testamentary were issued to his widow, Elmira L. Stone. Mrs. Stone thereupon brought this action in her own right and as the executrix of her husband's estate to quiet title to the lands described, averring that the property was acquired by her husband and herself by purchase on November 14, 1890, and that the same became and was their community property; further averring that the respondents claimed some interest therein as the heirs at law of S. B. Hinds, which constituted a cloud upon her title. Issue was joined on the complaint, and a trial was had which resulted in findings to the effect that the respondents were the successors in interest of S. B. Hinds, and the owners of an undivided half of the property; that the tax title of the appellant was invalid and a cloud upon the respondent's title; that the respondents were not guilty of laches; but that the appellant was entitled to contribution for one-half of the taxes paid, and entered a decree accordingly. This appeal is from that decree.

The first contention of the appellant is that the patent from the United States to S. B. Hinds and C. P. Stone created in them an estate in joint tenancy, with all the incidents such an estate had at common law, including the right of survivorship, and that, in consequence, Stone succeeded to all of the interest Hinds had in the property at his death, leaving no interest therein to pass to his wife or to be inherited by his heirs. In support of their contention, counsel call attention to the earlier territorial statutes which expressly refer to estates held in joint tenancy, and to the statute of 1885, by which the right of survivorship in such estates was expressly abolished. But without following the argument in detail, we are clear that the interest of Hinds in these lands at the time of his death did not descend to Stone by right of survivorship. The lands were acquired by Stone and Hinds after the enactment of the community property statutes, or common property statutes as they were then called; and the land when purchased became the common property of Stone and Hinds and their wives, and was never held by them in joint tenancy. Laws 1869, 318; 5 U.S. Stat. at Large, p. 566. On the death of Hinds, therefore, his interest in the land passed to his widow and children under the statute of descents of the then territory of Washington, and did not pass to his co-purchaser named in the patent.

It is next insisted that Stone acquired all the interests of the respondents by virtue of his purchase of the tax certificate after the land had been sold for delinquent taxes. But this purchase was in effect nothing more than a redemption from a tax sale, and inured to the benefit of all of the co-owners.

"It is a general rule, founded on the requirements of good faith, that any one interested in land with others, all deriving their titles from a common source, cannot acquire an absolute title to the land by a tax deed, to the injury of the others." Woodbury v. Swan, 59 N. H. 22. See, also, Shepard v. Vincent, 38 Wash. 493, 80 Pac. 777; Finch v. Noble,

49 Wash. 578, 96 Pac. 3. Doubtless under the rule in this state, Stone by the payment of the tax assessed against the entire estate acquired a lien on the respondents' interests for their just proportion of the taxes so paid, which he could have foreclosed by a suit in equity; Burgert v. Caroline, 31 Wash. 62, 71 Pac. 724, 96 Am. St. 889; Spokane v. Security Savings Society, 46 Wash. 150, 89 Pac. 406; but he could not and did not acquire the respondents' interests by suffering the land to go to sale for the taxes and buying the land at the tax sale.

The appellant further contends that the respondents' claim to their father's and mother's interest in this land is stale and inequitable. This contention is based upon the fact that no assertion of right in the property was made by the respondents from the time of their father's death until after the commencement of the action. But the appellant is not in a position to assert this fact as a bar to the respondents' interests, even were the plea available if made by a stranger. The appellant and her husband, knowing, as they must have known, that the respondents were ignorant of their interests in this property, owed them the duty either to inform them directly of their interests, or take such open and notorious possession of the property as to make it clear that they were claiming against all the world; and in the absence of proof that they did one or the other of these things, a court of equity will not allow them to appropriate the respondents' interests because of delay on the respondents' part in asserting such interests. There was here no possession at all on the part of the appellant or her testator, much less was there such a possession as would of itself imply an adverse holding of the property. Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005.

The judgment appealed from is affirmed.

All concur.

HANNAH E. DELACEY, Appellant, v. COMMERCIAL TRUST COMPANY et al., Respondents.

(51 Wash. 542. 1909).

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered May 28, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title and recover possession of land. Affirmed.

Chadwick, J.--In April, 1886, James Delacey, husband of the plaintiff, made settlement with his family upon one hundred and sixty acres of land, lying within the corporate limits of the city of Tacoma, in Pierce county, intending to claim it under the homestead laws of the United States. The land was within the limits of the original grant in aid of the Northern Pacific Railroad Company, by Congress, under the act of July 2, 1864, and the acts and resolutions supplemental thereto and amendatory thereof. The company filed its maps of definite location May 14, 1874, and March 26, 1884, so that, at the time of the Delacey settlement, the land was not subject to private entry. It was so held in the several departments, and by the secretary of the interior, by whom the contest was finally decided November 28, 1891. Northern Pac. R. Co. v. Flett, 13 Land Dec. 617.

Patent was issued to the Northern Pacific Railroad Company, and filed for record in Pierce county, Washington, on January 18, 1893. In April of that year, the railroad company brought an action of ejectment against James Delacey, as sole defendant, in the United States circuit court for the district of Washington, in which judgment of ouster was obtained. This case was appealed to the supreme court of the United States. The decision of the lower court was affirmed May 22, 1899. Northern Pac. R. Co. v. De Lacey, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111. Pending the appeal to the supreme court of the United States, the Northern Pacific Railway Company succeeded to the rights of the original plaintiff in the ejectment case, and was substituted as the plaintiff therein.

Upon remand, final judgment was entered in the United States circuit court, sitting at Tacoma. Prior to the entry of the judgment, there was filed in said court a motion, in the name of James Delacey, defendant, supported by the affidavit of plaintiff, in which the statute of limitations, the community interest of plaintiff, and the fact that she had not been made a party to the action of ejectment, were urged as reasons why the court should limit and confine its order of removal to defendant James Delacey. This motion was overruled and the judgment became res adjudicata as to all the rights of the parties to the ejectment suit.

In the fall of 1894, James Delacey abandoned the land and his family. His whereabouts, if alive, is now unknown. On March 22, 1900, plaintiff was ejected from the land under a writ of restitution issued out of the United States circuit court. In the year 1907, plaintiff was awarded a decree of divorce from her husband, and by a later modified decree it was adjudged that the property herein involved was community property, and

and the whole thereof was set apart to her sole and separate use. She has also acquired by deed the interest, if any, of all her children, the issue of her marriage with James Delacey. During the time the Delaceys lived on the land, from 1886 until March, 1900, valuable improvements were made. On the 7th day of November, 1905, the Northern Pacific Railway Company conveyed the lands in controversy to defendant, the Commercial Trust Company. This action was brought by plaintiff to recover possession and quiet her title to the land. From a decree in favor of defendants, plaintiff has appealed.

It will be seen that appellant relies upon the assertion of a community interest on the land, and upon the statute of limitations. She claims that she "entered into the possession of the land as the owner thereof under a claim of right and in good faith, and has continued to occupy the same as the owner thereof by actual, uninterrupted, and notorious possession, under a claim of right, from April, 1886, to the latter part of March, 1900." The fact that James Delacey acquired no interest in the land, community or otherwise, is an adjudged fact, from which the conclusion must inevitably flow that the appellant could acquire no greater right than her spouse. The community is an entity; the rights of the wife cannot be disassociated from those of her husband; the right of each is dependent upon the other, and unless it exist in the one it cannot exist in the other. It may be laid down as a fixed rule that no community interest results to the spouses by reason of settlement on government land. The entryman takes title upon such conditions and under such terms as the Congress may prescribe. The government may designate the object of its bounty, or its preferred vendee, and fix the terms of its indulgence. Under existing laws, there is no limitation upon its power to give or take away up to the time patent issues. Mere settlement creates no rights in the entryman other than those given by statute or recognized by rule of the department. Nor can he put the statute of limitations in motion against the government, either in his own behalf or in behalf of those whose occupancy on the land is dependent upon his entry. Therefore one contesting for government land cannot gain the advantage of the statute over his adversary while the contest or litigation in aid of his title is pending. Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; Blake v. Shriver, 27 Wash. 593, 68 Pac. 330; Hesser v. Siepmann, 35 Wash. 14, 76 Pac. 295.

The homestead law was passed without reference to our local laws of property. McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237; Hall v. Hall, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016; Cunningham v. Krutz, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N.S.) 967; Towner v. Rodegeb, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936. It is only when title is vested that the land becomes subject to the law of the state. It may then with propriety control its conveyance, provide for its taxation, and fix rules of descent. Appellant, therefore, did not, and could not, acquire any right by reason of her community relationship or as an individual prior to the final determination of the contest between her husband and the railway company. She held in privity with him. James Delacey did not enter adversely to the respondents' grantor, but as a homesteader, willing to try out his claim with the Northern Pacific Railroad Company under the rules governing contests between conflicting claimants for the public land. Appellant is in no better position than he would have been

had he remained on the land, for it is because of his entry and attempted filing that she became an occupant, and not because of the present assertion of an independent adverse claim under a claim of right. Appellant, though her possession was in a general sense adverse, did not, under the well-established rule in this state, hold under a claim of right or with color of title. It is not mere undisturbed, exclusive possession of property that makes title, but a hostile adverse possession under a claim of right or color of title, as the case may be. The foundation of the title, the time of its inception, must be marked with these essential elements. One essential will not follow another or be created by the mere lapse of time. All must concur from the beginning until the end of the period fixed by the statute. Otherwise no right to assert the statute accrues. Port Townsend v. Lewis, supra. Our holding is, that appellant has no community interest in the land; that neither she nor James Delacey had any interest whatever subject to the jurisdiction of the superior court of Pierce county in the divorce proceeding; that the deed from her children was of no effect; and that the running of the statute could not by any possible process of reasoning antedate the termination of the contest in the U. S. land departments, thus disposing of her claim under the ten-year statute of limitations.

Neither was appellant a necessary party to the ejectment suit. The successful contestant in the land department may invoke either the equity or the law side of the courts in aid of his title, and in so doing he is not bound to look for parties other than his adversary, for no interest could attach pending contest in the land department. But if the rule were otherwise as to third persons domiciled on the land, it is certain that the family of James Delacey, and all persons who could not assert a title or right independent of him, were bound by the judgment in the action of ejectment and subject to the writ without being named therein. There being no independent or community interest in the appellant, the general rule in such cases applied. It is stated by Mr. Freeman as follows:

> "The defendant and all the members of his family, together with his servants, employees, and his tenants at will or sufferance, may be removed from the premises in executing a writ of possession. . . . All persons entering upon the possession of the property pendente lite are presumed to have entered under the defendant; and prima facie, are liable to be turned out by the writ. It is obvious that the temptation to render the plaintiff's action fruitless by turning over the possession to one not a party to the suit is very great. All courts will exercise great caution in considering the right of a person to retain possession after the judgment, when it is clear that he entered pendente lite. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him." Freeman, Executions (3d ed.), Sec. 475.

See, also, Saunders v. Webber, 39 Cal. 287; 1 Herman, Estoppel, 204; Lichty v. Lewis, 63 Fed. 535; Id., 77 Fed. 111.

This disposition of the case makes it unnecessary to discuss the remaining assignments of error, all of which go to the strength of respondents' title. It would be idle to consume space in the citation of auth-

ority to support the proposition that appellant must recover, if at all, upon the strength of her own title rather than upon the weakness of the title of the respondents.

The judgment of the lower court is affirmed. For Def.

Rudkin, C. J., Fullerton, Crow, and Mount, JJ., concur.

Dunbar and Gose, JJ., took no part.

GARDENHIRE v. GARDENHIRE et al. pl.

(No. 7234.)
(172 S.W. Rep. 726)
(Court of Civil Appeals of Texas. Dallas
Jan. 2, 1915.)

Appeal from District Court, Grayson County; W. J. Mathis, Judge.

Trespass to try title by F. E. Gardenhire against C. M. Gardenhire and others. Judgment for the plaintiff, and defendant C. M. Gardenhire appeals. Reversed and remanded.

Rainey, C. J.--F. E. Gardenhire, appellee, brought this suit in the nature of trespass to try title to a tract of 47 acres of land in Grayson county, Tex., and in the alternative for partition, against C. P. Gardenhire, his father, C. M. Gardenhire, his stepmother, Nick Graves, sone of the said C. M. Gardenhire, and against the surviving sisters of the said F. E. Gardenhire and their husbands and the legal heirs of the deceased sisters of the said F. E. Gardenhire. Before the trial of the cause, the father, C. P. Gardenhire, died, and by amended petition his name was omitted from those of defendants and the suit proceeded against his second wife, C. M. Gardenhire, her son, the said Nick Graves, and the surviving heirs of the said C. P. Gardenhire, deceased. C. M. Gardenhire specially answered that the land was the homestead of herself and husband, C. P. Gardenhire, deceased, and that she was entitled to possession of same as such homestead; that she had a community interest in said land by reason of community funds of herself and said husband being paid for part of said land and improvements placed on the same. The case was submitted by the court to the jury on special issues, and upon the verdict rendered by the jury a judgment was entered in favor of appellee, F. E. Gardenhire, for the entire tract of land, charged, however, with $105 in favor of Blanche Ferguson, one of the defendants in the suit below.

(1) The first assignment is:

"Because the court erred in qualifying questions Nos. 1 and 2, so as not to permit the jury to answer other questions submitted to them on other issues raised by the evidence and pleadings of the parties; said questions Nos. 1 and 2 and said qualifications being as follows:

"'Question No. 1. Did the defendant Mrs. C. M. Gardenhire, on or about the 19th day of January, 1910, abandon and discontinue the use of the premises involved in this suit with the intention not again to use same as a home?'

"'Question No. 2. Did defendant on or about the 19th day of January, 1910, abandon and separate from deceased, C. P. Gardenhire, with the intention of thereafter living separate and apart from him as his wife?'

"'If you answer "Yes" to questions Nos. 1 and 2, or either of them, then it will not be necessary for you to answer further; but you will at once return your verdict into court. If, however, you shall answer "No"

to said questions, then you will proceed to answer question No. 3.'"

At the request of appellee, Gardenhire, the court submitted to the jury, in addition to the questions above mentioned, 17 others; but in accordance with the court's instructions the jury returned a verdict affirmatively in answer to only one of them. The court thereupon entered judgment for appellee, and against appellant, evidently deeming that said answer settled all other issues raised by the pleadings and evidence. This action of the court we think was error. It is well settled in this state that when a case is submitted on special issues the parties thereto are entitled to have the jury pass upon every controverted issue involved in the controversy, unless where the court is authorized to pass upon issues not found by the jury, as provided by article 1985, R. S. 1911.

(2) The court submitted to the jury all controverted issues under the pleadings and evidence, and it was not necessary for the appellant to submit in writing those issues of which she complains as not submitted, for she duly excepted to the qualification made thereto by the court, which qualification prevented the jury from passing on only one issue.

(3) One of the issues involved in this controversy is:

"Did appellant abandon and separate from her husband, C. P. Gardenhire, with the intention of thereafter living separate and apart from him as his wife?"

This issue was in part embraced in question No. 1, but we think not sufficiently explicit to cover the legal proposition covered by question No. 2, which should have been answered. In 1889, when C. M. Gardenhire married C. P. Gardenhire, he was living on the land in controversy, where he took his last wife to live. The land was the community homestead of himself and a former deceased wife, by whom he had several children, most, if not all, of whom were living at the time of the trial of this case. Mrs. C. M. Gardenhire claims that some of the payments for this land were made by C. P. Gardenhire out of community funds of herself and the said C. P. Gardenhire, after their marriage. She also claims that there were two or three rooms added to the dwelling house and other improvements made on the premises after she went there to live, which were paid for with community funds of herself and husband, C. P. Gardenhire, and for which she claims an interest.

Plaintiff claims that about January 1, 1910, Mrs. C. M. Gardenhire separated from C. P. Gardenhire and abandoned the home with the intention of never returning to it to live and of never again living with her husband, C. P. Gardenhire. Plaintiff also claims that a short time after Mrs. C. M. Gardenhire separated from her husband and abandoned the home, the husband, C. P. Gardenhire, abandoned the state and went to the state of Oklahoma, with the intention of living there, and died there in the year 1913. In November, 1910, Mrs. C. M. Gardenhire returned to the land, took possession of same, and claims it as her homestead. In 1911, some months after she returned to the place, C. P. Gardenhire conveyed the land to plaintiff.

(4) If the wife, without fault of the husband, voluntarily separates

from and abandons him and leaves the homestead which is the separate property of the husband, or their community property, she thereby forfeits her homestead right therein, and the husband is free to dispose of it without her consent. Cockrell v. Curtis, 83 Tex. 105, 18 S. W. 436; Ezell v. Dodson, 60 Tex. 333; Craddock v. Edwards, 81 Tex. 609, 17 S. W. 228. If Mrs. C. M. Gardenhire did in fact voluntarily separate from and abandon C. P. Gardenhire, and thereby lost her homestead right in the premises, she could not resume that right and repossess the property without the consent of C. P. Gardenhire, and his right to dispose of the property without her consent did not affect the validity of the sale to appellee. When C. P. Gardenhire left the place, if he never intended to return thereto, it then stood free from any homestead claim that Mrs. C. M. Gardonhire could assert. C. P. Gardenhire having disposed of his interest in the property before his death, Mrs. C. M. Gardenhire could inherit no estate therein.

(5, 6) If Mrs. Gardenhire did abandon her husband, she did not forfeit her right to have his separate estate charged with any community funds that went into any permanent improvements placed upon his separate estate, and appellee had notice thereof when he bought. Sanburn v. Deal, 3 Tex. Civ. App. 365, 22 S. W. 192. And if the community funds of C. P. and C. M. Gardenhire were expended in purchasing the interest of the children in the land, the sale by C. P. Gardenhire was made with intent to defraud Mrs. Gardenhire of her rights, and such intent on the part of C. P. Gardenhire was known to appellee, then the sale of such interest is void as to Mrs. Gardenhire, and did not affect her interest.

We think the jury should have been allowed to pass upon the issues as indicated, and the court erred in withdrawing them from their consideration.

For Def

The judgment is reversed, and the cause remanded.

Wife at fault [illegible] hus. separated [illegible] left homestead [illegible] she forfeited her homestead [illegible] therein.

This homestead [illegible] com. funds [illegible] voluntary separation [illegible] hus. [illegible] cause her [illegible] forfeit the [illegible] homestead [illegible] extent [illegible] com. funds.

CERVANTES v. CERVANTES et al.
(Court of Civil Appeals of Texas. Oct.
21, 1903.)
(76 S.W. Rep. 790)

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Juan Cervantes against E. G. Cervantes and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Fly, J.--Appellant sued E. G. Cervantes, Damas Cervantos, Lucinda Cervantes, Cliotilda Casenova, and her husband Manuel Casenova, to recover lots 2 and 3 and an undivided two-thirds interest in the west half of lot 4, block 5, on Losoya street, city of San Antonio, and a tract of 126 acres of land on Calaveras creek, Bexar county. Appellees answered by general denial and two, three, four, five, and ten years' limitation, and set up improvements in good faith and payment of taxes. A trial by jury resulted in a verdict and judgment for appellant for one-half of the 126 acres of land and for appellees for the lots on Losoya street.

The court gave the following instructions to the jury: "You are instructed to find for the plaintiff for lot 3 and for one-fifth of lot 2 and two-fifths of lot 2 and one-third of the W. 1/2 of lot 4, according to the Friesleben plat of the Losoya street property, the first tract described in plaintiff's petition, unless you find under the charges hereinafter given you that the defendants have acquired title thereto by limitation. If you believe from the evidence that plaintiff, Juan Cervantes, abandoned his wife, Maraquita Cervantes, and that after said abandonment, and prior to the 16th day of April, 1901, the said Maraquita Cervantes, or the defendants herein claiming under her after her death, were in actual, peaceable, and adverse possession of said property on Losoya street claiming the same as her and their own, and that said possession continued for ten years, and that the plaintiff had notice during all said time of said adverse claim, then you will find for the defendants for said property."

There is but one question presented by the record: Can a married Ques woman, who has been abandoned by her husband, acquire title to his separate property by limitation? The record discloses that some time in 1867 Juan Cervantes, the appellant, left his wife with two children, the oldest seven years of age, and went to Mexico. Shortly after his departure another child was borne by his wife. He returned to San Antonio several times, the last visit being made in 1872. During the time that appellant was absent from his family, his wife and children were in possession of those portions of the lots that were his separate property, using and enjoying the same, and paying the taxes thereon, and Mrs. Cervantes claimed the property as her own. Improvements from time to time were made on the property. In December, 1899, Maraquita Cervantes, the wife, died, and in a few months appellant returned to claim the property in controversy, and in order to obtain it instituted this suit against appellees, three of whom are his children. During all the years from 1867 to 1900 appellant Note contributed nothing, according to the statement of all the witnesses ex-

cept himself, to the support of his wife and children, and practically nothing according to his testimony. After 28 years of utter disregard for his wife and children, appellant, upon the death of the former, returned to set up his legal rights and dispossess his children of a home. If a case can be conceived of whose surroundings and circumstances would form a basis for a decision that the abandoned wife can obtain a title by limitation to the separate estate of her unfaithful and recreant husband, the facts of this case would undoubtedly sustain it. Justice and humanity cry out against the injustice to the wife and children through over a quarter of a century, and all the higher sentiments condemn the acts of the father. But, however much his acts may be condemned, the question must be stripped of sentiment, and a cold application of the law made to the facts attending the case.

There has been no discussion in Texas of the direct question involved in this case, and in only one case has the matter been directly alluded to, and that is the case of Burnham v. McMichael (Tex. Civ. App.) 26 S. W. 887, where it was said, "The husband cannot invoke the statute of limitation against his wife during coverture." While it may be that the proposition was not demanded by the facts of that case, it has some weight as showing the trend of opinion of one of the appellate courts of the state. The only case that has been brought to the notice of this court that tends to sustain the judgment is the case of Warr v. Honeck, 29 Pac. 1117, decided by the Supreme Court of Utah. In that case the husband and wife had separated, and in a void decree of divorce certain property belonging to the husgand had been set apart to the wife. She went into possession of it, and held it adversely to the husband for a period sufficient under the laws of Utah to acquire title by limitation. The court held that the wife had acquired title to her husband's land by limitation. The court starts out with the false premise that, while marriage makes one of the husband and wife, his abandonment of her changes that condition, and the relationship is dissolved. That proposition is based on the fact that courts, from sheer necessity, and in order to protect helpless wives, and children abandoned by unfaithful husbands and fathers, have held that the abandoned wives were invested with certain powers in connection with the community property and their separate property not held when the husbands were present, and could sue and be sued and make contracts. These powers are conferred merely as a protection to a deserted wife and her children, and cannot form a logical basis for holding that she is placed on the same footing with her husband as she occupies to other parties, and can acquire rights in his property antagonistic to him. The extraordinary powers granted to her are not weapons of offense to be used against her husband, but rather of defense against the exigencies and necessities of life. They form no means of destroying her husband's rights of property, but form a fortress to protect her and her children against hunger and want.

The Utah court went further, and held that the abandoned wife could acquire the property of her husband, because she was living in Utah under what is denominated "married woman's statutes." Those statutes are quoted, and, while they confer extraordinary powers upon married women in connection with their separate property, and permit them to sell it and otherwise dispose of it, and to sue and be sued, there is nothing in the statute that hints at dissolving the marriage relation and destroying marital

duties by the misconduct of the husband. Those statutes pertain to separate property of the wife, which is defined to be that acquired by her before marriage and that acquired afterward "by purchase, gift, bequest, devise, or descent." It may be, however, that the word "purchase," used in the statute, is broad enough to comprehend title by limitation, and that the court was justified in holding that in Utah the statutes permit the husband or wife to obtain title to the lands of the other by limitation; but, if so, no such statute exists in Texas, and the decision, being based on the peculiar statute of Utah, can have no force in this state. In Texas the man is made the head of the family, and the control and management of the property belonging to the marital partnership and to either of the partners is placed, with certain restrictions, under his management and control, and unity and peace is contemplated in the management of family affairs, and not the building up of the interests of the one at the expense of the other. Should one of the parties to the marriage contract prove false to its demands, and recreant to his duties towards the other, the injured party is not by the law transformed into an enemy, and armed with weapons with which to destroy the property of the other. The law of reprisal has no place between husband and wife in the shape of statutes of limitation nor in any other method. The laws governing the marriage state are not suspended by misconduct, but, so long as both shall live, if the marriage contract is not sooner dissolved by judicial decree, the laws as to their property and relations towards each other are inflexible and unchanged.

It will not be contended that the abandonment of Mrs. Cervantes by her husband annulled the marriage relation existing between them, or that they were not man and wife until the marriage was dissolved in 1899 by the hand of death. There may have been, and doubtless was, abundant cause, under the laws of Texas, for a dissolution of the marriage tie; but it was merely cause for action in a judicial tribunal, whose aid and power was never invoked by the injured party. Her abandonment by the husband invested her with more power and clothed her with more authority in incurring debts, in suing for her separate community property, and in conveying the same alone; but she was still the wife of Juan Cervantes, entitled to the same privileges in connection with the property acquired by him through his labor or enterprise, and subject to the same demands upon his part to an interest in the product of her labors. The laws of Texas create a partnership between the husband and wife, and declare that all property acquired during the existence of the partnership, as in other partnerships, shall be a common fund, except that derived from sources independent of and disconnected with the partnership. The partnership thus created by law between the man and woman, unlike other partnerships, cannot be dissolved by mutual consent, nor by any act upon the part of one or the other, no matter how flagrant and reprehensible, but stands undissolved and indissoluble until annulled by death or the decree of a court of competent jurisdiction. So long as the marital relation exists, it is declared by statute that all property acquired by husband or wife, except that which is acquired by gift, devise, or descent, shall be deemed the community property of the husband and wife. The community nature of the property acquired during marriage is not made to depend upon the life and conduct of either husband or wife, the one towards the other, but the broad definition covers all property that may be acquired except that specially mentioned.

The foregoing proposition is fully supported by the case of Routh v. Routh, 57 Tex. 589, in which the husband abandoned a wife in the state of Illinois, and came to Texas, and married again, not having obtained a divorce from the abandoned wife. The abandonment took place in 1844, and continued until the death of the husband in 1864. The husband acquired property in Texas. The Illinois wife sued for the property of the husband acquired during the abandonment. The court, in rendering a decision in favor of the Illinois wife, said: "The question here presented is not whether the acts of the plaintiff were such as to have entitled her husband to procure a decree of divorce against her, but it is whether her acts toward him, their consent and agreement to live apart, and his subsequent marriage, had the effect to so operate upon her marital rights to property as to exclude her from the partnership which the law establishes between husband and wife. It is quite certain that those facts do not have the effect to annul and dissolve the matrimonial relation itself. It will survive until the death of one or the other, unless it shall be terminated by judicial decree. * * * The law of our state then impresses upon the marriage relation inflexible and continuous durability, and at its formation ipso facto establishes a community of interest in all property that may be thereafter acquired by either of the matrimonial partners, except that acquired by gift, grant, or descent." It would not matter how the property was acquired by either spouse, if not within the exceptions, whether by the labor or enterprise of the husband or wife, or by the statutes of limitation; the moment the title becomes perfected in the one or the other it becomes the community property of the marriage. Speaking on the subject of the title to land acquired by the wife by limitation in Hurley v. Lockett, 72 Tex. 262, 12 S. W. 212, the Supreme Court said: "Whatever right or title she acquired to the land under the statute of limitation was necessarily in common with the husband. Her possession in whole or in part for the period of ten years was that of her husband, and his possession was hers." The court denied the right or power of the wife to acquire separate property by limitation, and this was but a reiteration of the statute which declares that all property acquired during marriage is community estate, except that acquired by gift, devise, or descent. Rev. St. 1895, art. 2968.

As before stated, the law does not say that all property acquired while the husband and wife are living together and acting faithfully and loyally towards each other shall be community property. The title to the property depends upon no such contingency, but "all property acquired by either husband or wife during the marriage, except that acquired by gift, devise, or descent, shall be deemed community property of the husband and wife." Under the provisions of that statute, if Maraquita Cervantes had gone into possession of the property of some third person, and had acquired title by 10 years' adverse possession, there can be no doubt that the property would have been the community estate of herself and husband. This is the plain ruling in the case of Hurley v. Lockett, above cited; and, if it be held that she acquired title by limitation against her husband, the effect of the acquisition was not to change the property from his separate property to her separate property, but to convert it into community property, in which she had a half interest. The statement of the condition necessarily following the sustaining of the wife's power to obtain title to her husband's land by limitation clearly demonstrates the weakness and untenability of the proposition. The law, in its great

desire to sustain a second marriage relation honestly entered into, has permitted the presumption of death of a former spouse of one of the parties to be indulged in after a lapse of years; but it has sustained the last marriage on ground of public policy, not because of the abandonment. The doctrine is based on the presumption of death alone. If Mrs. Cervantes had believed her husband dead, and had entered into another marriage, a different question might have been presented; but she knew he was living, and that she remained his wife, and it is sought to obtain title by a possession on her part adverse to her husband. No matter how reprehensible and inexcusable was his conduct, no matter the length of his abandonment of his wife, they were still man and wife, under the laws of Texas, with common interests, and her possession of his property was his possession. To hold otherwise would be, in effect, to declare the marriage relation dissolved without judicial decree, by mere abandonment of the one spouse by the other, which can find no warrant in the laws of Texas.

The funds used by Mrs. Cervantes to make improvements on the separate property of her husband were community funds, and it is the settled law in Texas that the separate estate of one member of the community must reimburse the community for any proper improvements made in good faith upon the separate property with community funds. Rice v. Rice, 21 Tex. 58; Bond v. Hill, 37 Tex. 626; Furrh v. Winston, 66 Tex. 521, 1 S. W. 527; Cameron v. Fay, 55 Tex. 58; Clift v. Clift, 72 Tex. 144, 10 S. W. 338. In the case of Rice v. Rice, above cited, the lots belonged to the husband, but the improvements were made by the wife, and it was held that the improvements belonged half to the husband and one-half to the wife. So, in this case, the improvements made by Mrs. Cervantes on the property of her husband would be community property, and her children would be entitled to be reimbursed for one-half of the cost of such improvements.

The question as to the taxes has been one of more difficulty than the improvements, and we have been unable to obtain any authority on the subject, but have concluded that the rules of justice and equity would be subserved and a correct principle enunciated in holding that, the taxes being paid by community funds, the children should have the benefit of one-half of the sum so expended. The taxes were expended to preserve the separate estate, and should be a charge upon it.

It may be well, in view of the cause being remanded, to say that appellant is not in a position to claim any rents for use and occupation of the land, because it was his duty to furnish a home for his wife and children, whether from his separate or the community property.

It is the conclusion of this court that appellant should recover all those lots or portions thereof involved in this suit which he shows to be Held his separate property, and one-half of any portions of said property bought by Mrs. Cervantes with community funds, and that appellees should recover of appellant one-half of all improvements made with community funds on his separate estate, and one-half of all the taxes paid thereon, and that the value of such improvements and taxes should constitute a lien on his separate property.

That part of the judgment as to the 126 acres of land on Calaveras creek, in Bexar county, will be affirmed, but that relating to the other

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

property will be reversed, and the cause remanded to be tried in consonance with this opinion.

On Motion for Rehearing.

(Nov. 18, 1903.)

The improvements were made upon the separate property of appellant with community funds, and the wife owned one-half of those funds, and it is right that her children should be reimbursed for any proper improvements made by her in good faith upon the separate estate with community funds. To reimburse them they should receive one-half the community funds invested in such improvements. Rice v. Rice, 21 Tex. 66; Bond v. Hill, 37 Tex. 626; Furrh v. Winston, 66 Tex. 521, 1 S. W. 527. We do not consider these authorities in conflict with Clift v. Clift, 72 Tex. 144, 10 S. W. 338. In that case the improvements were paid for by the husband partly in goods, and the court said: "If it had been shown that the identical goods Clift had on hand at the time of his first wife's death went to pay for the construction, a trust in the property to amount of the value of her community interest therein would have been shown." In the case of Branch v. Makeig (Tex. Civ. App.) 28 S. W. 1050, the rigid rules as between co-tenants was enunciated, and in the Clift Case it is said "that in adjusting equities arising out of conflicting claims which arise under our community laws we should not be restricted by the rigid rules which apply ordinarily between tenants in common." The Rice and Furrh Cases are cited in support of the proposition. It would be inequitable and unjust not to reimburse the heirs of Mrs. Cervantes for one-half the community funds expended by her for taxes on the private property of appellant and for the whole of the taxes so expended by them since her death. He should recover rent for his portion of the premises from the time of the death of Mrs. Cervantes.

For 101,

In all other respects, except as to the rent as above stated, the motion is overruled.

Wife [illegible] acquire title to her husband's [illegible] by adv. [illegible] continuance of marriage relation.

my case!

HURLEY v. LOCKETT et al. pls,

(Supreme Court of Texas. Dec. 11, 1888.)
(72 Tex. 262.)
(S.W. Rep. Vol. 12,
212.)

Commissioners' decision. Appeal from district court, Johnson county; J. M. Hall, Judge.

Hobby, J.--This suit was brought to recover about two acres of land, situated along and contiguous to the eastern boundary line of the R. Campbell survey, and the western boundary line of the I. B. Sessions survey, these lines being coincident, the latter survey being junior to and calling for the former. The land in controversy is the lower or southern portion of a narrow strip of land situated as above described. The suit was instituted on the 21st day of June, 1883, by Mrs. M. S. Lockett, joined by her husband, Solomon Lockett, against W. J. Hurley. The petition alleges ownership in Mrs. Lockett in fee-simple on and prior to June 4, 1883, and sets forth specially that plaintiffs, and those under whom they claim, have had, 10 years prior to said date, continuous adverse, etc., possession, cultivating, using, and enjoying the same up to the western boundary line of the Sessions survey, which is alleged to be marked on the ground for a distance of about 800 varas by a bois d'arc hedge and fence. As the case was developed on the trial, the issues between the appellant and appellees were whether the hedge and fence, as claimed by appellees, constituted the eastern boundary line of the Campbell survey, or was it, as contended by appellant, located upon the ground east of said hedge and fence? If said hedge and fence marked the true east line of the Campbell survey, then was appellees' specially asserted title of 10 years' adverse possession established?

strip of land in cont-rovers

Upon the issues thus made the court instructed the jury: "If, under the evidence and instructions given, you find that the east boundary line of the Campbell survey, as originally located on the ground, is east of the line upon which the bois d'arc hedge and fence is shown by the evidence to have stood, then you will find for the defendant, and by your verdict say, 'We, the jury, find that the east line of the R. E. Campbell survey, as originally established on the ground, is ______ varas (naming the number of varas, if any) east of the line marked by the bois d'arc hedge and fence, and therefore find for the defendant,' unless you find for plaintiffs under the plea of the statute of limitations, and under the plea of acquiescence, as hereafter instructed. But if you find that the east boundary line of the Campbell survey is on a line where the hedge and fence are shown by the evidence to be, or west of said hedge and fence, as the same stand upon the ground, you will find for plaintiffs, and say, by your verdict, 'We, the jury, find that the east boundary line of the R. E. Campbell survey, as originally established on the ground, is on the line _______, or west of the line ______, as marked by the bois d'arc hedge and fence, and therefore find for plaintiffs.'" The form of verdict was given the jury in the event it was found that defendant had acquiesced in the hedge and fence line. If plaintiffs were entitled to recover un-

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

der the plea of 10 years' limitation, the form of the verdict was also given to the jury. The response of the jury to the foregoing instructions was: "We, the jury, find for the plaintiffs, under the statute of 10 years' limitation, with $12 as rental value of the land." There was abundant evidence, we think, to justify the implication contained in the verdict as to the location of the east boundary line of the Campbell survey, originally east of the hedge and fence line; and it remains then to determine only whether on the trial of this cause, as it is presented to us by the assignments of error, the plaintiffs established their right to the land by adverse possession, in accordance with the familiar principles governing the assertion of title under that plea as settled in well adjudged cases.

Note

During the trial of the cause Solomon Lockett testified in behalf of himself and his wife that "he had never at any time acknowledged that the land in controversy belonged to the defendant; that the defendant had acquiesced in the division line as claimed by plaintiffs for the past fifteen years; that he had not offered in 1880 to buy the same from defendant, and had not stated that it was not worth much to the latter, but was of value to him." He also testified that "the land in dispute, and which the defendant fenced, embraced about three-fourths of an acre, which plaintiffs, and those under whom they claim title, had been in possession of, actually inclosed, since about 1862 or 1863; that he was the plaintiff M. S. Lockett's authorized agent, attending to renting out the place for her each year, and the collection of the rent, and that she occupied and cultivated the land by tenants every year since she bought it." For the purpose of contradicting this evidence of Lockett, the defendant offered to prove, by his own testimony, and that of Mat Hale, that the plaintiff and witness Lockett, several times during the year 1877, while attending to the Lockett or Nelson farm as agent for his wife, M. S. Lockett, stated and admitted that the land involved in this suit was the property of the defendant; that he did not claim the same for his co-plaintiff; that he recognized the line claimed by defendant as the true line, and asserted no adverse claim to it. This evidence was objected to by plaintiffs, and excluded by the court, "because, the property being the separate property of Mrs. M. S. Lockett, she cannot be bound by the admissions and declarations of her husband." That the admissions or declarations of the husband with respect to the separate estate of the wife, and prejudicial to her interests therein, are not admissible as against her, is a rule the correctness of which cannot be doubted, (McKay v. Treadwell, 8 Tex. 177;) but when he acts as her agent, under authority express or implied, his declarations made within the scope of his agency would be. So, too, where she claims under or by virtue of the acts and declarations of the husband they would be admissible against her, not as to her separate property, but as to the property she seeks to acquire by virtue of his acts. We do not understand, however, that the rule that the wife is not bound by the declarations or admissions of the husband as to her separate property, when they are prejudicial to her, has any application to this case.

Note

Held

The title to the land is specially pleaded by the plaintiffs to be one acquired by an adverse possession of 10 years. A recovery was had by plaintiffs upon this theory. Consequently, the land could not have been the separate estate of the wife. Whatever right or title she acquired to

the land under the statute of limitations was necessarily in common with the husband. Her possession, in whole or in part, for the period of 10 years, was that of her husband, and his possession was hers; and his acts, declarations, and conduct in relation to it were admissible.

The court instructed the jury that the "mere admissions of the husband as to the right or interest of the wife's separate property will not be sifficient to prejudice or defeat any rights of the wife, unless such admissions are made by authority or consent of the wife, or unless the same are acquiesced in by the wife after the same has come to her knowledge; and in this case, if you find that the husband of the plaintiff M. S. Lockett made any admission to the extent of her right or claim to the boundary lines of her land, then you are instructed that you will not consider such admissions, if any, as evidence against her, unless you further find that she authorized, consented to, or knowingly acquiesced in such, if any, admissions; but if you find that the husband, Solomon Lockett, did make any admission or agreement affecting the right or interest of M. S. Lockett's claim to the land described in the petition, and that the same was done with her authority or consent, or was, after same was known to her, acquiesced in by her, then you may regard such admissions or agreement, if any, as evidence in the case, and you may give to the same such weight as you may think, under all the evidence in the case, the same, if any, is entitled to."

The charge requested by the defendant in this connection was to the effect that if it was found that "Solomon Lockett acted as the agent of, and for his wife, M. S. Lockett, in the purchase of the Nelson tract of land, and took possession thereof under the authority of Mrs. Lockett, and held it as her agent, she would be bound by his agreement and admissions made within the scope of such agency;" and that "if it was found from the evidence that Solomon Lockett was the agent of M. S. Lockett, as stated above, and that she claims the land in controversy under the 10-years statute of limitations, acquired in part by virtue of the possession of the said Solomon Lockett as such agent and if you find from the evidence that said Solomon Lockett, during the time that he was in possession of said land as such agent, and while acting as such agent, admitted that the defendant was the owner of the land in controversy, you are instructed that the plaintiff Mrs. M. S. Lockett is bound by such admissions so made; and, if you so find, you are instructed to find in favor of the defendant." As we have said, the admissions of the husband in respect to the separate property of the wife cannot defeat or prejudice her right or title thereto; nor are they admissible as to the extent of the boundary lines of the wife's land to her prejudice. But in this case the title of the plaintiff M. S. Lockett to the land could be derived from the deed of Nelson's administrator, Banks, only in the event that the hedge and fence mark the true east line of the Campbell and the western line of the Nelson or Sessions survey. It was shown upon the trial that this was not the ground upon which she was entitled to recover; but the title upon which the recovery was had was under the statute of 10 years' limitation, acquired in part by the possession and occupancy of Nelson, her own, and that of her husband.

The case standing thus, we do not think it was necessary, in order to affect her title by limitation, that the plaintiff Mrs. M. S. Lockett Held

should have authorized the admissions of her husband, nor that she should have acquiesced in them. If the title to this land was acquired as set forth in the petition, and as ascertained by the verdict, it was not her separate property; and, the possession of M. S. Lockett being the possession of her husband, his declaration and acts were admissible; and the charge requested presenting this view of the law should have been given, or instructions embodying this principle.

For the errors mentioned in the opinion we think the judgment should be reversed, and the cause remanded.

Per Curiam. Adopted. [illegible]

Ct held [illegible] Code. [illegible] relatives [illegible] acquire therein [illegible] in common w her husband, [illegible] his acts [illegible] declarations [illegible] regard [illegible] admissible [illegible] not authorized nor acquiesced in [illegible]

SIDDALL v. HAIGHT. (S.F. 1,789)

(132 Cal. 320) (64 Pac 410)
(Supreme Court of California, 1901)

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Henry Siddall against George W. Haight. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Chipman, C. Action for neglect of professional duty as attorney for plaintiff. Defendant had jusgment on motion for nonsuit, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Defendant was the attorney for plaintiff in an action against one Robert Thompson, against whom plaintiff recovered judgment for $679.99 on May 18, 1891. The lien of this judgment expired May 18, 1893. Plaintiff testified that he employed defendant on April 1, 1893, to cause levy of execution to be made on certain real property (admittedly the only property in which Thompson had any alleged interest, and out of which alone the judgment could be collected, if at all), being a lot situated in the city of San Francisco. On April 20th plaintiff paid defendant $20, of which $10 was to go on account of his fees and $10 to pay sheriff's fees for levying execution. Execution was sued out the next day, April 21st, and put in the sheriff's hands, but for some unexplained reason was returned to defendant, and was by him again given to the sheriff April 256h, and levied. There would have been time to advertise the sale before the expiration of the lien had the notice been published promptly, but here again, for reasons not clearly appearing, but apparently because the cost of publishing the notice was not prepaid, the publication did not begin until about May 25th, and the day of sale was fixed for June 19th. On the 19th of June, before the hour of sale, Mrs. Thompson filed a declaration of homestead on the lot in question. On account of this homestead being filed, and because of defendant's absence at the time, the sheriff adjourned the sale for a day, and what afterwards took place does not appear. It seems to be conceded by both parties-what is undoubtedly the law-that the execution and levy did not extend the judgment lien, and hence no enforceable judgment lien existed at the time the sale was advertised to take place, the property being then exempt from forced sale by virtue of the homestead. Cov. Code, Sections 1240, 1241. It was admitted that, if Thompson had no interest in the lot in question, he was insolvent. It follows, that, if this lot belonged wholly to Mrs. Thompson as her separate property, it becomes immaterial whether defendant was negligent in failing to have it sold on execution; and this would be true regardless of the homestead. Plaintiff introduced in evidence the complaint, answer, and judgment in a certain action brought by the administratrix of the estate of Jane Peebles, deceased, against Elizabeth M. Thompson, who was the wife of Robert Thompson, but he was not made a party defendant. The action was to quiet plaintiff's title, as administratrix, to the lot in question; and it was alleged that defendant, Mrs. Thompson, claimed some interest therein The complaint was filed November 14, 1891. Answer was filed January 11,

Imp- see end of case

1892, on which day the cause was tried. The court found in that action that for more than 20 years last past defendant has been in the actual and continual and exclusive occupation of the premises under claim of title, and has claimed title for that time adversely to all the world; that she maintained a substantial inclosure around the lot, and had paid all the taxes levied or assessed upon the land during all said time; and "that the defendant (Mrs. Thompson) is the owner and entitled to the possession of said land and premises"; and decree was accordingly entered. At the trial of the present action, plaintiff called Robert Thompson, husband of Elizabeth, as a witness. He testified that he had been married for 30 years, and had resided, with his wife, on the lot in question, since 1862. He testified that he "never owned it," and never had a lease of the premises; that his wife paid the taxes with money she got form her sister, Jane Peebles, the deceased person referred to in the action against Mrs. Thompson. He testified: "I lived with my wife there all this time on those premises. That property was her sister's. Her sister died, and gave it to her. I do not know that my wife's claim to that property was based upon adverse possession." Upon cross-examination he testified: "My wife's sister, Jane Peebles, gave her the property, and put her in possession of it; and we have lived there together under that possession." It is contended, however, by appellant, that a verbal gift is impossible; citing section 1091, Cov. Code, and section 1971, Code Civ. Proc. But there may be an executed parol gift of land (Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806), and as the evidence was that Jane Peebles gave the lot to Mrs. Thompson, and put her in possession, I do not think the fact that her husband lived on the lot with his wife "under that possession," as he testified he did, could affect his wife's right to perfect her title by adverse possession. There is no evidence to show that Mrs. Thompson did not reside on the premises before marriage, but we do not think this essential.

Respondent makes the point that the judgment by which Mrs. Thompson was decreed to be the owner of the lot was, in effect, a conveyance, within the meaning of section 164 Civ. Code, as amended in 1889 (St. 1889,p 328), and that the presumption is that the title was "therby conveyed in her as her separate property." We do not think it necessary to pass upon this question. There is evidence of an executed parol gift to Mrs. Thompson, her sister, and, so far as anything appears, the adverse possession under which Mrs. Thompson was decreed title was the possession thus given, and whether it was before or after her marriage makes no difference. Thompson claimed no interest in the lot, and he testified that he never owned the property. According to plaintiff's view, a wife could never perfect a title in herself by adverse possession which had originated in a gift or devise to her, either before or after marriage, because, as he claims, the joint adverse possession of husband and wife would be, in effect, a purchase with community funds. We cannot agree with appellant. All property owned by either spouse before marriage and that acquired afterwards by gift, bequest, devise, or descent is separate property. Civ. Code, Sections 162, 163. All property otherwise acquired after marriage is community property. Id. Sec. 164. Here, however, the right to possession was by gift to the wife, and if, when later the administratrix of her sister's estate set up a claim to the premises, Mrs. Thompson could defend by showing subsequent adverse possession, and because the decree adjudged the title in her by adverse possession, it does not follow that t premises became community property. As Thompson had no interest in the

property, plaintiff suffered no injury by defendant's alleged negligence. Appellant claims that whether or not Thompson had any interest in the land ought to have been left to be determined by future litigation after sale on execution. We do not think so. The complaint is framed on the theory that Thompson owned the premises sought to be levied upon and sold and, before plaintiff could show damage, it was incumbent on him to prove his allegations. This he failed to do, and the nonsuit properly followed. The judgment and order should be affirmed.

We concur: Haynes, C.; Gray, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

For Def.

It appeared [illegible] Mrs Thompson [illegible] debtor [illegible] acquired [illegible] prop. [illegible] gift [illegible] her sister [illegible] Mrs. Thompson occupied it [illegible] yrs. [illegible] she [illegible] decreed [illegible] in a suit [illegible] quiet title brought [illegible] administratrix [illegible] sister.

The title so perfected [illegible] not [illegible] com. fund [illegible] Mrs. Thompson [illegible] but operated [illegible] her separate prop.

Therefore [illegible] suit [illegible] claimant [illegible] entitled [illegible] execution [illegible] prop. it [illegible] shown [illegible] debtor's [illegible] prop. [illegible] prop. [illegible] separate prop.

BISHOP v. LUSK et al.

(8 Tex. Cv. A. 30)
S. W. Rep. Vol.27)

Court of Civil Appeals of Texas. June 6, 1894.

Appeal from district court, Henderson county; W. C. Reeves, Judge.

Trespass to try title by J. B. Bishop against W.B. and J.R. Lusk. Judgment for plaintiff for half the land claimed. Plaintiff appeals. Reversed.

Finley, J. This is a suit of trespass to try title to 320 acres of land, situated in Henderson county, and for recovery of rents, ets. Appellant claims title under W. M. Sloan, through purchase at administrator's sale, while appellees claim as heirs of Mrs. W. M. Sloan, their grandmother. The court below found that the land in controversy was the community property of W. M. Sloan and his first wife; that appellees are the grandchildren and heirs of this marriage, and, as such, are entitled to the community interest of their grandmother. The question whether this was the community property of W. M. Sloan and his first wife is urged, as the main point in the case, in the brief and argument of appellant. Appellees present no brief. The facts found by the court below, upon which is based the conclusion of law that the property was the community property of W. M. Sloan and his first wife, are as follows: "I find that W. M. Sloan and his first wife settled on a 640-acre tract of land in January, 1859,-, one-half of which is the land in controversy,-cultivating and using it as their homestead. That it was continually so occupied by them until 1869, in August or September, when Mrs. Sloan died; and thereafter, until 1876, it was occupied without break in possession by W. M. Sloan, as his homestead, W. M. Sloan marrying his second wife in 1870." The court further finds that said Sloan continued to occupy, in person and by tenants, to the time of his death, in 1887. Appellant bought the title of W. M. Sloan, under a regular administration sale. It will be seen that the title of W. M. Sloan was acquired under the statute of limitations of 10 years. His adverse occupancy began in January, 1859, during the lifetime of his first wife, and continued during her life, to August or September, 1869, when she died. The statute of limitations was suspended in Texas from January 28, 1861, to March 30, 1870. Limitation had run about two years Note when the wife died, and the bar of the statute was not complete until March, 1878, more than eight years after her death. The two years' occupancy during the lifetime of the first wife, while the statute of limitations was in operation, is the only basis upon which the theory that the property is the community property of the husband and wife can be placed. Our statute fixing the property rights of husband and wife is as follows: "Art. 2852, Sayles' Civ. St. Allproperty acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, shall be deemed the community property of the husband and wife, and during the coverture may be disposed of by the husband only."

If this land was "acquired" during the coverture of W. M. Sloan and

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

his wife, then they owned it in common. Can it be said that the land was "acquired" during their coverture, within the meaning of the statute? Our statute of limitations gives any one, having a right of action for the recovery of lands, 10 years in which to institute suit against an adverse holder without paper title. Sayles' Civ. St. art. 3194. Article 3196 further provides; "Whether in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable adverse possession shall be held to have full title, precluding all claims." Until the period of limitation, as fixed by the statute, has expired, under the adverse possession, the owner of the real title may dispossess the occupant by suit; or, if the occupant abandons his possession, he will have acquired no title or interest, either legal or equitable, in the land. Uutil he has acquired title by adverse holding for the full period of time prescribed in the statute, his possession is wrongful, and, in contemplation of law, he is a trespasser. At the time of the death of the wife, she and the husband, could have been dispossessed by suit, or, had they given up possession, they could not have acquired title, even against one who had entered without shadow of title. They had no title or interest in the land at that time which the law recognizes,-their holding had been wrongful; they were trespassers, Then, if the wife had no interest in the land, legal or equitable, in contemplation of law, none could be cast upon her heirs by descent. We have not been cited to any case which decides this question, and are not aware of any decision of our supreme court upon it. There are many cases upon the general features of limitation titles, in which are discussed and announced general principles, which we have sought to correctly apply to the particular question under consideration. See Craig v. Cartwright, 65 Tex. 421; Charle v. Saffold, 13 Tex. 112; Aikin v. Jefferson, 65 Tex. 145. Also, Walters V. Jewett, 28 Tex. 200; Webb v. Webb, 15 Tex. 276. Upon the issue of title, therefore, we are of the opinion that the trial court erred in holding that the defendants were entitled to one-half the land, as the comjunity interest of their grandmother.

The court below found that the rental value of the land was $125 per year, and that appellees had occupied same since January 1, 1891. This suit was filed January 4, 1892. Appellant is entitled to judgment also for his rents. Sayles' Civ. St. art. 4809. The pleadings of plaintiff only claim $100 per year as rents. The judgment of the court below will be reversed, and here rendered for appellant for the entire tract of land, and for rents for the years 1891 and 1892, at $100 per annum. It is accordingly ordered.

For def. Pl,
Held for pl. for whole of prop. claimed.

GAFFORDv. FOSTER et al.

p18

(36 Tex. Civ. App 56)

(31 S.W.Rep. 63)
(Court of Civil Appeals of Texas
May 7, 1904.)

Appeal from District Court, Hood County; W. J. Oxford, Judge.

Action of trespass to try title by C. L. Foster and others against J. Pl Gafford. From a judgment for plaintiffs, defendant appeals. Reversed.

Speer, J. This is a suit in trespass to try title. brought by appellees against appellant in the district court of Hood county to recover an undivided interest in 320 acres of land. On April 6, 1878, R. R. Foster, Sr., whose wife was then living, purchased at tax sale the 320 acres of land in controversy. Immediately thereafter he took possession, after which, and on January 23, 1880, Mrs. Foster died, leaving surviving her, besides her husband, the appellees, and a son, through whom appellant claims. The tax deed to R. T. Foster, Sr., was filed for record August 3, 1880. R. T. Foster, Sr., by warranty deed dated March 4 1895, filed for record August 22, 1895, conveyed the land in controversy by metes and bounds to a son, G. W. Foster, who in turn conveyed the same to appellant November 24, 1902. R. T. Foster, Sr., together with his wife during her lifetime, and together with his children after her death, was in possession of the land until the conveyance to G. W. Foster above referred to. Since the conveyance to him G. W. Foster has at all times held possession, and paid the taxes for the years 1895, 1896, 1897, and 1898. The taxes fro 1899 were paid, but by whom the record does not disclose. Upon this state of facts the trial court, without the intervention of a jury, rendered judgment for the appellees, upon the theory, doubtless, that the land was a part of the community estate of R. T. Foster, Sr., and his deceased wife. This, we think, was error. From the dates above given it will be seen that the tax deed, which all the parties to this suit claim to be the basis of their title by limitation, was not recorded until after the death of Mrs. Foster. Until its registration the five-year statute of limitations did not begin to run. Sayles' Ann. Civ. St. 1897, art. 3342; Porter v. Chronister 58 Tex. 56; Adkins v. Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291. For this reason, at least, we think the children of Mrs. Foster acquired no interest whatever by inheritance from her to the land in controversy. By the registration of the deed in 1880, and the subsequent occupancy of the land for the period prescribed by law, R. T. Foster, Sr., must be held to have full title in his own right to the land in controversy. Sayles' Ann. Civ. St. 1897, art. 3347. If it be contended that, since the possession of Foster and wife antedated the registration of the tax deed, the 10-year statute of limitations would apply, it is sufficient to say that his possession was taken under, and must be attributed to, the tax deed. And, if it were not, it has been expressly held under the 10-year statute that the property is not acquired, within the meaning of our statute defining community property, uutil the expiration of the period of prescription. Bishop v. Lusk (Tex. Civ. App.) 27 S. W. 306; Speer's Law of Married

Women, Sections 197, 199. See also, Texas & New Orleans Railway Company v. Speights (Tex. Sup.) 60 S. W. 659; Votaw v. Pettigrew (Tex. Civ. App) 38 S. W. 215; Roberts v. Trout (Tex. Civ.App.) 35 S. W. 323. The writer is inclined to the view, for the reasons given in the authorities cited, that, even though the tax deed in this instance had been recorded during the lifetime of the wife, yet, the period of prescription not having expired at the date of her death, the land was not acquired, within the meaning of our community statute, so as to cast upon appellees by inheritance any interest therein whatever. It is insisted that at the death of Mrs. Foster she had an inchoate right in the property which she might perfect by limitations into a perfect title. But a right is something which may be asserted in the courts as a basis for cause of action or defense. Clearly, Mrs. Foster had no such right as would enable her, or the husband for her, to defend against the true owner, or even to recover from a trespasser the possession of the land had it once been lost. There are any number of authorities to the effect that, when a right to property is acquired during marriage, such property will belong to the communtiy, even though the wife dies prior to the completion of the title. This is so in bonds for title to property or other contracts of purchase bounty warrants, land certificates, and the like; but in all these cases a legal right exists in favor of the community which may be asserted as against the world. This is not true in the case of one who attempts to acquire title by limitation. He has only the chance of obtaining title by being permitted unmolested to hold for the prescribed time. Neither party contends that the tax deed in this instance is more than a basis for limitations. The prerequisites of a sale for delinquent taxes were not shown. This being true, and the facts hereinbefore shown being undisputed, the district court should have rendered judgment judgment for the defendant.

The judgment is therefore reversed, and here rendered for the appellant.

For Def.

MITCHELL et al. v. SCHOFIELD et al.

(140 S. W. Rep 254)
(Court of Civil Appeals of Texas.
Oct. 14, 1911, Rehearing Denied
Oct. 28, 1911.)

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Trespass to try title by Louisa L. Mitchell and others against J. D. Schofield and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Rainey, C. J. This is an action of trespass to try title, brought by appellants to recover of appellees a certain parcel of land. Appellees recovered below, and the appellants prosecute this appeal.

The evidence shows that George Lytle, Sr., and his first wife, Sallie, are the parents of the appellants. Said Lytle and wife, Sallie, acquired title to the land by the statute of limitation of 10 years during their coverture. After the title had been so acquired, Sallie Lytle, the first wife died. George Lytle, Sr. afterwards married Annie Lytle. He, with his second wife, continued to occupy the land. While so occupying the land they deeded the land for a valuable consideration to appellee J. D. Schofield. Schofield at the time of his purchase knew nothing of George Lytle, Sr., ever having been previously married, or of his having any children, and had no notice of appellants' claim to any interest in the land. Before the purchase by Schofield the Gulf, Colorado & Santa Fe Railway Company had sued George Lytle, Sr., for the land, and judgment was rendered for Lytle, which recited that the railway company take nothing by reason of said suit, and that defendant George Lytle do have and recover from the plaintiff the property described in plaintiff's petition, and that the title and possession of said land be settled and quieted in the defendant George Lytle, Sr. Schofield knew of that judgment and that the land had been acquired by George Lytle, Sr., by limitation.

The question for solution is: Can a surviving husband convey a good title to land acquired by him and his deceased wife by limitation to an innocent purchaser, when there are living children of the deceased wife?

(1,2) The holding possession of land adversely for ten years under our statute vests in the holder "full title precluding all claims," and gives a complete legal title as to all parties. MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649. Where the holder is married and the title is perfected by limitation, it becomes community property of the husband and wife.

(3,4) The land in suit was the community property of George and Sallie Lytle, and at her death her surviving children inherited her interest and the title to such interest vested in them. No right existed

in George Lytle, Sr., to sell the children's interest in the land, and, unless Schofield was an innocent purchaser of the land, his title to the land must fail.

(5) But we think Schofield was an innocent purchaser. He paid a valuable consideration to Lytle for the land. Lytle was in possession and claimed to be the owner. Schofield knew no better. He knew of the judgment that Lytle had recovered against the railway company. The deed was executed by Lytle and his then wife, Annie, and there was nothing to show Schofield that Lytle had ever before been married, and that there existed any children, issues of said first marriage.

(6) It is the settled doctrine of our decisions that the purchaser purchasing from a survivor of the community without notice of the existence of such community takes a good title. Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, and other cases.

We think the principle announced in those cases applies to this case, and the judgment is affirmed.

WORD v. COLLEY et al.
(143 S.W. Rep.257)

(Court of Civil Appeals of Texas. Jan. 11, 1912)

Appeal from District Court, Cherokee County; John C. Box, Special Judge.

Action by Horace Word against Thomas M. Colley and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Appellant instituted the action of trespass to try title to an undivided half interest in 730 acres of land, part of the Brooks-Williams league of land in Cherokee county, Tex., described by notes and bounds in the petition. He claims it as being the community interest of his deceased mother, Mrs. M. A. Word, the second wife of Thomas J. Word, deceased. The appellee Mrs. Sarah M. E. Colley, who is joined by her husband, and who is a daughter of Thomas J. Word, deceased, by his first marriage, claims the land by a deed to her through trustee sale under a deed of trust. The deed of trust, it was claimed by Mrs. Colley, was executed by her father to secure her in the payment of a commuuity debt owing by the community estate of himself and his second wife. There is involved on the appeal only the controversy as to the validity of the deed of trust under which appellee claims. Mary A. Word, mother of appellant, died on the 8th day of August, 1869. Thomas J. Word died May 25, 1890. On November 9, 1875, Thomas J. Word executed and delivered a deed of trust on the land in suit to Thomas M. Colley, trustee, to secure the recited indebtedness therein of $850 and interest due Mrs. Sarah M. E. Colley. The trustee, acting under the powers of the deed of trust, regularly sold the land to satisfy the indebtedness, and Mrs. Sarah M. E. Colley became the purchaser, and holds whatever title was conveyed by such trustee's sale. The court made the finding that: "(4) The community estate of T. J. Word and Mary A. Word was, at the time of the death of Mary A. Word, and on the 21st day of April 1870, and on the execution of the deed of trust on the land in controversy, indebted to Sarah Mary Elizabeth Colley in an amount sufficient to justify T. J. Word in executing the deed of trust on the community estate to secure its payment." And on this fact the court made the conclusion of law: "(3) The deed of trust executed by T. J. Word on the land in question, for the purpose of securing the payment of a community debt owing by the estate of T. J. Word and Mary A. Word, was a valid one, and the sale thereunder passed the title of the commuuity estate to the defendant."

Levy, J. (after stating the facts as above) (1) The appellant by his assignments assails the foregoing finding and conclusion of law made by the court. It appears that the court based the finding that the community estate was indebted to appellee on the declaration of Thomas J. Word, as made inthe memorandum and note, dated April 21, 1870, and in the recital in the deed of trust. It appears from the testimony that in 1844, and during the first marriage, Thomas J. Word, then living in Mississippi, purchased five slaves, one of whom was named Aaron, Sr.,

one Aaron, Jr., and one Robert. The slaves, it appears, were his separate property. Thomas J. Word was a distinguished lawyer in Mississippi and Texas, having represented Mississippi as a congressman at large, being the colleague of Sargent S. Prentiss. In December, 1856, and after his second marriage, he removed to Texas, and there continuously resided until death. The memorandum and note, dated April 21, 1870, were written and signed by Thomas J. Word and delivered by him to his daughter, Mrs. Colley the appellee. The memorandum reads: "Palestine, Texas, April 21, 1870. Thomas J. Word, natural guardian in account with his children Justinia, John J., Jefferson, Jr., and Sarah Mary Elizabeth Word, minors. 1863, January 1. To amount of proceeds of sale of negroes, as their natural guardian, Aaron and Rob, to Ira Pruett, Confederate money $3,400.00, to be divided between four children, $850.00 each--$3,400.00 bearing interest at 8% per annum. Paid off in full Justinia (now Mrs. Hunter), John J. and Jefferson, Jr., their respective shares leaving still due to Sarah M. E. (now Mrs. Colley) this sum of $850.00. Interest from January 1, 1863, to April 1, 1870-7 years and 3 months-$493.00. Amount due Mrs. Colley to this date this sum $1,343.00. But interest should be computed on $850.00 from January 1, 1863, not compounding interest. I think this is right, as most of the money received for the negroes fell dead on my hands; but this is not the fault of my children but my misfortune. I have made the above statement to show how the matter stands and executed the note below to place the debt in a tangible form. (Signed) T. J. Word." The note reads: "$850.00. On demand I promise to pay my daughter Sarah Mary Elizabeth Colley or bearer, the sum of eight hundred and fifty dollars in specie with interest thereon at 8% per annum from January 1, 1863, for so much received by me for her as her natural guardian for the sale of her negroes on that day, the above sum being her share of proceeds." The recital in the deed of trust was: "Whereas I, Thomas J. Word, of the county and state aforesaid, am indebted to my daughter Mary Sarah Elizabeth Colley, formerly Mary Sarah Elizabeth Word, now wife of Dr. Thomas M. Colley, for money received by me as her natural guardian on January 1, 1863, for her portion of the negroes belonging to my four children Justinia, John J., Jefferson and the said Mary Sarah Elizabeth and sold by me; and whereas, I have not paid the same nor the interest, but have kept the debt up by renewal of my note; and whereas, I am desirous to secure the said debt, being $850.00 with interest thereon at 8 per cent. from January 1, 1863."

(2) The evidence is sufficient, we think, to warrant and support the finding of the court that the slaves were the property of the children by transfer or gift from the father, Thomas J. Word. The slaves were the separate property of Thomas J. Word at the time of the transfer or gift to the children, and this is admitted by the record, and, being his separate property, no question could arise as to his right to make a valid transfer or gift of them to his children. His admission, against his own separate estate's adverse interest, that the slaves were "her negroes," and he recognized them to be their property and not his, necessarily involves that all things had been done which were essential to vest the children with title, and the court was warranted in so inferring from the admission. It sufficiently appearing that the slaves were the property of the children, one of which was appellee, then the legal effect of the conversion of the slaves by Thomas J. Word on January 1, 1863, was to create an indebtedness or liability to appellee on that date for her one-fourth the value of the slaves. Thomas J. Word, by his written admission, without legal right, sold the slaves on January 1, 1863, for $3,400, and never accounted to

Note: mortgage, hus. alone — binding on community.

Imp. Note hus. alone binds his sep. prop., & com. prop.

appellee for her interest in the proceeds. The legal effect of the conversion of the slaves by Thomas J. Word being to create an indebtedness or liability on Janyary 1, 1863, to appellee for her one-fourth interest in the value of the slaves, and his second wife, Mary A. Word, being then living, and Thomas J. Word admitting the liability or an indebtedness for the conversion and reducing same to a note, the question of the liability of the community estate for the debt created by the husband is presented. Being an obligation or debt created by the husband during marriage, it should be said that it legally created a charge upon and burdened the community property with the liability for its payment. Hinzie v. Robinson 21 Tex. Civ. App. 9, 50 S. W. 635; McKinney v. Nunn, 82 Tex. 44, 17 S. W. 516; Carter v. Conner, 60 Tex. 52. The Hinzie Case supra, was where the husband became a surety on a county treasurer's bond, and the court there said: "In general terms, a community debt may be said to be any debt or liability made by the husband during marriage." For reference: Moody, Adm'r. V. Smoot, 78 Tex. 119, 14 S. W. 285. As to the power of the husband here to sell the land to pay the community debt, see Barrett v. Eastham, 28 Tex. Civ. App. 189, 67 S. W. 198; Davis v. Carter, 55 Tex. Civ. App. 426, 119 S. W. 724. Being a community debt, the power of the survivor to extend and renew the community obligation existed; and therefore Thomas J. Word had the power to renew the note, as he said he did. Morris v. Morris, 47 Tex. Civ. App. 244, 105 S. W. 242.

(3) It is true that Mr. Word says he sold the slaves for $3,400 Confederate money in 1863, and that he admitted liability and made the note payable in specie. The bare fact that Mr. Word received in exchange for the slaves Confederate money then in use and circulation, and made the obligation, to secure which the deed of trust was made, payable in specie would not defeat the power of the trustee to make sale under the trust deed. T. J. Word was liable in conversion for the reasonable value of the slaves at the time. It is not denied that the slaves at that time had some value. It does not appear what was their value, except the admiosion of Mr. Word that he sold them for $3,400 Confederate money. His admission of the fact of conversion, and that he was liable for $850 to appellee, in the absence of proof of a contrary value, would be at least sufficient to sustain the finding of the court that T. J. Word was indebted in an amount sufficient to justify him in executing the deed of trust. Even if a part of the amount of $850 was invalid as excessive value for the conversion, and there is no evidence to say it was excessive, still the trustee would have the power to make sale under the trust deed. In Groesbeck v. Crow, 85 Tex. 200, 20 S. W. 49, it was held that a trustee with power to sell the land has the power and can act under the power, "so long as any sum was due on the note" secured by the trust.

We therefore think the finding and conclusion of the court is and should be sustained. It follows that the judgment should be affirmed, and it is so ordered.

SAUVAGE v. WAUHOP.

(143 S. W. 259)
(Court of Civil Appeals of Texas. Texarkana. Jan 2, 1912.
Rehearing Denied Jan. 11, 1912.

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Action by W. A. Wauhop against Kate D. Sauvage. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The appellant brought the suit of trespass to try title and for partition of 213 acres of the C. A. Ballard survey and 219 acres of the John Bartley survey in Red River county. The two surveys are contiguous, as are the lands in suit. It was alleged that the lands were community p property of Mary J. Wauhop and John W. Wauhop, both deceased. Appellant claims a one-half undivided interest as sister and sole surviving heir of Mary J. Wauhop. It was proven that she was the only heir. Appellant also sues to recover rents and the value of certain personal property alleged to have been converted and appropriated by the appellees which either belonged to the community, or was separate property of Mary J. Wauhop. The appellee is the proven legally adopted heir of John W. Wauhop, but not the legally adopted heir of Mary J. Wauhop, and claims as devisee and sole heir under him, that the real estate was the separate property of John W. Wauhop. He further answered that John W. Wauhop died testate, and that Mary J. Wauhop was named as one of the beneficiaries and as executrix of the will, and if there was community realty that the will disposed of his separate property, as well as the community real and personal property of himself and Mary J. Wauhop, and that Mary J. Wauhop elected to claim under the will, and received benefits therefrom that she would not have received. John W. Wauhop made a will, and it was probated and later referred to. He died in September, 1903. Mary J. Wauhop died intestate October 21, 1907. The cause was submitted to the jury on certain special issues. The jury findings were that the Ballard land was the separate property of John W. Wauhop and that Mary J. Wauhop elected to take under the terms of the will. The court made the finding that the Bartley land was partly separate and partly community property. A judgment was entered for appellee, except for the value of the crop of 1907, which was adjudged to belong to appellant as heir of Mrs. Wauhop.

Levy, J. (after stating the facts as above) There is mainly involved here the controversy between the parties, first, as to the determination of whether all the land in suit was vested in the separate estate of John W. Wauhop, or partly the community of himself and wife; second, the proper legal construction that should be given the will of John W. Wauhop, and whether Mrs. Wauhop was put upon election and did elect to take under the will. There being no evidence of the character of the personalty, other than the land note of Chapman, it must here be presumed to have been the community property, and this is in effect admitted in the briefs. These questions are presented by proper assignments of error. One of the tracts in suit is the C. A. Ballard survey, and the other is the John Bartley survey, While the surveys are here mentioned, nevertheless in

passing the fact is borne in mind that since the marriage of John W. Wauhop the original acreage of the surveys was reduced by sales by him to the acreage in suit. In order to constitute both surveys of land in suit the separate property of John W. Wauhop, the appellee first relies upon a deed from Bartley M. Ballard to James W. Wauhop, father of John W. Wauhop, dated September 23, 1843. The deed recites the consideration as $1,800.00 to me in hand paid," and in words conveys "1,280 acres of land situated in Red River county about five miles N. E. from Clarksville, described as follows: (Then follow calls and distances)." After the signature to the deed follows: "And the said B. M. Ballard furthermore obligates himself to give the said Wauhop peaceable possession of said premises on or before the 1st day of January next." The field notes only describe the Bartley survey, it is admitted, and there were not 1,280 acres in such survey. Under and by virtue of an unconditional certificate for 1,280 acres, issued in 1841 to John Bartley, there was a location and survey of 600 acres of land in Red River county, which isthe survey in suit. As the deed to "1,280 acres" admittedly does not embrace the Ballard survey, then there was no ambiguity in the description, and its legal effect was to pass title only to so much land as was contained in the specific tract of land therein described by metes and bounds, and the same could not be enlarged and extended, so as to embrace an adjoining survey which was in no wise mentioned under the terms of the instrument as a part of the conveyance. So the two tracts will have to be here traced separately to determine the question of separate or community ownership by John W. Wauhop. The Bartley survey is first considered.

(1) John Bartley, it appears, made sale and transfer of his unconditional certificate to W. T. Montgomery and Bartley M. Ballard October 6, 1841. The location and survey of the 600 acres, however, appear not to have been made until September 11, 1855. The patent issued to the heirs of W. T. Montgomery and B. M. Ballard, assignees of John Bartley, for the tract February 22, 1870. No deed of sale appears by W. T. Montgomery to any one, and title to his one-half interest would appear outstanding, unless acquired by Wauhop by limitation. James W. Wauhop, the grantee in the deed mentioned, died in the year 1849-the exact date not being shown-but prior to November 26th. He left surviving him as only heirs the three children, John W., Wm. A., and Sarah. Wm. A. Wauhop died without issue in the war between the states. John W. Wauhop was married to Mary J. Wauhop, sister of appellant, on September 16, 1861. On February 27, 1867, Sarah Wauhop, sister of John W., joined by her husband, executed a deed to John W. Wauhop, conveying to him her undivided half interest in the Bartley land; the deed reciting "$2.50 per acre for the whole number of acres ascertained and found to be in the survey." Under these facts, it must be said that John W. Wauhop, by inheritance, got from his father a one-third interest in such title as the father had, which was the one-half undivided interest of B. M. Ballard, and later inherited one-half of the third interest of his brother William. After his marriage, John W. Wauhop then acquired the interest of his sister, and this would be presumed to be community. Theoutstanding interest of Montgomery, if acquired, must in the record here rest upon limitation. That such interest of Montgomery could not have been acquired by James Wauhop by limitation in his lifetime is manifest, because he died in 1849, and the certificate was never located and the land surveyed until

September 11, 1855. So John W. Wauhop could not be held to have inherited from his father a completed limitation title of the Montgomery interest. It appears, therefore, furthermore that John Wauhop's claim to the half interest of Montgomery must rest in bare adverse possession begun by him, but not completed, before his marriage. As to whether this character of claim would be sufficient to constitute that interest separate property is later discussed, and decided to the contrary. It follows, as to the Bartley survey, that one-fourth interest is shown to be separate property, by inheritance, of John W. Wauhop, one-half community of limitation title, and the sister's purchased interest of one-fourth presumed to be community.

The C. A. Ballard survey is next considered. A conditional certificate of 640 acres was issued to C. A. Ballard in 1842. An unconditional certificate was issued to him, by virtue of the conditional certificate on February 3, 1845. On February 5, 1845, C. A. Ballard made sale and transfer of the unconditional certificate to B. M. Ballard. On September 10, 1855, there was a location and survey for B. M. Ballard of 613 acres of land in Red River county, which is this survey in suit, under and by virtue of the unconditional certificate. Patent issued to B. M. Ballard, assignee of C. A. Ballard, on October 4, 1858. There is no evidence in the record to show that John W. Wauhop, or his father before him, had any deed or paper title to the Ballard survey. But to show that the title vested in the separate estate appellee relies, first, on a judgment of the district court of Red River county as muniment of title connecting to the deed before mentioned of B. M. Ballard for "1,280 acres"; and, second, upon title by statute of limitation of 10 years. As in proper connection here, the question of limitation is taken up first. It appears that the unconditional certificate was issued in February, 1845, but there was no location and survey under it until September, 1855. It does not appear that there was location under the conditional certificate of 1842. So under the facts, and assuming that James Wauhop, the father, commenced his occupancy in 1844, it is manifest that he had no interest or right by reason of mere adverse possession under limitation laws that would descend to to John W. Wauhop, one of his heirs, because it was in this record merely, in legal effect, occupancy of vacant, unappropriated public domain until the location and survey of the unconditional certificate in 1855, which was six years after his death. This reduces the question of title by limitation to adverse possession by John Wauhop before marriage, which, in the most favorable light to him, could not have begun before 1855, which was considerably less than 10 years before his marriage. As to whether the fact that limitation began to run before marriage would constitute it separate property is later discussed.

(2) The judgment relied on as muniment of title is next considered. In September, 1870, N. W. and W. B. Guinne, claiming to own the Ballard survey in fee simple title, sued Ballard Bledsoe in trespass to try title. It appears that on December 27, 1869, John W. Wauhop and his wife deeded the survey to Ballard Bledsoe under warranty deed. Later on, however, it appears that Bledsoe, being unable to pay out the land, reconveyed it to Wauhop. As a warrantor, John W. Wauhop made himself a party to the suit, and answered, first, that B. M. Ballard, in 1843, sold to James W. Wauhop "1,280 acres" of land, and that he paid for and was put in immediate possession of the same, and that there had been peaceable and uninterrupted

possession of the same from that date to the date of the suit; that the deed of that date for 1,280 acres was given as evidence of the purchase of the same, but by oversight, inadvertence, and mistake the metes and bounds of the Ballard survey were omitted, and those only of the tracts purchased were described therein; second, the 10-year statute of limitation was pleaded. It appeared that B. M. Ballard had made a warranty deed to the Guinne for the survey on June 20, 1870. The judgment in the case was simply a general judgment to the effect that the defendant "go hence without day and recover his costs." Mrs. Wauhop was not a party to the suit; and neither she nor those claiming under her are concluded by the judgment as her rights. The effect of the judgment was simply to deny the plaintiffs therein a recovery. It did not vest any title in Wauhop; it was merely a general denial of any recovery to plaintiffs. It could not, therefore, be sustained as a muniment of title back to the deed of "1,280 acres," before mentioned, because it undertook to vest none, and neither did the pleading ask it to be done. Neither could it be said that there was evidence, if the proceedings in the suit were admissible as such evidence, going to show that James Wauhop had an equitable title to this survey, because he purchased and paid for the land, and was put in possession of the same.

(3) At the time such claim would be made, a conditional certificate only existed as to this survey. Under the law of January 4, 1839, in force at the time, there was provided, as to conditional certificates, "that no sale of said claim to land by the individual entitled to the same of this government shall be valid in law and binding upon the person ruling the same until an unconditional deed shall be obtained by the grantee for said land." Paschal's Digest, art. 4167. A sale was against the policy of the law. Smith v. Johnson, 8 Tex. 423; Turner v. Hart, 10 Tex. 442. So no equity of title could be rested in such purchase, if purchased. It is true that in the case of Hart, supra, it was in effect stated that the owner of the conditional certificate might himself, in his lifetime, ratify the invalid sale after the issuance of the unconditional certificate. But here the evidence is conclusive that the owner of the conditional certificate of this survey never sold nor attempted to sell to James Wauhop. And the evidence is further conclusive that the owner of this conditional certificate never sold nor attempted to sell the same to B. M. Ballard, under whom James Wauhop makes the claim of such purchase. B. M. Ballard, under the conclusive written evidence, only purchased the unconditional certificate, which was more than a year after the date of the insisted purchase of the land by Wauhop, senior. Conclusively there was neither purchase by Wauhop from C. A. Ballard, nor question of ratification as to sale of this survey by Ballard, presented. The whole proceedings in that suit were unadmissible as evidence, we think, and should have been excluded Therefore the whole title to the Ballard survey, as well as one-half of the Bartley survey before mentioned, was acquired in the proof by the statute of limitation of 10 years adverse possession, beginning to run, in the evidence most favorable to appellee, more than four and less than five years before the marriage of John W. Wauhop, but not complete until some time after his marriage. John Wauhop lived on the land before marriage, and he and his wife resided on it after marriage.

(4) Mere adverse possession is the sole basis for the ownership, and it does not otherwise rest in any form of contract, conveyance, bond, or

right. Article 2967 of the Revosed Civil Statutes provides; "All property, both real and personal, of the husband, owned or claimed by him before marriage, that acquired afterwards by gift, devise or descent, as als the increase of all lands thus acquired, shall be his separate property." Article 2968 provides: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, shall be deemed the common property of the husband and wife." So from the statutes defining their separate and community estates, the property gets its character as belonging separately to the husband or wife, or in common to both. If the property is "owned or claimed" before marriage, it is the separate property of the spouse owning or claiming same; if it is "acquired" by either after coverture, it is in common to both. The word "acquired" in its content was not intended, we think, to be used in the limited sense of actually purchased, but is used in the broad sense to denote all property which might come to the husband or wife during coverture by title, other than by "gift, devise or descent." It is not doubted that merely holding adverse possession of some third person's land does not give title to the land to such naked trespass until the limitation period has run. Boship v. Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306. Consequently, as the title here was matured or gotten during coverture, it should properly be classed under the statute as property "acquired" during the marriage, and community, unless it would become the separate property o the husband because "claimed" by him before marriage. Ordinarily a "claim" is the means by or through which the claimant obtains the possession or enjoyment of the thing sought. This implies some obligation or liability in favor of the claimant. When applied to land, the word "claimed" imports some legal or equitable right to the land, existent to the claimant. It is quite suggestive that the word "claim" is contsured as synonymous with "cause of action." The words "owned or claimed" were manifestly used in the statute, we think, to signify a legal or equitable ownership or legal or equitable right of demand of the land. The statute speaks, as it were of the husband as the "owner" or "claimant" of the land before marriage. Having some legal or equitable right existing to him to demand the land would constitute him a "claimant" to the land, within the sense of the statute. Hence, if the particular spouse "owned" or had " a cause of actio for the land, it is separate property. To what would a naked trespasser refer his "claim" to the land before the period of limitation has run? Before the expiration of the prescribed period, he has no legal or equitable rights or demand against the owner. It is only because of prior possession, not ownership or claim of title, that he can prevail against subsequent trespassers. It is true that such trespasser could be said to have "claimed," in a sense, the land, as against the wife, before marriage. But it is not by the mere agreement or assertion of the parties, but by the statute, that the property gets its character as belonging separately to the husband, or in common to husband and wife. To extend the word "claimed to include merely an assertion of right, which is not further founded in a legal or equitable right of demand, but based on a wrong against the true owner, would not be within the sense of the statute; for, failing in legal or equitable right existent to demand the land, there would be no "claim to the land shown. So we think it must be held that ownership resting on pure adverse possession for 10 years as here, extending partly through coverture, should be, under the statutes, classed as commuuity property. The following cases support the ruling: Bishop v. Lusk, supra; Hurley v. Lockett, 72 Tex. 262, 12 S. W. 212; Speer on Married Women, Sec. 197.

In the case of Webb v. Webb, 15 Tex. 275, the property was selected by the husband before the wife's death, but title was not extended until after her death; and because there was no title during her life it was held not community. The case of Railway Co. v. Speights, 59 S. W. 572, cannot be regarded as authority for a contrary holding to the ruling here. It was decided by the Supreme Court, on writ of error, in that case (94 Tex. 350, 60 S. W. 659), that the statute of limitation was so interrupted as not to give adverse possession at all. So that the question of whether the land there was community or separate property was not a question arising at all in the case mentioned for ruling by the first court.

(5) It is true that it is a general principle that a title, when perfected, relates back and takes effect from the time of its origin, and that its status, as separate or community, is determined by the character of the right in which it had its inception. The following cases apply that principle: Welder v. Lambert, 91 Tex. 510, 44 S. W. 281; Alford et al v. Whitesided, 41 Tex. Civ. App. 456, 91 S. W. 639; Creamer v. Briscoe, 101 Tex. 490, 109 S. W. 911, 17 L. R. A. (N.S.) 154, 130 Am St. Rep. 869, and others of like facts. But none of these cases in which that principle was applied rested, for claim before marriage, merely on "adverse possession," as here. Their right to the land was referred, in the first instance, to some legal or equitable claim appearing before marriage. And these cases fully support the holding here made by us that, before it could be said that the husband "claimed" the property, in the sense of the statute, there must appear some legal or equitable right in him before marriage to refer the claim to. In Welder v. Lambert, supra, a concession was made by the government, in consideration of a stipulation to introduce colonists into the state, by which the parties were given the right to a premium in lands to be selected and granted to them, upon their compliance with the agreement. Because it was a fixed contract right which attached to the grant subsequently extended, the heirs of Mrs. Sanchez were held to have a community interest. It was "claimed" during her coverture, because it was founded in a legal demand or right, not pure adverse possession. In Alford v. Whitesides, supra, Mrs. Williams, before her marriage, was the owner by transfer to her of the land certificate, and her claim to the land was founded on this. It was because she had acquired an equitable title to the land by the transfer of the certificate to her that the court was able to say that it was her separate property, because "claimed" by her before marriage. The inception of the title did not, as here, rest alone in pure adverse possession. In Creamer v. Briscoe, the husband and wife settled on land to acquire it as a homestead donation, and did everything required by law in that respect, except to complete the three years occupancy. There the claim was under a legal right, good against the world, except the state, until the title was extended by occupancy. It was because the court was able to refer the title, when extended, to a legal right conferred by law, by which it had its inception, that it was held that the land could be "claimed" as community of the first wife.

Therefore, from the conclusions thus reached the judgment must be reversed. After a careful consideration of the record, we have concluded that the cause should be remanded, because there remains in the record a question of fact as to whether the consideration for the deed from Mrs.

Tomlin to Wauhop was in exchange for separate land. There is some evidence in the record to the effect, but which we suggest is slight to overcome the presumption of community purchase. Further evidence may be obtained And there is an issue as to all the personalty in suit that we cannot undertake by the record to finally pass on.

The judgment is reversed, and the cause remanded.

BELLEFONTAINE IMP. CO. et al. v. NIEDRINGHAUS et al.

(Supreme Court of Illinois. Oct. 16, 1899.)
(181 Ill. 426)
(55 N.E. Rep. 184)

Appeal from circuit court, Madison county.

Bill by F. G. Niedringhaus and others against the Bellefontaine Improvement Company, Jonathan B. Turner, St. Louis Stamping Company, and others. There was judgment for plaintiffs, and defendants appeal. Affirmed.

Phillips, J.--Appellees filed a bill for partition of, and to remove a cloud from, certain lands situated in township 3 N., range 10 W. of the third principal meridian, in Madison county, Ill. The land is bounded on the south by the north line of the S. 1/2 of section 23, and the western continuation thereof to the main channel of the Mississippi river; on the north by land of the Granite City, Madison & Venice Water Company; on the east by a channel of the Mississippi river known as "Gaboret Slough"; and on the west by the thread of the stream in the main channel of the Mississippi river. The bill alleges that the complainants and the defendant the St. Louis Stamping Company are the owners of the land in equal portions, as tenants in common, by title derived through a regular chain of conveyances from the government, and by open, continuous, and adverse possession of the same, by them and their respective grantors, for upwards of 20 years, and by possession under claim and color of title, made in good faith, with seven years' payment of taxes, as required by the statute. Appellants and about 150 other persons were made defendants. The object and purpose of the bill are for partition of a tract of land known as "Gaboret Island," and what are claimed and known as lands and accretions thereto.

Appellant the Bellefontaine Improvement Company, a corporation of the state of Missouri, answered the bill, claiming ownership of a part of the lands sought to be partitioned, known as "Willow Bar Island," and which is by it claimed to be situated in township 46 N., range 7 E. of the fifth principal meridian of Missouri; that it is bounded on the east by the old main channel of the Mississippi river, and on the west by a new channel, known as "Sawyer's Bend"; that it also owns the bar lying immediately south of, and until recently a part of, the first-mentioned tract; that the improvement company claims the island and bar are in the state of Missouri, and constitute a part of that state, and claims its title is a Missouri title, derived by regular chain of conveyances from the Spanish government. Appellant Turner also answered the bill, claiming title to fractional section 3, sections 10 and 11, and all of fractional sections 14 and 15, lying north of a line running east and west, parrallel to, and 5.28 chains south of, the south line of said sections 10 and 11, in the state of Illinois.

There were numerous disclaimers filed and numerous defaults entered. A decree was entered in accordance with the prayer of the bill, and the

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defendants the Bellefontaine Improvement Company and J. B. Turner prosecute an appeal to this court.

The determination of the controversy between the Bellefontaine Improvement Company and appellees depends on whether the island and bar are in the state of Illinois or in the state of Missouri; or, in other words, where the thread of the stream of the main channel is with reference to the lands in controversy. As a part of the controversy, it is necessary to determine whether Willow bar became and was a part of lands attached to the Missouri shore, and constituted a part of the Missouri lands at any time, and whether it was separated therefrom by avulsion. The question in dispute between Turner and appellees is based on the claim of the former to title by reason of certain conveyances, and an alleged judgment in ejectment on January 30, 1874, and is a controversy depending on the title of the respective parties.

It was admitted by both appellants in open court, on the hearing, that on the 28th day of January, 1896, immediately preceding the commencement of this suit, the complainants and the defendant the St. Louis Stamping Company had title to all the real estate involved in this suit by the deeds introduced in evidence as color of title, with seven years' continuous possession under claim of title, and payment of taxes successively for said period, and by continuous adverse possession for a period of twenty years immediately preceding said January 28, 1896, except fractional section 3 of lot 3 of the Woolridge subdivision, known as the "Beckman Tract," and accretions thereto, and the island known as "Willow Bar Island," and the lands lying west of the west high bank of Gaboret island. The appellant Turner claims that Gaboret island, with the exception of fractional section 2, was patented to William Rector. Rector conveyed the N. 1/2 to wit, fractional sections 3, 10, and 11, and the north parts of 14 and 15, to William O'Hara, in 1820. Helen O'Hara Harrel, as sole heir at law of William O'Hara, conveyed the same, along with other property, to one Kibbe, in 1868. Kibbe recovered a judgment in 1874 against Beckman for possession of fractional sections 3, 10, and 11 and the north part of 14 and 15. Kibbe conveyed the same property, in 1877, to the appellant Turner. Appellees' title to section 3 (which is claimed by Turner) is based upon a tax deed made in 1843, while their title to section 2 originates from the government. The two sections were united in October, 1857, in the conveyance from Hawkins and others to Hopkins, and passed by mesne conveyances to complainants below and the St. Louis Stamping Company, each deed describing both tracts. The two fractional sections adjoin, and were used and occupied by appellees and their grantors as one farm. They were so inclosed and used by the Fishers under proper deed and claim of ownership continuously for nearly 30 years. It is shown that fractional section 2 was conveyed to appellees by mesne conveyances from John Stein, who was the patentee thereof. Fractional section 3 was conveyed to appellees by mesne conveyances from Thomas F. Purcell, who acquired the same by a tax deed from the auditor of state, of date August 12, 1846. Subsequently the appellees, seeking to further protect their title, offered in evidence a deed of date September 17, 1880, from Frederick Beckman and wife to John Schenk, conveying lot 3: Schenk conveyed to his wife, by will, all his real estate, and June 4, 1887, she conveyed to Peter Schenk, and Peter Schenk and wife conveyed to the St. Louis Stamping Company on May 22, 1891. Those latter-

mentioned conveyances show color of title in the St. Louis Stamping Company, who, with appellees, claim to own the land in controversy, a partition of which is sought. With these conveyances, the evidence shows that appellees and the St. Louis Stamping Company paid taxes on fractional sections 2 and 3 from 1885 to 1891, inclusive. This is, as to these lots, color and claim of title and payment of taxes for seven successive years. Fractional sections 2 and 3 having been used continuously under proper deeds and claim of ownership for nearly 30 years as one farm by parties in privity with the title of appellees, appellees, with their grantors, were in adverse possession of fractional sections 2 and 3 for more than 20 years. This possession was with claim of ownership.

Appellants contend that a claim of title by accretion cannot be sustained where the accretion is to land held by claim and color of title and payment of taxes, or to lands held under 20 years' limitation. When adverse possession has ripened into a title, that title relates back to the inception of the possession. It is not necessary that a party should have lands inclosed before he can be said to be in actual possession. It was said in Fisher v. Bennehoff, 121 Ill. 426, 13 N. E. 150 (on page 439, 121 Ill., and page 153, 13 N. E.): "When he has color of title, possession may be shown by the constant and uninterrupted use through a series of years; and of timber land, by taking therefrom wood for fuel, fences, and other purposes; or it may be shown by an actual occupancy of a portion of a tract for which he may have a deed, under which possession is held. In such cases, the deed may be regarded as enlarging the possession to all the land it includes." It was held in Dills v. Hubbard, 21 Ill. 328: "If he makes entry under a conveyance of several adjoining tracts, his actual occupancy of a part, with a claim of title to the whole, will inure as an adverse possession of the entire tract. Possession is to be regarded as coextensive with the description in the deeds under which he enters, and the original entry as a disseisin of the owner to the same extent." It was held in Saulet v. Shepherd, 4 Wall. 502: "Where one has been in the uninterrupted and peaceable possession, for more than twenty years, of the property or real estate to which the accretions sued for are attached, as long as they existed he owns such accretions."

In Benne v. Miller, 50 S. W. 824, decided by the supreme court of Missouri, March 31, 1899, in speaking of the character of possession necessary to constitute adverse possession, the court say, quoting from Ewing v. Burnet, 11 Pet. 53: "To constitute adverse possession, there need not be a fence, building, or other improvement, and it suffices for that purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; that much depends upon the nature and situation of the property, the uses to which it is applied, and to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule in all cases, but that it may be safely said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of the adverse claimant, without interruption or an adverse entry by him, such acts are evidence of the ouster of the former owner, and an actual adverse possession, provided the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held; that neither actual occupancy, cultivation, nor residence are necessary

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where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim." In speaking of possession as applied to accretions, the court said: "An accretion becomes a part of the land to which it is built, and follows whatever title covers the mainland, whether it be title by deed or title by possession. In its nature it is not susceptible, during its forming of that kind of possession which distinguishes the occupation of dry land. But it attached to the dry land even while it is under water, and belongs to the owner of the land, and is in the actual possession of him who holds the actual possession of the mainland. If the mainland is in fact unoccupied, it is in the constructive possession of the owner of the true title, and that gives constructive possession of the forming accretion. But, if the mainland is held in adverse possession to the true owner, he is not in constructive possession of the accretion; and, since the accretion in its formative state is not susceptible of actual occupancy in the sense of a pedis possessio, the indicia of the actual possession of him who held on the mainland are extended over the forming accretion, and bring it within his actual possession. And it is not necessary that such possession of the accretion should be held for ten years to give a possessory title, because title to it follows title to the mainland; and, when the latter is held under the conditions and for the length of time required by law to vest the title in the possessor, the title to the accretion follows, even though the deposit had been made but a year or a day. One who acquires title to the mainland by ten years' adverse possession acquires title to cover deposits made and making on his front and during the period in which his possessory title was forming. The accretion grows into the land, and grows into the title of him who holds the land as the title itself grows, and, when the title to the mainland has become perfect, it extends over the accretion, however recent its formation.".

Under these authorities, it is clear that a title by possession, merely, is sufficient to maintain title to accretions to land the title of which is so held by possession. Where one acquires title by reason of color of title and payment of taxes, accretions to land to which the title is thus held go with the land to which it is such an accretion, to the same extent as to a title obtained directly from one holding the patent title.

The evidence showing that, as to fractional sections 2 and 3, there was color of title and payment of taxes, with open, notorious, exclusive, hostile, and adverse possession on the part of appellees, their title was sufficient to authorize the decree as to these tracts. Further than that, the title to fractional section 2 is shown to be in appellees by transfers from the patentee of the same, and that it, with fractional section 3, was for a period of about 30 years a part of one farm, and together were conveyed by deed by various grantors who were in privity with the title of appellees, and there being such actual, open, notorious, and adverse possession for the period of more than 20 years, with claim of title, that possession and claim of title were sufficient, and would draw to the possession all the lands described in the deed, and this would authorize the decree as entered as to these two tracts. It was held in

Zirngibl v. Dock Co., 157 Ill. 430, 42 N. E. 431: "It is, of course, settled law that possession of part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed."

Gaboret island, lying in the Mississippi river on the Illinois side thereof, has been in existence as an island since the river was known, so far as the evidence in this record shows, and was surveyed and platted by the United States government as a part of Illinois. Opposite Gaboret island, in the state of Missouri, a tract of land was granted to Hyacinth St. Cyr before the purchase of the Louisiana territory by the United States government, and the tract so granted to St. Cyr was confirmed as United States survey No. 3, and through mesne conveyances the Bellefontaine Improvement Company claims title to that tract. Gaboret island was patented to William Rector by the United States, and through mesne conveyances from him, and through color of title, payment of taxes, and by possession and limitation, the greater portion thereof became the property of appellees and the St. Louis Stamping Company. By the enabling act of April 18, 1818, under which Illinois was organized as a state and admitted to the Union, the middle of the Mississippi river was made its western boundary. By the enabling act of March 6, 1820, under which Missouri was organized as a state and admitted to the Union, the middle of the main channel of the Mississippi river was made its eastern boundary. An island was formed in the Mississippi river between Gaboret island and the western bank of the Mississippi river, which appellees claim is in the state of Illinois, and appellants insist is in the state of Missouri. This island is known as "Willow Bar Island." Taking into consideration the manner of its formation and its extent, it is clear that it is an island in the Mississippi river, and its ownership is to be determined by the determination of the question whether it is an accretion to lands on the Missouri side or to Gaboret island.

As to the formation of the island, it is shown that between Gaboret island and the Missouri shore there were fluctuations in the channel which rendered the navigation of the river difficult. The weight of evidence, however, shows that the navigable channel was on the western side of the river prior to the formation of this island, as it has been a greater part of the time since. The evidence with reference to the time when it first was formed is conflicting. The appellants claim that the island was formed by reason of the sinking of certain boats, the first of which sank about 1853. The evidence is, in substance, as follows: William Marcum, who moved with his parents upon Gaboret island in 1844, testified that he saw Willow Bar island there as early as 1847, and that he saw the boat Altona sink on the west side of the bar in 1856, in what was then the main channel. Capt. Seeborn Miller, an old pilot, who knew the river intimately in 1847, swears that Willow bar was there at that time, and that the main channel was always west of it. Capt. Parker, an old pilot whose recollection of the river extended back to 1850, swore that Willow bar was there then, having trees upon it. His brother, Capt. Thomas Parker, who knew the river since the early 40's, testified that Willow bar formed before the sinking of the boats, and that the main channel was always west of it. Henry Cremer, a resident and former landowner on Gaboret island, knew Willow bar since 1854, and had on different occasions seen the water in Pocket chute so low that Gaboret island proper

and the bar were practically connected, and states that the channel was always on the west side. Henry Kueter, another old pilot, whose knowledge of the river dates from 1854, says the channel was always west of Willow bar. Buttron, who testified for the appellants, swore the island formed in the middle of the river, leaving a channel on both sides. Marsh, a witness for appellants, said he did not know what caused the bar, but that, to his knowledge, the channel had been west of it for upwards of 20 years. Appellants' witness Montgomery, who knew the river intimately from 1852, swore that they always ran west of the bar, and that it formed east of the main channel in which the boats sank. Monroe, a witness for appellants, and who was upon Willow Bar island as early as 1858, a year before one of the boats (the Baltimore) sank, says there were then trees from four to six inches in diameter upon it. The testimony of Pepper, Leverett, Schenk, Pitzman, Roberts, Hirt, and other witnesses shows that the channel was always to the west of the island as far back as any of them could remember. There is testimony in the record showing that between 1878 and 1883 (the time not being fixed with certainty), for a period of about two years consecutively, the channel was on the east side of Willow bar.

The evidence with reference to the wrecks of the boats is that the Cornelia sank in 1853, near the Missouri shore, and the Altona two or three years after, 500 or 600 yards east of the Missouri shore; that the Baltimore, the largest boat, sank in 1859, about 200 feet west of the Altona; that the Badger State sank on top of the Altona; that the M. M. Runyan struck on the Baltimore, and sank below her; that the Keithsburg sank in the same neighborhood. All of these boats sank in the winter, when the water is generally lowest, and when the boats must follow the main channel most closely. Not only did these boats all sink as stated, but some of the wrecks are still west of the Willow Bar island, the largest (the Baltimore) being at the extreme western side, and visible only when the water is so low as to be only two or three feet above zero on the St. Louis gauge. Willow Bar island at present is separated by the main deep-water channel from the Missouri shore, while only a shallow stretch of water separates it from the Illinois shore. A number of witnesses have testified to occasions when it was so connected with Gaboret island proper that persons could walk from one side to the other. Being so connected that there was land, sometimes free of water, and sometimes submerged, actually connecting it with Gaboret island, constituted it an accretion to the latter.

It has been the uniform rule of this court that the title of Illinois proprietors to land on a river extends to the thread of the current or main channel. Middleton v. Pritchard, 3 Scam. 510; President, etc. v. McClure, 167 Ill. 23, 47 N. E. 72; Buttenuth v. Bridge Co., 123 Ill. 535, 17 N. E. 439; Fuller v. Shedd, 161 Ill. 462; 44 N. E. 286; Griffin v. Kirk, 47 Ill. App. 258; Griffin v. Johnson, 161 Ill. 377, 44 N. E. 206. And his boundary changes with the changes of the center of the river's main channel. Houck v. Yates, 82 Ill. 179; Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396. In Nebraska v. Iowa, supra, it was held: "Frequently, where, above the loose substratum of sand, there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the substratum of soil into the river, so that it may, in one sense of the term, be said

that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must always be borne in mind, familiar to all dwellers on the banks of the Missouri river and disclosed by the testimony: That, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water. * * * The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from one side and deposit of the same upon the other. The one thing which distinguishes this river from the other streams in the matter of accretion is in the rapidity of the change caused by the velocity of the current, and this, in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto." The court sums up the controversy in this language: "Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel and the washing from the one side and onto the other, the law of accretion controls on the Missouri river as elsewhere, and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states."

On the same character of question, this court held in Buttenuth v. Bridge Co., supra (page 552, 123 Ill., and page 446, 17 N. E.): "Commercial considerations make it imperative, where states or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass; that is the 'channel of commerce,'--not the shallow water of the stream, which at some seasons of the year may be impossible of navigation,--upon which each nation or state demands the right to move its products without any interference from the state or nation occupying the opposite shore." The court also said in that case: "Where a river is a boundary between states, as is the Mississippi between Illinois and Missouri, it is the main--the permanent--river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times."

Under the rule announced in these cases, it is clear that the boundary line between Illinois and Missouri is, and by the weight of evidence has always been, west of Willow Bar island, as the thread of the stream is west of that island. Willow Bar islands are about two miles long, and, if any other rule were adopted than that here declared, then the boundary between the state of Missouri and the state of Illinois would, for a distance of two or three miles, not be the thread of the stream, as the thread of the stream would be wholly in the state of Missouri. It is true that in the uncommon case of avulsion, where a considerable tract of land is, by the violence of the stream and in consequence of its cutting a new channel, separated from one tract of land and joined to another, b but in such manner that it can still be identified, the property of the soil so removed or the tract so cut off by the change continues vested in its former owner; but where the change is gradual, so that it cannot be determined what land has been taken off by the violence of the stream, or when its taking away took place, in such case a gradual change of the stream causes the center thread of the stream, not only to constitute the

boundary of the proprietor's land on that stream to the center thread, but constitutes the boundary of the state. It cannot be said that this record contains any satisfactory evidence of any such sudden change of the thread of the stream as would amount to an avulsion. The change, where any change was made, was gradual and insensible. Neither is there any evidence showing that Willow Bar island itself was, as a tract of land, cut off from the Missouri shore, but the evidence shows the gradual formation of an island in the stream, and the law of accretions is applicable thereto. We hold, therefore, the boundary line between the states of Illinois and Missouri, as well as the boundaries of Illinois proprietors, is the present center thread of the stream between Willow Bar island and the Missouri bank.

Neither are the rule announced in the foregoing cases and the principles herein announced in conflict with the adjudications of the supreme court of the state of Missouri. It has been held by the supreme court of that state that where the owner of land in Missouri bordering on the Mississippi river loses a portion of the same by its being submerged or washed away, and a tow-head forms in the river between his land and an island opposite thereto, and land gradually accrues to the tow-head and extends towards his land and within the limits of his original survey, it is nevertheless not an accretion to his land, and he has no right thereto. Cox v. Arnold, 129 Mo. 337, 31 S. W. 592. To the same effect is Cooley v. Golden, 117 Mo. 33, 23 S. W. 100.

It is insisted by the appellants that the court erred in excluding evidence offered by them, by which they sought to prove that certain owners of lands on the west side of Gaboret island, opposite Willow Bar island, did not claim that Willow Bar island was a part of Gaboret island. There was no error in excluding this testimony. Owners of land, or of any interest therein, could not, by any declarations made by them, prejudice the title of their grantee. Neither would their declarations be binding on the appellees, who acquired title through them, for the reason that an accretion to the land purchased from them is determinable solely by reference to the fact of acdretion to those lands, and not by an assertion of a claim of ownership. It was not error to exclude that evidence. From a careful examination of the record, we find no error in the decree, and it is affirmed. Decree affirmed.

COOK et al. v. HOUSTON OIL CO. OF TEXAS.

(Court of Civil Appeals of Texas. Galveston.
Feb. 4, 1915.)
(154 S.W. Rep. 279)

Error from District Court, Hardin County; L. B. Hightower, Judge.

Trespass to try title by Peter Cook and others against the Houston Oil Company of Texas. Judgment for defendant, and plaintiffs bring error. Affirmed.

Reese, J.--This is an action of trespass to try title by Peter Cook and others, children and heirs at law of F. W. Cook, to recover a tract of 320 acres of land, part of the M. M. Bradley league. It was alleged substantially in the petition that 640 acres, of which the 320 acres sued for is a part, had been acquired by the father and mother of plaintiffs under the statute of limitation of 10 years during the lifetime of their father; that, after their father's death, their mother, Mrs. Augusta Cook, recovered judgment against the Texas Pine Land Association for 320 acres of said 640 acres; that she represented to her children, the present plaintiffs, that this was her half of the 640 acres, and she would leave the other 320 acres, being the land now sued for, to her six children as their father's part of the land. The judgment in this suit was in 1896. It was further alleged that the deed afterwards executed by Mrs. Cook to the Texas Pine Land Association to all her right, title, and interest in and to the Mark M. Bradley league, save and except the 320 acres for which she had recovered judgment, conveyed no title as against these plaintiffs, she having by her election to take the said 320 acres as her share of the community 640 acres divested herself in favor of her children of any right or title to the 320 acres sued for, and the said deed is a nullity, so far as the claims of plaintiffs are concerned. It was alleged that the 320 acres sued for was at the time of the execution of said deed by the plaintiffs Peter, F. W., and Ernest Cook their homestead, occupied by them with their respective wives and families, and that the same was not executed by their said wives, that the said deed was a nullity, and there is prayer that the same be canceled and held for naught. Defendant answered, denying generally the allegations of the petition, and specifically the material allegations herein set out. As to the prayer for cancellation of the deed to the Texas Pine Land Association, they pleaded the statute of limitation of four years. Defendant also pleaded in reconvention, and prayed for judgment establishing its title as against plaintiffs. A trial with a jury resulted in a judgment against plaintiffs as to their claim of title, and also in favor of defendant on its affirmative plea. No motion for new trial was made. From the judgment plaintiffs appeal by writ of error. The trial court prepared and filed conclusions of fact and law. The case was tried October, 1911.

None of the assignments complain specifically of any of the conclusions of fact, which were not excepted to, either by way of exception to the judgment or otherwise. From an examination of the statement of facts, we find that the conclusions of fact are fully supported by the evidence,

and they are adopted by us as our conclusions of fact. These conclusions are as follows: "I find that the plaintiffs and defendants entered into an agreement in writing which was filed herein, by which they agreed that the record title to the land in controversy is in the defendant, and that the only claim of plaintiffs to the land is the claim thereto by limitation: The plaintiffs having made some contention as to their right to introduce proof on the homestead claim set up by some of them and their wives and as to attacking the deed from Mrs. Augusta Cook and others (some of the plaintiffs) to the Texas Pine Land Association, I allowed plaintiffs and the wifes of them to file homestead claims, as also the plea attacking said deed for want of consideration. I find that Mrs. Augusta Cook and Frederick Cook were the mother and father of plaintiffs named in the petition (except the husbands of the women), and that the wives asserting the homestead claims are the wives of the three plaintiffs, Peter or A. P. Cook, Fritz or F. W. Cook, and Ernest or E. C. Cook; that plaintiffs claim by inheritance through their father, Frederick Cook, based upon his occupancy of the 320 acres adjoining the land in controversy. I find that Frederick Cook and his wife, Augusta Cook, settled and moved onto the 320 acres (afterwards awarded to Mrs, Augusta Cook by the District Court of Hardin county in 1896) in 1852 or 1853, and which fact was admitted by plaintiffs in open court. I find that Frederick Cook and wife, Augusta Cook resided on said land continuously until at some date during the Civil War, between 1860 and 1865, at which time said Frederick Cook died; that his wife, Augusta Cook, continued to reside on said land thereafter until her death, which occurred about 1901 or 1902; that subsequent to the death of Frederick Cook, and about the year 1885, Mrs. Augusta Cook,had the land in controversy surveyed, which adjoins the 320 acres on which she and her deceased husband resided. I find that all of the plaintiffs and those parties asserting the homestead claims have resided with their mother on said original 320 acres, and do now reside thereon, and that neither of them have ever resided on or used any of the land here in controversy. I find that the record title to the land in controversy is good in the defendant, and that (as admitted in open court by all parties) the defendant holds under the Texas Pine Land Association by a regular and consecutive chain of conveyances. I find that on April_____, 1896, Mrs. Augusta Cook, F. W. Cook, E. C. Cook, and A. P. Cook (the latter three parties being plaintiffs in this suit, and Mrs. Augusta Cook their mother) conveyed by deed to the Texas Pine Land Association all of their right, title, interest, and claim in and to the Mark M. Bradley league, except the 320 acres recovered by Mrs. Augusta Cook in the judgment of the Hardin county district court, in 1896, above referred to which Mark M. Bradley league embraces and includes the land in controversy. I find also that said deed was executed on said date, which was more than four years prior to the filing of this suit."

(1) By the first six assignments of error plaintiffs in error (who are hereafter styled, for brevity, appellants) complain of the judgment on the ground that the evidence shows that F. W. Cook, Sr., father of appellants, and his wife, Augusta, took possession of 640 acres of the Bradley league, being the 320 acres here sued for and the 320 acres for which Mrs. Cook recovered judgment as aforesaid, more than 10 years before the statute of limitation ceased to run, on account of the war, to wit, January 28, 1861, and that by adverse possession they acquired, as community property, title to 640 acres of land under the law then in

force. It is contended that under this state of facts, upon the death of their father in 1864, one-half of this 640 acres descended to and vested in his heirs, that their mother, by virtue of the suit referred to and the judgment in her favor, elected to take the 320 acres adjudged to her as her one-half of the community, leaving the 320 acres sued for as the property of appellants as heirs of their father. The entire case for appellants depends in fact upon this issue of fact, which, as we have shown, was decided against them. The burden was upon appellants to establish affirmatively these facts. This they failed to do in two particulars, either of which was fatal to their claim. It is substantially admitted that they have no claim if their father's possession began at a date less than 10 years prior to January 28, 1861. Their contention is that it began in 1848 or 1849, and this claim rests solely upon the testimony of their witness, J. M. Humble. The trial was in October, 1911. Humble testified that he was then in his sixty-ninth year; that is, that he was born in the year 1842. He testified that F. W. Cook and his family were living on the place where they now live in 1848 or 1849 "or about that time," and that they were also living there to his knowledge in 1852, and at various times afterwards. This witness, according to his own testimony, was only six years old in 1848, and his testimony shows that either his memory is treacherous, or he testified to matters of which he knew nothing. He stated that he was between nine and ten years old when he first saw Cook on the land. He was, according to his own statement, nine years old in 1851 and ten years old in 1852. He stated that F. W. Cook died before the Civil War. His children testified that he died in 1864. Humble stated that Mrs. Cook died a year or two, or possibly three years, before the trial. Her children, appellants here, testified that she died nine years before the trial. None of the children of Mr. Cook place his settlement and occupancy of the land at an earlier date than 1852. Four of them testified for appellants; and they placed the first occupancy of this land in 1852, 1853, or 1854. One of them, Ernest Cook, testified that he was born August 24, 1852, and that his mother told him that "she brought me there when I was about a year old." This would be in 1853. The testimony of Humble stands alone and unsupported by any other testimony, or by any fact or circumstance in evidence. Any other conclusion than that at which the court sitting as a trier of the facts arrived, that F. W. Cook's occupancy began in 1852 or 1853, would have been against the great preponderance of the evidence. It certainly cannot be said not to be supported by the evidence.

(2) Assuming, then, that limitation title was not perfected until after the death of F. W. Cook, Sr., what would be the legal consequences? The trial court held that the land became the separate estate of Mrs. Augusta Cook. This precise question has never been determined by our Supreme Court. Creamer v. Briscoe, 101 Tex. 494, 109 S. W. 911, 17 L. R. A. (N.S.) 154, 130 Am. St. Rep. 869. It may be that the opinion in this case may be taken as an implied approval of the opinion of the Court of Civil Appeals in Bishop v. Lusk, 8 Tex. Civ. App. 30, 27 S. W. 306, as the Supreme Court held that the case under consideration was distinguishable from the case of Bishop v. Lusk. In this latter case, however, the precise question was decided in an able and well-reasoned opinion by Judge Finley of the Court of Civil Appeals of the Fifth District, in which it was held that the land was not "acquired" within the meaning of that term in article 2852, R. S., with regard to community property,

until the completion of full ten years of adverse occupancy as provided by the statute of limitation, that until this was done the adverse occupant was a mere trespasser, without right or title, and upon his death there was nothing for his heirs to inherit. To the same effect, as applied to the acquisition of property under the five-year statute of limitation, was the opinion of the Court of Civil Appeals of the Second District in the case of Gafford v. Foster, 36 Tex. Civ. App. 56, 81 S. W. 63. No writ of error was applied for in this case. Without undertaking to repeat or add to the opinion in the Luck-Bishop Case, which is on all fours with the present case, we are content to adopt the reasoning as well as the conclusions there announced. This disposes of the first six assignments of error and the several propositions thereunder, which are overruled.

(3, 4) This practically disposes of this appeal, as appellants only seek to recover that portion of the land inherited from their father. The evidence is sufficient to support the finding that F. W. Cook and wife only claimed the 320 acres which Mrs. Cook recovered from the Texas Pine Land Association, and that no claim was set up to the land here sued for until 1885, at which time the title to a claimant under the 10-year statute was limited to 160 acres. With regard to the contention that the deeds of F. W. Cook, Mr., Peter Cook and Ernest Cook to the Texas Pine Land Association for their right, title, and interest in the M. M. Bradley league was void, in so far as it affected the title to the land sued for, on the ground that it was their homestead and their respective wives did not join in the deed, the evidence showed that these parties had their homes on the 320 acres adjudged to Mrs. Augusta Cook, and had never used or occupied any part of the land here sued for as a homestead. Whatever title had been acquired by limitation to the land here sued for, if any, was in Mrs. Augusta Cook. Whatever title she had passed by her deed to the Texas Pine Land Association. Appellants undertook to attack this deed as having been procured by some sort of fraud, and having been executed without consideration. If the evidence was sufficient to raise this issue, and we do not think it was, appellants were barred by the statute of limitation of four years, which was pleaded to this attack on the deed. This disposes of all of the assignments of error which, with the several propositions thereunder, are severally overruled.

(5) By cross-assignment of error appellee contends that evidence as to appellants' claim of title under the 10-year statute of limitation should have been excluded, upon their objection that appellants had not pleaded the limitation title. The legal proposition that, when a plaintiff in trespass to try title relies upon a limitation title, he must plead it, is supported by the authorities. Mayers v. Paxton, 78 Tex. 196, 14 S. W. 568; Miller v. Gist, 91 Tex. 335, 43 S. W. 263; Molino v. Benavides, 94 Tex. 413, 60 S. W. 875. We are of the opinion, however, that the limitation title was pleaded in this case. The cross-assignment is overruled.

Finding no error in the record, the judgment is affirmed.

Affirmed.

Prop. [illegible] acquired before. [illegible] [illegible] [illegible] same.

Neither spouse [illegible] permitted [illegible] dispute [illegible] which [illegible] in [illegible] marriage.

If [illegible] prop. [illegible] might [illegible] marry [illegible] title ripens in one [illegible] marriage [illegible] in Ill. title relates [illegible] prop. is [illegible] prop. of one [illegible] single man; or [illegible] sep. prop.

Texas holds [illegible] and [illegible] book, [illegible] decided [illegible] it seems [illegible] [illegible] hold [illegible] Texas. That is [illegible] finally barred [illegible] marriage.

Rem. §§. 181-2-3-4-5-6-189-194. Read.

CHAPTER IX.

CITATIONS

Damages for injuries.

Hawkins v. Front Street Cable Co. (1892)	3 Wash. 592.
Horton v. Seattle (1909)	53 Wash. 316.
Blackwell v. Seattle (1917)	97 Wash. 679.
Apker v. City of Hoquiam (1909)	51 Wash. 567.
Davis v. Seattle (1905)	37 Wash. 223.
Haley v. Finch (1877)	1 W.T. 518.
(a) Property acquired by occupancy.	
Tustin v. Adams (1898)	87 Fed. 377.

Prop. acquired by: Accretion + Confusion + Contract.

ALICE C. DOYLE, Appellant, v. W. E. LANGDON, Respondent.

(80 Wash. 175. 1914)

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 4, 1913, dismissing an action for equitable relief, after a trial on the merits to the court. Affirmed.

Fullerton, J.---On November 29, 1909, Katherine F. Langdon died intestate, in King county, Washington, leaving an estate, situated in part in King county and in part in Snohomish county, consisting of real and personal property. Letters of administration on her estate were issued to W. E. Langdon, as her surviving husband, on December 13, 1909. On the same day, the administrator filed the statutory affidavit of heirs, averring therein that he, as the surviving husband of the deceased, whose place of residence was at Seattle, Washington, and the appellant Alice C. Doyle, as her mother, whose place of residence was at Chicago, Illinois, were the sole heirs of the deceased's estate. Due notice to creditors was given, and the administration of the estate was proceeded with regularly otherwise, until February 27, 1911, at which time the administrator filed his final account with the estate, together with a petition for distribution. In this petition, the administrator averred that the property of the estate was the community property of himself and his deceased wife, and that he was the sole heir and distributee thereof. April 3, 1911, was fixed by the court for settling the final account and for a hearing on the petition, of which time the statutory notice was regularly given. No appearance was made on the day appointed for the hearing by any one claiming to be interested in the estate, and on that day the court entered a decree approving the final account and awarding the property to the administrator as the surviving husband of the deceased, reciting in the decree that the property of the estate was community property.

The present action was begun by Alice C. Doyle, on August 17, 1912, to set aside the decree of distribution and for an award to her of an undivided half interest in the property. In her complaint, she alleged that the property of the estate was the separate property of Katherine F. Langdon; that she was the mother of the deceased, and a co-heir to her estate with the administrator, W. E. Langdon, and that she had been deprived of her interest therein by the fraud and deceit of the administrator. The administrator answered the allegations of the complaint by a general denial; and on the issues thus formed, a trial was had before the court, as a cause of equitable cognizance. No formal findings of fact or conclusions of law were made by the court, but the learned trial judge, at the close of the case, made an orderly and succinct statement of the evidence and of the conclusions he drew therefrom, finding that no fraud had been practiced upon the plaintiff by the administrator, and that the property was, in fact, the community property of the deceased and her husband, and not the separate property of the deceased, entering a judgment accordingly. From the judgment entered, this appeal is prosecuted.

The claim of fraud and deceit is based upon the conduct of the administrator had in connection with the probate proceedings. From the statement of the facts relating to the administration proceedings, it will be observed that the proceedings were apparently instituted originally on the theory that the property of the estate was the separate property of the decedent, in which case it would descend in equal shares to the respondent and appellant, and that the administrator subsequently adopted the theory that the property was community property, which would change the rule of descent, the respondent in that case being the sole heir thereof. In connection with this, the appellant testified (her testimony being taken by deposition) that, shortly after the institution of the probate proceedings, the respondent wrote a letter to a member of her family at Chicago in which he stated the fact of his wife's death, the fact that she left an estate, that he had begun administration proceedings upon the estate and would attend to its due administration, and that the appellant with himself were the heirs at law of the estate, and the persons to whom it would be finally distributed. She testified further that she relied upon these statements, believing that the respondent would carry into effect his promises, and had no knowledge or idea prior to the entering of the decree of distribution that the estate would not be so distributed; that she was thereby lulled into security, and, for that reason, did not appear in the proceedings or take any steps otherwise for the protection of her interests.

But, however persuasive these facts may be, when considered by themselves, they lost much, if not all, of their effectiveness when considered with other facts in the record. The testimony on the part of the respondent tended to show that he did not so much change his opinion as to the character of thie property of the estate--that is, whether it was separate or community property--as he did his views of the law with relation to the descent of community property. He testified that he at all times understood and claimed that the property was community property, but understood from his attorney that the rule of descent as to property of that character did not differ from the rule applicable to separate property. The letter on which the appellant relies bears out this statement. In it, he describes the property left by the decedent with particularity, and speaks of it as property "we owned," as "our property," and as "community property;" saying therein, "Mother Doyle and I are the sole heirs of Katherine's community interest" in such property. This letter was written on the day after letters of administration were granted to him, before he made claim to be the sole heir of the estate, and before he learned that the rule of descent was different with respect to community property than it was with reference to separate property. Clearly, if he thought then that the property was the separate property of his wife, he would not have used the terms in describing it that he used in the letter. Moreover, it was shown that he discovered his mistake about a month later, and immediately wrote another letter to a member of the appellant's family at Chicago, in which he enclosed copies of the statutes of this state showing the rule of descent with reference to community property, and saying that he had been in error in regard thereto in his former letter. That this letter, at some time, reached the appellant is made clear by her disposition, as she attaches t the same thereto. That she received it long prior to the close of the administration of the estate, we think is also clear. Aside from the

fact that it is improbable that a member of her family would not immediately show her a letter which so vitally affected her interests, the respondent testifies that he visited the appellant and the different members of her family at Chicago, not long after writing it, and that on this visit the matter of the heirship of the estate was fully talked over with the appellant, in the presence of different members of the family, including the persons to whom the letters were written. Some fault is found because the letters were not written directly to the appellant, and because the second letter was not written to the same member of the family to whom the first one was written. But the fact that the appellant was not addressed directly is explained by her rather extreme age and her inability to either read or write. As to the other part of the objection, it seems that neither of the persons addressed resided in the immediate family of the appellant, and it is difficult to see why one might not as well be addressed as another. But the fact is immaterial, since we conclude that knowledge of the contents of the letter, and knowledge of the respondent's intended action with regard to the estate, were brought home to the appellant prior to the time the administration thereof was closed.

Since fraud must be proved by clear and convincing evidence, we are unable to conclude, on the foregoing facts, that the trial court did not rightly decide that fraud had not been proven. We have not overlooked that the appellant's strictures upon the conduct and character of the respondent, based upon his past history, but, giving these their full weight, we agree with the trial judge that it is difficult to conceive anything the respondent could have done that he did not do towards informing the appellant and her immediate relations of his intentions with regard to the property.

But, moreover, we cannot follow the appellant in her claim that the property of this estate was the separate property of the decedent. The evidence regarding this branch of the case can hardly be even epitomized here, but it has its foundation in the claim that the property left by the decedent was the result of investments made by her of moneys she had prior to her marriage with the respondent. The parties were married on May 23, 1899, some ten years prior to the wife's death. The appellant testifies that her daughter had at that time money and personal property of the value of more than $10,000, and real property in the city of Chicago of the value of about $8,000, which was sold shortly after her marriage. The respondent, however, testifies that his wife had no money at the time of the marriage, and that the sale of the Chicago real estate, mentioned by the appellant, netted, after the commissions on the sale and the amount of a mortgage thereon had been deducted, a little less than two thousand dollars. He further testified that this money was deposited in a bank with moneys of his own; that he contributed to such fund from time to time as money was earned by him; and that, from this fund, was paid all of their household expenses, as well as the sums which were paid in the acquisition of the property possessed by them at the time of his wife's death. None of the wife's separate funds was traced directly into any particular piece of property, and we conclude, with the trial court, that there was such a commingling of community and separate funds as will not enable the court at this time to say that any part of the property acquired was the separate property of the wife.

The appellant further complains that the court erred in the admission of certain evidence. But, aside from the fact that we think the evidence properly admitted, we are unable to conclude that the result of the cause would be changed were the evidence excluded. If error at all, it was error without prejudice, and therefore immaterial.

The judgment is affirmed.

Crow, C. J., Morris, Parker, and Mount, JJ., concur.

ANNA W. BENEKE, Personally, and as Administratrix
of Community Estate of Henry Beneke, Deceased,
et al., Appellants, v. HENRY J. BENEKE,
as Alleged Executor, et al., Resp
spondents.

(47 Wash. 178. 1907)

Appeal from a judgment of the superior court for SSpokane county, Poindexter, J., entered October 22, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to determine conflicting rights to community property, and quiet title. Affirmed.

Rudkin, J.--In the month of August, 1895, Mary Zander Beneke died intestate in Spokane county. At the time of her death she and her husband, Henry Beneke, were possessed of the real property now in controversy, together with other property in Spokane county, all of which was either the separate property of the husband or the community property of the husband and wife. Soon after the death of the wife a dispute arose between the surviving husband and the four children of the marriage over the distribution of the estate, the surviving husband claiming the whole as his sole and separate property, and the children claiming an undivided one-half interest therein as community property, and as heirs at law of their deceased mother. An action was thereupon commenced by the surviving husband in the superior court of Spokane county against the heirs of the deceased wife to establish title in himself. During the pendency of this action, and on the 19th day of May, 1897, said Henry Beneke and the plaintiff Anna W. Beneke intermarried and maintained the relation of husband and wife thereafter until the death of the husband on July 29th, 1905.

Soon after this marriage Henry Beneke and his children entered into an agreement or stipulation reciting that Henry Beneke claimed all the real estate in process of administration as his sole and separate property; that the children claimed a one-half interest therein as community property; that they deemed it for their best interests to settle their conflicting claims and to have the estate distributed without further delay or expense; and it was thereupon agreed that the father should pay the sum of $1,000 to each of the four children, and that upon the distribution of the estate certain described property should be awarded and decreed to each child. A decree of distribution was entered in pursuance of this agreement or stipulation, and the property now in controversy, subject to a mortgage of $1,300, together with certain other property, was awarded to Henry Beneke. Upon the entry of the decree of distribution Henry Beneke and the plaintiff herein executed their promissory note in the sum of $5,300 to pay each of the four children the sum of $1,000 as agreed, and to take up the $1,300 mortgage already on the property, and the land in controversy was mortgaged to secure the payment of the note. The note was afterwards paid, in part out of the separate funds of the plaintiff, and in part out of the community funds of Henry Beneke and the plaintiff, according to the allegations of the complaint. Henry

Real estate [illegible] shown [illegible] com. [illegible] [illegible]; second [illegible] appears [illegible] 1st [illegible], [illegible] sep. estate, [illegible] pending suit [illegible] quiet [illegible] title, brought [illegible] ½ [illegible] com. [illegible] he remarried [illegible], 2nd [illegible] note [illegible] $5,300 [illegible] $1,300 [illegible] $1,000 to [illegible] release [illegible] disputed [illegible]; [illegible] note [illegible] sep. funds [illegible] 2nd [illegible] com. funds [illegible] herself [illegible] hus; [illegible] remedy [illegible] 2nd [illegible] sep. estate [illegible] hus. [illegible] money advanced [illegible] com. [illegible] procure [illegible] release [illegible] disputed [illegible] sep. estate.

Beneke died testate in Spokane county on the 29th day of July, 1905, having by will disposed of the property in controversy to certain of his children. This action was thereupon prosecuted in the name of the surviving wife, as administratrix of the community property of herself and her deceased husband, against the executor of the will and the devisees named therein, to recover possession of the property as a part of the community estate. If community property, her right to recover should probably prevail, but if not it is manifest that her complaint should be dismissed. The court below gave judgment in favor of the defendants, and the plaintiff appeals.

If we concede that the property in dispute was the community property of Henry Beneke and his first wife, we do not understand by what process it was converted into the community property of Beneke and his second wife. In any view of the case, Henry Beneke had an undivided one-half interest in the property as surviving husband, and if it be conceded that he and the appellant purchased the undivided one-half interest belonging to the children, this would not convert the whole into community property. The utmost that can be said in favor of the appellant is, that the community would have an interest in the property in the proportion that the funds advanced by the community bore to the entire purchase price, under the decision of this court in Heintz v. Brown, 6 Wash. Dec. 238, 90 Pac. 211. But what would that interest be? The children were paid in part for their interest by the conveyance or distribution of property in which Henry Beneke confessedly had a one-half interest, and in which the appellant had none. Thirteen hundred dollars of the money went to satisfy an existing mortgage, and the remainder went to satisfy the claims of the heirs in part. What proportion this sum bore to the entire amount received by the heirs is uncertain and incapable of ascertainment; and when we consider that the money was paid for the release of a disputed claim which was very doubtful at best, the uncertainty is still further increased. If the community advances money to compromise or procure the release of a disputed claim against the separate property of one of the spouses, in the nature of things this cannot convert the whole or any definite portion into community property. If the appellant has any claim, it is in the nature of a claim against the separate estate of Henry Beneke for moneys advanced by the community, such as she is prosecuting in the action instituted after the dismissal of the present action in the court below. In view of the conclusion we have reached on the merits we express no opinion on the motion to dismiss the appeal.

There is no error in the record and the judgment is affirmed.

For Def

Hadley, C. J., Crow, Fullerton, and Mount, JJ., concur.

[illegible]

[illegible]

[illegible]

[illegible]

EMPIRE STATE SURETY COMPANY, Respondent, v.
O. H. BALLOU et al., Appellants,
OTTO H. SIEFERT et al.,
Respondents.

(66 Wash. 76. 1911)

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 24, 1911, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enforce an indemnity agreement and to foreclose certain trust deeds. Affirmed.

Mount, J.--The plaintiff brought this action to recover against O. H. Ballou, Otto Siefert, and Elmer Weston, as copartners, the sum of $2,547.35, with interest, attorney's fees, and disbursements upon a guaranty agreement; and also to foreclose two trust deeds, which were alleged to be mortgages to secure the plaintiff against loss upon a surety bond. The other defendants were alleged to claim some interest in the property sought to be foreclosed, except Otto Hink, who was a surety or indemnitor to the plaintiff. Upon the trial of the case, the court found that the defendants were indebted in the sum named, and that the two deeds were in fact mortgages, and entered a decree of foreclosure. The defendants O. H. Ballou and wife have appealed.

It appears that, in December, 1908, the appellant Ballou, under the trade name of "Building Company of San Francisco," had agreed to sell John Payne and wife a certain lot in the city of Seattle, and to erect a building thereon within a given time for a consideration of some $33,000, $20,000 of which was to be paid in cash, $7,500 was to be paid by real estate in Port Townsend, Jefferson county, Washington, and the remainder by mortgage upon the premises which were to be improved. The appellant Ballou, under the name of the building company, agreed to furnish an indemnity bond to Payne and wife for the completion of the building free from liens. On January 21, 1909, O. H. Ballou, Otto Siefert, and Elmer Weston entered into a written agreement of copartnership for the purpose of constructing the building above named at a cost of $18,000. In these articles of copartnership it was agreed that each should share the profits and losses equally, but that the bond to be furnished should be paid for, one-half by Ballou and one-half by Siefert and Weston.

On January 20, defendant Ballou, under the name of the Building Company of San Francisco, applied to the plaintiff for a surety bond in the sum of $15,000, and upon the same day, each of the partners above named and one Otto Hink entered into an agreement to indemnify the surety company against loss. One of the trust deeds in suit was executed by Siefert and wife, and delivered to the surety company as indemnity, and at the same time $1,000 in money was deposited with the surety company by Ballou for the same purpose. The surety company thereupon issued the bond guaranteeing the construction of the building above named, and against liens, etc. The partnership above named thereupon entered upon the construction of the building, but before it was completed, Siefert

The title [illegible] conveyed [illegible] builder [illegible] consid. [illegible] poss [illegible] com. consisting [illegible] deed; [illegible] held [illegible] trust [illegible] deed [illegible] trustees [illegible] request [illegible] bus., posses title [illegible] conveyance [illegible] and Weston seem to have abandoned the work and Ballou proceeded to the completion of the building. In the meantime the surety company advanced $3,547.35 in the payment of liens and claims, and $700 for attorney's fees and other costs in regard thereto. The surety company used the $1,000 deposited by Ballou in part payment of these claims. So that the actual outlay of the surety company in money was $2,547.35 and the other costs. During the construction of the building, Mr. and Mrs. Payne, at the request of Ballou, executed a trust deed of the Port Townsend property to the plaintiff as additional indemnity. Later this action was begun by the surety company to recover against all of the partners, and to foreclose the two trust deeds named.

Appellants next argue that the transfer of the Port Townsend property to the surety company was without consideration, and that the property was community property of himself and wife, and that the wife never consented to the transfer. The evidence shows that the legal title to this property never passed into the community of Ballou and wife. The property was deeded directly by Payne and wife to the surety company, in trust. It was, therefore, not necessary for either Ballou or his wife to join in the conveyance. It is true that the surety company did not demand the additional security, and that Ballou voluntarily caused the property to be deeded to the surety company, to make good "any loss or deficit arising under a certain contract made between myself (the building company of San Francisco) and John and Ruth Payne only." This contract was the one to build the building. The fact that the surety company accepted the deed when they had already advanced money or subsequently advanced it, was a sufficient consideration.

Judgment affirmed.

Dunbar, C. J., Parker, Gose, and Fullerton, JJ., concur.

A. D. ANDREWS, Appellant, v. ALETHA W. C. ANDREWS,
Respondent.

(16 Dec. 391,1921)

Appeal from a judgment of the superior court for King county, Jurey, J., entered October 9, 1920, in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Bridges, J.--A. D. Andrews brought this suit for the purpose of establishing and enforcing an alleged oral contract with his father, Joshua Andrews, to the effect that the latter would, by will or otherwise, at the time of his death, give to the plaintiff all property then owned by him. Upon a trial on the merits, the lower court dismissed the action, and the plaintiff has appealed.

The direct and surrounding facts are as follows: Joshua and Harriet Andrews were, respectively, the father and mother of the appellant, and lived in the city of Seattle, while the appellant with his family lived in West Seattle. This was in 1903. At that time, Joshua and his wife owned certain lots in the city of Seattle, on which they lived. Mrs. Andrews, senior, was afflicted with cancer, and for many months the wife of the son, A. D. Andrews, daily at times, and at other times less frequently, went to the home of Mrs. Andrews, senior, and nursed her and took care of her wants. After some months of this manner of care, it was agreed between the two families that Joshua and his wife should move to West Seattle and live in the home of their son and his family. This contemplated move was made sometime in 1903. The mother continued to reside in the home of her son until her death, and the father lived there much longer.

In the early part of January, 1904, it became apparent that Mrs. Andrews, senior, was approaching death, and she desired to make disposition of her property. She seems to have felt herself much indebted to her son and his family for their services to her in her long and serious sickness, and it was her desire that they should be compensated. During January, 1904, she made a will giving all of her property to her husband, but in the will expressed the desire that, at the death of her husband, the property should go to their son, the appellant. For some reason which is not made clear from the testimony, at the same time Mrs. Andrews, senior, made her will, she and her husband made a deed to appellant covering the property then owned by them, and immediately thereafter appellant executed a quitclaim deed of the same property to the father, Joshua Andrews; apparently the deeds were made with the view of vesting in Joshua the full title to the property. Mrs. Andrews, senior, died within a month or two after making her will. The appellant alleges that, at the time Mrs. Andrews, senior, made her will, and at the time of the execution of the deeds above mentioned, it was orally agreed between Joshua Andrews and the appellant that the former should continue to live with the latter and receive his care and attention for such length of time as Joshua should desire to live with him, in consideration of which Joshua orally agreed that, at the time of his death, he would will all of his property to his son. This alleged oral agreement was made, if at all, on the 2d day of January, 1904.

After the death of his wife, Mr. Andrews, senior, continued to abide with the son and his family until about the middle of the year 1905, when the son, for business reasons, went to Nome, Alaska, with a view to remaining there for at least several years. Mrs. Andrews, junior, however, continued to reside in the West Seattle home until July, 1906, when she and her family moved to Nome. During all of the time previous to the departure of Mrs. Andrews, junior, Joshua lived with her in her home and she took care of him and furnished him board. When the son's family went to Nome they solicited the father to go with them and agreed to give him a home there. In fact, the testimony shows that arrangements at Nome had already been made by the son for the proper care of his father. The latter, however, deemed himself too old to make the trip or to live in the rigorous climate of the far north, and refused to accompany the family thence. He continued, however, to live at the son's home in West Seattle, but took care of himself and paid his own living expenses, until 1908, when he was married to the respondent. Shortly thereafter he and his wife took up their residence in the city of Seattle, where they continued to reside until his death several years after. Long after the appellant and his family moved to Nome, and on November 20, 1907, Joshua undertook to make his will. That instrument, however, was void as a will because it had but one witness instead of two as required by statute. This purported will gave certain small sums to the children of appellant, and all remaining of the estate to the appellant. Still later, and long after he was remarried, and on August 20, 1918, Joshua attached a codicil to the previous will, modifying it to the extent of giving his wife $500 in cash, the household furniture, and the use of the homestead for a period of five years. Except as indicated in the codicil, the will was left as originally written. This codicil was illegal also because it had but one witness.

All the briefs in the case refer to a memorandum opinion of the trial court and quote extensively therefrom, referring to it as part of the record. It is not, however, a part of the record, but from the assertions in the briefs, we take it that the trial court found as a fact that the oral contract was made substantially as contended for by the appellant, but that the latter breached it by moving to Nome.

This court has more than once held that an oral contract of the character here mentioned is enforcible notwithstanding the statute of frauds, if there has been full or partial performance. In fact, that question seems to be so well settled in this court that we deem it unnecessary to do more than cite some of the cases: Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465; Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572; Worden v. Worden, 96 Wash. 592, 165 Pac. 501; Swash v. Sharpstein, 14 Wash. 326, 44 Pac. 862, 32 L. R. A. 796. In the Lewes case we said:

"Cases of this kind are not favored, and when the promise rests in parole are even regarded with suspicion, and will not be enforced except upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the deceased. But while not favored and rarely enforced upon oral proofs, the power to make a valid agreement to dispose of property by will in a particular way has long been recognized.

This court has expressly held that, if a like oral contract with the husband was concerning community property, or if the property sought to be acquired by the suit would be community property when acquired, then the wife is an interested party and is forbidden by the statute to testify concerning the contract. In the case of Whitney v. Priest, 26 Wash 48, 66 Pac. 108, the facts were as follows: Whitney was a physician and surgeon and claimed to have entered into a verbal contract with Harriet S. Priest, agreeing to perform certain professional services for her, for which she agreed to pay him an agreed amount. She subsequently died, and Whitney instituted suit against her estate to recover the amount of the alleged compensation. He undertook to prove by his wife the conversations between himself and Mrs. Priest concerning the amount of compensation agreed to be paid. After quoting the statute, we said:

"The plaintiff and the witness Josephone Whitney were husband and wife. The professional services which were the subject of contract between plaintiff and the deceased involved the community interest. The compensation for such services belonged to the community. Mrs. Whitney was interested equally with her husband. She must necessarily be said, therefore, to be a party in interest, and the transaction and the statements made to plaintiff must equally involve his wife. The witness then falls within the disability of the proviso of the statute, and it was error to admit her testimony as to the transaction and statements made by the deceased to the plaintiff."

The whole question here, then, resolves itself into the proposition whether the property which the appellant sought to recover would have been, had he succeeded in recovering it, community property or his separate property. If it would have been community property, then the wife was a party in interest and could not testify, and the objection of the respondent should have been sustained.

We are convinced that the property sought to be acquired by this action would have been community property had it been acquired. Section 5915, Rem. Code, defines the separate property of the husband as follows:

"Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts and contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such management, alienation or encumbrance, as freely and to the same extent as though he were unmarried."

Section 5915, Rem. Code, defines in substantially the same words the separate property of the wife. Section 5917, Rem. Code, defines community property as follows:

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property."

The main question is, was the property sought to be obtained by this suit acquired by "gift, bequest, devise or descent," within the spirit

Prop. [illegible] acquired 6 hus. [illegible]
[illegible] its devise in return [illegible] services
rendered [illegible] con. [illegible]
[illegible] gift, [illegible] meaning of Rems
§ 5915 [illegible] pecuniary [illegible]
acquired 6 [illegible] hus. "by gift, bequest,
devise, [illegible] descent" shall constitute
[illegible] sep. prop.

of the statute?

We are satisfied that it would not have been so acquired. It would have been acquired by contract. There is no element of gift, bequest or devise involved in this case. Joshua Andrews, according to the alleged agreement, was to will his property to his son for a consideration, and that consideration was that the latter was to maintain and support him during the remainder of his life, or such portion thereof as he might elect to accept such maintenance and support. The testimony was that the services to be performed in payment of the property to be acquired were performed by the appellant and his wife. It was their community property which housed and sheltered Joshua Andrews; it was the community money of the appellants and his wife which furnished, and was to furnish, the table from which Mr. Andrews, senior, was to eat. The testimony shows that the appellant's wife did the housework and cooked the food, and did the other usual duties in the maintenance of the home, and in the care and attention given to Mr. Andrews, senior. Everything that went into his maintenance was the joint effort of the appellant and his wife. In no true sense was the appellant to acquire this property by gift. He was to acquire it by virtue of a contract which was to be performed on the one side by himself and his wife. Bouvier's Law Dictionary defines "Gift" as a "voluntary conveyance or transfer of property; that is, one not founded on the consideration of money or love. A voluntary, immediate, absolute transfer of property without consideration." The "gift, bequest, devise or descent" contemplated by the statute as constituting separate property is not based upon contract or consideration, and property willed by one to another in compliance with a contract between the parties is not a gift or bequest in contemplation of the statute. If the appellant had alleged and shown that the contract was a personal one between his father and himself and was to be performed, and was performed, by means of his separate property and his individial endeavors, then the property to have been acquired might have been his separate property, and his wife might have testified as to the terms of the contract. But this situation is not before us and we do not decide it. But, even in that instance, it would be his separate property by purchase, and it would not have been his by gift, devise or descent within the spirit of the statute. If the alleged contract had been made by the appellant with a stranger and not with his blood relation, then it would seem to us that everyone must say that the property to be acquired under it would be community property, because we have always held that property acquired by the joint efforts of the husband and wife is presumed to be community property. The mere fact that it is alleged that the contract here was made with the appellant's father could not change the legal situation, and the legal effect must be the same as if the contract had been made with entire strangers.

Without the testimony of the appellant's wife, there is not sufficient evidence upon which to base any contract. While the self-sacrifice made by the appellant, and particularly by his wife, are to be highly commended, the rules of law forbid them any compensation.

The judgment must be affirmed. For Def.

Parker, C. J., Mackintosh, Fullerton, and Holcomb JJ., concur.

WELDER et al. v. LAMBERT et al.

(Supreme Court of Texas. Feb. 7, 1898.
(91 Tex. 510.)
(44 S.W. Rep. 281.)

Certified questions from court of civil appeals of First supreme judicial district.

Action by Dolores Welder and others against Patrick Lambert, administrator, and others, for a partition of lands. A judgment sustaining a demurrer to the plea was affirmed in the court of civil appeals, which certified questions to the supreme court.

Gaines, C. J.--In this case certain questions have been certified by the court of civil appeals for the First supreme judicial district for our decision. The statement and questions are as follows:

"The appellants, Dolores Welder and others, brought the suit against the appellees, Pat Lambert and others, in form for the partition of a part of 4½ leagues of land situated in Refugio county, on the west side of the San Antonio river, granted to the empresarios, James Power and James Hewitson, as premium lands, for the introduction of colonists, under a contract with the state of Coahuila and Texas. There had been a partition of the interests of Power and Hewitson, and the 4½ leagues above mentioned were set apart to Power. The contract for colonization was made June 11, 1828. The grant of the 4½ leagues was made October 12, 1834, and the other premium lands were granted in December, 1834. Power was twice married. In July, 1832 he married Dolores de la Portilla. By this marriage there were two children,--the appellant Dolores Welder and a son, James Power, who was the father of the other appellants. The appellants are the only heirs of Dolores, the first wife. She died in 1836. Afterwards James Power married Tomasa de la Portilla, a sister of the first wife, who bore him five children. James Power died in 1852, and Tomasa, his second wife, died in 1893. The appellees represent the entire interest of the five children by the second marriage. Appellants contend that the land was the community property of James Power and his first wife, Dolores, and that they are entitled to one-half thereof in the right of their mother, and to two-sevenths of the remaining one-half in their right as heirs of James Power, while appellees contend that the land was the separate property of James Power, and that the appellants are only entitled to two-sevenths of the whole. The contract of Power and Hewitson with the state of Coahuila and Texas was for a colony within the littoral leagues, and received the approbation of the supreme government. Article 1 refers to the approbation of the supreme government, and states that the government admits the project so far as conformable to the law of April 24, 1824. It defines the limits of the colony, which was afterwards, on March 13, 1829, augmented, and the colony was established in the augmentation limits. The remaining articles of the contract are as follows: 'Art. 2. In view of the described territory, the empresarios remain obligated to introduce and settle, on their own account, two hundred, instead of four hundred, families, which they offered; it being

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

an express condition that one-half of this contract shall be Mexican families, and the rest alien families, from Ireland. Art. 3. All possessions, with corresponding titles, found within the territory described in article 1, shall be respected by the colonists of this contract; the empresarios being charged with compliance with this obligation. Art. 4. Whenever any land may be required, as useful and advantageous, owing to its locality and circumstances, for the construction of some fortress, wharf, or store, for the defense of the port, or establishment of public administration, the empresarios shall have no right to prevent the occupation of any land or interesting point that it may be advantageous to take for any of the indicated objects, or any other not herein expressed. Art.' 5. In conformity to the law of March 24, 1825, the empresarios remain obligated to introduce and settle the two hundred families mentioned in article 2 within the term of six years, counted from this day, on penalty of forfeiting the rights and donations granted them by the same law. Art. 6. The families, besides being Catholic, as the law requires, must be of good character; establishing these qualifications with certificates by the authorities of the country whence they came. Art. 7. It is an obligation of the empresarios not to introduce nor permit within their colony criminals, vagrants, or men of bad conduct, They shall cause all persons in such circumstances to leave their territory, and incase of resistance the armed force must be resorted to. Art. 8. To this end, whenever there shall be a sufficient number of men the national civic militia shall be organized, in full compliance with the law. Art. 9. Whenever they shall have introduced at least one hundred families, they shall notify the government, in order that it may send a commissioner to give to the colonists possession of their lands, and to establish towns in conformity to the law and to the instructions which he shall receive. Art. 10. After the particular application of lands to colonists, and of premiums to the empresarios, shall have been made, the government alone shall have the power to dispose of the lands remaining vacant. Art. 11. Official communications with the government or authorities in the state, and all public instruments and deeds, must be written in the Castilian language. Art. 12. In all other cases not expressed in the articles of the present contract, the empresarios shall subject themselves to the general constitution and laws, and to the particular constitution and laws of the state. And his excellency the governor, and the attorney, in the name of the empresarios, having agreed to every one of the articles of the present covenant, obligated themselves reciprocally to punctual compliance herewith before me, the secretary of state, and signed hereto for perpetuation. And, the original proceedings remaining archived, a testimonio of the whole proceedings was ordered to be delivered in duplicates to the party interested for his protection. Leona Vicario. June 11th, 1828. Jose Maria Viesca. Victor Blanco. Juan Antonio Padillo, Secretary. This is a copy. Santiago del Valle, Sec.'

"Dolores de la Portilla had no separate means when she married Power, and did not receive anything from any source after her marriage. The evidence shows that colonists were introduced both before and after the marriage; but it is uncertain how many were introduced before, and how many were introduced after. If the respective interests in the land are to be established by proof as to what proportion of the consideration for the grant was of the separate estate of Power, and what of the community estate of himself and his wife Dolores, the party having the burden of proof

will be at great disadvantage, on account of the uncertainty of the evidence.

"Appellees pleaded stale demand against the right of appellants to maintain their suit. The plea is substantially as follows: It alleged that plaintiffs claimed the land in controversy was community property of James Power and Dolores de la Portilla, and that they inherited from said Dolores her community interest, and then further stated that the grant to James Power and James Hewitson of four and one-half leagues, embracing the land in controversy, and of five leagues in which Power relinquished his interest for that of Hewitson in said four and one-half leagues grant, were both made to James Power and James Hewitson as grantees, and invested them with the legal title, and the record and apparent title, thereto, and in no manner disclose any trust or interest in favor of said Dolores; that said Dolores, wife of James Power, died intestate in about 1836, and prior to 1840, leaving surviving, as her heirs at law, the plaintiff Dolores Welder and a son, James Power, Jr.; that the plaintiff Dolores Welder was born in 1835, married in 1850, and her husband died in 1876, and that continuously thereafter she had been a feme sole; that said son, James Power, Jr., was born in 1833, and consequently became of age in 1854, and died intestate in 1886, leaving as heirs at law the other plaintiffs, Mary F. Swift, Agnes E. Shelley, and James Power; that neither Dolores Welder nor James Power were at any time subject to any other disability than those named; that from the time of the accrual of such right, if any, until the institution on August 18, 1890, of this suit, neither said James Power, Jr., nor plaintiffs, ever actively asserted any claim to any community interestsofnDolores Power; that defendants claimed title to interests therein as though it were separate estate of James Power, and as devisees and purchasers from devisees under his will; that, while the land in controversy has been used by all parties to the suit, yet such use was entirely consistent with the interests as defendants assert them, and inconsistent with plaintiffs' claims, and that the right to the use and enjoyment therefor has been recognized and respected by all parties to this suit, and their predecessors in estate, to be as defendants contend, and the burdens incident to the ownership have been borne in the same proportions; that none of the defendants ever sanctioned, recognized, or respected any such claim as now asserted to a community interest under Dolores Power; that, if any such interest ever existed, the delay by plaintiffs to institute this suit has resulted in the loss of evidence which would establish its amount; and that the evidence probably once obtainable to establish that there was no such interest can no longer be obtained. Accordingly, defendants contend that plaintiffs' demand was stale. Toithis plea the appellants demurred as follows: 'And, further, that said plea, in so far as it attempts to set up a use of said lands by the parties plaintiff and defendant inconsistent with plaintiffs' demands, and inconsistent with the alleged claim of defendants, is insufficient, in that it does not set up any facts as to such user as would tend to show such, and, further, because, in so far as by the allegations of said plea an equitable estoppel is attempted to be set up, it is insufficient in that it does not allege any facts constituting such estoppel, nor does it allege that any act of the plaintiffs was to the injury of the rights of defendants, or that by such act or acts they were led by plaintiffs into a false position as to their rights, or that they were thereby in any manner misled by any such act or acts, or were induced to act thereon to their

injury. And, further, in so far as this said plea undertakes to set up a plea of stale demand, same is insufficient, in that it attemps to set up a plea not applicable to the case made by the pleadings.' The demurrer was sustained, because the court was of the opinion that there was no such defense as stale demand. There is a cross assignment of error upon this ruling of the court.

"Upon the foregoing statement, the opinion of the supreme court is requested upon the following questions: (1) Did the fact that the grant to the land in controversy was made after the marriage of James Power and Dolores de la Portilla create the presumption that the land was the community property of the said James Power and his said wife Dolores? (2) Upon an issue of fact as to how much of the consideration for the grant was of the separate estate of Power, and how much was of the community estate of himself and his wife, on which party should the burden of proof rest? (3) What efforts or expenditures of Power should be estimated in determining the extent of the separate and community interests in the land? Should his expenditures and labors in obtaining the contract be taken into the estimation? (4) What was the character of the title inherited by the appellants from their mother? Was it legal or equitable? (5) Does the doctrine of stale demand apply to the appellants' cause of action? (6) Should the demurrer of appellees setting up stale demand against the appellants' cause of action have been sustained?"

Preliminary to answering the questions certified, we deem it expedient to determine what the respective interests of Power and his first wife were in the lands at the time the final title was extended. The Spanish law being at that time in force, the result of the inquiry must depend upon the principles of that system of jurisprudence. There are decisions of this court which bear upon the question, but there are none, that we have found, in which the precise point has been considered. The Spanish authors, having no precedents to guide them, are necessarily confined to the enunciation of general principles, which fall short of declaring the law as to the specific question before us We are of the opinion that the concession made to Power and Hewitson under the law of Coahuila and Texas of March 24, 1825, by which, in consideration of their stipulating to introduce into the state a certain number of families, they were given the right to a premium in lands, to be selected and granted to them upon their compliance with the agreement, has all the elements of a contract; and it seems to us that it is a matter of no moment whether the right so acquired was alienable or not. It was a fixed contract right, which entitled them to acquire the lands by a compliance with its conditions, and, as we think, was property, under the Spanish law. Escriche, in his Dictionary, treats of the respective rights of the husband and wife in the property held by them under the words "Bienes Gananciales," and he there says: "Among 'las bienes gananciales' are not considered (1) those which the consorts had at the time of contracting the marriage. * * *" Escriche, Dic. Leg. p. 367. In defining the meaning of the word "bienes," he uses this language: "Under the word 'bienes' are included, also, 'las acciones,' of whatever kind they may be. 'Acque bonis adnumeratur quod est in actionibus, petitionibus, persecutionibus.'" Id. p. 362. The first class of "acciones" defined by the author cited are shares in a partnership or incorporated company. Id. p. 48. Then, again, under a separate head, he defines the word "accion" as follows: "The

right to demand anything, and the method of judicial procedure which we have for the recovery of that which is ours, or which another owes us. * * * 'La accion,' meant in the first sense (that is, such as a right which belongs to us to demand anything) may be considered movable or immovable (that is, personal or real), by reason of its object, although it may be neither the one nor the other in its nature." Id. p. 49. The result is that all choses in action owned by either of the consorts before marriage remain the separate property of such consort. If contracts be property, and if all property held by either the husband or wife at the time of the marriage be the separate property of the consort who hold it, it follows that the right of acquisition secured to Power by the contract of himself and Hewitson with the state of Coahuila and Texas remained his separate property upon his marriage, and did not fall into the community. But this comes short of settling the point under consideration. The inquiry still remains, is the status of the property to be determined by the acquisition of the final title or by the origin of the title? Upon this point we have found no direct expression in the authorities upon the Spanish law. But in Louisiana, where the community system prevails, the question has been set at rest by repeated decisions of the supreme court of that state. In the case of Barbet v. Langlois, 5 La. Ann. 212, the husband at the time of his marriage was possessed of a tract of land fronting on Bayou Placquemine. By a statute of the congress of the United States, the owner of land in Louisiana fronting on any water course was given a preference right to purchase the vacant lands lying adjacent to, and in rear of, his plantation; and upon his death the question arose whether the land so purchased was his separate property, or belonged to the community of himself and wife. It was held to be of his separate estate. After quoting Pothier, to the effect that the individual acquisitions of the spouses are community property only when the title or cause of the acquisition has not preceded the marriage, the court, in their opinion, proceed to say: "He (Pothier) gives numerous examples in illustration of this rule. A person, says he, who died before my marriage, has left me, by will, an estate, upon a condition which is not accomplished until after my marriage. The estate is my separate property, because the will is my title, and it preceded the marriage. So, where I have bought an estate, before marriage, at a sum below the half of its just value, and after marriage I give validity to the sale by paying my vendor to residue of the just price, the estate is my separate property." Again, after quoting from Pothier to the effect that if a parent die after having sold property with the right of redemption, and the heir redeem it with community funds, it becomes his separate property, although he did not inherit the property, but merely a right of redemption, the court say: "The doctrine is a deduction from the maxim, 'Is qui actionem habet, ipsam rem habere videtur.' Now, although the illustrations we have cited are not identical with the one at bar, they present a very strong analogy. It is true that the land was not purchased from the United States until after Langlois' marriage. But the 'cause' of the acquisitions may be fairly considered as having preceded the marriage. It was because he was the owner of the front land (an ownership acquired long before), that, under the liberal legislation of congress, he was allowed a preference to enter (and that, too, at a low price) specific lands, which may perhaps have been worth much more." The same ruling was made in the case of Succession of Morgan, 12 La. Ann. 153, in which the court say: "But we consider the decision in the case of Barbet v. Langlois, 5 La. Ann. 212, as

decisive of this question. The only right to which the community is entitled is that of claiming the reimbursement of the sum paid on account of the entry of the double concession, if such payment has been made out of the funds of the community. The principle was also embraced in the later case of In re Moseman's Estate, reported in 38 La. Ann. 219, and the previous rulings of the court were followed. In that case the husband, a short while before his marriage, had taken out a policy of insurance on his own life, payable "to his executors, administrators, or assigns." After his marriage the premiums were paid from community funds. After his death, upon settlement of his estate, the question was agitated whether the money paid by the insurance company upon the policy belonged to the community; and it was held that it was property of his separate estate, but that it was chargeable, in favor of the community, with the premiums which had been paid with community funds. The court in that case say: "The contract creates certain rights and obligations, which spring into existence the moment it is formed. Thus, at the date of the policies Moseman acquired for himself the right to receive at his death, through his executors, administrators, or assigns, the sums stipulated to be paid, subject to the condition of compliance with his own engagements to pay the premiums as they fell due. This condition, having been complied with, 'has a retrospective effect to the day that the engagement was contracted.' Rev. Civ. Code, art. 2041. The character of the interest and of the ownership thereof takes its impress from the date of the contract." The quotation in the opinion is from the Civil Code of Louisiana. But the same rule seems to prevail under the Spanish law. Schmidt says: "When the condition is accomplished, it refers back to the time of the making of the contract, and it is considered as made at that time; but, if the condition be not duly accomplished, it is considered as never made." Schmidt, Spanish Law, art. 512. See, also, Escriche, under the words "Obligacion Condicional," to the same effect.

Our own decisions are in harmony with the principles announced in the cases referred to, although, as we have said, the precise point seems not to have been determined. In Mills v. Brown, 69 Tex. 244, 6 S. W. 612, a widow, the head of a family, was entitled to acquire a homestead by settling upon the public domain, causing a survey to be made of the land, and by a continued residence thereon with an improvement of the same. While still a widow, she made application for the land, and paid the surveying fees. Thereafter, she married, and moved with her husband upon the property. The conditions of the law were complied with, and, she having died, a patent issued to her heirs. The question came up in a suit between the heirs and a purchaser holding under the husband. It was held that the land was community, and not separate, property, and that the heirs were entitled to recover only one-half, and the surveying fees paid by her mother. The court, speaking through Chief Justice Willie, say: "To ascertain, therefore, the status of the property in controversy, we must find out by whom the first actual settlement upon it was made, of what the family consisted who first occupied the land, and in whose behalf an application could thereafter be made for a homestead pre-emption. The evidence upon that point is clear and undisputed. The settlement was made by Yarborough and his wife, formerly Mary Roberts, and her children by a former marriage. This initial and absolutely essential step was the joint enterprise of husband and wife. The occupation was continued by them jointly so long as the wife lived, and by the husband till the title matured.

Considered in reference to this state of facts alone, there cannot be a shadow of a doubt that the husband had the same interest in the land as that held by the wife or her heirs, and that it was community estate. We are of the opinion that the facts that Yarborough's wife had, before marriage, filed a pre-emption claim to the land, and paid the surveying fees out of her own money, do not affect the right of her husband to a community interest in the homestead pre-emption. The law, as we have seen, does not contemplate that a survey shall be made on an application therefor filed until the pre-emptors have actually settled upon the land. Such acts must necessarily inure to the benefit of the family who make the first settlement, and no steps taken previous to that time, by any member thereof, for the benefit of any portion of the family and the exclusion of the remainder, can defeat the object of the law, which is to give to actual settlers a home upon land previously occupied by them." In Manchaca v. Field, 62 Tex. 135, the husband obtained a concession for the purchase of 11 leagues of land, to be selected by him under the twenty-fourth section of the colonization law of March 24, 1825. He obtained the final title to 10 leagues under the concession granted to him, but before the extension of that title the wife died. The grant was held to be community property. In that case the court say: "It is urged by the defendants that, although the concession had issued in the lifetime of Mrs. Sanches, no step had been taken to appropriate any land under it; that, before the grant could be made effectual by the issuance of the final title, it was necessary to obtain the consent of the empresario to locate the concession within his colony; that the particular land must have been selected, and surveyed and classified by an authorized surveyor, and the survey and classification approved by the commissioner, and that the fees of the empresario and other colonial officials, and the amount due the government for the land according to its classification, must have been paid or secured; and that the mere concession, which was nothing more than a license to purchase so many leagues of the public domain, to be subsequently selected, and at a price and on terms to be subsequently determined, ought not to be treated as property in being at the death of Mrs. Sanches, so as to entitle her heirs to claim a community interest in the land afterwards granted under it. There is much force in the argument, and it finds an apparent sanction in Webb v. Webb, 15 Tex. 274, Walters v. Jewett, 28 Tex. 192, and perhaps other decisions of this court; but the later decisions and the weight of authority seem to favor the proposition of appellants, that the concession, having a money value, and being the subject of sale, was property, in which Mrs. Sanches had a community interest, which descended to her heirs at her death, and which attached to the grant subsequently extended in the name of her husband. Porter v. Chronister, 58 Tex. 54; Wilkinson v. Wilkinson, 20 Tex. 244; Yates v. Houston, 3 Tex. 433." See, also, Hodge v. Donald, 55 Tex. 344. All these cases turned upon the determination of the question whether or not the party taking the initial step in the acquisition of the property was at the time married or single. Nor do we regard either the ruling in Webb v. Webb, 15 Tex. 275, or that in Walters v. Jewott, 28 Tex. 192, as being in conflict with these views. In the former, Judge Lipscomb, speaking for the court, says: "The question presented by this statement of facts is, was the property in controversy held by the husband and wife, at the time of her death, as community property? If it was, there is no question but that her heirs are entitled to the one-half, after the payment of the community debts. The statement of facts shows

conclusively that the title to the land was not obtained until after the dissolution of the matrimonial relations by the death of the wife. Does it show that anything had been done before this dissolution, giving a right in law to demand the title that subsequently issued to the husband, on which an equity could be raised in favor of the heirs of the wife, and attach to the land? The record of the statement of facts shows that the land had been selected before the death of the wife, but does not show in what way it had been selected,--whether by application to the commissioner, or in any other way. It does not show that the requisite qualifications of the applicant had been decided upon by the commissioner, or that anything had been done that was essential to the validity of the grant, prior to the death of the wife. We have no evidence that the necessary qualification of the colonist had been adjudicated upon by the commissioner before the date of the title; and at that time the husband was qualified, as a head of a family, to have received the same quantity of land, as his children were in the country with him." This extract, as we think, makes it manifest that if it had been shown that the land had been lawfully selected, and the qualifications of the husband adjudicated, before the death of the wife, the result would have been different. The ruling that the immigration of the husband with the wife did not, of itself, entitle the latter to a half interest in the land granted by reason of that immigration, may be in conflict with other decisions upon that point; but, in so far as the decision bears upon the question under consideration, it seems to us to be in accord with our cases previously cited. In Walters v. Jewett, supra, we do not understand the court to hold that the heirs of the wife were not originally entitled in equity to an interest in the land by reason of their mother's community right. There, during the life of the wife, the husband sold one-half of his right to acquire land from the republic by reason of him immigration as the head of a family. After her death he sold the other half. Both sales were made before the certificate issued. The certificate was issued to Jewett, his assignee, and the patent issued in the name of Jewett. The court held that the heirs of the wife had a more equitable claim upon the land, and that it could not be recovered in an action of trespass to try title. In most of the cases cited, where the initial step in procuring title was taken, the purpose was to acquire a specific tract of land. In that respect the case before us is different. Power and Hewitson were not entitled, upon compliance with the conditions of their contract, to any specific tract or tracts. They were entitled only to so many leagues of land which were to be selected. In this respect it does not differ from the case of Manchaca v. Field, before cited. In that case, however, the concession was obtained while Sanches was a married man, and the lands were held to be of the community, although the final title was not extended until after the death of the wife. If he had been single at the date of the concession, and had married before the issuing of the title, the lands would doubtless have been held his separate property, and the case would have been precisely in point. In this cause the title originated in the contract of Power and Hewitson with the state of Coahuila and Texas. That contract, in the language of the Louisiana court, was the "cause" of the title. Power was single when it was entered into, and the right to earn the lands acquired by it was his separate property. The title relates to its origin, and must take the impress of its character from it.

The rule of the Spanish law as to improvements made with community funds upon the separate property of the husband or wife is thus stated by Schmidt: "Money expended in improving property belonging to one of the spouses belongs to the community, but gives the other no claims to the property itself." Schmidt, Spanish Law, art. 48. It was so ruled by the supreme court of Louisiana in cases in which the rights of the parties depended upon the laws of Spain. Hughey v. Barrow, 4 La. Ann. 248: Frique v. Hopkins, 4 Mart. (N. S.) 212. These were cases in which the lands of one of the spouses were improved from community funds. We find no rule laid down in the Spanish laws which applies to a case precisely like this, But, as we understand that law, improvements, such as buildings and the like, made upon the land of one of the consorts by the community, must, upon partition, be credited to the community estate, and are made a charge upon the property. 2 Febrero Reformado, arts. 2403, 2404, p. 95. The question here must therefore be determined by analogy to that principle. In Mills v. Brown, before cited, the expense of acquiring the land, which was held to be community property, was borne in part by the separate money of the wife. It was ruled that the heirs of the wife were entitled to one-half of the land, as community, and to a reimbursement of one-half of the expense so paid, as a charge upon the husband's half of the property itself. They were not entitled to recover the other half of such expense, because they received one-half of the land, and in that had one-half of the benefit of the expense. This decision would, we think be absolutely controlling, but for the fact that it is a ruling upon our own statutes, and not upon the Spanish law. But we think that the principle was deduced from the latter law. In the case of In re Moseman's Estate, before cited, the doctrine was distinctly announced and applied. It follows, as we think, that, upon partition of the property in controversy, the land was chargeable, in favor of the community, with whatever the community may have contributed in labor and funds to its acquisition.

Having disposed of the preliminary points which, as we think, are necessarily involved in the questions propounded by the court of civil appeals, we proceed to answer as follows:

1. Although, both under our statute and under the Spanish law, the presumption of community property arises from the naked fact that it was acquired during the marriage, yet when, as in this case, upon the exhibition of the whole title it appears that its origin preceded the marriage, and that it was the separate property of one of the spouses, we are of the opinion that the presumption no longer prevails.

2. The lands in controversy appearing to be of the separate estate of Power, we are of opinion that, in order for the heirs of the first wife to establish a charge upon them for a reimbursement of community funds expended in their acquisition, the burden was upon them to prove that the funds had been so expended. 2 Febrero Reformado, art. 2414, p. 98.

3. We do not deem it necessary to decide the third question. The lands being the separate property of Power, and the heirs of the wife, as such, having no title in the property itself, the questions are: Were community funds invested in acquiring them? And if so, how much?

An empresario [illegible] [illegible] [illegible] state [illegible] Coahuila [illegible] Texas in 1828 to colonize [illegible] carried [illegible] [illegible] [illegible] a [illegible] [illegible] [illegible] premium. He performed [illegible] [illegible] in 1834 — premium [illegible] set apart [illegible] use- [illegible] 1832 he [illegible] married. Colonists [illegible] introduced [illegible] [illegible] marriage.

Held — That since [illegible] appeared [illegible] title [illegible] [illegible] preceded [illegible] marriage, [illegible] presumption [illegible] Spanish [illegible] [illegible] statute, [illegible] com. prop. did not prevail.

The [illegible] [illegible] sep. [illegible] husband.

4. The fourth question we consider abstract. We think this sufficiently appears from what we have already said.

5 and 6. If, as asserted in defendants' plea, the parties have had common use and enjoyment of the property in question, as tenants in common we are of the opinion that the demand of plaintiffs for reimbursement of the community for community funds expended in their acquisition could be asserted at any time in a suit for partition. In other words, we think that the matter was adjustable upon the final division of the property, and that it was not necessary to assert the claim until partition was sought. 2 Febrero Reformado, art. 2250, p. 64.

In our view of the law, the question of stale demand only arises in case the appellants, in their pleadings, alleged that community funds had been used in the acquisition of the land, and sought, at least in the alternative, a restitution of their mother's half of the community funds so used. Whether or not they did this, we cannot determine from the statement which accompanies the certificate.

This opinion will be certified to the court of civil appeals of the First supreme judicial district as an answer to the questions propounded.

[illegible] Wash. [illegible] held [illegible] if single [illegible] settles [illegible] person [illegible] marries [illegible] statute runs [illegible] marriage [illegible] prop. [illegible] prop. [illegible] hus. [illegible] The prop. [illegible] its character [illegible] deed [illegible] statute and not [illegible] hus., when single, first settled [illegible] land.

CHAPTER X.

CITATIONS

Property acquired by ~~accession~~ accretion and confusion.

Shbrett v. Signor (1910)	58 Wash. 89.
Ruth v. Morse Hardware Co. (1913)	74 Wash. 361.
Cannon v. Snipes (1901)	24 Wash. 166.

(a) Property acquired by contract.

Beneke v. Beneke (1907)	47 Wash. 178.
Malloy v. Benway (1904)	34 Wash. 315.
McKnight v. McDonald (1904)	34 Wash. 98.
Clark v. Eltinge (1904)	34 Wash. 323.
Hayden v. Zerbst (1908)	49 Wash. 103.
Re Mason's Estate (1917)	95 Wash. 564.

E. MAIN et al., Appellants, v. JOHN D. SCHOLL et al., Respondents.

(20 Wash. 201, 1898.)

Appeal from Superior Court, Pierce County.--Hon William H. H. Kean, Judge. Reversed.

The opinion of the court was delivered by

Scott, C. J.--Appellants concede that the principal question in this case is as to whether property purchased by a married woman having no separate estate, with borrowed money, is, under the law of this state, her separate property or that of the community. The property in controversy was a number of shares of stock in the Puget Sound Brewing Company, which were exposed for sale under an execution issued upon a judgment against the husband on a separate liability, and were bid in by the wife, she at the time obtaining the money to pay therefor by hiring it from a bank and pledging the property purchased as security for its payment. Section 1398, 1 Hill's Code (Bal. Code, Sec. 4489), provides that the property and pecuniary rights owned by a woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband etc. There was some attempt in this case to show that the wife had a prior separate estate, and there are other questions presented upon this appeal relating thereto, but, under the view of the first question taken by the court, it will not be necessary to consider them. Sections 1408, 1409 and 1410 (Bal Code, Sections 4502-4504) are as follows:

"Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried."

"All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has; provided always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law,

"Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried."

The several sections relating to the rights of married women are somewhat conflicting, and in construing them the scope of some is necessarily enlarged and of others restricted. We are of the opinion that, while the property in question was not acquired strictly within the terms of Sec. 1398, she not haing owned it at the time of her marriage, and it not having been acquired by gift, devise or inheritance, or from the proceeds of any separate estate, it was nevertheless her separate property;

for she should have the same right to the benefit of her individual credit under the subsequent sections, that the husband has as to his.

Unless this property, when so purchased, became the separate property of the wife, the debt which she individually contracted to pay for it became a community debt. To hold that the wife might bind the community generally, and without limitation, by any contract that she might make, would certainly be contrary to the spirit, if not to the express provisions of the various statutes dealing with the rights of married persons. The husband is given the control of all of the community property and the right to dispose of the personalty. Consequently the same right cannot exist in the wife, and the scope of Sec. 1409 (Bal. Code, Sec. 4503) is limited thereby. At the common law the wife might create a valid debt against the husband for necessaries purchased for herself and family, and Sec. 1414 (Bal. Code, Sec. 4503) provides that the expences of the family including the education of the children, shall be chargeable to the property of both husband and wife or either of them. While, for instance, a married woman might contract at a store a valid debt against the community and the husband for a sack of flour needed in the family, she could not, independently of any authority from the husband, buy out an entire establishment, amounting perhaps to thousands of dollars in value, for the purpose of engaging in a business, and thereby create a valid debt against the husband or the community.

No fraud was shown in this case, the facts regarding the purchase are conceded, and we are of the opinion that the property in question, at the time of its purchase by the wife at the execution sale, became her separate property, and it follows that the judgment of the lower court should be affirmed.

Gordon and Reavis, JJ., concur.

Anders, J. (dissenting).--I am unable to assent to the proposition that Mrs. Scholl, by bidding inthe stock in question at the execution sale, thereby made it her separate property, for the reason that the statute provides explicitly that all property acquired by either husband or wife, and not by gift, devise or inheritance, shall be community property. It is conceded that this stock was acquired by purchase, and hence I think it should be deemed the property of the community. In my opinion the judgment should be affirmed, if affirmed at all, on the ground that the stock was originally purchased with the separate money of Mrs. Scholl, to establish which fact there was evidence introduced at the trial.

Dunbar, J. (dissenting).--The testimony convinces me that the purchase was not made with the separate money of Mrs. Scholl. I therefore think the profits arising from the purchase became community property. The judgment should be reversed.

Opinion on Rehearing, May 31, 1899.

Gordon , C. J.--For a former opinion in this case see 54 Pac. 1125. The principal question argued at the rehearing was whether property purchased by a married woman having no separate estate, with borrowed money, becomes her separate property or property of the community. The question

Imp.

Personalty of [illegible] married [illegible]
[illegible] sep. estate [illegible] money
borrowed [illegible] her constitutes com. of
under Stat. §§ 4488–90, defining [illegible] sep.
[illegible] com. of [illegible] hus. [illegible]

Note. — Bad case.

Rehearing [illegible] good.

Bissett thinks [illegible] prop. of [illegible]
[illegible] borrowed, [illegible] sep. prop., [illegible]
rents, issues [illegible] profits [illegible] her sep. of
wife [illegible] bind [illegible] community [illegible]
[illegible] prop. of [illegible] borrowed [illegible]
community prop. [illegible] sep. prop. [illegible]

This case [illegible] overruled [illegible] holds
[illegible] prop. [illegible] is comm. prop.

was squarely decided in Yesler v. Hochstettler, 4 Wash. 349 (30 Pac. 398). The decision of that case was overlooked in the discussion of this question in the former opinion. In that case the question is exhaustively discussed and the authorities fully reviewed. In the course of the opinion the court say:

"There can be no doubt that if a married woman, under the act of 1881, borrows money entirely upon her personal credit, the money and whatever she buys with it becomes common property. . . ."

Without again attempting to review the authorities, we are disposed to think that the statute itself necessitates that conclusion. Sections 4488 and 4489, Bal Code (1 Hill's Code, Sections 1397, 1398), define what is the separate property of husband and wife, Sec. 4489 being as follows:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband, can, property belonging to him."

Section 4490 (1 Hill's Code, Sec. 1399) provides that,

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property."

If we are to accept the plain, statutory definitions of what is separate and what community property, it becomes at once evident that property purchased with the proceeds of a loan made by either husband or wife subsequent to marriage is community property, because it is not acquired in any of the ways enumerated by Sections 4488 and 4489, supra. It was the evident purpose of the legislature to place the spouses upon a footing of equality as nearly as practicable. Let us suppose that this transaction had been that of the husband. In that event it would scarcely be questioned that the property so acquired would have become community property. Is there any reason discoverable in the legislative enactment for regarding it differently because the wife instead of the husband is the operator? To depart from the plain letter of the statute is to embark upon a sea of uncertainty.

The decision in the case of Brookman v. State Insurance Co., 18 Wash. 308 (51 Pac. 395), was controlled by a state of facts different from that existing here. But it must be conceded that much that was said in that case conflicts with the view herein expressed, and with those expressly declared in Yesler v. Hochstettler, supra. To the extent of such conflict Brookman v. State Insurance Col is overruled.

The judgment of dismissal in the present case is reversed and the cause remanded, with direction to the lower court to overrule themotion to dismiss and to proceed with the cause.

Fullerton, Anders, Dunbar and Reavis, JJ., concur.

For Pl.

JAY P. GRAVES, Respondent, v. COLUMBIA UNDERWRITERS, Appellant.

(93 Wash.196,1916)

Appeal from a judgment of the superior court of Spokane county, Webster, J., entered November 12, 1915, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Fullerton, J.--Bessie Lynch Fife, at the time of her marriage to James H. Fife, was the separate owner of lot 4, block 4, Havermale's addition to Spokane, which property she had inherited from a former husband. On March 1, 1914, the Columbia Underwriters, a corporation, obtained a judgment for $172.60, with interest and costs, against the community composed of James H. and Bessie Lynch Fife, upon which execution was issued and returned unsatisfied. On February 23, 1915, Bessie Lynch Fife borrowed $2,100 for the purpose of paying off some $1,747.39 delinquent and current taxes on lot 4, block 4, Havermale's addition, the property being unproductive and incapable of meeting its tax burdens. The balance of the loan was used in connection with other separate property of the wife. A mortgage was given upon the foregoing described lot, husband and wife both joining in the note and mortgage at the request of the person making the loan. On June 14, 1915, Mr. and Mrs. Fife joined in a warranty deed conveying such mortgaged lot to J. P. Graves for a consideration of $10,000. The purchaser retained $250 out of the sale price pending the bringing of an action to quiet title against defendant's judgment, which, at the time of sale, amounted to about $240. The action to quiet title was brought in the name of the purchaser, J. P. Graves, at the expense of James H. and Bessie Lynch Fife, who were stipulated to be the real parties in interest. From a judgmentquieting title in J. P. Graves, the Columbia Underwriters appeal.

The appellant contends that the $2,100 obtained on the note jointly executed by James H. Fife and Bessie Lynch Fife became community property, and the payment of the tax liens with such borrowed money vested the community with an interest in the lot in question, which could be subjected to the rights of an existing judgment creditor. In other words, it is contended that money borrowed on the joint note of husband and wife on the security of her separate property, and designed solely for the protection or improvement of such property, acquires the status of community property by reason of the joinder of the husband in the note and mortgage given for the loan, even though his joinder were unnecessary under the law; and that its investment in theseparate property of one spouse is the commingling of a community interest in such property to the extent of subjecting it to liability on the claims of existing judgment creditors of the community

The separate property of a wife is defined by Rem & Bal. Code, Sec. 5916, as follows:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance,

with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

The preceding section of the code, Id. Sec. 5915, after defining the husband's separate property, provides that he may manage and incumber it without the joinder of his wife, as fully and to the same extent as if he were unmarried. Id., Sec. 5917 provides that, "Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property."

Under these sections we have held that the proceeds of a loan to husband and wife, and property purchased therewith, though the money was borrowed on the security of the separate property of one spouse, would constitute community property. Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398; Main v. Scholl, 20 Wash. 201, 54 Pac. 1125; Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am St. 937.

It will be noticed in these cases that the decision is rested on the ground that additional property was acquired with the borrowed money, or that such money was put to other uses for the benefit of the community. The present case is readily distinguishable by reason of the fact that the money was borrowed solely for the purpose of preserving the wife's separate property from loss under tax foreclosure. The statutes give the right to married persons to manage and encumber their separate property as fully as though they were unmarried. It certainly falls within the proper management of one's separate property to take measures against its sequestration for taxes, and the encumbering of one's property to raise money for such a purpose amounts to nothing more. If the money is not devoted to any community purpose, it retains its status as separate property. The joinder of the husband in the note and mortgae on his wife's separate property, an act exacted by the person making the loan in an excess of precaution, would not convert the money acquired thereby into a community fund, if it was in no way applied to community uses. We have held in the case of Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 Pac. 1088, that the joinder by a husband with his wife in a note and mortgage upon her separate property would not make the property nor the proceeds therefrom community property. While the presumption naturally arises that property acquired during the marital relation is community property, the presumption is a rebuttable one. Weymouth v. Sawtelle, 14 Wash, 32, 44 Pac. 109. In the present case, the facts indisputable show that the borrowed money was in no way devoted to a community use, but solely for the benefit of the separate property on which it was raised. The status of Mrs. Fife's separate property having been fired as such at the time of its acquisition, would remain so fixed unless changed by deed, due process of law, or by the working of some form of estoppel. Katterhagen v. Meister, 75 Wash, 112, 134 Pac. 673; Inrre Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009; Morse v. Johnson, 88 Wash..57, 152 Pac. 677.

The money arising from the mortgage upon Mrs. Fife's separate property never having become community property, under the facts and the law, there was, of course, no commingling of community with separate property, as contended by appellant. Hence no question of the right of a community

creditor to follow community funds commingled with separate properry is presented.

The judgment of the lower court is affirmed. For A

Morris, C. J., Chadwick, Ellis, and Mount, JJ., concur.

Money borrowed [illegible] note [illegible] hus. [illegible] secured [illegible] sep. [illegible] taxes [illegible] preservation [illegible] prop., [illegible] com. fund, [illegible] com. [illegible] subjected [illegible] liens [illegible] com. [illegible] in view [illegible] Rem. 1915, §§ 5915-7 defining sep. [illegible] com. prop., [illegible] letters [illegible] hus., [illegible] providing [illegible] sep. [illegible] debts [illegible] hus., but [illegible] moneys [illegible] hus. [illegible] belonging [illegible]

ALICE HEINTZ, Respondent, v. CHARLES R.
BROWN et al., Appellants.

(46 Wash. 387, 1907)

Appeal from a judgment of the superior court for Adams county, Warren, J., entered October 19, 1905, after a trial on the merits before the court without a jury, enjoining an execution sale of real property. Reversed

Rudkin, J.--In the month of December, 1900, the plaintiff Alice Heintz entered into a contract with the Northern Pacific Railway Company for the purchase of fractional section 5, tp. 20, N. R. 38, E. W. M., containing 208 and a fraction acres. Under the terms of this contract the purchase price was to be paid in five annual installments of about $62 each. Three of these installments were paid by the plaintiff out of her separate funds, acquired by bequest from her deceased father. On the 25th day of January 1904, she borrowed money on this land from the Holland Bank to pay the deferred payments, or balance due, and on that date received from the Railway Company a warranty deed reciting a consideration of $361. In the year 1901 the plaintiff entered into a further contract with the Oregon Mortgage Company for the purchase of the S. W. ¼ of N. W. ¼, the N. E. ¼ of the N. W. ¼, the N. W. ¼ of the N. E. ¼, and lot 1 of section 8 in the same township and range. At the time of the execution of this contract she paid $300 on the purchase price from her separate funds, acquired as above stated. On the 25th day of January, 1904, she borrowed money from the Holland Bank on this land to make the deferred payments and received a warranty deed from the mortgage company of that date, reciting a consideration of $650.

In the year 1902 the plaintiff entered into a further contract with one Kohl for the purchase of fractional section 7 in the same township and range. No payments have beenmade on the last mentioned contract, except interest paid out of separate funds. On the 24th day of July, 1905, the defendant Gilson, as sheriff of Adams county, levied on all the above described lands under and by virtue of an execution issued out of the superior court of Lincoln county on a certain judgment therein entered in an action wherein Charles R. Brown was plaintiff, and the plaintiff herein and John T. Heintz her husband were defendants, and gave notice that he would sell the same at public auction to satisfy the above mentioned judgment and execution. John T. Heintz and the plaintiff Alice Heintz were husband and wife during all the times herein mentioned. The judgment sought to be enforced against the plaintiff was for a community debt, and the character of the land in controversy, whether community property or the separate property of the wife, is the only question presented on this appeal. The plaintiff had judgment below enjoining the execution sale, and from that judgment the defendants appeal.

The respondent has moved to dismiss the appeal for the reason that the appellant, sheriff, has no interest in the controversy, and cannot appeal from the judgment against him. Counsel has suggested no reason why an officer, who has been restrained from the performance of a duty enjoined upon him by law, cannot appeal from theadverse judgment and we perceive none. The motion to dismiss is therefore denied.

Holds — 9 Main v. School p. 606.

From the foregoing statement it will be seen that the property acquired from the Railway Company and the Mortgage Company was paid for in part by the separate funds of the wife, and in part by money borrowed on the property in which she has invested her separate funds. Under the rule announced by this court in Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398, and reaffirmed on rehearing in Main v. Scholl, 20 Wash. 201, 54 Pac. 1125, the funds borrowed by the wife, even though borrowed on her separate property, or on property in which she had invested her separate funds, was community property, and to that extent at least the property in controversy was paid for with community funds and became community property. See, also, Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Heidenheimer Bros. v. McKeen, 63 Tex. 229.

In the states where community property laws prevail the rule seems to be established that property purchased in part with community funds and in part with separate funds is community property to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest in the property in proportion to the amount of his or her investment. 21 Cyc. 1644; Schuyler v. Broughton, supra; Jacksonv. Torrance, 83 Cal. 521, 23 Pac. 695; Northwestern etc. Bank v. Rauch, 7 Idaho 152, 61 Pac. 516; Love v. Robertson, 7 Tex. 6, 56 Am. Dec. 41; Braden v. Gose, 57 Tex. 37; Parker v. Coop, 60 Tex. 111; Goddard v. Reagan, 8 Tex. Civ. App. 272, 28 S. W. 352; Glardy v. Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52.

A rule which permits married persons to commingle separate and community funds in the acquisition of property after marriage, and to assert their separate property rights as against creditors of the community is by no means free from objection, but such a rule is established by the authorities and we feel constrained to adopt it. It follows that the judgment must be reversed with directions to ascertain the proportion that the separate funds of the respondent, entering into the purchase price of the property, bore to the entire consideration paid, and to enjoin the execution sale to that extent. It is so ordered.

Hadley, C. J., Mount,,Dunbar, Crow, and Root, JJ., concur.

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sep. funds [illegible] borrowed [illegible]
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sep. funds invested therein; and an execution
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sep. interests.

CATHERINE FIELDING, Respondent, v. H. L. KETLER et al.,
Appellants.

(86 Wash. 194, 1915)

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered September 15, 1914, upon findings in favor of the plaintiff, in an action for money lonaed, tried to the court. Affirmed.

J. W. Selden, for appellants.

Gilbert E. Peterson, for respondent.

Holcomb, J.--Numerous assignments of error are made by appellants on this appeal, but the only question argued is whether or not the debt is a community debt and should stand as lien against the community property of appellants. The trial court so found and concluded and rendered judgment accordingly.

Katherine Fielding is the mother of appellant Martha Ketler. Appellants had been married some thirty-one or thirty-two years prior to the original transaction involved in this action, and were living together as husband and wife at the time and since. On October 7, 1911, Martha Ketler obtained from respondent three hundren dollars, which she claimed and testified was an advancement or gift to her. Respondent testified it was a loan, produced a letter from her daughter admitting it was a loan, the court so found, and the evidence fully justifies the finding. Appellants claimed, however, that the money was used by the wife as part purchase price of a hotel bubiness, not the real estate, which she bought and managed as her own sole and separate property, and with which the husband had nothing to do.

The legal presumption is, of course, that the money being borrowed, it became a community liability. Our statutes define separate property as that acquired by either spouse, (1) before marriage, or (2) by gift, devise or inheritance, and the rents, issues and profits of property so acquired. Rem. & Bal. Code, Sections 5915, 5916 (P.C.95, 9). Exemptions are also made in favor of the wife as to her earnings by personal labor, and as to the earnings and accumulations of herself and minor children living with her, or in her custody, while she is living separate and apart from her husband, by the provisions of Rem & Bal Code, Sections 5920 and 5921 (P. C. 95 Sections 17, 35). The hotel was occupied by the appellants together, though the husband was away much of the time at other work he had, and the wife ran the hotel.

In this case, appellants in reality sought to establish that the money was acquired by the wife as a gift from the mother, so as to come under the provisions of Sec. 5916, supra, and failed. It was established as a loan to the wife, during the existence of the status and relations of the community. In such case it is a community obligation. Rem & Bal. Code, Sec. 5917 (P.C. 95 Sec. 27); Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398; Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St.

176; Main v. Schell, 20 Wash. 201, 54 Pac. 1125; Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am St. 937; Graves v. Graves, 48 Wash. 664, 94 Pac. 481.

The judgment entered was correct in giving judgment against Martha Ketler personally, and against the community consisting of herself and husband.

Affirmed. For Pl.

Morris, C. J., Mount, Chadwick and Parker, JJ., concur.

The loan [illegible] hotel [illegible] a [illegible] her hus., [illegible] she ran [illegible] hotel, constitutes a com. debt.

DANIEL HELICAN et al., Respondents, v. THE
PENNSYLVANIA FIRE INSURANCE COMPANY; Appellant.

(21 Wash. 488, 1899)

Appeal from Superior Court, Thurston County.- Hon.Byron Millett, Judge. Reversed.

Daniel Gaby and Troy & Falknor, for appellant.

George C.Israel, for respondents.

The opinion of the court was delivered by

Reavis,J.- Action upon an insurance policy to recover for loss by fire.Several defenses were set up by defendant,and the burden at the trial was put upon defendant.Considerable testimony was produced by each party, much of which is conflicting. The jury returned a verdict infavor of the plaintiff. Numerous assignments of error are made by counsel for appellant. It would not be profitable ,however, to review many of them. Where objections were well taken to testimony introduced, they seem to have been largely formal, and ,in view of a necessary reversal of the cause, they are unlikely to occur again. The motion for a new trial assigned as one ground misconduct of the jury. It appears that the argument of the cause was made at the evening and morning session of the court, immediately after the conclusion of the taking of testimony; that the arguments of counsel were limited intime by the court. At the evening session, and during the argument, a juror was intoxicated. This fact was brought to the attention of the court after the session was concluded, and the court permitted counsel at the following morning session to make their arguments without limitation as to time. It appears the juror became intoxicated after the testimony was all adduced. It is contended by counsel for respondent that, the juror having been sober during the progress of the trial and having heard all the testimony, and counsel having been given an opportunity to make further and complete arguments when the juror had become again sober, no injury resulted to either party by reason of his intoxication during the progress of the trial. But this position cannot be maintained in the light of authority and the proper administration of justice. Such gross breach of the duty of a juryman cannot be condoned. Parties are entitled to have a cause submitted only to sober jurors, and the court will not undertake an inquiry into the state or condition of mind of a juryman who has been intoxicated during the progress of a trial, but will assume that he was incompetent to determine the cause. Drunkenness during the progress of a trial is not only the gravest breach of the juryman's duty, but it is also a most serious contempt of the court and the administration of the law. Jones v. State, 13 Tex. 168 (62 Am. Dec. 550); Brown v. State, 137 Ind. 240 (36 N.E. 1108, 45 Am. St. Rep. 180); Ryan v. Harrow, 27 Iowa, 494 (1 Am. Rep 302).

The object to the amended complaint is not well taken. By the amendment the wife was joined with the husband. It will be assumed that the court was satisfied to grant the amendment, whether leave was formally entered before or after the amended complaint was filed. The property destroyed was communi-

ty property, and there can be no question but that the wife was a proper party to the action with her husband. Bal. Code, Sec. 4827.

The cause is reversed because of the misconduct of the jury and remanded for a new trial. For Pl.

Gordon, C. J., and Anders, Fullerton and Dunbar, JJ., concur.

In . o, [illegible] recovery [illegible] loss
s fire — ♀ is proper party pl. w hus. where
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BOLLINGER v. WRIGHT. (S. F. 2,699.)
(143 Cal,292)

(76 Pac. 1108)
Supreme Court of California, May 16, 1904.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Edwd. A. Belcher, Judge.

Action by Frank Bollinger against W. C. Wright, administrator. From a judgment for plaintiff, defendant appeals. Affirmed.

Cooper, C. Action to quiet title. Plaintiff recovered judgment. This appeal is by defendant from the judgment and order denying his motion for a new trial. The court found the allegations of the complaint to be true, which are to the effect that plaintiff is the owner in fee and entitled to the possession of the premises described, being a lot on Twenty-Fifth street, in San Francisco; that defendant, as administrator of the estate of Mourning E. Bollinger, deceased, claims an estate or interest therein adverse to plaintiff; that said claim is without right, and the said estate has no right or title to said property. In order to discuss the legal propositions contended for by appellant, it is necessary to state briefly the facts, which are, in substance, as follows: Mourning E. Bollinger, deceased, and plaintiff were husband and wife for 26 years prior to her death, which occurred in January, 1896. They had no children. Prior to the year 1887, a sister of the deceased, who was the wife of one Brown, died, leaving several small children, the oldest being about 7 years of age. Plaintiff and deceased were then poor, and deceased had no separate property of her own, but, with the consent of plaintiff, she took the children of her dead sister to raise and educate. At the time of his wife's death, Brown was a member of the American Council of the Order of Chosen Friends, and was carrying a benefit certificate for $3,000, payable to his wife in case of his death. After the death of his wife, and after the plaintiff and deceased had taken charge of his children, Brown had the benefit certificate made payable to deceased in case of his death. Prior to the death of Brown's wife, plaintiff had paid and assumed an indebtedness of about $300 for assessments due by Brown on said certificate. Brown agreed to pay to plaintiff and deceased the sum of $50 per month for the care of his said children, but was in arrears in his payments. It was agreed between Brown and plaintiff and deceased that the benefit certificate should be assigned in satisfaction of the indebtedness due by Brown to plaintiff, and that plaintiff should thereafter keep up and pay the assessments upon said certificate. Plaintiff thereafter paid the assessments upon the said certificate, and he and deceased supported and cared for the four children of Brown until his death, and after that time. After the death of Brown the amount of the benefit certificate was collected, and with the proceeds a lot was purchased on Jackson street, in the city of San Francisco. This lot was taken in the name of deceased, with no mention of her husband therein. A mortgage was given upon the property for $3,000, the mortgage note being signed by both plaintiff and his wife. Plaintiff paid the interest on this mortgage. There is no evidence tending to show that the benefit certificate was a gift to deceased, but it

was assigned for the consideration herein stated. About October, 1895, the plaintiff and deceased sold the Jackson street property subject to the mortgage, and received therefor the net sum of $1,700. They then purchased the property in controversy on Twenty-fifth street for $2,250, which was paid for with $1,000 realized from the sale of the Jackson street property, and $1,250 by a note and mortgage executed by plaintiff and deceased to the Hibernia Bank. The deed to the Twenty-Fifth street property was teken in the name of plaintiff and deceased.

We think the evidence clearly shows that the property was community property at the time of the death of deceased. The Jackson street property was acquired by deceased after marriage, and at the time it was acquired the Code defened the separate property of the wife as that owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, and all other property acquired after marriage by either husband or wife or both is community property. Civ. Code, Sections 162, 163. As the property was acquired after marriage, and was not acquired by gift, bequest, devise, or descent, it became community property. At the time the Twenty-Fifth street property was purchased, section 164, Civ. Code, had been amended so as to provide that, in case of a conveyance to a married woman and her husband, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument. This, at most, only created a presumption that the deceased took the part conveyed to her as tenant in common with her husband. The presumption is not conclusive, and was not intended to control or overthrow direct evidence. Here the evidence overthrows the presumption, and shows that the deceased did not take as tenant in common, but that the entire interest conveyed by the deed was community property. Being community property, it belongs to the husband without administration. Civ. Code, Sec. 1401.

The plaintiff was allowed, under the defendant's objection, to testify as to the facts and circumstances and consideration paid for the Jackson street property, and also for the property in controversy. It is claimed that the evidence was incompetent, and should have been excluded, by reason of subdivision 3 of section 1880, Code Civ. Proc., which provides; "The following persons cannot be witnesses: * * * (3) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." We are of opinion that the witness was competent, and the evidence properly admitted. The controversy is not concerning a claim or demand against the estate of deceased, within the meaning of the section. It is concerning the property of plaintiff, and to quiet a claim or demand or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by deceased under, the deed is the property of the estate or the property of plaintiff, If it is not property of the estate, then the action does not involve a claim or demand against the estate. To hold that the claim or demand in controversy here was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question at issue. It has accordingly been held that the statute quoted did not exclude a

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providing [illegible] conveyance [illegible]
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presumption [illegible] conveyed
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[illegible] conclusive.

party plaintiff in an action to enforce a resulting trust in real estate against the executors of deceased. Myers v. Reinstein, 67 Cal. 90, 7 Pac. 192. Nor in an action to enforce a mechanic's lien against the executors of a deceased person, where the buildings were erected by deceased in his lifetime. Booth v. Pendola, 88 Cal. 42, 23 Pac. 200, 25 Pac. 1101. Nor in an action to quiet title brought by the wife against the administrator of her deceased husband. Poulson v. Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

We attach little importance to the fact that, after the death of his wife, plaintiff filed a petition for letters of administration upon the estate of deceased, in which he stated that she was the owner of an interest in the lot described in the complaint. The petition states that the property was community property. It may have been the intention of plaintiff at the time he filed the petition to administer upon the estate for the purpose of clearing up the apparently defective title. The statement did not estop the plaintiff from claiming the property. Dean v. Parker, 88 Cal. 287, 26 Pac. 91. There was no error in striking out the testimony of the witness Morais. The only object of the testimony appears to have been to show that the deceased was the beneficiary in the certificate for $3,000. This was shown by other testimony and is not disputed. Nor did the court err in refusing to allow defendant to testify that, while plaintiff and deceased were in possession of the Jackson street property under the deed to deceased, the deceased said to defendant that she was the owner of the property. It was not a declaration against her interest, and hence does not come within the authorities cited. Under certain circumstances, such evidence would be admissible between the parties by way of estoppel, but it was not admissible as in favor of defendant in his representative character, nor was it admissible against the plaintiff. Deceased, by declarations made in her lifetime, could not create evidence to be used against her husband for the purpose of changing the character of the community property into the separate property of the wife.

Finally it is claimed that the court erred in not finding on the affirmative allegations of defendant's answer stating that deceased had creditors, and that claims had been allowed against her estate. It may be conceded that such was the case, yet the result would be the same. Defendant had all the rights in regard to recovering property of the estate, as administrator, that he could have had if it had been shown that deceased had many creditors. The fact that she owed debts, if it be a fact, would not authorize the taking of the lot in controversy from the plaintiff for the purpose of paying such debts.

It is advised that the judgment and order be affirmed.

We concur: Chipman, C.; Harrison, C. For Pl.

For the reasons given in the foregoing opinion, the judgment and order are affirmed, McFarland, J.; Lorigan, J.; Henshaw, J.

JONES v. JONES.

(Court of Civil Appeals of Texas. San
Antonio. March 27, 1912.)
(146 S.W. Rep. 265.)

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by T. H. Jones against the Merchants' Life Association of Burlington, Iowa, and Fay T. Jones. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

Moursund, J.--On October 8, 1910, appellee filed this suit against the Merchants' Life Association of Burlington, Iowa, for $2,000, alleged to be due him upon a life insurance policy upon the life of Nat B. Jones, deceased, payable to Fay T. Jones, appellant, and joined appellant in the suit, alleging that she claimed some interest in the policy. Appellee alleged that on October 8, 1909, said Nat B. Jones by a written instrument transferred and assigned said policy to appellee, thereby substituting appellee for appellant as beneficiary. The Merchants' Life Insurance Company admitted the validity of the policy sued upon and paid the money into court.

Appellant, answering, alleged that she was entitled to receive the proceeds of the policy for the following reasons: (1) That the money used to pay for said policy was community property of said Nat B. Jones and appellant, who was his wife, and that such policy is the community property of Nat B. Jones, deceased, and appellant, and that any attempted change of beneficiary in said policy without appellant's consent was unlawful and fraudulent, and passed no title to her community interest in the policy or the proceeds thereof; and further that any stipulation in said policy authorizing a change of beneficiary, in so far as it attempted to dispose of appellant's community interest, was void. (2) That no change of beneficiary was authorized by the insurance company, nor was any such change made in the manner required by the provisions of the policy, and that after the death of Nat. B. Jones it was too late for the insurance company to consent to the change of the beneficiary. (3) That the policy was procured and made payable to her as a beneficiary to procure her consent to selling and her signature to a deed conveying away her homestead, and her consent to invest the proceeds of the homestead in incumbered property, alleging that she had refused to deed away her homestead and consent to the investment of the funds in property which would be greatly incumbered, and, in case of her husband's death, would leave her without funds to pay off the indebtedness upon the newly purchased property. That thereupon the deceased, Nat B. Jones, promised in case she would sign the deed to a valuable homestead, practically free from incumbrance, and consent to the investment of the proceeds, he would take out life insurance in her name as beneficiary, so that in case of his death she would have sufficient funds to meet the incumbrance upon the "Castle," the property to be purchased with the proceeds. "That, acting upon said promise, on September 30, 1908, she signed away her homestead rights, and on October 15, 1908, the policy in suit, as well as others,

was issued with her as beneficiary, and delivered to her husband, Nat B. Jones, now deceased, who held the same for her benefit. That, by reason thereof, she had a vested right in the proceeds of said policy, and the proceeds thereof could not be diverted from her by any act, transfer, or change by Nat B. Jones, the insured, without her consent, and that she did not agree or in any manner consent to said attempted change of beneficiary made by the insured on October 8, 1909." Appellant further pleaded that no rules of the company or provisions in said policy as to the manner of the change of beneficiary therein were applicable to her, because she had a vested right in and to the proceeds of said policy by reason of having parted with her homestead upon promise of the procuring and issuance of said policy to her as beneficiary, for a valid and valuable consideration. The case was tried before the court on June 10, 1911, and judgment rendered for appellee for the entire proceeds of the policy, and that appellant take nothing by her cross-action and answer in said cause. Appellant has appealed the case to this court.

Upon request of appellant the court filed findings of fact and conclusions of law, as follows: "Findings of fact. First. I find that on the 15th day of October, 1908, Nat B. Jones, deceased, took out a policy of insurance upon his life in favor of Fay T. Jones, which policy contained the following provision: 'Provided, however, that the member shall have the right at any time with the consent of the president or secretary indorsed hereon to make a change in his beneficiary without requiring the consent of the beneficiary.' Second. That the deceased, Nat B. Jones, a short time before his death, filled out the certificate on the back of the insurance policy as follows: 'For Change of Beneficiary. I, Nat B. Jones, do hereby revoke the appointment of Fay T. Jones designated by me as beneficiary under certificate No. 23,230 in the Merchants' Life Association of Burlington, Iowa, and do hereby make, designate and appoint T. H. Jones, my father, of Atlanta, Ga., as my beneficiary under the said certificate, and direct that that the benefits thereunder be paid at my decease, to such beneficiary. Dated at San Antonio, Texas, this 9th day of October, 1909. Signature of Insured: Nat B. Jones. Thurel Hicks, Witness. O. M. Oppenheimer, Witness. The Merchants' Life Association, of Burlington, Iowa, hereby consents to the above change of beneficiary. __________, President. _________, Secretary.' Third. I find that Nat B. Jones came to his death on the 13th of November, 1909, thereafter. Fourth. I find that the Merchants' Life Association have always been ready, willing, and able to pay the $2,000 insurance, and would have paid the same but for a claim set up to it by the defendant Fay T. Jones, and after the institution of this suit the said Merchants' Life Association, as shown by its answer, which is on file under date of December 5, 1910, voluntarily deposited the said sum of $2,000 due under policy No. 23,230 upon the life of Nat B. Jones, deceased, in court, and disclaimed all interest therein or thereto. Fifth. I find that on the 13th day of November, 1909, Nat B. Jones carried life insurance to the amount of $16,500, as follows: $3,000 payable to his estate; $4,000, payable to the defendant Fay T. Jones; $7,500 payable to Nat B. Jones, the minor child of the deceased and defendant Fay T. Jones; and $2,000 as shown by the policy in controversy. Sixth. I find that the premiums on the entire sum of $16,500 carried upon the life of Nat B. Jones were paid out of the community funds of Nat B. Jones, deceased, and the defendant Fay T. Jones, and that the premium paid on the policy in dispute was $44. Seventh.

I find that the father of Nat B. Jones, deceased, is about 81 years of age. Eighth. I find that at the time of the death of Nat B. Jones he left a piece of improved property known as the 'Castle' of the estimated value of $25,000, which was the community estate of himself and Fay T. Jones, and that the said 'Castle' property was incumbered at the time of his death for about $9,500, and after his death the said property, subject to said incumbrance, became the property in equal portions of defendant Fay T. Jones, and the minor, Nat B. Jones, Jr. Ninth. I find that he left insurance more than sufficient to pay off and discharge the incumbrance upon the 'Castle' property.

"Conclusions of law: (1) I conclude that the payment of the premium of $44 on policy No. 23,230 for $2,000, in favor of the aged father, was not an unlawful use of the community funds belonging to himself and the defendant Fay T. Jones, and that the same constituted no fraud upon the rights of said defendant Fay T. Jones. (2) I conclude that the defendant Fay T. Jones cannot question the sufficiency of the change of beneficiary in the policy of insurance, and that such matter could only be questioned by the Merchants' Life Association of Burlington, Iowa. (3) I conclude that the Merchants' Life Association of Burlington, Iowa, having deposited the money in court, and disclaimed all interest therein, thereby waived the question of the sufficiency of change of beneficiary, and that the plaintiff, T. H. Jones, is the lawful beneficiary under the policy. (4) I conclude that the plaintiff, T. H. Jones, in any event, would be entitled to recover the $2,000 in controversy in view of the fact that $14,500 of life insurance that the deceased, Nat B. Jones, carried was for the benefit of the defendant Fay T. Jones and their minor son, Nat B. Jones, Jr., and the estate of Nat B. Jones."

(3-5) By her second assignment of error appellant contends that judgment should have been rendered for her for at least half of the policy, because the premiums on all policies had been paid out of the community estate, and the deceased had made $7,500 of his insurance payable to his son, $3,000 payable to his estate, and the $2,000 in controversy was attempted to be diverted to his father, which attempted diversion appellant alleges was in fraud of her rights. The proposition under this assignment is as follows: "Insurance left to the son, Nat B. Jones, Jr., became his separate property in which Fay T. Jones, appellant, had no interest, just as would the policy changed to T. H. Jones, and the insurance left the estate would be consumed by general indebtedness; therefore the insurance to Nat B. Jones, Jr., and to T. H. Jones, amounting to $9,500, as against $4,000 left to wife, showed a diversion of community investments and judgment for at least one-half of this policy should have been for appellant." The trial court reached the conclusion that the payment of the $44 premium on the policy in question was not an unlawful use of the community funds, and that the same constituted no fraud upon the rights of the appellant.

The case of Rowlett v. Mitchell, 52 Tex. Civ. App. 589, 114 S. W. 846, was one in which a widow sued to recover one-half of the proceeds of a life insurance policy upon the life of her deceased husband, which was payable to his children by his first wife. The policy was taken out before his second marriage; but after such marriage he continued to pay the premiums thereon, and used about $73,20 of the community funds of the

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second marriage in paying the premiums due on such policy. The policy was for $1,000, and the entire community estate was only worth about $450. The trial court concluded as a matter of law that the facts did not show any fraud upon the rights of the wife, and that the children named in the policy were entitled to the proceeds thereof. The appellate court, in affirming the judgment, said: "We think the evidence was sufficient to support the conclusion reached by the trial court that the use by Shoulders of community funds of his second marriage to pay the premiums on the policy in favor of the children of his first marriage was not with intent to defraud appellant as the owner of an interest in such community funds. Therefore it must be said that in rendering the judgment complained of the trial court did not err; for the right of the husband to dispose of community funds is an absolute one, so long aa it is not exercised for the purpose of defrauding the wife. Sayles' Ann. Civ. St. 1897, art. 2968; Stramler v. Coe, 15 Tex. 215; Martin v. McAllister, 94 Tex. 567, 63 S. W. 624." Further along in the opinion the court uses the following language; "The right of the husband to dispose of the community estate except for the purpose of defrauding his wife is an absolute one only while the marriage relationship exists. While that relationship continues, if not under a disability-as lunacy, for instance-he may expend their joint estate ever so unwisely, may squander it in riotous living," or may give it away to objects meritorious or without merit, yet she cannot be heard to complain. It is only when he disposed of it for the purpose of defrauding her that the law will afford her relief."

Our Supreme Court, in the case of Martin v. McAllister, has held that when insurance is taken upon the life of the wife, payable to the husband, and premiums paid out of the community funds, the proceeds of the policy became the separate property of the husband. The court stated that it saw no ground in the facts of the case to impeach the action of the husband as fraudulent towards his wife, and announced the doctrine that, as the proceeds of a policy upon the life of the husband or wife could not become the property of either during the lifetime of both of them, it cannot be held to be community property, and is therefore the separate property of the one to whom it is payable.

The case of Martin v. Moran, 11 Tex. Civ. App. 509, 32 S. W. 905, relied upon by appellant herein, is fully discussed in the case of Rowlett v. Mitchell, supra. The distinction therein made is applicable in this case. The court, in that case, appeared to take the view that an insurance policy is community property, which view is not in accord with the opinion of the Supreme Court in Martin v. McAllister, supra; but it will be noticed that after all the court relied strongly upon the proposition that the act of the husband was for the purpose of making the policy his separate property, and was therefore a disposition in fraud of the rights of the wife.

The policy itself not being community property, as is held by the Supreme Court, it seems clear that the only question which can arise in a case like the present is whether the husband, in expending the community funds, acted in fraud of the rights of the wife. The rule appears to be so understood by appellant's counsel, as shown by the assignment of error. The questions arise upon the application of the rule to different sets of facts. In this case it is shown that the deceased carried $16,500 insurance upon his life, of which $4,000 was payable to his wife, $7,500 to his

son, $3,000 to his estate, and $2,000 to his father, who was 81 years old. He left a piece of improved property of the estimated value of $25,000, which was incumbered to the extent of $9,500. The amount of community funds expended for premium on the policy in question was $44. There is no evidence showing the amount of income of the deceased, nor the financial condition of his father. If deceased had given his father even twice or three times the amount of the premium on the insurance policy while both were alive, it could hardly be contended that it amounted to a fraud upon the wife. Or if he had given the amount of the premium each year for some charitable, or even some foolish and unnecessary, purpose, it would not be considered a fraud upon the wife. The sum expended for premium was so small that in itself it raises no presumption of fraud. The amount of insurance carried for his wife and son and for his estate shows that he was not disregarding his obligations to those having the first claim upon him. He owned a valuable equity in real estate, which together with his other insurance comprised such an estate for the benefit of his wife and child as would rebut any inference that he might have tried to injure his wife. There are no acts proved to have been done by him evincing a desire to injure or defraud her, unless it be the act of changing the beneficiary on the two policies-one to his son and one to his father. If fraud can be inferred from such act alone, then no policy could be taken by the husband in favor of his children or any other relative, without the same being in fraud of his wife's rights.

We think the evidence sustains the trial court's first conclusionsof law, and we therefore overrule the second assignment of error.

Appellant's third, fifth, and sixth assignments of error complain of the action of the court in rendering judgment for appellee, because the policy in question was procured by Nat B. Jones, deceased, in consideration of appellant signing away her homestead rights and in pursuance of his agreement to take out sufficient insurance in her behalf to pay off the incumbrance on the "Castle," and thereby she acquired a vested right in such policy, and could not be deprived thereof without her consent.

(6) The signing of a deed to the homestead by the wife is a valuable consideration, which will support an agreement on the part of the husband that property purchased with the proceeds shall be her separate property. Drake v. Davidson, 28 Tex. Civ. App. 184, 66 S. W. 889; Blum v. Light, 81 Tex. 415, 16 S. W. 1090; McKinney v. McKinney, 87 S. W. 217.

In this case appellant pleaded that her husband agreed to take out life insurance payable to her in such an amount that she would have sufficient funds to pay off any claims against the "Castle" which might remain at his decease, and that the policy in question was taken out in fulfillment of such promise. The only evidence in regard to this matter is that of appellant, as follows: "I made a deed to that homestead after Mr. Jones promised that he would have his life insured sufficient to cover the indebtedness on the property that he wanted to buy. He wanted to sell tthe homestead and buy other property. I would not have signed the deed to the homestead without his promise to take out the insurance. It was about a month prior to my signing the deed when Mr. Jones made the promise to me that he would take out sufficient life insurance to cover the debt on the property he was buying. Prior to signing the deed he made application for the life insurance promised. He made the application for the life insurance

promised. He made the application before I signed the deed. After we signed the deed, he told me that the policies were made out and he was in possession of them."

(11) We do not think it within our province to find the existence of the agreement pleaded, or to infer such a vital finding by the lower court, even if the evidence was specific enough to show it, and would therefore be required to overrule these assignments. However, the lower court found that deceased had left insurance more than sufficient to pay off the incumbrance on the "Castle," and concluded that in any event plaintiff would be entitled to the money in controversy, because of the amount of insurance carried for the benefit of appellant, and of their son, and of his estate.

The court appeared to take the view that, even if appellant's testimony was true, the promise or agreement testified to by her was complied with, and appellant therefore could not be heard to object to the claim of the appellee to the money in controversy. If the finding and conclusion are correct, the assignments of error now being considered should be overruled on that ground.

It is undisputed, and the court found, that $7,500 of the insurance carried by deceased was payable to his son, Nat B. Jones, Jr.; that $4,000 was payable to appellant, and $3,000 to his estate; that the "Castle" property was subject to an incumbrance of $9,500, and subject to such incumbrance became the property of appellant and Nat B. Jones, Jr., each becoming the owner of one-half. Appellant did not testify that the insurance was promised to be made payable to her. The son's interest in the property was of the estimated value of $12,500 and was liable for half the indebtedness, viz., $4,750. There can be no doubt that, in order to prevent the sacrifice of his half of the valuable property, the guardian of his estate could pay off his half of the incumbrance, and thus require sale of the other half first to satisfy the remainder of the incumbrance. To pay off the other half of the incumbrance appellant would have the $4,000 insurance payable to her, and her interest in the policy payable to his estate, which together would be more than sufficient to pay off the incumbrance. However, she complains that there were other debts due by the estate, and therefore this insurance due the estate could not be made available for the purpose of paying off her half of the incumbrance. Appellant did not testify that her husband agreed to take out sufficient insurance to pay off the incumbrance and such other indebtedness as he might owe when he died, or owed at that time. The spirit of the agreement testified to would not have been complied with by taking the insurance payable to an outsider so that it could not be available for paying off the incumbrance; but we think, had he made it all payable to his estate, it would have been a compliance with the promise testified to by her, and that she cannot domplain that $3,000 was made payable to his estate. Not taking into consideration other indebtedness, she could, with the insurance accruing to her from her policies and the one payable to the estate, have paid off her half of the incumbrance, We sustain the conclusion of the trial court, and therefore overrule the third, fifth, and sixth assignments of error.

The fourth assignment of error complains of the action of the cour in considering the insurance left to the son, in determining whether th deceased left sufficient insurance to pay off the incumbrance on the "Ca What we have said disposes of this assignment of error, and it is overrul

The judgment is affirmed. [illegible]

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Birnett [illegible] case [illegible] Wash.

C. P. OUDIN, Respondent, v. CHARLES CROSSMAN
et ux., Appellants.

(15 Wash. 519. 1896.)

Appeal from Superior Court, Spokane County.--Hon. John McBride, Judge pro tem. Affirmed.

The opinion of the court was delivered by

Scott, J.--The plaintiff brought this suit to recover a sum of money paid to the defendants for the purchase of a mine. The cause was tried without a jury and the findings and judgment were in favor of the plaintiff, and the defendants have appealed.

It is further contended that the findings are not sustained by the evidence, and that, if they are, they do not support the judgment. Without entering upon a discussion in detail of the points urged under these heads, we think it sufficient to say that there was evidence tending to show that the mine in fact had no existence, the location being invalid, and that the ore exhibited as a sample did not come from the mine at all, and there was evidence to sustain the findings which the court made, and the facts found sustain the judgment entered.

It is next contended that the plaintiff was not entitled to a judgment against Mabel Crossman, on the ground that it was not a community liability; but the alleged title to the mine was in her name and the consideration paid therefor was clearly community property, and this contention is untenable.

Affirmed. For Pl

Gordon, Anders and Dunbar, JJ., concur.

CLARA MAY MILLER, Respondent, v. ELDRIDGE R. GERRY et al., Appellants.

(81 Wash. 217. 1914)

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered April 16, 1913, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

Mount, J.--This action was brought to recover damages alleged to have been sustained by the plaintiff in the purchase of a relinquishment of a quarter section of land in Grant county. The plaintiff in her complaint alleged, that the purchase was made upon false and fraudulent representations made to the plaintiff by the defendant; that she relied upon such statements and purchased the land; that the statements were false and by reason thereof she was damaged in the sum of $2,400. The defendants denied the allegations of the complaint, and the cause was tried to the court without a jury.

After the trial, the court made findings to the effect that, in January, 1911, the defendants, for the purpose of inducing the plaintiff to purchase the right, title, and interest of the defendants to the land in question, fraudulently represented to the plaintiff that one hundred and ten acres of the land was good irrigable land; that the same could be easily and cheaply irrigated; that there was a well on the land which would furnish a sufficient quantity of water with which to irrigate over forty acres thereof; that these representations were false and made for the purpose of inducing the plaintiff to purchase the land; that the defendants at the time the representations were made were acquainted with the nature and character of the land and knew that the plaintiff desired to purchase the same for the purpose of irrigating the land; that the plaintiff had no knowledge of the land, or of irrigation; that she relied upon the statements made to her by the defendants, that she believed the same, and purchased the land and paid therefor the sum of $1,500. The court also found that there was not to exceed forty acres of irrigable land upon the whole tract; that these forty acres were in irregular and detached patches; that the land could not be irrigated from the well of water thereon; that there was not a sufficient quantity of water to irrigate any portion of the land; that without irrigation the land had no commercial value except for grazing purposes, and was not worth to exceed $400. Upon these findings, the court entered a judgment in favor of the plaintiff for $1,100, being the difference between the purchase price and the value of the land at the time. The defendants have appealed and make five contentions, which will be noticed in their order.

(1) That the agents, Stonestreet and Noyes, who brought the parties together, were the agents of the respondent and not of the appellants. It appears upon the record that the appellant Eldridge R. Gerry had made a desert entry upon the land in question. Thereafter he desired to sell his relinquishment, and asked Stonestreet to find him a purchaser. Mr. Stonestreet interested Mr. Noyes in finding a purchaser. Mr. Noyes was the brother-in-law of the respondent. After the property was sold, the appellant Eldridge R. Gerry paid to Mr. Stonestreet the commission agreed

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upon. The question whether these agents were acting for the respondent or the appellants is of no importance in the case, because it is conceded upon the record that the representations which were made were made directly by Mr. Gerry to the respondent. She does not claim that any misrepresentations were made by the agents. So that the question of agency is therefore entirely unimportant.

(2) The appellants next contend that the representations made by Mr Gerry were true. This contention is based upon the evidence of Mr. Gerry to the effect that the representations made were that there were one hundred and ten to one hundred and twenty acres of irrigable land upon the claim; that there was a well of water on the place, which contained twenty-nine feet of water, and that in his opinion there was an abundance of water in the well to irrigate forty acres of the land, but that the well had never been tested. There is a conflict in the testimony as to whether he expressed an opinion or made the representations as a matter of fact. The evidence on the part of the respondent tended to show that he represented that there were at least one hundred and ten acres of irrigable land upon the premises, and that he represented that there was an abundance of water in the well to irrigate forty acres. The court found, as a matter of fact, that he made these representations without any qualification. We are satisfied from an examination of the evidence that the weight of the testimony supports the findings of the court in these respects. It was abundantly shown that there were not one hundred and ten acres or one hundred and twenty of irrigable land upon the property, and it is abundantly shown that there was no water in the well of any consequence. The pump, which was placed upon the well at an expense of more than $900 by the respondent, exhausted the water in one minute and a quarter. And it was conclusively shown that there was no water to irrigate any appreciable quantity of the land.

(3) It is next argued by the appellants that the respondent did not rely upon the representations made to her by Mr. Gerry, but relied upon her own observation and the advice of her brother-in-law. The fact is that when the respondent was informed of the opportunity to purchase the relinquishment upon the land in question, she, with the two real estate agents, one of whom was her brother-in-law, visited the appellants and the land. But it appears from the evidence that, at this time, the ground was covered with snow and she could not determine either the character of the soil or the amount of water available for irrigation purposes. She, at the same time, examined other property in the vicinity, and in a few days returned and again examined the appellants' place, but at that time there was snow upon the ground. The ground was frozen and she could not and did not discover the character of the soil or the amount of water in the well. She saw that there was a well, and she saw the general lay of the land. But she testified that she relied upon the statements of Mr. Gerry in regard to the quantity and character of the land and the quantity of water available. We think the great weight of the evidence is that she could not determine the verity of the representations made to her because of unfavorable conditions, existing at the time, and did not rely upon her own observation, but relied wholly upon the representations that were made to her by Mr. Gerry, as she was justified in doing. Duffy v. Blake, 58 Wash. Dec. 483, 141 Pac.

(4) The appellants next argue that the court erred in finding for the respondent in the sum of $1,100 damages. There was evidence to the effect that the land was worth more than $1,600. There was also evidence to the effect that the land was worth less than $200. Different witnesses placed the value of the land at different figures. Under these circumstances, we are inclined to follow the finding of the court, which was that the land, at the time of the purchase, was of no value except for grazing land, and did not exceed $400.

(5) It is next argued by the appellant that the court erred in rendering judgment against the wife of Eldrige R. Gerry. There is no merit in this contention. It is not disputed that the appellant Mr. Gerry was a married man at the time he filed his desert location upon the claim. If he had acquired title to the property, it would have been community property. When he sold the relinquishment, the proceeds were, of course, community property. In short, Mr. Gerry was the agent of the community, attending to community business, and the community was liable for a refund of the money so acquired.

Upon an examination of the whole case, we are satisfied that the judgment of the trial court was in accordance with the facts, and it is therefore affirmed.

For Pl.

Crow, C. J., Parker, Fullerton, and Morris, JJ., concur.

When a married [illegible] a
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GRACE H. CATTON, Respondent, v. WILBUR F. CATTON et al., Appellants.

(69 Wash. 130 1912)

Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge pro tempore, entered August 31, 1911, upon findings in favor of the plaintiff, in an action for divorce. Affirmed.

Mount, J.--The plaintiff brought this action on February 15, 1911, for a divorce from her husband. The action was brought in the superior court of King county, where the plaintiff resided. It was alleged in the complaint that the community owned certain described real estate in Grant county, certain other described real estate in Pierce county, and also certain described personal property in King and Pierce counties, all in this state, all of which property was community property. The prayer, among other things, was for a restraining order to prevent the defendant Catton from disposing of any of the property. A temporary restraining order was accordingly issued. The defendant Catton was not served with process until February 18, 1911. On the 16th day of February he transferred his personal property in Pierce county to one Shrewsbury, and on February 17, 1911, he was sued by John J. Reehling in Pierce county, upon two promissory notes aggregating $1,700. He immediately confessed judgment, and execution was thereupon issued and levied upon the community property of the plaintiff and defendant Catton in Pierce county. On the next day, the defendant Catton was served with process in this action. Thereafter on March 10, 1911, the plaintiff filed a supplemental complaint, which brought Shrewsbury, Reehling and the sheriff of Pierce county into the case as parties defendant, and these parties were restrained from disposing of the property.

Upon a trial of the case, the court granted a decree of divorce to the plaintiff, and awarded her certain property. The court found that the transfer of the personal property to Shrewsbury was fraudulent and void as to the plaintiff; that the notes upon which the action was brought by Reehling against defendant Catton in Pierce county were given for money which was "borrowed and used by said Catton for his separate use and not at all for the community of plaintiff and said Catton; that most or all of said money was borrowed and used for speculation in options and futures on stock and produce; that none of it was borrowed or used in the business of H. Robert Paul & Company, which was the only legitimate business in which said Catton was engaged during all such times; that said Reehling was in position to know of all these facts and circumstances."

The defendant Reehling only has appealed, and argues two points, to the effect, (1) that the superior court of King county had no jurisdiction over the real estate in Pierce county, and (2) that the finding above quoted does not support the conclusion that the judgment obtained by Reehling is not a community obligation.

It is quite plain, we think, that the superior court of King county had jurisdiction over the property in Pierce county, because this is an

action for divorce. The plaintiff was a resident of King county. The statute provides, at Sec. 984, Rem. & Bal. Code, that a plaintiff in such cases may file her complaint in the county where she resides. Section 989 provides that the court granting a divorce shall make such disposition of the property of the parties as shall appear just and equitable. This court has held that the court in a divorce action has power to award any part of the property of the parties as shall appear just, but to do so it is necessary that the property shall be brought before the court, and the proper way to do this is to describe the property in the pleadings. Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; In re Smith's Petition, 9 Wash. 85, 37 Pac. 311, 494; Budlong v. Budlong, 43 Wash. 425, 86 Pac. 648. The disposition of the property of the parties is an incident to the divorce. Where the property is brought into the action by description, the court thereafter acquires jurisdiction over it. Otherwise it would be necessary to bring an action in each county where the parties may have p property. This was not the intention of the statute. Section 204, Rem. & Bal. Code, which provides that actions for possession of, or affecting the title to, real estate shall be commenced in the county where the subject of the action is situated, clearly does not apply to divorce actions, because the residence of the plaintiff determines where such action shall be brought. The superior court of King county, therefore, had jurisdiction over the property of the parties in Pierce county.

Appellant next argues that the finding above quoted does not support the conclusion that the debt owing from defendant Catton is not a community obligation of plaintiff and her husband. The finding is specific, that the money was borrowed and used by said Catton for his separate use, and not at all for the community of plaintiff and Catton. If the finding had stopped there, the contention now made would have no foundation whatever. But the finding continues: "That most or all of said money was borrowed and used in speculation in options and futures on stocks and produce . . . ; that said Reehling was in position to know all these facts." Appellant argues that, because the proceeds of these speculations, if successful, would have been community property of Catton and wife, therefore the community was liable upon the notes for money borrowed for such purpose. The question is stated by appellant in his brief as follows:

"Where the husband borrows money and gives his negotiable promissory note therefor, using the proceeds thereof in dealing in futures--that is, buying and selling stocks on margins--does such an obligation create a separate debt of the husband, or does it create a community debt?"

It is apparently conceded--as the fact appears--that the defendant Catton borrowed this money from Reehling for the purpose of gambling in futures, and Reehling knew the facts. Catton lost the money. "By the weight of authority money loaned for the express purpose of gambling in a manner prohibited by law cannot be recovered back." 20 Cyc. 939. The debt, therefore, could not be collected from either the separate or community property of the plaintiff or her husband.

Appellant relies upon the case of McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. That was a case where Johnson had obtained by fraud a sum of money from McGregor. We there held that,

since the community consisting of Johnson and wife had received the benefit of money wrongfully obtained, the community was estopped from deny liability in a suit to recover the money. The rule in that case does control this, because the community here received no benefit, and the obligation being a gambling obligation was not enforceable against either the plaintiff or her husband.

The judgment is therefore affirmed. For Pl

Ellis, Morris, and Fullerton, JJ., concur.

Money loaned [illegible] hus, [illegible] express [illegible] gambling [illegible] futures [illegible] manner prohibited [illegible] recovered either [illegible] hus, [illegible] community [illegible] com. debt.

Note [illegible] money borrowed [illegible] gambling [illegible] com. debt.

GEORGE E. SNYDER et al., Respondents, v.
JOHN STRINGER, as Sheriff of King
County, et al., Appellants.

Appeal from a judgment of the superior court for King county, Marion Edwards, judge pro tempore, entered December 18, 1920, upon findings in favor of the plaintiff, in an action to determine the ownership of an automobile and its liability to seizure on execution. Affirmed.

Parker, C. J.--This was a proceeding in the superior court for King county under Rem. Code, Sec. 573-577, relating to adverse claims to property levied upon. The plaintiffs, Snyder and wife, as a community, sought recovery of an automobile, claimed by them as their community property, which had been levied upon by the defendant sheriff under a writ of execution issued upon a judgment rendered against the plaintiff Snyder in favor of the defendant Merkel. Proper affidavit and bond having been furnished to the defendant sheriff, he delivered the automobile to the plaintiffs, and thereafter the cause came regularly on for trial upon the merits as to the ownership of the automobile and its liability to seizure and sale in satisfaction of the judgment rendered against Snyder in favor of the defendant Merkel. Findings and judgment were made and rendered by the superior court, adjudging the automobile to be community property of the plaintiffs and not subject to seizure and sale in satisfaction of the judgment rendered against Snyder. From this disposition of the cause, the defendants have appealed to this court.

We think there is no room for serious controversy as to what the controlling facts of the case are. They may be summarized as follows: Respondents Snyder and wife were married in July, 1917, and ever since then have been residents of the state of Washington. In February, 1919, Note there was duly rendered in the superior court for Spokane county a money judgment, against respondent Snyder and in favor of appellant Merkel, for the sum of $2,500, upon an obligation incurred by Snyder long before his marriage, which obligation and judgment were not, and never became, a debt or obligation of the community composed of respondents. The business of respondent Snyder, consisting wholly of the business of the community, called him frequently, and for periods of considerable duration, out of this state, and particularly into the states of Montana and Iowa. While in Iowa in May, 1920, he purchased there the automobile here in question, with funds which for present purposes we may regard as having been earned by him in his business in that state and in Montana. He brought the automobile to this state, and thereafter it was seized by appellant as sheriff under an execution issued upon the judgment rendered against Snyder in favor of appellant Merkel. This proceeding was thereupon commenced by respondents, seeking recovery of the automobile, and resulted as above noticed. It was proven upon the trial that, by the laws Note of both Montana and Iowa, the earnings of a husband during coverture become his separate property and become liable to levy and sale in satisfaction of his individual debts.

Counsel for appellant, while conceding that community property cannot in this state, during coverture be seized and sold to satisfy the separate debts of the husband, invoke the general rule that the ownership of property brought into this state from another state remains unchanged; so that, if such property be separate property of the husband when brought here, it so remains, and becomes subject to seizure and sale to satisfy his separate debts, notwithstanding it may have been earned during coverture; citing Freeburger v. Gazzam, 5 Wash. 772, 32 Pac. 732; Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914, 123 Am. St. 944, 13 Am. Cas. 839, 12 L. R. A. (N.S.) 921; and Meyers v. Albert, 76 Wash. 218, 135 Pac. 1003. The Freeburger decision seems to assume, rather than decide, that the property acquired in Kansas was there the separate property of the wife. The real point decided seems to be that the property did not change its character as to ownership by being brought into this state; that is, that it did not thereby become community property, though acquired during coverture. The place of the actual domicile of the husband and wife seems not to have been noticed in that decision. The Brookman and Meyers decisions render it plain that the properties there involved were acquired in states other than Washington, while the husband and wife were actually domiciled in those states, and became under the laws of those states the separate property of one or the other, and so remained when brought into this state.

Our decision in Colpe v. Lindbolm, 57 Wash. 106, 106 Pac. 634, we think, is in principle decisive here in favor of the respondents. The property there involved was in this state, having been purchased by the husband with moneys earned by him in Alaska during coverture. Holding that the property was community property, Judge Gose, speaking for the court, said:

"The appellants urge that the interest of the appellant Dawson in the premises was his separate property. The evidence which forms the basis for the contention is that the money which Dawson put into the property was earned by him at Nome, Alaska, and that, under the laws of that place, his earnings were his separate estate. The record discloses that both the husband and wife were at Nome, he working at different things, as she expressed it, and she keeping house. The wife further testified that the marriage occurred at Phoenix, Arizona, about seventeen years before the trial. We have not been able to discover from the record whether Nome was their domicile or merely their temporary abode. As we have stated, in this state the presumption is that all property acquired by either spouse after marriage is community property. This rule is so well established that the citation of authority is not necessary. The law of the domicile controls as to personal property acquired during coverture. Thayer v. Clarke (Tex. Civ. App.), 77 S. W. 1050. In the absence of evidence as to the domicile of the parties at the time the money was earned, the presumption will be indulged that the domiciliary law is the same as our own. Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736."

It seems to be argued by counsel for the appellants that, by this language, the court had in mind the presumption that the laws of Alaska were the same as our own in the absence of proof; but, clearly, we think, this is not what the court meant; for near the beginning of the quoted language it is said, "under the laws of that place (Alaska), his earnings

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were his separate estate." We think it clear that, since the court was unable from the record to determine where the domicile of the husband and wife was at the time of earning the money which purchased the property, it would be presumed that, in whatever state or territory that domicile was, the laws of such state or territory were the same as our own; manifestly proceeding upon the theory that the husband and wife were not domiciled in Alaska, but were only there temporarily.

We are of the opinion that, for the purpose of determining by the courts of this state the ownership of this automobile, that is, as to whether it is community or separate property, both spouses being domiciled in this state when the automobile was acquired in the manner we have noticed, the situs of the property, to wit, the automobile, must be deemed to be that of the domicile of respondents; whatever may be said as to its situs for the purpose of determining its liability to seizure and sale to satisfy the individual debts of respondents Snyder while it was in Montana, or Iowa, by the courts of those states.

The judgment is affirmed. For Pl.

Mitchell, Main, Mackintosh, and Tolman, JJ., concur.

The situs auto deemed domicile plo. Wash. community prop. and not subject separate liability husband.

CHAPTER XI.

CITATIONS.

Property purchased on credit.

Yesler v. Hochstettler (1892)	4 Wash. 353.
(a) Proceeds of Insurance Policy.	
Gaskill v. Northern Assurance Co. (1913)	73 Wash. 668.
(b) Property acquired by illegal means.	
McGregor v. Johnson (1910)	58 Wash. 78.
Crowley v. Taylor (1908)	49 Wash. 511.

[illegible] hus. [illegible] insurable [illegible] com. prop. hus. [illegible] marriage is sep. prop. even [illegible] premiums [illegible] marriage [illegible] com. funds. [illegible] Texas holding [illegible] com. [illegible] sep. prop. No case [illegible]

Where [illegible] single [illegible] pays [illegible] marries [illegible] marriage finishes [illegible] land [illegible] presumption [illegible] comm. [illegible] unless [illegible] shown [illegible] first [illegible] all [illegible] his sep. [illegible]

what is Separate Property.

LIZZIE H. FORKER, Appellant, v. SAMUEL HENRY et al., Respondents.

(21 Wash. 235, 1899)

Appeal from Superior Court, Spokane County.--Hon. Abraham L. Miller, Judge. Reversed.

The opinion of the court was delivered by

Reavis, J.--Action to recover possession of land. Appellant alleged her ownership and possession of two parcels of land in Spokane county, --160 acres acquired under the homestead laws of the United States and a half section acquired by purchase from the Northern Pacific Railroad Company,--and alleged that defendants wrongfully entered into possession of 40 acres of each parcel, and erected a saw mill and other buildings upon the premises, and were cutting down standing timber growing thereon. Defendants answered, denying the ownership in plaintiff of the premises, and also set up affirmatively that appellant, through her husband as her agent, made an oral contract with defendants, the effect of which was that defendants should cut the standing timber thereon and manufacture it into laths and lumber, paying appellant therefor anagreed price for the timmber so manufactured by them, which agreement was to continue in force about two years; that, in pursuance of such contract, defendants had entered upon said premises and erected their saw mill and other buildings thereon and had commenced to cut timber for the purpose of manufacturing it into laths and other lumber. Defendants also alleged that the premises described in the complaint were the community property of appellant and her husband, C. W. Forker. Note

1. The motion to dismiss the appeal, because of an alleged defect in the bond, is not well taken; the defect pointed out was merely technical, and cured by the prompt offer of a bond correct in form. Upon the trial, the testimony disclosed that appellant was an unmarried woman when she filedlupon the homestead, in 1883; that she settled upon and improved the homestead and continued to reside there, when, in 1887, she was married to C. W. Forker, her husband. Thereafter she and her husband resided thereon, and final proof was made upon the homestead. Patent issued to her in due course. Upon the facts thus shown, the superior court withdrew the 40 acres in suit from the consideration of the jury and determined, as a matter of law, that the homestead was community property of appellant and her husband, and that failure to join the husband as plaintiff in this action was fatal to its maintenance under Sec. 4826, Bal. Code. Appellant excepted to the withdrawal from the case of the land acquired as her homestead, and the imporotant question thus presented is whether, upon the facts shown, the homestead wassseparate property of the appellant or the community property of herself and husband. It is proper to further add that the facts shown disclose that, as between appellant and her husband, it was deemed her separate property. Counsel for respondents maintain that the ruling of the superior court is sustained by decisions in this court, and those cited will be mentioned here. Ques

Kromer v. Friday, 10 Wash. 621 (39 Pac. 229). In this case the court observed:

"In considering the character of the title, as to whether it was community land as a matter of fact, a question is raised as to when the title vested in Erskine D. Kromer. Final proof was made by him before the marriage ceremony aforesaid was performed, but the patent was issued thereafter. Although, for certain purposes, the title, at least the equitable title, was earned and accrued upon the making of final proof and receipt of the certificate, the full, or legal, title did not pass until the patent was issued. The plaintiffs claim that the patent should relate back to the time of making final proof, and that therefore the land vested in Erksine D. Kromer aa his separate property, if in fact he was not then a married man. Undoubtedly, for certain purposes this would be true, but the doctrine of relation is a fiction of law adopted by courts solely for the purpose of justice. Gibson v. Chouteau, 13 Wall. 92. We are of the opinion that is should not be invoked in this case to defeat the claims of the widow. Her equities were as great as those of Erskine D. Dromer, or the children. It may fairly be inferred from all that transpired that there was no intentional wrong-doing upon the part of either of said parties; and that they were living together and regarded each other as husband and wife is apparent prior to the marriage ceremony aforesaid, and if necessary to save her rights in the premises we are satisfied that we would be justified in holding, and should hold, that the legal title having passed subsequent to the marriage of the parties, it vested in the community. A further question is raised, to the effect that title to the land under the homestestead laws is taken by gift, and consequently that it would become the separate property of the husband under the laws of the territory. There seems to be some conflict in the authorities upon this proposition. As the matters hereinbefore discussed decide this case in favor of the defendants; we will not undertake to enter into any consideration of the cased bearing upon this question, but content ourselves with saying weare satisfied that within the intent of our laws relating to community property, such land is in effect taken by purchase, by reason of the settlement and improvements thereon, in which the wife participates as well as the husband; and consequently, that this land was the community property of Erskine D. Kromer and his said wife."

But in that case it was shown that in an action in partition, in which all of the parties and privies were before the court, it had been before determined that the land involved was community property, and it was held that such adjudication was final, estopped parties and their privies, and they would not be permitted to again litigate that question. It also appeared that the man and woman were living upon the premises before the initial step or filing was taken for their acquisition, and it was held that the fact of a marriage ceremony having been performed afterward,--that is, at the date mentioned after final proof,--did not negative the presumption that they were man and wife at the time the filing was made. Thus, the equities of the wife were cogent. She had lived with her husband upon the land from the initiation of the settlement, and the court assumed, in support of her equities, that the fact of a marriage ceremony made after final proof did not, for the purposes of the case, negative a pre-existing valid marriage.

The case of Philbrick v. Andrews, 8 Wash. 7 (35 Pac. 358), relates to a statutory homestead of the husband and its exemption from a judgment for alimony. and it was stated that the homestead was community property, acquired under the homestead laws of the United States.

In Bolton v. La Camas Water Power Co., 10 Wash. 246 (38 Pac. 1043), the facts were as follows: Husband and wife established a residence upon a United States homestead in August, 1865, and lived thereon, in full compliance with the requirements of the law, until the 15th day of June, 1871, when the wife died, and final proof was made on June 14, 1872, by the husband, and a patent thereafter issued to him. The husband thereafter married a second wife, and they together executed and delivered a warranty deed to the premises. The purchasers had no knowledge whatever as to the manner in which the title was acquired, further than was disclosed by the records of the auditor's office, which upon their face showed a perfect chain of title from the government to their granters. The decision was put mainly upon the ground that the record title was perfect in the defendants and their grantors, they having no notice of any facts which tended to impugn the validity of such title and were purchasers for value. The conclusion reached was by a majority of the court, as then constituted, two members not concurring, and Chief Justice Dunbar filing an elaborate dissenting opinion, and the principle stated has not since been reaffirmed.

The separate property of tho wife is defined in Sec. 4489, Bal. Code:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, . . ."

Had Mrs. Forker any property or pecuniary right in the premises at the time of her marriage? She had entered upon the land, qualified to enter it under the homestead laws of the United States. She remained in sole possession for four years, improved, cultivated and resided thereon. She had made expenditures of money, which was her own, in some improvements. She had such possession as entitled her to prevent trespass and intrusion on the premises, and, upon compliance with the full term of five years' residence, she was entitled to a patent.

In Burch v. McDaniel, 2 Wash. T. 58 (3 Pac. 586), it was adjudged that a promissory note executed by the purchaser of the right to possession of a settler upon a preemption claim was founded upon valid consideration, and it was observed by the court:

"Bare possession of anything of value of which exclusive possession may possibly and lawfully be had, is property, and is valuable, and ordinarily the transfer or relinquishment of such possession is good consideration for a contract."

It is apparent that the rule thus stated with reference to possession of land under the pre-emption laws is equally applicable to such possession under the homestead laws. It would seem that, under the homestead laws, residence and improvement are required as conditions precedent to the grant of the title. It is evident that equities attach upon such settlement and improvement which entitle the settler to the continued

possession and ultimate title. A consideration of the authorities from those states in which the community property law exists seems to establish the principle, "If either spouse before the marriage has acquired an equitable right to property, which is perfected after marriage, the property is separate." There is perhaps considerable uncertainty as to a uniform rule concerning the right of the community to reimbursement, out of the separate estate of the spouses benefited, for expenditures of money and time and effort made in performing conditions and perfecting and completing the title. But the rule also seems to prevail in favor of the community as to the title initiated during the community and perfected after the dissolution of the marriage. In the first case, the title takes effect as of time before the community, and the property is therefore separate; and in the other as of a time during the community, and is therefore community property. Thus, in the case of Barbet v. Langlois, 5 La. An. 212, the husband and wife intermarried in the year 1818. At the time of the marriage, the husband owned and possessed a tract of land fronting on the Bayou Plaquemine, under the title confirmed by the United States. In May, 1822, during the marriage, he purchased from the United States, by virtue of his right of preference as front proprietor, the double concession, or lands lying in the rear of his estate. By law, every person who owned a tract of land bordering on a river, creek, bayou or water course was entitled to a preference in becoming the purchaser of the vacant land adjacent to and back of his own tract, and three years were given to file applications, under the provisions of the act. The court observed, in holding that it was separate property;

"It is true that the land was not purchased from the United States until after Langlois' marriage. But the 'cause' of the acquisitions may be fairly considered as having preceded the marriage. It was because he was the owner of the feont land, an ownership acquired long before, that under the liberal legislation of Congress he was allowed a preference to enter, and that too at a low price, specific lands, which may perhaps have been worth much more. We, therefore, think the land so acquired was his separate property."

In Succession of Morgan, 12 La. An. 153, the principle was again affirmed.

In the case of Morgan v. Lones, 80 Cal 317 (22 Pac. 253), it was determined that the occupant of lands for whose benefit the townsite acts were passed had an equitable interest in the lands, and, if such occupant is an unmarried woman and marries, such interest is her separate property; and this is so, although the patent from the government to the municipal authorities has not issued. The property does not become community property from the fact that the husband advanced the funds necessary to get a conveyance from the municipal authorities. In support of the same principle are found the cases of Harris v. Harris, 71 Cal. 314 (12 Pac. 274), and Labish v. Hardy, 77 Cal. 327 (19 Pac. 531).

In the case of Gardner v. Burkhart, 4 Tex. Civ. App. 590 (23 S. W. 709), Gardner, when unmarried, entered upon and improved 160 acres of land and made application therefor under the homestead laws of Texas, which, in the principle requiring residence and improvement, followed those of the United States, and thereafter divided the tract with a brother, but continued to live thereon. He afterwards married, and made application a homestead settled [illegible] 6. [illegible] marriage [illegible] resides there [illegible] her hus. [illegible] her marriage [illegible] patent [illegible] final proof [illegible] is her sep. prop. [illegible] § 4489 Pol. Code [illegible] defines sep. [illegible] her [illegible] pecuniary [illegible] "at [illegible] her marriage, [illegible] afterwards acquired [illegible] gift, devise [illegible] inheritance, [illegible] rents issues, [illegible] profits thereof."

for 55 more acres adjoining the tract upon which he lived, and patent was issued to him therefor for the 135 acres, which he continued to occupy as a home. Upon these facts, it was held that the original 80 acres located and improved by Gardner was his separate estate; and a similar conclusion was reached in Lawson v. Ripley, 17 La. 238. In our state, the rents, issues and profits of separate property retain the separate character, while in Louisiana and Texas, deraigned from the Spanish ganancial system, these acquets went into the community. So here the improvements put upon the homestead by the appellant were her separate property, and whatever of value she added to the premises prior to her marriage, or after, from her separate estate, still continued her separate property. It is not disclosed by the testimony that the community contributed anything of value upon the premises.

We conclude that the superior court erred in its decision that the homestead was community property. It was, upon the facts disclosed, the separate property of the appellant. Held

2. The only exception found in the record here, to the instructions of the court, was to its action in withdrawing the homestead from the case, but numerous exceptions were taken to testimony admitted to show agency alleged to have been given the husband by the wife to make the contract set up by the defendants. Some of these exceptions were well taken, for witnesses were permitted to state declarations of the husband which should not have been admitted, and, in view of the fact that the cause must be reversed and a new trial had, it is deemed proper, though no exception was taken to the instructions of the court, to suggest that the testimony at the trial seemed to determine, as a matter of law, that the lands purchased by appellant from the Northern Pacific Railroad Company were her separate property.

The cause is reversed and remanded for further proceedings not inconsistent with this opinion.

For Pl.

Gordon, C. J., and Dunbar, Anders and Fullerton, JJ., concur.

VICTOR E. KROMER ET AL., Appellants, v. FRANK P. FRIDAY ET AL., Respondents.

(10 Wash 321, 1895)

Appeal from Superior Court, Snohomish County.

The opinion of the court was delivered by

Scott, J.--The plaintiffs have appealed from a decree of the superior court of Snohomish county dismissing their complaint, and adjudging in effect that they have no title to the property in controversy, which is a certain tract of land, of about 147 acres, in the present city of Everett. The complaint set up title in fee in the plaintiff, Victor E. Kromer, with subsidiary interests for a limited period in his three sisters, Emma and Mattie Kromer, who were joined as plaintiffs, and Alice Kromer, who declined to join as plaintiff, and was made a defendant. The title is claimed by the plaintiffs through their deceased father, Erskine D. Kromer, by will. The complaint attacks, and seeks to vacate on the grounds of lack of jurisdiction and fraud, a decree of sale and deed in partition in said court under which the defendants, Rucker and Hewitt, and the Everett Land Company, intervenor, claim title in fee to certain interests in said lands, and joins the defendants Friday, Holland and Plaskett on account of their connection with said partition and participation in the alleged fraudulent proceedings. The answers of the defendants Rucker and Hewitt, with their conterclaims, and the intervening complaint of the Everett Land Company, set up the validity of the partition proceedings which originated in an alleged community right in the lands in controversy in the widow of Erskine D. Kromer, who is the defendant Emma Holland.

The material facts relating to the matters in controversy are as follows:

On May 3, 1870, said Erskine D. Kromer made a homestead filing upon the land aforesaid, situate in Snohomish county, Washington. It is claimed that he was at that time a single man, but at or about said time (the exadt time not being material), a certain Indian woman who had previously been known by the name of Emma Kanouke, and who was thenceforth known as Emma Kromer, came to live with him as his wife, and continued to live with him until his death, in 1885. The plaintiffs and said Alice Kromer are his children.

On October 26, 1876, said Erskine D. Kromer made the requisite proofs of his capacity to file and compliance with the laws of the United States relating to such homestead entry. On December 21, 1876, he and said Indian woman appeared before a justice of the peace of said county, and had a marriage ceremony performed. On December 30, 1876, a patent for said land was issued to him. At his death he left the following will purporting to devise the land in controversy:

Note

"I will, bequeath and devise to my beloved son, Victor E. Kromer, the land upon which myself and family reside, situated in said county of Snohomish, Washington Territory, to-wit: Lots numbered one and two, the south

east quarter of the northwest quarter, and the northwest quarter of the northeast quarter of section thirty, in township twenty-nine, north of range five east, containing one hundred and forty-seven acres and 55-100 of an acre. It is my will and desire that my family be not separated, and it is my intention that my said son, Victor E. Kromer, shall not sell or dispose of said described premises until each of my daughters shall become of full age, viz: Alice Kromer, Hattie Kromer and Emma Kromer, and that they shall each have the privelege of residing upon said premises until they shall each become married, provided they should marry before they shall have arrived at the age of majority, and it is my desire that the rents, issues and profits of said described premises ahall go to support my said son and daughtershereinbefore mentioned until said girls shall have become married or arrived at the age of majority, at the expiration of which time my said son, Victor E. Kromer, is hereby empowered to dispose of said premises as he shall see fit.

* * * * * * * * * * * * * * * *

Third. I give and bequeath unto my wife, Emma Kromer, the sum of two hundred dollars, which my executor is herevy authorized to pay at my death. And it is my will and desire that my said wife, Emma Kromer, reside upon the premises hereinbefore mentioned and bequeathed to my said son, Victor E. Kromer, until her death or marriage.

* * * * * * * * * * * * * * * * * *

I nominate and appoint my respected friend, J. H. Plaskott, my executor and authorize him to administer upon my estate and to execute this will without giving bond, and without any direction or control from any court and without notice to dreditors or otherwise."

This will was probated September 10, 1885, Said J. H. Plaskett qualified as executor and a copy was filed in the auditor's office for record in October, 1885. On September 23, 1885, said Plaskett was appointed guardian of the persons and property of said children and has ever since served as general guardian of their persons and property. On October 25 1886, the final account of said Plasket as executor was allowed by the probate court, and distribution made of the real and personal property willed by the deceased. There is some contention as to whether the widow was a party to this proceeding, but we do not regard it as material, and the plaintiffs practically concede that it is not.

On December 14, 1889, said Plaskott as guardian filed a petition in the probate court, praying for the sale of the real estate in controversy, alleging such facts as the statute required to authorize a sale by a guardian of his monor ward's real estate. It was claimed that the real estate was unproductive, and that there were no junds to pay the taxes thereon or to support the children, and that it would be for the advantage of said children to have the same sold. Upon the hearing of this petition, on January 27, 1890, the widow of Erskine D. Kromer, who had previously to that time married one Holland, appeared and filed objections to the order and asked for partition, claiming, among other things, that the land in controversy was community property of herself and said Erskine D. Kromer, and that she was entitled to one-half thereof as the surviving spouse. The probate court found against her, and entered an order directing a sale

Note

of all of the land. On January 28, 1890, she filed a notice of appeal from said order and judgment of the probate court. This appeal was heard in the superior court of Snohomish county on the 24th day of March 1890, whereupon the court found and adjudged as follows:

"The court finds that the real estate described in the petition of said guardian for an order of sale thereof, and which said probate court ordered to be sold as prayed for in said petition, is community property, and as such, the said appellant, Emma Holland, formerly widow of Erskine D. Kromer, deceased, is entitled to the undivided one-half thereof, and that the said probate judge or probate court had no right to order the sale of the entire property, or any part thereof, in the manner in said transcript shown.

"It is therefore ordered, adjudged and decreed by this court, that the order of sale, and judgment rendered by said probate court below, is reversed, set aside and held for naught."

But the court made no finding or order as to a partition.

It is contended that the court could not have found upon the facts that said parties were husband and wife prior to the marriage ceremony which was performed between them by the justice of the peace, and that said ceremony was evidence that they were not married prior thereto. There is no doubt that it was some evidence of the fact that the parties had not been previously married, but it was not conclusive. Said parties may possibly have entertained a doubt as to the validity of a previous ceremony, and may have wished to set that doubt at rest by such subsequent ceremony. It does appear that they had lived and cohabited together and held each other out as husband and wife for a number of years. It is true this would not constitute a marriage under the laws of the territory, but it was some evidence of marriage, and in making his homestead proofs said Kromer testified that he was the head of a family, and submitted the affidavits of two of his neighbors that he was a married man. The parties were all before the probate court in said proceeding brought by the guardian for authority to sell the land for the purposes therein set forth, for a better investment of the proceeds, etc., and were likewise before the superior court upon the appeal therefrom by the widow, and the court having found therein that said Erskine D. Kromer and said woman with whom he was living were lawfully married, and that the land was the community land of said parties, and there having been no appeal prosecuted therefrom, that decree must stand if the court had jurisdiction to make the finding. And it would make no difference whether it was an erroneous finding of fact or of law. It would be the law of the case as applied to the lands in question and conclusive upon the parties. The jurisdiction of the court to find that said parties were husband and wife, and that the land was community property is strenuously attacked by the plaintiff, and contended for by the defendants. It raises a most improtant question as to the power of the former probate courts of the territory, and of the superior courts of the state upon such appeal. The fact that the proceedings were had in the probate court while we were under a territorial form of government, and in the superior court of the state after statehood, might have some bearing also as to whether the latter court upon the appealwas limited by the powers possessed by the former court. A decision of those questions is not necessarily involved in this case, as weview it, and we shall refrain from

Held

deciding them at the present time, but have set forth the facts as having some bearing upon the later proceedings.

Subsequent to the foregoigg. and on April 7, 1890, said widow executed and delivered to defendant Friday a quit-claim deed of her undivided one half of the land. On May 12, 1890, said Friday began an action for partition in the superior court of Snohomish county, alleging, in substance, in his complaint, the filing upon the lands in controversy by said Erskine D. Kromer, and his compliance with the United States homestead laws; that during all of said times he was a married man, and that his wife, said Emma W. Kromer, lived with him upon said land; that he died testate; that the children aforesaid were the issue of said marriage and were living at t the time of his death; the appointment of the said Plaskett as guardian, the interests of the children therein to an undivided one-half of said lands, and his ownership of the other by virtue of the conveyance from the widow; that the land was so situated and its condition such that a division could not be made without great prejudice to the owners, and praying that the court ascertain and determine the interests of each of said parties, and that partition thereof be had, and in case it could not be made, etc., then that the land be sold and the proceeds paid to the several owners inproportion to their respective interests. Summons was issued upon this complaint, and was personally served upon allof said children and upon said Plaskett, as guardian. On June, 6, 1890, a firm of lawyers appeared for said defendants, and filed a general demurrer to the complaint. It does not appear what disposition was made of this demurrer, but on the 3d day of July, 1890, an answer was filed in that action, denyimg the sale by the widow to the plaintiff Friday and that the real estate was so situated that it could not be divided without great prejudice to the owners, and by way of counter-claim set up the payment by them of taxes for several years upon all of said land, and that one-half of said sums was a just claim against the interest and claim of the plaintiff, etc. On the 3d day of July the court rendered the following decree:

"This case coming on by agreement of the parties hereto on this 3d day of July, 1890,before the honorable J. R. Winn, judge of said court, at his chambers in Snohomish City, in said county and state, the plaintiff appearing by Craddock & Hilber, his attorneys, and the defendants appearing by Frater & Ault, their attorneys, and said minor defendants also appearing by J. H. Pladkett, their ggardian, and the court being fully advised in the premises, finds from the pleadings and evidence submitted the following:

Findings of fact: 1. That prior to the 30th day of December, 1876, one Erskine D. Kromer, having complied with the laws of the United States, became the owner in fee simple of the following described property, to-wit:

Lot one (1) and two (2) and the northwest quarter of the northeast quarter (NW$\frac{1}{4}$ of NE $\frac{1}{4}$) and the southeast quarter of the northwest quarter (SE$\frac{1}{4}$ of NW $\frac{1}{4}$) of section No. thirty (30), in townshi_ No. twenty-nine (29) north of range No. five (5) east Willamette Meridian, situated in Snohomish county, state of Washington, and on said last mentioned date a patent was issued to said Kromer under the homestead laws of the United States, of said lands, that prior to that time said Kromer resided upon said tract and had entered the same as a homestead upon public lands of the United States, that the said Erskine D. Kromer was a married man, and thereafter

while residing upon said lands and during all the time of his said residence upon said tract was there living with his wife, Emma D. Kromer.

2. That on or about the 8th day of August, 1885, the said Erskine D. Kromer died testate in said county and in the then territory and now state of Washington; and that the above described tract of land was a portion of the estate of said decedent.

3. That at the time of the death of said Kromer there were living as the issue of his said marriage, the following children, to-wit; Victor E. Kromer, Emma Kromer, Mattie Kromer and Alice Kromer, who has since intermarried with one Llcyd Allen, who are heirs at law of said Erskine D, Kromer, deceased; that the only other heir at law of said decedent is his said wife surving him, whose name at the time of his decease was Emma K. Kromer, but who has since re-married and who is now and has been for a long time past, Emma D. Holland, wife of Samuel S. Holland.

4. That prior to the commencement of this action the said Emma D. Holland, for a valuabel consideration, sold and by deed duly conveyed to the plaintiff herein, an undivided one-half (½) interest in and to all of the above described tract of land; and that the said plaintiff is now the owner of said undivided one-half of said real property, and is in possession thereof.

5. That after the death of the said Erskine D. Kromer, the above named defendant J. H. Plaskett was duly appointed guardian of the persons and estates of the above minor children of the said Erskine D. Kromer and Emma D. Kromer, his wife, and duly qualified as such and ever since the time of his said appointment, said J. H. Plakkett has been and now is the guardian of the said minor children.

6. That said plaintiff and said minor children and heirs at law of said decedent, viz; Victor E. Dromer, Emma Kromer, Mattie Kromer and Alice Allen, are the owners and tneants in common of the above described tract of land, as follows, to-wit: The said plaintiff, Frank P. Rriday, has an estate in said lands to the extent of an undivided one-half part or interest in fee thereof; thesaid minor defendant Victor E. Kromer has an estate of inheritance in said real estate to the extent of an undivided one-half (½) part or interest in fee thereof; and the other minor defendants, Emma Kromer, Mattie Kromer and Alice Allen have a contingent interest in said real estate above described, to the extent of the right of said minor defendants, Emma Kromer, Mattie Kromer and Alice Allen, to live, reside and remain on an undivided one-half part thereof until they became of lawful age or until they became married.

7. There are no liens or incumbrances on said lands appearing of record and that no person other than the said plaintiff and the defendants hereinbefore named have any interest in said lands as owners or otherwise.

8. That said real estate is so situated and its condition is such that a partition thereof cannot be made without great prejudice to said owners.

9. That said defendant J. H. Plaskett, as guardian, has paid the taxes on said lands for the years 1885, 1886, 1887, 1888 and 1889.

And upon the above and foregoing findings of fact, the court finds the following conclusion of law:

That said premises should be sold and the proceeds arising from the sale thereof be divided according to the respective rights of the parties hereto as found by the court, and that an order of sale issue therefor.

It is therefore ordered, adjudged and decreed, in accordance with the foregoing finding of facts and conclusion of law, that the said real estate be sold at public auction to the highest bidder, in the manner prescribed by law, upon the following terms, to-wit:

One-half of the purchase price to be paid cash in hand on the day of the sale, the balance in two equal installments payable in nine(9) and eighteen (18) months respectively, with interest on the deferred payments at the rate of ten per cent. per annum, and secured by mortgage on said premises; and that A. W. Hawks, Esq., be and he is hereby appointed referee to sell said real estate, and of his proceedings hereunder to make due return."

Notice of sale of the land was posted and published by the referee appointed to make the sale, and the same was sold to said Friday for the sum of thirteen thousand dollars, on August 2, 1890. A stipulation was thereafter entered into between the parties relative to certain security taken for a portion of said sum, and the sale was duly confirmed, and thereafter on the 21st day of August, 1890, the referee, pursuant to such proceedings and sale, executed and delivered a deed of the land to Friday, which was, on the 25th day of said month, duly approved by the court. On the 28th day of November, 1890, Friday executed a deed of an undivided one-half of this land to the defendants Rucker, and on the same day executed and delivered to defendant Henry Hewitt, Jr., a deed of the other undivided one-half, which interest was subsequently conveyed by Hewitt and wife to the Everett Land Company. No appeal was taken from the decrees of the superior court in any of the foregoing proceedings by any of the parties interested or at all, and the same remained unquestioned until the commencement of this action in December, 1891.

Many points have been raised and argued in the case which we think unnecessary to pass upon, owing to the conclusion we have reached with regard to others. And before proceeding to discuss the matters of law involved inn the various proceedings, we wish to dismiss the charge of fraud as utterly unfounded, as, after an examination of the argument with reference thereto, contained in the six hundred and sixty odd pages of briefs filed in this case, and the evidence upon which it is based, found in the three large volumes of the record, we are satisfied that all parties, including the courts and guardian, acted in entire good faith in the premises. A lengthy discussion of the question raised with reference to this feature of the case would serve no good purpose. The several proceedings must be viewed in the light which surrounded them at the time thay were had, and although the land in question has now become very valuable by reason of the fact that a prosperous city is being in part built thereon, and that several hundred thousand dollars have been expended in improvements upon the same by the purchasers and their grantees, all of which have been projected and done since the sale under the partition proceedings, it is apparent that at the time the land was sold thereunder it brought a high price, which was due in a measure to an unsuccessful "boom," that was independent of the matters

which have since given value to the lnad. Even though the parties purchasing had an undisclosed purpose of platting a townsite thereon and were endeavoring to obtain the land for that purpose, it is apparent that the same would not have been carried out if the supposed title had not been procured, and, had it not been for these subsequent developements, undoubtedly the sale would have been regarded as a fortunate one, and the proceedings would not have been questioned.

Although Erskine D. Kromer in his will sought to provide for the retention of the land until his daughters had arrived at the age of majority, the court clearly was not deprived of power to order a sale thereof in the partition proceedings, if the land was community property, as the will would only operate to convey the title to a one-half interest. The land at that time was practically in a wilderness and was unproductive, and was, it seems, in danger of being sold for taxes, and there were no funds available for the support of the minors. It was as much the intention of the deceased parent that the chiedren should be supported during their minority as it was to preserve the land intact. However, as to this feature of the case it is sufficient to say that the land was not sold upon the application aforesaid of the guardian of the aplaintiffs,but was sold by virtue of the independent partition proceeding brought by the alleged owner of the other half interest, against which claimed interest, if welllfounded, the will could not in any wise operate.

There being no fraud in the premises the claims of the plaintiffs in this case must be sustained, if at all, on the ground of the invalidity of the various proceedings above set forth by virtue of which the land was found to be community property and was sold to the defendants now claiming it.

Questions of estoppel against the plaintiffs, and claims that the defendants, or some of them, are boan fide purchasers without notico have been presented, which we pass over as immaterial and treat the case as though all of the defendants had full notice of all the foregoing proceedings

In the proceedings brought for a partition of tha land by virtue of which it was sold, the court had jurisdiction of the plaintiffs in this case. and of the subject matter. It was there found that Friday owned a one-half interest in the land, and its sale was ordered, and had accordingly. These proceedings are attacked on the ground that the statute was not complied with in advertising the sale. The first publication of the notice of sale was made on the 3d day of July, and the decree was not signed until the 7th. As a matter of fact, however, the finding of the court had been made prior to the publication, and the point raised is nothing more than an irregularit which would not affect the jurisdiction of the court in the premises. It could only be taken advantage of by an appeal in the proceedings, if at all and none was taken.

Complaint is also made that the guardian and attorneys of record for the plaintiffs herein admitted in that proceeding that the land in controversy was the community property of said parents; and it is contended that they had no right to make such admission, and that the same is an evidence of bad faith and of fraud in said proceedings. It must be borne in mind that this last proceeding was in the same court which heard and disposed

of the appeal from the order of sale made by the probate court on the application of said guardian to sell, and the same judge was presiding. All parties were acting in a measure in view of said former proceeding; and that proceeding, even if invalid, throws a strong light upon the good faith of all parties whose acts are now questioned.

We are satisfied that such admissions were made in entire good faith, and were such as the parties had a right to make and the court was justified in acting upon; and furthermore, that they in no wise contravene the facts as they existed independent of such former proceedings. Witnesses were examined in this case as to what took place, what was admitted and what testimony was introduced in such former proceedings, and the judge before whom they were had was called and testified, and said that he based his judgment on what he supposed was sufficient to justify the decree which he signed. There is no testimony in this record tending to show that any person connected with the defense of that partition case was not as fully informed of every existing fact connected with the subject matter of that litigation as this court is capable of being informed by the record before it, and there is absolutely no hint in the testimony, that the plaintiff in that case or any person in his behalf, did anything to mislead the legal representatives of those defendants, or to conceal from them any fact, or did anything in any way to prevent a fair trial. If, as claimed by appellants, the question of title was heard, in part, upon an agreed statement of facts, they were the true facts in the case. Plaintiff's counsel produced in court the deed on which plaintiff relied to prove his title. He also produced in court sufficient testimony to convince the court of the necessity of selling the premises. The sale of the property followed in accordance with the decree of the court. The plaintiff in the partition proceeding was the purchaser. The defendants, through their counsel and otherwise, employed every means to make the property bring the highest possible figure. This commendable zeal had its effect, and the testimony stands undisputed that the sale was in all respects fairly conducted, that there was a lively rivalry between the bidders and that the land brought the highest estimate of its value.

Partition is a civil action in contemplation of our code, and may be used as a form of action to try title.

"The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit, and where a defendant fails to answer, or where a sale of property is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the decree for partition or sale is given." Code 1881, Sec. 558.

The Code of California provides that any right, title or interest in the land may be put in issue, tried and determined in the action, substantially in the language above quoted from our own code. The determination of the fact of title by the court is held to be conclusive upon all the parties to the suit. Hancock v. Lopez, 53 Cal. 362-371.

"Any questions affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried and determined in such action. * * * If disputes exist as to their right or interest in any respect, such disputes may be litigated and determined in such action." DeUprey v. DeUprey, 27 Cal. 329 (87 Am.

Dec. 81); Morenhout v. Higuera, 32 Cal. 290; Gates v. Salmon, 35 Cal. 57 (95 Am. Dec. 139); Nash v. Church, 10 Wis. 244 (78 Am. Dec. 678).

This court in Hill v. Young, 7 Wash. 33 (34 Pac. 144), has held that the court has power in a partition proceeding, and is required, to determine title.

"The judgment or adjudication is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have been litigating and have had decided. as incident to or essentially connected with, the subject matter of the litigation and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." Clemens v. Clemens, 37 N. Y. 59; Bloomer v. Sturges, 58 N. Y. 168; Danaher v. Prentiss, 22 Wis. 299; Tallman v. McCarty, 11 Wis. 420; Wells, Res.Adj., Sec. 248 and 249; Barrett v. Failing, 8 Or. 152; Trayhern v. Colburn, 66 Md. 277; Pray v. Hegeman, 98 N. Y. 351; Blakeley v. Calder, 15 N. Y. 617; Howell v. Mills, 56 N. Y. 226; Sayward v. Nunan, 9 Wash. 22 (36 Pac. 966).

When the plaintiff alleged the extent of his interest in the property, and the extent of the defendant's interest as he understood it, and showed on the fact of his pleading that the parties, plaintiff and defendant, were tenants in common, he stated every fact required to give the court jurisdiction. Code 1881, Sec. 553.

Appellants seek to avoid the effect of this proceeding by reason of the minority of the defendants in the partition suit, and by reason of the fact that the plaintiff was the purchaser. These defendants had a general guardian, on whom service was made, as well as upon themselves personally. He answered to the suit, and was represented by counsel throughout. The statute expressly provides that the action may be maintained against infant cotenants, the provisions being broad enough to reach any and all interests, and any and all parties, and expressly makes a confirmation conclusive against all parties to the suit. The guardian might consent to a partition without suit under the supervision of the court. Code 1881, ch. 48.

"In America, the rule of the common law that infancy does not suspend the right of the adult cotenants to enforce a partition is believed to be of universal obligation. This rule has been held to be applicable to a sale of the property, when a digision was impracticable. The right of the adults to have the possession of their property, and to have their wishes in the premises gratified, is to be respected equally with the interests of the infants. It would be monstrous to hold that adult part owners should be kept out of the enjoyment of their property merely because the other part owners were infants, and the interests of such infants did not require the property to be sold." Freeman, Cotenancy and Partition (2d ed.), Sec. 467; Albright v. Flowers, 52 Miss. 246.

In the absence of fraud or collusion, minors properly represented are bound as fully as if they had been majors and personally cited.

"Representation in courts of justice is a necessity of civilized society, and the acts or neglects of the representative must in some

the fact [illegible])
([illegible] subsequently
the marriage ceremony performed [illegible]
conclusive [illegible] previous
marriage [illegible]

[illegible] sisters [illegible]
partition proceeding brought [illegible]
[illegible] com. half [illegible] a
deceased husbands' will providing [illegible]
retention [illegible] until [illegible] arrive
at majority.

Although [illegible] equitable title [illegible]
acquired [illegible] homestead [illegible] accrues
[illegible] final proof [illegible] receipt [illegible]
final certificate, [illegible] title [illegible]
[illegible] until [illegible] issuance [illegible] patent
[illegible] marriage [illegible] homestead claimant
[illegible] final proof [illegible] issuance of a
patent, [illegible] title [illegible] vests
in [illegible] community.

Lands acquired [illegible] homestead [illegible]
[illegible] U.S. are [illegible] intent [illegible]
state, acquired [illegible] consequently [illegible]
com [illegible] title [illegible] marriage.

degree be binding upon the party represented. And persons under disability at the time of a judicial proceeding to which they are parties, represented by their guardians and agents, are bound upon the knowledge of such guardians or agents." 1 Herman, Estoppel, p. 178, Sec. 164; 1 Daniel, Chanc. Prac. (5th Am. Ed.), 163 and 164; English v. Savage, 5 Or. 518.

In considering the character of the title, as to whether it was community land as a matter of fact, a question is raised as to when the title vested in Erskine D. Kromer. Final proof was made by him before the marriage ceremony aforesaid was performed, but the patent was issued thereafter. Although, for certain purposes, the title, at least the equitable title, was earned and accrued upon the making of final proof and receipt of the certificate, the full, or legal, title did not pass until the patent was issued. The plaintiffs claim that the patent should relate back to the time of making final proof, and that therefore the land vested in Erskine D. Kromer as his separate property, if in fact he was not then a married man. Undoubtedly, for certain purposes this would be true, but the doctrine of relation is a fiction of law adopted by courts solely for the purposes of justice. Gibson v. Chouteau, 13 Wall. 92. We are of the opinion that it should not be invoked in this case to defeat the claims of the widow. Her equities were as great as those of Erskine D. Kromer, or the children. It may fairly be inferred from all that transpired that there was no intentional wrong-doing upon the part of either of said parties; and that they were living together and regarded each other as husband and wife is apparent prior to the marriage ceremony aforesaid, and if necessary to save her rights in the premises we are satisfied that we would be justified in holding, and should hold, that the legal title having passed subsequent to the marriage of the parties, it vested in the community.

A further question is raised, to the effect that the title to the land under the homestead laws is taken by gift, and consequently that it would become the separate property of the husband under the laws of the territory. There seems to be some conflict in the authorities upon this proposition. As the matters hereinbefore discussed decide this case in favor of the defendants, we will not undertake to enter into any consideration of the cases bearing upon this question, but content ourselves with saying we are satisfied that within the intent of our laws relating to community property, such land is in effect taken by purchase, by reason of the settlement and improvements thereon, in which the wife participates as well as the husband; and consequently, that this land was the community property of Erskine D. Kromer and his said wife. We adopted this view in the case of Philbrick v. Andrews, 8 Wash. 7 (35 Pac. 358); and although the point was not contested there, we desire to announce our adherence thereto. A contrary holding would be productive of the grossest injustice under the community property laws of this state and territory.

Held

For Def.

Judgment affirmed.

Dunbar, C. J., and Hoyt, J., concur.

Stiles, J. (dissenting).--I think the view which the court takes of the actions of the principal respondents in this case is entirely too

charitable. The opinion makes it appear as though Friday and the Ruckers had been mere passive movers in the transactions which led up to the practical annulment of the will of Erskine D. Kromer, and the despoiling of his children of the property which their father had devoted, first, to their residence and maintenance, and lastly to the use of his son Victor. Kromer, Sr., died in 1885, and his widow accepted the bequest made to her, and suggested no claim of interest in her for more than four years. Meanwhile the will was proven, administration had, and distribution made in accordance with the terms of the will. In 1889 the Ruckers appeared and by their urgency and offers succeeded in moving the guardian to apply for an order of sale. They had already bought up all of the surrounding lands and were exceedingly anxious to acquire the Kromer tract which was the key to the situation, commanding as it did the principal water front in the present city of Everett. To bring about the application of the guardian to sell they put $150 into the hands of his attorney to cover the costs of the proceedings, and agreed to bid $2,000 for the land. The bait took, and the application was made. At this time there was no occasion for selling, as the family had the land to live on, and the guardian had money enough in his hands to last nearly two years. Moreover, there was no legal warrant whatever for selling the land under any circumstances, since its condition was fixed by the will.

The interference of the late Mrs. Kromer had the effect to postpone the proceedings, but her attempt to secure recognition from the probate court was a proceeding without color of legality, since that court had long since lost jurisdiction of the matter of distribution by its final decree of distribution which was unappealed from. Any order which that court might have made in the matter would have been wholly void. So, also, the appeal to the superior court could and did determine nothing, since on appeal the latter court had no power to determine a matter not within the jurisdiction of the probate court; all that the superior court could do was to dismiss the appeal for want of jurisdiction in the probate court over the subject matter. The net result of these judicial performances was to leave the entire estate where the will and the decree of distribution placed it, without a valid pen-scratch either for or against it.

The next operation was the conveyance by Mrs. Kromer to Friday. Now, a great endeavor was made in the course of this voluminous case to show that Friday and the Ruckers were independent individuals, but I am convinced that they were simply shadows of one substance. The Ruckers put up every dollar from first to last, Friday being their instrument and factotum.

Next came the partition. Friday presented his petition, the exact language of which will be found in the so-called finding of facts quoted in the foregoing opinion. Now, let it be remembered that there had never been any sort of an adjudication that Mr. Kromer was the owner of one-half, or any other interest, in this land; on the contrary, the decree of distribution, which was binding upon her and unappealed from, was squarely against any such proposition. And yet, the petition for partition did not mention the will, or the decree of distribution, but falsely alleged the ownership of the land and the interests of the children to be as stated in par. 6.

And to crown everything, the guardian of these infant children came in and assisted the fraud that was bein perpetrated upon the court and his ward by admitting in the answer every one of these false allegations, without mentioning the actual condition of the title, or the will. He did set out some pitiful allegations about payment of taxes, and denied that a sale was necessary; and upon these as the sole issues the matter came on for hearing; And of what did this heaing consist? The guardian was there, of course, with his attorney, but there was no hostitlity in the proceeding. Counsel for the petitioner was there with a witness or two, and findings and decree already drawn in the exact language of the petition. No question was asked of any witness about any matter other than whether the land could be divided or ought to be sold. The judge who made the decree so testifies, and the findings declare that the alleged facts are found "from the pleadings and evidence submitted."

And thus, upon the admissions of the guardian, without trial, and without knowledge on the part of the court that there could be any issue over the title to the land, the decree was rendered, finding that 147 acres of wild land could not be divided into two fairly equal parts, but must be sold. Of course it must be sold. That was the entire object of the scheme from A to Z. And of course Friday was the purchaser, on time; and he at once conveyed half of his purchase to the Ruckers, and pocketed $6,000 profit within sixty days by a sale to the Everett Land Company. It only remained to carry out this judicial proceeding by allowing the attorney for the guardian $500 out of the proceeds of the sale of these infants' lands, and giving the Ruckers an execution against them for the $150 advanced to start the guardian's application to sell. If these be fair dealings between fair men and infants, then Heaven help the children. of the state when they fall into the hands of rogues.

The following legal propositions, I maintain, should have all been decided in favor of the appellants:

1. The full equitable title to the land having been acquired by Kromer before his marriage, it was his separate property.

2. Mrs. Kromer was bound by the decree of distribution, unless in some direct proceeding she asserted her interest.

3. The probate proceedings and appeal were void.

4. It was beyond the power of a guardian to admit away the title of his ward by answer in a partition proceeding. A guardian in such a case is not called upon to answer further than to put his opponent upon proof of every allegation. It has held, always and everywhere, that while upon the trial of a case a guardina or his attorney may admit probative facts, neither of them can admit ultimate facts, and to do so is a fraud upon the ward. Formerly, and even now in some of the states, and infant might, after coming of age, set aside a decree for error even; and fraud, either in fact or law, is a just ground for such relief. Bank of U. S. v. Ritchie, 8 Pet. 128; Daingerfield v. Smith, 83 Va. 81 (1 S.E. 599); McIlvoy v. Alsop, 45 Miss. 365; Curtis v. Ballagh, 4 Edw. Ch. 635; Loomer v. Wheelwright, 3 Sandf. Ch. 135; James v. James, 4 Paige Ch. 115; Price v. Crone, 44 Miss. 571; Tucker v. Bean, 65 Me. 352; Fisher v. Fisher 54 Ill. 231; Eaton v. Tillinghast, 4 R. I. 276; Chaffin v. Kimball's Heirs, 32 Ill. 36; Ingersoll v. Ingersoll,

42 Miss. 155; Claxton v. Claxton, 56 Mich 557; Ralston v. Lahee, 8 Iowa, 17 (74 Am Dec. 291).

In Joyce v. McAvoy, 31 Cal. 274 (89 Am. Dec. 172), Judge Sawyer learnedly reviewed the origin and principle of the parol demurrer, and showed it to have no application to the stateof California, because there was no statute; and he also found the doctrine not pertinent to the case because the attack was collateral and not by appeal or review.

But we have a modified statute of parol demurrer in Code Proc., Sec. 1393, which in subd. 8 expressly provides for the vacation of a judgment against a minor for error within one year of his coming of age. Under this provision, the question of the title not having been in issue, or considered by the court, I maintain that the partition decree should have been set aside, and that matter determined. At bottom, the only point we have to consider here is: Was there error? If there was, the statute regulates the matter by requiring a new hearing. As it is, this court has taken up the original case and decided it upon equitable grounds which were in no proper way before it.

The opinion of the court quotes the partition statute, which authorizes title to be put in issue in such proceedings; but the trouble is that in this case it was not put in issue, the petition of Friday fraudulently concealing from the court the fact that there was any question of title, and the answer of the guardian assisting the fraud by its admissions. Authorities are cited to show that whatever might have been decided in a litigated case will be taken as actually decided; but in partition, unless the defendant answers, title must be shown. Code 1881, Sec. 558. In substance there was no ansert in this case, for what was answered was merely illegal admission. Guardians may consent to partition without suit, as pointed out, under supervision of the court; but in such cases the court is the counsel of the guardian, and must be satisfied that the proposition i is fair, the title certain, and the division just. But here the proceeding ought to have been hostile, whereas it was, in fact, collusive. Moreover, the statute does not permit a guardian to consent to partition by sale.

I have not had tp pass upon a case which so profoundly impressed me with a conviction of legal wrong as this. Not, perhaps, that a sufficient price was not obtained for this land; but that the door has been opened whereby speculators, casting their covetous eyes upon the property of infants, may be enabled, by seemingly fair propositions, and by holding out tempting offers to guardians who would rather handle money than be bothered with land, to evade the solemn provisions made by a deceased father for his children. If the courts sit passively and let guardians confess away the estates of their wards in this way, no estate is safe, and a man who makes a will might as well save himself the trouble.

Above all, in this case there was absolutely no occassion for causing this land to be sold; for I undertake to say that there is not a tract of land of that size in the state of Washington which cannot be fairly divided into two parts of equal value. The partition proceeding was a sham, initiated by the first approach of Rucker to the guardian, with his offer

of $2,000, and $150 for expenses; and if its consummation is ratified, it crowns with success an effort, at a slightly advanced cost, it is true, to evade the law and the last will of Erskine D. Kromer.

From all appearances, Hewitt and the Everett Land Company seem to have been innocent purchasers, except that they could not take title save through Kromer's will, and therefore with knowledge of the whole record pertaining to the property.

I advise a reversal and therefore dissent.

EDITH KRIEG, Respondent, v. JAMES HAMILTON LEWIS
et al., Appellants.

(56 Wash. 196.) 1909.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered January 6, 1909, upon findings in favor of the plaintiff, in an action for partition and to quiet title, after a trial before the court without a jury. Affirmed.

Dunbar, J.--The material findings of fact, which are not excepted to, and on which this appeal is based, are briefly as follows: Martin Phillips and his wife Ellen were married in the year 1872, and plaintiff, their only child, was born August 13, 1884. Said Phillips, with his wife, about January 19, 1882, settled and took up his residence on the land in controversy in this action while the land was a part of the public domain, for the purpose of making the same their home and acquiring title thereto under the homestead laws of the United States, and they continued to reside upon said lands and cultivated the same until the year 1888. On January 19, 1882, Phillips filed his application to enter said lands as a homestead; complied with the homestead laws of the United States, and on November 9, 1883, commuted his homestead entry by making cash payment, and at the same time made the necessary proof of settlement, residence, and cultivation, and received his final homestead certificate. On June 20, 1884, patent to said lands from the United States was issued to said Phillips under the homestead laws. On February 24, 1888, while Phillips and his wife were still residing upon said lands, the said Ellen Phillips died intestate, leaving surviving her her said husband, Martin Phillips, and her child, Edith Phillips, plaintiff in this action, but no other child or descendant of any other child. Thereafter the said Martin Phillips married his second wife, Susan Phillips, and on the 15th day of May, 1890, said Martin Phillips and Susan Phillips, by deed of conveyance, dated and acknowledged May 15, 1890, conveyed to the defendant James Hamilton Lewis the lands in controversy in this action. The said James Hamilton Lewis has since married the defendant Rose L. Lewis.

Upon these facts, the court found, as conclusions of law, that the plaintiff Edith Phillips was entitled to a decree declaring that she was the owner of an undivided one-half interest in the above described land, subject to the lien in favor of the defendant James Hamilton Lewis for one-half of the amount of taxes which he had theretofore paid, with interest thereon, and that plaintiff is entitled to have said lands partitioned and her share thereof set off and allotted to her in severalty, subject to the lien of said James Hamilton Lewis for said taxes and interest aforesaid. The defendants excepted to the conclusions of law, and appealed from the judgment rendered. Held

It is contended by the appellants that the error of the superior court consisted in assuming that the title, conveyed by the patent of the United States to the father of the respondent, depended upon the laws of the state of Washington instead of upon the laws of the United States. If such construction as this were placed upon the laws by the superior court, it was evidently a wrong construction. But such is not the case, while [illegible] U.S. [illegible] owner-ship until title passes, 9 [illegible] patent [illegible] it [illegible] legislation, [illegible] com. [illegible] providing [illegible] rule [illegible] descent [illegible] acting [illegible] contravention [illegible] U.S.,

A homestead patent [illegible] married [illegible] is com. prop., [illegible] subsequent [illegible] leaving [illegible] child an undivided ½ [illegible] descends [illegible] child.

nor was this the question at issue. It was decided in McCune v. Essig, 199 U. S. 382, 26 Sup. Ct.78, 50 L. Ed. 237, which case is relied upon by appellants, that the interest which arises, in an entryman by his entry who can fulfill the conditions of settlement and proof in case of his death and to whom the title passes, depended upon the laws of the United States and not upon the state laws. But it was also decided in that case, sustaining the doctrine announced in Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264, that whenever the question is whether title to land which had been the property of the United States had passed, that question must be resolved by the laws of the United States; but that, whenever according to those laws the title shall have passed, then, like all other property, it is subject to state legislation. In that case the plaintiff was the daughter of a deceased homestead settler, who died shortly after the homestead entry and long before the time elapsed for final proof and before final proof or issuance of patent, the claim in that case being that the patent related back to the homestead filing, and the doctrine of relation was denied by the supreme court in that case.

But the other doctrine is just as firmly announced, viz., that, when the title shall have passed under the laws of the United States, it is then subject to state legislation. In that case it will be noticed that there was no community in existence at the time the proof was made and patent issued, for the community had been dissolved by the death of one of the spouses. But in this case, by virtue of the laws of the United States, title passed while the community was in existence. The United States had no further concern in relation to the title of the property after it had established it in the person to whom it was entitled under the laws of the United States, and when that was done the laws of the state operated upon the property, and the legislature was not in any way acting in contravention of the laws of the United States when it undertook to regulate it and determine its ownership.

The cases from this court cited by the appellants, viz.: Hall v. Hall, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016, and Cunningham v. Krutz, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N.S.) 967, simply follow the rule laid down in McCune v. Essig, supra, and the facts in those cases brought them within the rule there announced, the patent having issued after the dissolution of the community. This question has been gone into at length by the cases just cited, so that it will not be necessary to discuss again the principles there announced.

The judgment will be affirmed.

Rudkin, C. J., Parker, Mount, and Crow, JJ., concur.

ANNA M. HALL, Respondent, v. ESTELLA B. HALL et al., Appellants.

(41 Wash. 186 1905.)

Appeal from a judgment of the superior court for Stevens county, Richardson, J., entered November 22, 1904, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a widow to recover an interest in lands patented to her divorced husband. Reversed.

Rudkin, J.--Prior to the year 1898 the lands in controversy in this case were unsurveyed public lands of the United States. In the month of June of that year, the surveyor's plat was filed in the district land office, and on the 30th day of August, 1898, the lands were thrown open for settlement. On the latter date John F. Hall, now deceased, entered said lands under the homestead laws of the United States, and made final proof on the 8th day of August, 1899, after completing his five years' residence thereon, as required by said homestead laws. Patent issued on the 9th day of February, 1900. At all times between the 24th day of March, 1889, and the 4th day of March, 1896, said John F. Hall and the plaintiff Anna M. Hall were husband and wife. On the latter date the plaintiff was granted a divorce from said John F. Hall, in the superior court of Spokane county, but no disposition was made of the property rights of the parties in the divorce proceeding. On the 30th day of August, 1899, the said John F. Hall and the defendant, Estella B. Hall, intermarried, and continued to live together as husband and wife until the death of the former, on the 5th day of February, 1903. On the 10th day of January, 1903, said John F. Hall conveyed all his interest in said property by deed to the defendant Estella B. Hall. In view of the conclusion we have reached on the merits, it becomes unnecessary to refer to the claims of the other defendants.

Note

The plaintiff brought this action, and asked that she be declared the owner of an undivided one-half interest in the property so acquired. The theory of the plaintiff's case was that said property was the community property of herself and her former husband, John F. Hall, and that by the decree of divorce they became tenants in common thereof. The plaintiff had judgment below, according to the prayer of her complaint, and the defendants appeal.

The only interest the decedent had in the property in controversy, at the time of the divorce, was the right of occupancy, coupled with a preference right to enter the land and acquire title thereto after the same was surveyed and thrown open for settlement. Before he could acquire such title, the land must be surveyed and thrown open to settlement, he must continue his residence until that time, and thereafter comply with the requirements of the homestead laws. How far state laws regulating the property rights of husband and wife attach to land acquired from the United States before patent, or at least before final proof, gives rise to an important federal question which can only be authoritatively settled by the supreme court of the United States. In the recent case of McCune v. Essig, 26 Sup. Ct. (not yet reported), that court held that the

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patent which issues to the widow upon the death of the homestead entryman carries with it the full legal and equitable title, to the exclusion of the entryman's children; in other words, that the federal law controls. True, the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of the wife, under identical circumstances.

The manifest object of our community property system is to place husband and wife on an equal footing as to their property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other. Furthermore, it is a well-known fact that our community system is utterly ignored in the administration of the federal land laws. The wife is not made a party to a contest against an entry, and the husband is permitted to relinquish without the wife joining him. In Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023, this court held that, where the wife of the entryman died after the homestead law had been fully complied with, but before final proof, her children were entitled to a one-half interest in the homestead claim, as community property. In James v. James, 35 Wash. 655, 77 Pac. 1082, it was intimated that the community rights of the wife attached at even an earlier date. We are not called upon to retrace our steps at this time, but we are satisfied that we can advance no further without coming in conflict with the paramount laws of the United States and the decisions of the Federal supreme court. Under no proper construction of the laws of the United States and of this state, can the respondent be held to have any interest in the property in controversy, under the facts disclosed in the record before us.

The judgment is therefore reversed, with directions to dismiss the action.

For Def.

Mount, C. J., Hadley, Fullerton, Crow, Root, and Dunbar, JJ., concur.

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[illegible] acquired [illegible] U.S. [illegible] final proof raises
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since [illegible] Fed. [illegible] title
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state are not recognized.

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R. CUNNINGHAM et al., Respondents, v. HARRY
KRUTZ et al., Appellants.

(41 Wash. 190 1905)

Appeal from a judgment of the superior court for King county, Bell, J., entered January 6, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for partition. Reversed.

Hadley, J.--This is an action for the partition of real estate. The plaintiffs allege that they are seized in fee simple of the undivided half interest in the land, and that the defendants Harry Krutz and Mary E. Foster are tenants in common with plaintiffs in the ownership of the land. The defendants Harry Krutz and wife, by their answer, deny that the plaintiffs have any interest whatever in the land, either as tenants in common with the defendants or otherwise. They also deny that the defendant Mary E. Foster has any interest in the land except that she holds a mortgage thereon for $500. It is affirmatively alleged in the answer that, in December, 1887, one Carlson made entry upon a certain quarter section of land, which includes the land in question, the entry being made under the homestead laws of the United States; that he continued to reside thereon until April, 1890, when he commuted the homestead entry, made final proof, paid cash for the land at the government price, received his final receipt therefor, and that, in due course thereafter, a patent was issued to him by the United States; that in July, 1890, said Carlson borrowed of one Thomas S. Krutz the sum of $750, gave his note therefor, and to secure the same, executed a mortgage upon said land, which was duly recorded. Allegations are made showing the due foreclosure of the mortgage by the assignee thereof against that part of the land here involved, Note a conveyance of the land under the foreclosure by the sheriff, and subsequent conveyances in direct line to the defendant Harry Krutz; that the defendant Hattie Krutz was, at the date of the conveyance to Harry Krutz, and still is, the wife of Harry Krutz, and that said land became, by said conveyance, the community property of the said two defendants. They ask that plaintiffs' complaint shall be dismissed. The answer of Mary E. Foster denies that the plaintiffs have any interest in the lands, and asks that their complaint be dismissed.

The reply avers, that the entry was made about December 21, 1887, and that from that time Carlson and wife were in possession of, and resided upon, the land; that in 1890 the wife of Carlson died testate, leaving a last will, which was duly admitted to probate; that said wife left three children as devisees under her will; that one of the children, an infant, has since died intestate, and without issue; that on the death of the wife and the probating of her will, the said children, her devisees, became the sole owners in fee simple of an undivided half interest in said land, and continued to hold the same until March, 1904, when, by deed, the two surviving children, together with their father, the surviving husband, conveyed said undivided half interest to one Shea; that thereafter said Note Shea and his wife conveyed to the plaintiffs. The cause was tried by the court, and resulted in a judgment for the plaintiffs, declaring that they are the owners in fee simple of an undivided half interest in the land,

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and awarding partition thereof. The defendants have appealed.

From the foregoing it will be seen upon what the respective claims of title are based. The respondents contend that the deceased Mrs. Carlson had a devisable community interest in the land, and that they are the owners, by successive conveyances, of the interest so devised. Upon the other hand, appellants urge that when the patent issued to the surviving husband, it conveyed to him the entire title as his separate property, and that through the foreclosure of a mortgage given by the patentee, and successive conveyances thereunder, the appellants Krutz and wife are the holders of the entire title. Note

The trial court refused to receive and consider the offered evidence of appellants as to the giving and foreclosure of the mortgage, and as to the subsequent conveyances by which Krutz and wife claim title. It was the theory of the court that the land was the community property of Carlson and his deceased wife, and that, by the will of the latter, the undivided half passed to her children through whom and their grantees it has come to respondents. Upon this theory the court treated appellants' offered evidence as immaterial and incompetent. Respondents, however, concede in their brief that, if the patent conveyed separate and not community property, they have no interest in the land.

The entry was made as a homestead entry, and within less than three years thereafter the wife died. The husband did not continue to reside upon the land the required time to perfect the homestead, but commuted his homestead rights after the death of his wife, and made final proof a and cash payment in pursuance of which, in due course, a patent was issued to him. It therefore becomes necessary to determine whether the land was the separate property of Carlson or whether it became the property of the community, and it is proper that we shall first refer to our own decisions bearing upon the question as to who obtained title from the United States through a homestead patent. Ques

In Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L.R.A. 671, Kromer made a homestead entry and an Indian woman lived with him as his wife. The required time of residence expired and final proof was made. After the making of final proof, a marriage ceremony was performed between Kromer and the woman, and soon afterwards a patent was issued to Kromer. It was held that the land became the community property of the two. The holding was, however, apparently based upon the theory that the fact that the two had been living together as man and wife, and that a marriage ceremony was subsequently performed, was not conclusive evidence that there was no previous marriage between them, and that the land therefore became community property, notwithstanding that final proof was made before the ceremony was performed.

In Bolton v. La Camas Water Power Co., 10 Wash. 246, 38 Pac. 1043, it was held that, where the required time of residence upon a homestead had expired, and the wife afterwards died but before final proof and issuance of patent to the husband, the community acquired only an equitable estate, the husband taking the full legal title and, upon his conveyance to a grantee ignorant of the equities of the wife's heirs, both the legal and equitable titles passed.

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In Forker v. Henry, 21 Wash. 235, 57 Pac. 811, it was held that, where a woman had settled upon and improved a homestead before her marriage, and final proof was made and patent issued to her after marriage, the land became her separate property, under our statute which defines as separate property of the wife all her property and pecuniary rights held by her at the time of her marriage. At the time of her marriage she had resided upon the land about four years, and although she was not then entitled to the legal title, the court seems to have considered that, on account of her previous settlement and improvements, such equities attached as entitled her to the ultimate title as her separate property, the further fact appearing in that case that, as between the husband and wife, the land was deemed to be the wife's separate property.

In Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912, the husband and wife had resided upon the homestead more than six years, when the wife died. Final proof was made after her death, and the patent was issued to the husband. It was held that the land became community property.

In Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. 99 Am. St. 956, it was held that, where a settler upon unsurveyed public lands died, leaving no widow and without heirs who were citizens of the United States, the land was again open to settlement, since the heirs could not succeed by right of inheritance, but by virtue only of a preference right given them by the laws of the United States, if they had been duly qualified citizens. In James v. James, 35 Wash. 655, 77 Pac. 1082, the homesteader and his wife settled upon land, and three years afterwards the wife died. The husband completed the required residence and obtained a patent. It was said in that case that, one who had been legally adopted by the husband and wife as a son was the lawful heir of the deceased wife, and had an interest in the land.

It is possible that some of the expressions in the above cases may be said to support respondent's contention here, and perhaps the conclusions upon the facts in some of them justify the contention that the decisions are decisive of this case in favor of respondents. Be that as it may, we shall now refer to recent federal decisions. In McCune v. Essig, 118 Fed. 273, the following facts existed: McCune settled upon land in this state as a homestead, and made entry thereon. Within a year he died intestate, his only surviving heirs being his widow and a daughter, who continued to reside upon the land the required time for the widow to complete the homestead rights. Mrs. McCune, having become Mrs. Donahue by remarriage, then made final proof and a patent was issued to her. About a year after the issuance of the patent, she conveyed the land to the defendants in the case cited. Thereafter the daughter instituted the suit to procure a decree establishing that she was the owner of an undivided half of the land. Her contention was that, when the land was conveyed by the patent to her mother, it became the property of the community composed of her father and mother; that she, as the surviving heir of the father, succeeded to his interest, and that the interest was not conveyed by her mother's deed to the defendant in the action.

The suit was begun in the superior court of this state for Lincoln county, and was removed to the United States circuit court. That court required the cause on the ground that the question in the case was one

which must be resolved by the laws of the United States, and decided that the widow, upon the issuance of the patent to her, took the entire title as her separate property, and that there was no community interest to descend to the daughter. This ruling was affirmed by the United States circuit court of appeals, ninth circuit. McCune v. Essig, 122 Fed. 588. The same case on appeal to the supreme court of the United States was in all particulars affirmed by a recent decision, rendered November 27, 1905, and not yet published, the opinion being written by Mr. Justice McKenna. From a copy of that opinion which has been placed before us, we here quote:

"The action of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground, to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the state. Sections 4488, 4489, 4490 and 4491 of the Statutes of Washington provide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. (3 Ballinger's Codes.) Relying on these provisions the argument of appellant is, and we give it in the words of her counsel. "When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry. (United States v. Turner, 54 Fed. Rep. 228.) The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent.

"But this is begging the question. What interest arose in McCune by his entry, who could upon his death fulfil the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. (Bernier v. Bernier, 147 U.S. 242.) The motion to remand was rightly overruled."

After quoting the federal statutes relating to the conditions of homestead entries and settlement, Rev. Stat., Sec. 2291 and 2292, the opinion further says:

"It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die his widow is given the right of residence and cultivation, and 'shall be entitled to a patent as in other cases.' He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the

children an interest paramount to that of the widow through the laws of the state.

"The law of the state is not competent to do this. As was observed by Circuit Judge Gilbert: 'The law of the state of Washington governs the descent of land lying within the state, but the question here is whether there had been any descent of lands.' And, against application of the state law, the learned judge cited Willcox v. Connell, (13 Pet. 517), and Bernier v. Bernier, supra. In the former it was said that whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States, but that whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subject to State legislation. In Bernier v. Bernier, it was said that the object of sections 2291 and 2292 was 'to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate.' See Hall v. Russell, (101 U. S. 503). And hence it was decided that Mrs. Donahue took the title free from any interest or right in the appellant under the laws of the state.

"Against the effect of the title conveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted 'that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent.' But it is contended that a beneficial interest having been created by the state law in McCune when the title passed out of the United States by the patent, it 'instantly dropped back in time to the inception or initiation of the equitable right of William McCune, and that the laws of the state intercepted and prevented the widow from having a complete title without first complying with the probate laws of the state.' This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions of the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling."

There is no necessity for further reviewing the arguments of our own or of the federal decisions. The above decision is final and conclusive that the question as to what title passed to Carlson must be resolved by the laws of the United States. Without regard to the community laws of this state, it follows from the decision that, when one makes a homestead entry and dies before completing the full residence period necessary under the homestead law, and leaving a widow who completes the period of residence, makes proof, and procures a patent, the land becomes the absolute separate property of such widow. In so far as our own previous decisions may be in conflict with the above, when applied to a similar state of facts, they must now be treated as overruled.

Held

The facts in the case at bar are very similar to those in McCune v. Essig, supra. In the other case the husband died and the widow completed the homestead title; while in this one, the wife died within the third year of residence, and the husband commuted the homestead rights and made final proof, paying cash, and procuring patent to himself. If Carl-

son's title had been perfected as a homestead title, we should see no difference in principle by which to distinguish it from the McCune case. Our views upon this point were expressed in the case of Hall v. Hall, 5 Wash. Dec.____, as follows:

"True, the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of the wife, under identical circumstances. The manifest object of our community property system is to place the husband and wife on an equal footing as to their property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other."

The additional fact in this case, that Carlson commuted the homestead entry and paid cash for the land, strengthens respondent's position. By the consent and concurrence of the United States, he relinquished the homestead entry and availed himself of the benefits of the law granting preemption rights. The title conveyed to him was based upon a new consideration passing from him to the United States, a consideration entirely different from the conditions which inhered in the homestead entry. We see no escape from the conclusion that Carlson took the title as his sole and separate property. It follows that respondents have no title to the lands in question and no cause of action.

The judgment is reversed, and the cause remanded, with instructions to enter judgment dismissing the action.

For Def,

Mount, C. J., Rudkin, Fullerton, Crow, Root, and Dunbar, JJ., concur.

as [illegible] title [illegible] patent [illegible] surviving hus. [illegible] homestead [illegible] decisions [illegible] U.S. cts [illegible] conclusive [illegible] cts.

A patent [illegible] homestead [illegible] surviving husband conveys [illegible] whole title [illegible] hus., [illegible] exclusion [illegible] heirs [illegible] under U.S. Rev. Stat., §§2291-2; since [illegible] com. [illegible] Fed. provisions [illegible] title, [illegible] apply.

JOHN TEYNOR et al., Respondents, v. CHLOE
HEIBLE et al., Appellants.

(74 Wash. 222. 1913.)

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered March 15, 1912, upon findings in favor of the plaintiffs, in an action for partition. Affirmed.

Fullerton, J.--This action was brought by the respondents against the appellants for the partition of certain real property. The land in question was acquired from the United States under the homestead laws by one Peter Teynor, who died without lineal heirs. The respondents are his father and mother. The appellant, Chloe Heible, was his wife at the time of his death. The other appellants claim an interest in the land through mortgages or contracts to convey executed by Chloe Heible. Peter Teynor entered the land in the year 1901. He was then a single man, never having theretofore been married. On January 1, 1903, he intermarried with the respondent Chloe Heible. He made final proof under the homestead laws on September 12, 1906, and thereafter a patent to the land from the United States was duly issued to him. He died intestate on October 30, 1906, without having parted with the title acquired by him under the homestead patent.

Letters of administration on Peter Teynor's estate were issued out of the superior court of the county in which the land is situated to John A. Willis, the father of the appellant Chloe Heible. The administrator performed the duties of his trust, and on October 26, 1908, filed his final account with the estate, together with a petition asking for the distribution of the property thereof, praying that his account be settled and allowed, and that the estate be distributed to those lawfully entitled thereto. The court, sitting in probate, entertained the petition, and made an order, dated as of the date on which the petition was filed, appointing November 16, 1908, as the time for hearing the petition; further ordering that the clerk of the court give notice thereof by causing notices to be posted in three of the most public places in the county, in which the land is situated, "at least two weeks before said day of settlement and hearing of petition, and publish notice thereof, according to law, for two weeks before said day of settlement and hearing upon the petition," in a certain designated newspaper. Proof by affidavit was made of the posting and publishing by the clerk, and on the day fixed for the the hearing the court entered a decree in which it approved the final account and distributed the estate. The part of the decree relating to the proof of service of notice of the time of the hearing recited that it appeared "to the Court by affidavits on file herein that due and regular notice as required by law, and the order of this court, was given of the hearing hereof." The order distributed the whole of the estate to the appellant Chloe Heible as the sole heir at law of Peter Teynor, deceased. In making the order of distribution, the probate court proceeded on the theory that the real property was, when acquired from the United States, the community property of Peter Teynor and Chloe Teynor, his wife, and that it descended on the death of Peter Teynor, under the statutes of the state governing and descent and distribution of community real property to the wife, since the entryman died without issue.

The court in the case now before us, on the same state of facts, held the property to be the separate property of Peter Teynor, and to have descended on his death, under the statutes governing the distribution and descent of separate property, one-half to the father and mother of the deceased, and one-half to his wife, Chloe Teynor; holding further that the decree of distribution entered in the administration proceedings was void because entered without sufficient notice. The first question suggested by the record relates, therefore, to the nature of the title acquired by Peter Teynor in virtue of his homestead entry. Did the land become, on his acquisition of the title thereto, his separate property, or did it become the community property of himself and his then wife, the respondent in this proceeding?

On the question, our own cases are out of harmony. Indeed, they seem incapable of being reconciled, whether considered with relation to the facts upon which they are founded or with relation to the reasons by which they are thought to be sustained. The cases in which the question of the nature of the title acquired by a homestead entry from the United States is considered are the following: Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; Bolton v. La Camas Water Power Co., 10 Wash.,246, 38 Pac. 1043; Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 33 L. R. A. 671; Forker v. Henry, 21 Wash. 235, 57 Pac. 881; In re Peas's Estate, 30 Wash. 51, 70 Pac. 270; Ahern v. Ahern, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912; Towner v. Rodegeb, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936; James v. James, 35 Wash. 655, 77 Pac. 1082; Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005; Hall v. Hall, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016; Cunningham, v. Krutz, 41 Wash. 190, 83 Pad. 109, 7 L. R. A. (N. S.) 967; Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065; Rogers v. Minneapolis Threshing Machine Co., 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014 Delacey v. Commercial Trust Co., 51 Wash. 542, 99 Pac. 574, 130 Am. St. 1112; Krieg v. Lewis, 56 Wash. 196 105 Pac. 483, 26 L. R. A. (N. S.) 1117; Curry v. Wilson, 57 Wash. 509, 107 Pac. 367; Eckert v. Schmitt, 60 Wash. 23, 110 Pac. 635.

Grouping the cases according to their facts, and the decision of the court upon the facts, in the first group can be placed the cases of Philbrick v. Andrews and In re Peas's Estate. In these cases all that appeared in the record was that the land was occupied by the entryman and his wife at the time final proof was made and patent issued, and it was assumed, as if not subject to controversy, that the property was the community property of the husband and wife.

In the second group can be placed Forker v. Henry, and Rogers v. Minneapolis Threshing Machine Co. In the first case, the land was settled upon and entered as a homestead by a single woman, who lived thereon for some four years and then married. Thereafter, while the marriage relation continued, she made final proof and was granted a patent. In Rogers v. Minneapolis Threshing Machine Co., the land was settled upon and entered by a married man living with his wife. Some two years later, while living on the land, the wife died leaving issue. A year and a half thereafter, the entryman married a second time, and two years after the second marriage, made final proofs and received a patent. In each of the cases the land was held to be the separate property of the entryman.

In the third group can be placed Kromer v. Friday, Ahern v. Ahern, James v. James, and Cox v. Tompkinson. In these cases, the wife resided

upon the land with her husband at the time of its entry, and continued to reside thereon until her death, which occurred in each instance prior to making final proof and the receipt of patent, although occurring after the full period of residence required by the federal statute as preliminary to making final proof had expired. The property acquired was held to be community property.

In the fourth group can be placed Bolton v. La Camas Water Power Co., and Cunningham v. Krutz. In the first of these cases, the wife resided on the land from the time of its entry by the husband until the residence per expired, but died before the making of final proof and the issuance of patent. In the second case the entry was made by a married man living with his wife. The wife died some three years later, after a continuous residence on the land subsequent to the entry. A few months later, the husband commuted the entry and received a patent for the land. The property was held in each case to be the separate property of the husband.

In the fifth group can be placed Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065; Curry v. Wilson, 57 Wash. 509, 107 Pac. 367; Krieg v. Lewis, and Eckert v. Schmitt. In these cases, the wife resided with the husband on the homestead from the time of the original entry until after the making of final proof, and in two of them until after patent was issued. The land acquired was held to be the community property of the spouses.

In a sixth group can be placed the cases of Towner v. Rodegeb, Hall v. Hall, and Delacey v. Commercial Trust Co. In the first case, the land was settled upon prior to the extension of the public surveys thereover, and prior to the time the land was subject to entry under the public land laws. The settler died before the land became so subject to entry, and it was held that he had no estate of inheritance therein, or estate of any kind that was cognizable in proceedings instituted on his estate in the probate court. In Hall v. H all, the parties thereto, while husband and wife, settled upon unsurveyed lands of the United States and lived thereon together as husband and wife for a period of more than five years. Prior to the time the lands were open to entry, they were divorced, and subsequent to the divorce, the lands became subject to entry, and the husband entered the same as a homestead, and subsequent thereto made final proofs and received a patent. It was held that his divorced wife had no interest in the property. In Delacey v. Commercial Trust Co., it was held that a mere settlement on government land by a husband and wife conferred no community interest in the land.

The arguments thought to sustain these several conclusions we shall not set forth. It is manifest, however, that no reasoning based upon principle can reconcile the first with the second group, or the third with the fourth. It is the opinion of the court now that the property in each of these groups, if nothing more appeared in the record than is shown in the opinion, should have been held to be the separate property of the entryman. In other words, the rule should be that in all cases where the marital relation does not exist at the time of the original settlement and entry, and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land. The folly of any other rule is illustrated by the case of Rogers v. Minneapolis Threshing Machine Co., 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014. This case we have placed in the second group, but it

Held

belongs under its facts in the fourth group also. In that case, it will be remembered that the entryman was married at the time he made entry on the land; that his then wife died leaving issue some two years later, after a continuous residence thereon; that, about a year later, the entryman married a second time, resided with his second wife on the property for some two years more, and made final proof and received a patent. If a community interest is impressed on the land by the fact of marriage at the time of its entry, as is held in the fourth group of cases, and if a community interest is also impressed by the fact of marriage at the time of the making of final proof, and the issuance of the patent, as is held in the first group, then this land was impressed with the interests of two distinct communities, the one in favor of the issue of the first wife, and the other in favor of the second wife. A rule that leads to such incongruous results is certainly not to be commended.

The facts of the case at bar bring it within the cases found in both the first and second group of cases as we have listed them, and since we conclude that the decision in respect to the first group rather than in the second were wrong in principle, we hold the property in question here to have been the separate property of the husband on its acquisition from the government.

The judgment appealed from will stand affirmed. For Pl.

Ellis, Morris, and Main, JJ., concur.

where a single [illegible] homestead entry [illegible] subsequently married [illegible] thereafter patent [illegible] became his sep. prop.

Note. [illegible] p. 669 is [illegible] and [illegible] Wash. in all these homestead cases. This rule [illegible] Wash.

Land [illegible] homestead [illegible] is a gift [illegible] and [illegible]

Where the marital relation [illegible] exist [illegible] entry [illegible] until final proof [illegible] held [illegible] sep. prop. [illegible] spouse who finally acquires the patent to [illegible] land.

GEORGE CARRATT, Appellant, v. HENRY B. CARRATT et ux., Respondents.

(32 Wash. 517. 1903.)

Appeal from Superior Court, Klickitat County.--Hon. Abraham L. Miller Judge. Affirmed.

The opinion of the court was delivered by

Hadley, J.--Henry B. Carratt and Sarah Carratt had been, for many years prior to November 28, 1889, husband and wife. On said date Sarah Carratt died. On March 29, 1887, and during the existence of the community arising from the said marriage relation, one Wise for a consideration of $2,500 executed a warranty deed to said Henry B. Carratt, purporting to convey certain described lands in Klickitat county, Washington. Said Carratt and wife at once entered into the possession of said lands and continued to occupy the same until the time of the wife's death. Henry B. Carratt remained in possession thereof after his wife's death. The said Wise, grantor in said deed, claimed title to the land by virtue of a conveyance thereof made by the Northern Pacific Railroad Company, bearing date March 24, 1887. The lands described in the deeds above mentioned were included in the land grant made to said railroad company by act of Congress. On September 29, 1890, Congress passed what is commonly called the "Forfeiture Act," whereby it declared "that there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain." U. S. Comp. St., 1901, p. 1598 (26 St. at Large, 496). By the terms of said act the lands sought to be conveyed by the said deeds became a part of the public domain. Under the provisions of Sec. 3 of the act a person then in possession of lands thus restored to the United States, such possession being under deed or contract from the corporation to which the grant was originally made, was entitled to purchase the land from the United States in quantities not exceeding 320 acres to any one person within two years from the passage of the law. As such person in possession of the lands above referred to Henry B. Carratt applied to purchase the same, and, having complied with the requirements of the law, a patent was issued to him bearing date May 31, 1892. Said patent conveyed to him all the lands described in the above mentioned deeds except twenty acres, and the latter was by patent of date August 27, 1892, conveyed to one Hinshaw, the same having been previously conveyed by deed from Hinshaw and wife to Henry B. Carratt October 28, 1891. Henry B. Carratt died February 5, 1900, and by will he devised all of said lands to Rachel Carratt. He remained in possession of the land until the time of his death, and since that time Rachel Carratt has been in possession thereof. George Carratt, the plaintiff and appellant in this action, is a son of Henry B. Carratt and Sarah Carratt, and is the only heir of Sarah Carratt. He brought this suit, claiming that the lands acquired as above stated were the community property of his father and mother, and that he, as the heir of his mother, is entitled to one-

The [illegible] surviving husband [illegible] forfeited [illegible] act [illegible] unearned grant [illegible] co., under [illegible] preference [illegible] thereby [illegible] in [illegible] would [illegible] estate therein, even [illegible] existence [illegible] community, under conveyance [illegible] co.

half of the lands. He seeks a partition of the lands. Rachel Carratt, the devisee of the lands under the will, is a granddaughter of Henry B. Carratt, and her co-defendant, Harry B. Carratt, is a grandson of said Henry B. Carratt. Said Harry B. Carratt was a beneficiary under the will, but not a devisee of any interest in the land. The court, after a trial, concluded that the property in question was not community property, but was the separate property of Henry B. Carratt at the time of his death, and that the entire title thereto vested in Rachel Carratt by virtue of said last will. Judgment was entered that the plaintiff shall take nothing by his action, and that the defendants shall recover costs. Plaintiff has appealed.

The respondent Rachel Carratt urges, first, that the lands were not community property, and further, that, if they were, appellant is barred by adverse possession, and is also estopped by a release of all his interest in his mother's estate, executed by him to his father Henry B. Carratt. We think, under the facts hereinbefore stated, that the lands were not the property of the community. With the death of the wife in November, 1889, the community ceased to exist. Nearly one year after that time the act of Congress mentioned above declared a forfeiture of the lands, and the title became absolute in the government. The act extended to the person in possession the privilege of purchasing. The privilege was granted to the person in actual possession at the time the law was passed. That person was Henry B. Carratt. The community was not in possession after the death of the wife, since it had ceased to be. The community, therefore, could not have been in possession when the law was passed, for the reason that no such an entity then existed. Actual possession by the purchaser was made a necessary element of the right to purchase granted by the law. The title conveyed by the government must therefore have vested in the person so in possession, proof of which was required before the conveyance was made. The property was acquired by Henry B. Carratt after the dissolution of the community by virtue of a right extended to him under a statute that did not exist in the lifetime of the community. He happened to be the surviving spouse, it is true. The right was not extended to him as such, however, but as the person in possession. We think it must be held that the lands so conveyed to him became the separate property of Henry B. Carratt. The same is true of the tract patented to Hinshaw. That was acquired by Hinshaw long after the community was dead, and was also conveyed by him to Henry B. Carratt nearly two years after the community ceased to exist. None of the lands were afterwards conveyed by Henry B. Carratt, and he was therefore authorized to dispose of them by his last will. By the terms of the will the respondent Rachel Carratt became the holder of the entire title, and the appellant is not entitled to any share in the lands.

The above point essentially disposes of the case. The trial court also found facts from which it concluded that appellant was barred in any event by adverse possession, and also that he was estopped by a quitclaim and release unto his father of all interest in his mother's estate. It is not necessary that we shall discuss those points, further than to say that from our examination of the evidence we should not be disposed to disturb the findings and conclusions in those particulars, even though it were necessary to discuss them for the determination of the case.

The judgment is affirmed. Ferness,

Fullerton, C. J., and Anders and Mount, JJ., concur.

GENEVIEVE GARDNER AND ROSALIND BEMIS, Appellants.
v. THE PORT BLAKELY MILL COMPANY, Respondent.

(8 Wash. 1. 1894.)

Appeal from Superior Court, Kitsap County.

The opinion of the court was delivered by

Scott, J.--This action was brought to quiet title to a quarter section of land in Kitsap county, which, on the 12th day of July, 1882, was government land. On said date one William Cadwell made entry thereof under an act of congress entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," approved June 3, 1878 (20 U. S. St. at Large, p. 89). At this time said Cadwell was the husband of the appellant Genevieve Gardner, and they were living together in the Territory of Washington, near the land in question. On the 20th day of January, 1883, a patent issued to said Cadwell under said act. July 15, 1882, said Cadwell executed a deed of said land to the respondent. The deed was drawn in form for his wife to sign, but she did not execute it and refused so to do. On January 18, 1890, the respondent placed this deed and the patent aforesaid, which was in its possession, on record.

On the 24th day of October, 1882, said Cadwell procured a decree of divorce from his said wife, annulling the bonds of matrimony theretofore existing between them. No property was brought before the court in this action, and no attempt was made to dispose of the property rights of the parties in any way in the decree which was therein rendered.

September 30, 1891, said Cadwell executed another deed purporting to convey said land to one Ella White Peterson, and on October 7, 1891, said Ella White Peterson, by deed, attempted to convey the same to appellant Bemis. This action was begun November 11, 1891. Neither of appellants have ever been in possession of said land, and it was at all times unoccupied. The respondent exercised acts of ownership thereover in looking after the timber to prevent its destruction, and paid the taxes assessed against the same from year to year. A trial was had, and the court below found in favor of the respondent.

It is contended by appellants that the land in question was community property at the time it was acquired by Cadwell, and also at the time he executed the deed aforesaid to the respondent, and that respondent at said times knew said Cadwell was a married man, and in consequence thereof, that the deed was void under the laws of the territory preventing a husband from conveying community real estate. Appellants claim to each own an undivided half of said land--appellant Gardner by virtue of its having been the community property of herself and Cadwell while they were husband and wife, and appellant Bemis by virtue of the deeds from Cadwell to Peterson and from Peterson to herself, above mentioned. It is contended by the respondent that this land was the separate property of said William Cadwell, and this is the principal question in the case.

By Sec. 2 of the act in question the applicant is required to file a statement in writing and sworn to, containing the following, viz.:

"That deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

The practice is to allow the husband and wife each to make an entry of one hundred and sixty acres of land under the provisions of this act in this state, and this can only be done upon the ground that land so acquired is the exclusive individual property of the person acquiring it. We know of no case where the point in question has been decided, but in the light of the provision of the act itself, and the practice of the government in allowing husband and wife to each make application under the act, sufficient authority is afforded, in our opinion, for holding that land so acquired is the separate property of the person acquiring it; and it being an act of congress, it takes precedence of our laws relating to the acquisition of community property.

There is little or no proof as to whether the money used by Cadwell in paying for it was community property. There is some evidence tending to establish this, and also an attempt to prove the contrary, but admitting that the money so used was the property of the community; the situation would not be altered as to the ownership of the legal title to the land. As to whether the wife, on a showing that community money was used in the purchase thereof, could follow the same and obtain any rights in the land, we are not called upon to decide. Such an attempt would have to be made without unreasonable delay, and if sufficient appears in this case to establish such equitable claim upon the part of appellant Gardner, she would be estopped by reason of her delay in the premises from undertaking to affect the title thereto in the respondent. Appellant Bemis was not a bona fide purchaser without notice.

It is further contended that the court erred in allowing the original deed from Cadwell to the respondent to be received in evidence. It is contended by appellants that said deed was not acknowledged, and the record thereof fails to show any acknowledgment. The deed itself, when introduced, purported to have been regularly acknowledged before a notary public, and contains the certificate, signature and seal of such notary.

It is contended by the respondent that the certificate of acknowledgment is prima facie proof of the facts required to be recited therein, and this being true, no further proof of execution was necessary to render the deed admissible in evidence. Our statutes providing for the execution and acknowledgment of deeds name the officers before whom acknowledgments can be taken; and set forth the form of certificate in which the officer is required to state that the grantor has executed the instrument, and that the execution thereof was his voluntary act and deed. Gen. Stat., Sec. 1437.

Section 1436, relating to acknowledgments taken without the state, lands acquired 6. married [illegible] act [illegible] providing [illegible] 6 [illegible] timber [illegible] sep. [illegible] and [illegible] (alienated [illegible] consent [illegible] , 9.

where — validity of deed [illegible] Ts is contested [illegible] an unacknowledged [illegible] disclosed, 6 — record [illegible] auditor's office, [illegible] deed itself [illegible] purporting [illegible] regularly acknowledged (a proper officer, is admissible — ev. [illegible] further proof of its execution.

provides that the certificate of acknowledgment shall be prima facie evidence of the facts therein recited. It cannot be supposed that the legislature intended to give greater force and effect to acknowledgments taken without the state than to those taken by like officers within the state. Furthermore, it is provided that a certified copy of a deed duly recorded shall be admitted in evidence, without further proof of execution. Gen. Stat., Sec. 209; Code Proc., Sec. 1685. We do not think the legislature meant to give to a certified copy any greater legal sanctity than could be given to the original document itself. Under the contention of appellants, the respondent had only to have its deed re-recorded if the original record thereof was incorrect, and then obtain a certified copy of such record, to have obviated the objections raised against it. We are of the opinion that the deed was properly admitted in evidence.

Affirmed.

For Def

Hoyt and Stiles, JJ., concur.

Anders, J., not sitting.

Dunbar, C. J. (dissenting).--I am unable to agree with my brothers in the disposition of this case. I do not think that property rights of citizens of this state can be affected by any construction which departmental officers place upon the laws of congress. What is community property and what is separate property are questions which must be settled by a judicial construction of our own statutes enacted on that subject. Although I do not think it necessarily is implied by the action of the department in allowing both husband and wife to purchase a timber claim that such claim becomes separate property. A husband and wife may both acquire various kinds of property; but without it is acquired in the way pointed out by the statute for acquiring separate property, it is plainly community property. The affidavit of the applicant is substantially the affidavit required of a homestead applicant, and shows on its face that it is simply to prevent fraudulent or speculative entries. Applying the construction uniformly given by this court to the community laws to the conceded circumstances of this case, the money with which the land in question was purchased was community property; and if that be true, the land which is purchased is equally community property. It seems to me hardly worth while to enlarge on this proposition. If then the land was community property, the original deed must be pronounced absolutely void; for the purchaser, as shown by the record, knew of the community relation; knew that Cadwell was a married man; knew that she was a resident of this state, and tried to get her to sign the deed, which she refused to do. There is no question of estoppel or of innocent purchaser in the case. The vendor bought with his eyes wide open, knowing the facts in the case, and he is presumed of course to have known the law. He, therefore, received nothing by the deed, and the wife was justified in absolutely disregarding the transaction. I am not able to agree with the other propositions urged by respondent, which the majority has not discussed, and believe the court erred in not sustaining the demurrer interposed to the answer.

FRANCES E. SLASOR, Appellant, v. KATE SLASOR, as Executrix etc., Respondents.

(189 P. 546. 1920.)

Appeal from a judgment of the superior court for King county, Hardin, J., entered August 7, 1919, upon findings in favor of the defendants, in consolidated actions for equitable relief, tried to the court. Reversed.

Fullerton, J.--This is an appeal by Frances E. Slasor from judgments entered in favor of the respondents in three separate actions consolidated for trial in the lower court, and consolidated for hearing on appeal in this court.

There are certain undisputed facts in the record necessary to be mentioned which are common to all of the actions. Kate Slasor was formerly the wife of Joseph M. Slasor, having intermarried with him on November 29, 1879. Of this marriage were born the respondents, Ray Slasor and Gaylie Slasor, each of whom are now approaching the middle age in life. Kate Slasor and Joseph M. Slasor were divorced at Seattle, Washington, on November 11, 1903, at the suit of Mrs. Slasor, the grounds being cruel treatment and personal indignities rendering life burdensome, and neglect and refusal on the part of the husband to make suitable provision for his family. After the divorce, Joseph M. Slasor lived in the vicinity of Seattle until the late summer of 1908, when he met the appellant, who was then a widow bearing the name of Lester. His acquaintance with her ripened into a marriage, which was solemnized at Victoria, in British Columbia, on March 24, 1909. The record does not disclose much concerning the habits, occupation or business of Mr. Slasor between the time of his marriage and the time of his death. It does appear, however, that, shortly prior to his death, which occurred on August 25, 1918, he became ill and went, or was sent, to a hospital. From the hospital he went to the home of his former wife, where he stayed something over a week, returning again to the hospital, where he died a few days later. While at his former wife's home he made a will in which he devised all of his property to his former wife, Kate Slasor, during her life, with remainder over to his children, naming the former wife as executrix of the will. She qualified as such and took possession of the real property here in dispute, claiming it to be the separate property of her devisor.

The appellant, Frances E. Slasor, then Mrs. Lester, first came to Seattle, in so far as the record discloses, in the year 1900. She had with her some money which she invested in a lot on North Broadway street. On this lot she caused a house to be erected. About a year later she went to Mt. Vernon where she remained for the following six years, conducting a dress-making business. While at Mt. Vernon she sold the Broadway property and invested the proceeds in other properties in Seattle. From time to time during that period she made like investments, also out of the earnings of her business. During this period her properties in Seattle were managed by one James W. Nolan. He paid the taxes and other assessments levied thereon, looked after the repairs and collected the rentals. Mrs. Lester returned to Seattle in the "winter of 1907 and 1908," and from that time seems to have managed the properties herself until her meeting with

Mr. Slasor. After the meeting, Mr. Slasor took an active part in the management of the properties, if, in fact, he did not take upon himself the entire duty.

On June 11, 1909, the appellant executed a general power of attorney to her husband, Joseph M. Slasor, granting him power as her attorney in fact to transact any and all of her business, lease, mortgage, sell and convey her real and personal property, collect rents and other obligations due her. Shortly thereafter the appellant went to Tacoma, in the adjoining county, where she acted as nurse for an aged lady for the following two years. Returning to Seattle, she lived in one of her own houses "until it was rented," when she went again to Tacoma, where she lived until her husband's death. During the latter period she pursued various occupations, such as sewing by the day for others, nursing, and for a time took care of an invalid man for the privilege of a home. She was residing at Tacoma at the time of her husband's death. Her husband's occupation after marriage, as we have said, is not shown, further than he seems to have managed her properties. Acting under the power of attorney, he executed mortgages on each of the properties, and employed an attorney, sued for, and collected a note given to her prior to her marriage by James W. Nolan.

The first of the properties in dispute is described as lot two, in block thirty-seven, of the Supplemental Tract of Hill Tract addition to Seattle. It was formerly owned by one John J. Frantz. Sometime in the year 1907, Nolan, learning the property was for sale, made a deposit of fifty dollars on the purchase price on behalf of the appellant and telephoned her at Mt. Vernon recommending its purchase. The appellant came to Seattle to examine the property and, being satisfied therewith, entered into a contract with Frantz for its purchase, paying three hundred dollars on the contract price in addition to the payment made by Nolan. Thereafter the appellant made, through Nolan, other payments on the property. After her acquaintance began with Mr. Slasor, he also made payments thereon, but from whose funds it does not appear. Two of such payments were made by check, the one dated October 31, 1908, for $66.12, and the other, January 9, 1909, for $41.40, each signed "J. M. Slasor, Trustee." The last of the payments was made by Slasor sometime in February, 1909. On February 25, 1909, a month prior to the marriage of Slasor with the appellant, Frantz and wife executed a deed to the property in which no grantee was named. The name of the grantee was omitted, so Frantz testifies, at the request of Mr. Slasor, who was representing the appellant's interest, the appellant herself not being present. The deed was recorded on April 2, 1909, at which time it bore the name of J. M. Slasor as grantee, and the recorder's certificate recited that it was recorded at his request. The original deed is in the record. On its face it substantiates the testimony of Frantz. The name of the grantee, while typewritten after the manner of the body of the deed, is written with a typewriter having a different style of type and a different colored ribbon than the typewriting machine first used. The appellant was not permitted to testify whom Mr. Slasor was representing when he made the payments mentioned and procured the deed, nor whose money it was from which the payments were made, but she was permitted and did testify that she never saw the deed, and did not learn that Slasor was named therein as grantee, until after his death. That Slasor had no visible property at the time he first met the appellant, the record also discloses. In the decree of divorce, entered at the suit of the first Mrs. Slasor, he was ordered to pay her the sum

of fifteen dollars per month for the support of the daughter, who is described as mentally defective, until such time as the daughter should be able to support herself. He paid none of the allowances, and Mrs. Slasor brought an action on the order and obtained a judgment thereon on February 9, 1906, for the sum of $360. This judgment, she herself testifies, she was not able to collect. Testimony was also produced showing declarations made by Mr. Slasor, subsequent to his marriage with the appellant, to the effect that the property was the property of the appellant.

On those facts the trial court found that the appellant and Joseph M. Slasor became acquainted and their relations became intimate in the summer of 1908;

"That they thereafter pooled their business interests, and joined together in all business transactions; that the last payments on said real estate contract were made by Joseph M. Slasor, until the full purchase price thereof was paid."

Finding further that, after the deed was executed,

"Either the plaintiff or the said Joseph M. Slasor, acting with the knowledge and consent of the plaintiff, or some other person acting with the knowledge and consent of the plaintiff, inserted in said deed the name of Joseph M. Slasor as grantee."

As a conclusion of law, the court found the property to be the community property of Joseph M. Slasor and the appellant, decreed it to be such community property, and directed the executrix to administer upon it as such in the administration of the estate of Joseph M. Slasor, deceased.

The second of the above tracts is described as lot 12, in block 74, Plat of Central Seattle, by McNaught, and the third as lot 20, in block 16, Walla Walla addition to the city of Seattle. It is undisputed that these tracts were purchased, paid for, and deeded to the appellant long prior to her acquaintance with Joseph M. Slasor. In September, 1907, the appellant and James W. Nolan purchased jointly a tract of land in the city of Seattle, not involved in these proceedings. To obtain the money to make the purchase, they borrowed $900 from the American Savings Bank & Trust Company of Seattle. They jointly executed a note for the loan, and to secure it the appellant deeded to the bank the properties described. Both the appellant and Nolan made small payments on the note from time to time, and it was at one time renewed, the balance then due being $420. About this time the appellant desired Nolan to take over the property and assume the liens upon it. This he did. The parties then had a settlement of the accounts between them, in which settlement it was found that Nolan was indebted to the appellant in the sum of $393, and for this sum gave her his promissory note, payable in one year. The appellant thereafter continued her payments on the note, paying all of the balance due thereon, save the sum of $100, prior to her first acquaintance with Mr. Slasor. The remainder of the obligation was paid in three installments, the first, of $24.32, on December 31, 1908; the second, of $74.68, on March 5, 1909, and the last, of $1, on March 20, 1909. The officer of the bank who had charge of the collections did not remember who made the first of these payments, but testifies that the last two were made by Mr. Slasor. After the final payment, the bank redeeded the property. Its records made at

the time show that it was deeded to the appellant under her former name of Frances Lester, but the recorded instrument (the original was not produced) names as grantees "Joseph M. Slasor and Frances E. Slasor (formerly Frances E. Lester)." Concerning this deed, also, the appellant testified that she had no knowledge that Mr. Slasor's name appeared therein as grantee until after his death.

As to these properties the court found, as in the case of the other property, that the parties became intimate after their acquaintance, contemplated matrimony, and joined together in their business interests, pooling their funds and transacting their business together; further finding that the appellant had knowledge of the conveyances and the form in which they were executed, and held the property out to the world as their joint property. As a conclusion of law, the court held that the parties owned the property as tenants in common, each owning an undivided half thereof. Judgment was entered in accordance with the findings and conclusions, with costs against the appellant.

The principal inquiry, therefore, is whether the findings made and the judgments entered by the trial court are sustained by the facts. Of the findings of fact common to each of the cases, it may be a just inference from the evidence that the appellant and Joseph M. Slasor became intimate, after their acquaintance in 1908, and contemplated matrimony, but clearly there is no evidence, or inference from evidence, from which it can be found that they thereafter pooled their business interests and joined together in all of their business transactions. Indeed, to our minds, the evidence points to the conclusion that Mr. Slasor was then utterly impecunious, with nothing to put into the pool. In addition to the evidence afforded by the decree of divorce and the money judgment obtained on the order for allowances, is the evidence that the appellant found it necessary after her marriage to continue her labors for her support. Sufficient is shown in the record, also, to lead to the conclusion that it was the life long habit of the appellant to transact this part of her business through the agency of others, and we think it more reasonable to conclude that, when Mr. Slasor made payments on the outstanding obligations against these properties, he made them as her agent with her funds, rather than from his own funds or the combined funds of each of them. This conclusion is further borne out by the evidence afforded by the bank checks given in payment of the installments due on the first of the described properties. These, it will be remembered, were signed "J. M. Slasor, Trustee," indicating a bank deposit in that form--a form not uncommon where one deposits in a bank money belonging to another, but exceedingly so where the deposit is the depositor's own fund.

Nor do we find any evidence to support the finding, made with reference to the first of the described properties, that, after the execution of the deed therefor without naming the grantee.

"Either the plaintiff (appellant) or the said Joseph M. Slasor, acting with the knowledge and consent of the plaintiff, or some person acting with the knowledge and consent of the plaintiff, inserted in said deed the name of Joseph M. Slasor as grantee."

On the contrary, the evidence points to an opposing conclusion. The

only evidence on the matter is the statement of the appellant to the effect that she did not know that Mr. Slasor's name was inserted therein as grantee until after his death. If the statement be true, then clearly the name was not inserted therein with her knowledge or consent.

The judgment with reference to this tract is erroneous in that it adjudges the property to have been the community property of Mr. and Mrs. Slasor. The property was purchased, paid for, and the deed thereto delivered prior to their marriage. Depending upon other circumstances, it could have been, when acquired, the separate property of Slasor, the separate property of the appellant, or the common property of both of them; but since the marital relation is essential to impress upon property when acquired a community character, it could have been in no sense their community property. But, if we were to treat the conclusion of the trial court as a finding that Joseph M. Slasor had an interest in the property as a tenant in common with the appellant, we think the finding without foundation. The property was contracted for and a substantial payment made on the purchase price by the appellant long prior to her meeting with Slasor. Between these times she had paid the remaining part of the price, save a comparatively inconsiderable part. This, when considered with her habit of entrusting this part of her business to others, Slasor's impecuniosity, the manner in which he signed the checks for the payments made by him, and his declarations concerning its ownership, to our minds points unerringly to the conclusion that it was with her funds the purchase price was paid. This being so, the property is hers notwithstanding Slasor is named in the deed of conveyance as grantee. The respondents, therefore, could acquire no interest therein as devisees under Slasor's will. Had they been purchasers from him for value and in good faith a different question would be presented, but a devisee can take no greater interest in the devised property than the devisor has to devise.

It is true, as the reppondents argue, that some ten years elapsed between the time of the conveyance and Slasor's death and it is not shown that the appellant made any effort to correct the mistake or wrong, if mistake was made or wrong committed. The force of the argument is appreciated, but we think it is met by the facts that the appellant has lived away from the property for almost the entire period, that Slasor, during that period, had had its exclusive management and control, and that the appellant did not know that she was not the grantee named in the deed until after her husband's death.

With reference to the other properties, we are likewise unable to conclude that the evidence supports the findings made by the trial court. The first of these findings we have sufficiently discussed. As to the second, there is the positive testimony of the appellant to the effect that she did not know that Joseph M. Slasor was named therein as a joint grantee with her. But it would seem that knowledge on the appellant's part of the execution of this deed in the form in which it was executed would not alone have been sufficient to vest a beneficial interest in the properties in Joseph M. Slasor. The property was originally the appellant's property. She deeded it to the bank as security for a loan. When the loan was paid, the bank stood as the holder of the naked legal title to the property, with no beneficial interest in it whatsoever. Having nothing but a naked legal title, a naked legal title was all it could convey. The beneficial interest in the appellant, the bank, when it conveyed

the legal title to the appellant and Joseph M. Slasor, vested no part of such interest in the latter. The title acquired by him through the deed could rise no higher than its source, and consequently could be no more than an interest in the naked legal title. Knowledge on her part that he was named as one of the grantees in the deed, or even consent on her part that he be so named, would not alone vest in him a substantial interest. Before such a result could follow, it must be shown that Joseph M. Slasor acquired from the appellant, the holder of the beneficial interest, all or some part of such interest. This the record not only fails to show; but, to our minds, does show afrirmatively that he acquired no such interest.

There is no need to pursue the inquiry. The judgment in each of the causes is reversed, and the causes are remanded with instructions to enter judgment in each of them in favor of the appellant, to the effect that she is the owner of the property there in question and that the respondents have no interest therein.

For Pl.

Holcomb, C. J., Tolman, Mount, and Bridges, JJ., concur.

Where A. [illegible] installments [illegible] P's [illegible] P's funds and [illegible] P's [illegible] deed [illegible] belonged [illegible] P. notwithstanding A. [illegible] grantee.

Where P. deeded [illegible] L [illegible] security [illegible] loan, [illegible] reconveyance [illegible] L jointly [illegible] P. [illegible] A., [illegible] P. [illegible] P's funds [illegible] insufficient [illegible] A. an [illegible] beneficial [illegible] loan [illegible] P., [illegible] conveyance [illegible] naked legal title.

SEEBER et al. v. RANDALL et ux.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)
(102 Fed. Rep. 215.)
No. 580.

Appeal from the Circuit Court of the United States for the Southern Division of the District of Washington.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Ross, Circuit Judge.--The motion to dismiss the appeal herein is denied. The suit is brought by certain of the children of John F. Seeber and Mary E. Seeber for the partition of a certain 160-acre tract of land situated in the county of Walla Walla, state of Washington; they claiming an interest therein as heirs of their deceased mother. The defendants to the suit are purchasers of the land from the grantee of their father. The suit was commenced in one of the state courts, and on motion of the defendants thereto, who are citizens of the state of Illinois, was transferred to the circuit court of the United States for trial, in which court an amended bill was filed. It is conceded by counsel that at the time the land in controversy was acquired by John F. Seeber the common law prevailed in the then territory of Washington, and that John F. Seeber acquired the title to the land as his separate property. That was in the year 1865. Note The bill shows that upon the acquisition of the title he went, with his wife and children, to reside on the land, and made it their home until the death of his wife, on the 11th day of March 1880, after which Seeber continued to live there with his children until the sale by him and one of his children (to whom he had proviously deeded the property) to the defendants in the year 1893. The interest claimed by the complainant children as heirs of their mother grows out of certain statutory provisions of the state of Washington as applied to these alleged facts found in the amended bill, to wit:

"That on the 2d day of December, 1869, the said lands and premises were of the value of fifteen dollars per acre, and of no other or greater value; and thereafter the said John F. Seeber and the said Mary E. Seeber, by their joint and common labor bestowed thereon, improved and developed said land and premises, and for that purpose used and expended the rents, issues, and profits thereof, and of their community labor and earnings, continuously up to the time of the death of the said Mary E. Seeber, on the 11th day of March, 1880, and thereafter, and until the said John F. Seeber and the said Katherine Seeber (to whom John F. Seeber had deeded the property) sold their interest therein as aforesaid, the said children labored upon said lands, and enhanced the value thereof; and that said lands and premises, at the death of the said Mary E. Seeber upon the said 11th day of March, 1880, were of the value of one hundred and fifty dollars per acre, and in 1893, when the said John F. Seeber and the said Katherine Seeber sold and conveyed their interest therein, they were of the value of two hundred dollars per acre,--all of which the said defendants, and each of them, had knowledge of at the time of and before the purchase of the said lands by them as aforesaid."

Besides denying these and other averments of the amended bill, the defendants, by their answer, set up, among other things, that the land in controversy was originally acquired from the government of the United States by one Amos Barnett, through whom John F. Seeber acquired the title, who afterwards, and on the 20th day of July, 1893, conveyed the premises to Catherine M. Seeber; and that on the 24th day of March, 1894, the said Catherine M. and John F. Seeber, for the consideration of $10,000, conveyed the property to the defendant William Randall. The answer also avers that at the time of the defendant's purchase the complainants, and each of their brothers and sisters whose interest the complainants claim, were present, and well knew that the defendant Randall intended to make the purchase, and to pay for the property the sum of $10,000, and that neither of them made any claim to any interest in the land, but permitted and encouraged the defendant to complete the purchase, and to pay the said sum of $10,000 therefor, and to receive a warranty deed for it; that soon after such purchase and conveyance the complainants, and their brothers and sisters whose interests they now claim, surrendered possession of the property to the defendant Randall, who, believing that he had a perfect title to the land, and relying upon the representations and the facts stated, made large, valuable, and permanent improvements thereon, at a cost of $5,300, with the knowledge of the complainants, and their brothers and sisters whose interests they now assert, without any claim by or on the part of either of them, or notice to the defendant that they claimed any interest in the property; wherefore the defendants aver that the complainants are estopped from maintaining this suit, or claiming any interest in the property. The court below, upon motion made by the defendants upon the pleadings, dismissed the suit, from which judgment the complainants bring the present appeal.

Under the community law of Spain and Mexico, the community property embraced, among other things, the rents, issues, and profits of the separate property of the spouses, and all property, of whatever nature, which the spouses acquired by their own labor and industry. Schm. Civil Law Spain & Mexico, art. 44, pp. 12, 13; 6 Am. & Eng. Enc. Law, 308, and notes. In the territory, and subsequently, in the state, of Washington, as in many of the other states and territories of the United States, community property is defined by statute. The first law passed upon the subject by the legislature of the territory of Washington was enacted December 2, 1869 (Laws 1869, p. 318), the first, second, eleventh, and twelfth sections of which are as follows:

"Section 1. That all property, both real and personal, of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterward, by gift, bequest, devise or descent, shall be his separate property.

"Sec. 2. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property."

"Sec. 11. In every marriage hereafter contracted in this territory, the rights of the husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto.

"Sec. 12. The rights of husband and wife married in this territory prior to the passage of this act, or married out of this territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provisions may be in conflict with the stipulations of any marriage contract."

By an act passed by the legislature of the territory in 1871 (Laws 1871, p. 67, Sec. 2) it was provided as follows: "All property acquired during the marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest, or proceeds of the separate property of both accruing during the marriage, shall become common property,"--with a proviso not necessary to be mentioned. In 1873 the legislature of the territory enacted (Laws 1873, p. 450), among other things, as follows: "All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property." Section 12 of the act of 1873 also provides, as a condition of residence, that the property acquired by the spouses shall be governed by that act, unless the same conflicts with the stipulations of any marriage contract.

In 1879 the legislature of the territory (Sess. Laws 1879, p. 77, Sec. 1) enacted, in substance, in its first section, that the property owned by either spouse before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is the separate property of such spouse; and by section 2 of the act declared that "all other property acquired after marriage by either husband or wife, or both, is community property, except such as may be acquired as is provided in the first section of this act." The act of 1879 went into effect upon its approval by the governor, on the 14th day of November, 1879.

It is clear that the land, which, prior to the year 1869, was the separate property of the husband, was not converted into community property by either of the acts of the legislature of the territory--First, because those acts apply only to property thereafter acquired, and contain no evidence of any intent to give them a retrospective effect; and, secondly, because, even if so intended, neither of them could have the effect of taking from the one spouse and giving to the other property theretofore acquired, because of the provisions of the constitution of the United States. Darrenberger v. Haupt. 10 Nev. 46; Lake v. Bender, 18 Nev. 361; 382, 4 Pac. 711, 7 Pac. 74. Nor in the legislation referred to do we find any provision declaring that the increase in the value of the separate property of either spouse shall constitute community property. There is in the act of 1871, above cited, a provision to the effect that all property acquired during the marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest, or proceeds of the separate property of both accruing during the marriage, shall be common property. But the increase in the value of the separate property of one of the spouses cannot be properly regarded as "property acquired during the marriage by the joint labors of the husband and wife or by their individual labors." Lewis v. Johns, 24 Cal. 98, 105. And, assuming that it is competent for the legislature to declare the rents, issues, and profits of the separate property of either spouse to be community property, there is nothing in the present bill to take the case

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out of the general rule that the skill or labor of either spouse in carrying on farming or other like operations has nothing to do with the question of the ownership of the crops or other proceeds thereof. In such cases the title to the products grows out of the title to the land itself, and belongs to its owner. Rush v. Vought, 55 Pa. St. 443, 93 Am. Dec. 769; Hamilton v. Booth, 55 Miss. 63, 30 Am. Rep. 500; Garvin v. Gaebe, 72 Ill. 448; In re Higgins' Estate, 65 Cal. 407, 4 Pac. 389; Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74, and numerous cases there cited. The judgment is affirmed.

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Land acquired 6. hus. [illegible] wash. prior [illegible] legislation regarding com. [illegible] became [illegible] sep. [illegible] remained so nor did [illegible] legislation [illegible] west [illegible] comm. [illegible] therein [illegible] its subsequent increase [illegible] proceeds [illegible] crops raised thereon, [illegible] produced 6 [illegible] joint labor [illegible] hus. [illegible]

HARRIS v. HARRIS
(No. 11,235)

(Supreme Court of California. Nov. 26, 1886.)
12 -(Pac. Rep. 274.)

In bank. Appeal from superior court, San Joaquin county.

Suit for divorce upon the ground of willful desertion, and for a division of land claimed to be community estate. Judgment for defendant. Plaintiff appealed. The facts are sufficiently stated in the opinion.

McKinstry, J.--In this action for divorce the plaintiff claims a moiety of the land patented to the defendant, on the ground that the money paid for the government title belonged to the community.

1. Even if it appeared that the money was paid out of community funds, the land would be the separate property of the wife. With full knowledge and consent of the plaintiff, the land was proved up and paid for in her name, and the proof of her occupation and "declaration" or affidavit was as necessary a prerequisite to the acquisition of the government title as was the payment of the price. The patent is a record which proves the facts which preceded its issue, on proof of which the proper officers of the United States were authorized to issue it. For certain purposes the possession of either spouse is the possession of both. But here the pre-emption declaration and exclusive occupation of the defendant preceded her marriage with the plaintiff, and constitute part of the acts which culminated in the certificate of purchase and patent. The plaintiff ought not to be permitted to ignore her declaration and possession, (without proof of which she could not have received the benefits of pre-emption,) and treat the acquisition of the government title simply as an ordinary purchase, made after the marriage, with community funds. Under the pre-emption laws, a woman, after her marriage, may secure a pre-emption based on occupancy, the right to which is her separate property. That was done in this case, and the plaintiff, who seeks to benefit by the transaction, cannot say the pre-emption title was not acquired legally and regularly.

She then had a right to acquire the United States title. Can the husband say that he obtained an interest in the pre-emption claim, prior to the certificate of purchase, by reason of the payment, with his consent, of money of which he had the control? Such a claim would seem to be invalid, because the express or implied agreement that he should have such an interest would be in fraud of the United States statute. If she "directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except herself," it was void. Act of congress of September 4, 1841, Sec. 13. It will not do to say that no contract was made; that the interest of the plaintiff, as a member of the community, arose out of the relation the parties so occupied towards each other under the state law. If he has an interest in this land, it is not one created

Where a ♀ [illegible] her marriage [illegible] holds [illegible] pre-emption [illegible] she [illegible] funds loaned her [illegible] her personal faith [illegible] her marriage, a patent [illegible] her [illegible] U. S., [illegible] patent relates [illegible] date [illegible] her entry; [illegible] divorce [illegible] moiety [illegible] brought [illegible] hus., [illegible] adjudged [illegible] <u>sep.</u> [illegible] ♀ free [illegible] hus.

<u>Note</u>, [illegible] Wash. [illegible] held [illegible]

by the marriage, but by reason of the fact that community money was paid for it. This was done, as the case shows, with his express consent, and, in any event, his consent would be implied. The attempt of plaintiff, therefore, is to enforce a claim growing out of an agreement made before the certificate was issued. The court will not aid in the enforcement of such agreement, because it is in violation of the spirit and letter of the pre-emption law.

2. But there was evidence that the money used to secure the government title was paid to the defendant by Cahill, in consideration of a promise that she should convey to him 40 acres so soon as she should obtain the United States title to a tract of 160 acres under the pre-emption laws. That contract was fully executed. When it was entered into, the possessory title to the 160-acre tract was in the defendant as her separate property. If the land had never been proved up and paid for, the possessory right would still be her separate property as between herself and husband. It may be conceded that her mere possession in connection with her pre-emption declaration, gave her no vested interest in the land which the United States was bound to recognize. But her possession commenced prior to the marriage,--was as to all persons except the United States a separate property right. In her possessory title the plaintiff had no part. The contract with Cahill was that she should convey, when she should get the government title, a portion of the tract, the possessory title to the whole whereof was in her as her separate property. She had a standing on which, and the payment of the money received from Cahill, she could acquire the true title. She, in accordance with her contract, perfected her title, as pre-emptor, by proceedings initiated by her "declaration" and sole possession, made and begun before her marriage. The plaintiff necessarily concedes the regularity and validity of those proceedings. The promise of defendant to Cahill could be performed only by and through a merger in the government title of her possessory title. The transaction was not a loan from Cahill to the community. The defendant parted with a portion of the right annexed to her possessory title, on which could be secured the government title; Cahill receiving the benefit of her possession pro tanto. The plaintiff had no interest in any part of the consideration which passed from the defendant to Cahill, either as a member of the community or otherwise. The money became her separate property when she received it, and continued such until she paid it to the United States.

Even if it should be conceded that the patent is absolutely void, the plaintiff could assert no claim here. It is only property "acquired" by either spouse after marriage which is community property.

Judgment and order affirmed.

We concur: Morrison, C. J.; Myrick, J.; Thornton, J.; Sharpstein, J.

MORGAN et al. v. Lones (No. 13,110.)

(Supreme Court of California. Sept. 2, 1889.)

(Pac. Rep. Vol. 22. p.253)

Commissioners' decision. In bank. Appeal from superior court, Nevada county, J. M. Walling, Judge.

For report on appeal by plaintiffs, see 20 Pac. Rep. 248.

Hayne, C.--This was an action to quiet title as to several lots in Nevada City. As to some of the lots the court gave judgment for the defendant, and as to the other lots the court gave judgment for the plaintiffs, from which judgment the present appeal is taken by the defendant. The evidence is not brought up. The defendant contends that upon the findings the judgment should have been for him.

The material facts shown by the findings are as follows: The plaintiffs' testatrix, one Mary J. Lones, was the wife of the defendant. Before her marriage she had a "possessory title" to, and was in possession of, the lots in controversy on this appeal. The land was then public land, and the title was in the United States government. After the marriage the tract covered by the town was conveyed by the government to the board of town trustees, "in trust for the several use and benefit of the occupants thereof," and subsequently thereto the husband made application that said lots be conveyed to the wife, which was done. The sum necessary to be paid to the municipal authorities was paid by the husband out of his separate property. The difference between this case and that made on the other appeal (20 Pac. Rep. 248) is that here the wife was in possession under "possessory title" before the marriage, while there the husband entered into possession under deeds from prior occupants after marriage. Upon that state of facts it was held that under no view that could be suggested was the property the separate property of the wife. We think, however, that as to the lots involved in this appeal a different conclusion results. It is true, as argued for the defendant, that mere possession of public land gives no right as against the government. But the government has chosen to convey the land to trustees in trust for the occupants, and we think that the wife was one of the beneficiary class. She had, therefore, an equitable interest, which was her separate property. This was held in the case of Eversdon v. Mayhew, 65 Cal. 163, 3 Pap. Rep. 641. The only difference between that case and this is that there the patent to the municipal authorities had issued before the marriage. Here it was issued after the marriage. But we do not think that this alters the case. The question is, what was the class of persons whom the townsite acts were intended to protect? The act itself (quoted on the former appeal) designates such class as consisting of those by whom said lands have been "settled upon and occupied." It must be taken from the findings that either the wife or those from whom she acquired her "possessory title" had settled upon and occupied said lands before her marriage. The circumstances, therefore, which entitled her to the bounty of the government had occurred before the marriage, and, this being so, we think that the con-

veyance of the government title to the town authorities was for her own benefit, and that the fact that she married before the patent to the board of trustees had issued is immaterial.

The wife being the owner of the equitable estate as her separate property, the husband could not turn it into community property by advancing from his own funds the sums necessary to obtain the legal title from the municipal authorities. Fuller v. Ferguson, 26 Cal. 566; Noe v. Card, 14 Cal. 600. If there is any expression in the former opinion in conflict with this proposition, it is inaccurate, and was not intended to assert the contrary of what is here stated. The question as to whether the property is the separate property of the wife is the only one discussed by counsel. We therefore advise that the judgment appealed from be affirmed.

We concur: Foote, C.; Gibson, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

For [illegible]

A woman [illegible] her marriage [illegible] a possessory title [illegible] after her marriage [illegible] U. S. [illegible] conveyed [illegible] tract [illegible] said [illegible] board [illegible] town trustees "in trust [illegible] use [illegible] occupants thereof". Subsequently thereto [illegible] hus. [illegible] application [illegible] said [illegible] conveyed [illegible] done [illegible] required sum [illegible] hus.

Held: That [illegible] conveyance [illegible] equitable [illegible] her sep. prop., [illegible] not [illegible] comm. [illegible] husband's advancing [illegible] title thereto.

It [illegible] immaterial [illegible] regards [illegible] conveyance [illegible] marriage [illegible] appears [illegible] she [illegible] those [illegible] she [illegible] possessory title, [illegible] settled [illegible] occupied [illegible] prior [illegible] her marriage.

MARY McCUNE, by Daniel Donahue, Her
Guardian ad litem, Appt., 77
v.
N. FRED ESSIG and Emma C. Essig, His Wife.

(Submitted November 9, 1905. Decided
November 27, 1905.) No. 61.
(26 Sup. Ct. Rep. 78.)

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which afrirmed a decree of the Circuit Court for the District of Washington, Eastern Division, sustaining a demurrer to the complaint in a suit in equity to establish title to real property, which had been removed from the Superior Court in and for Lincoln County, in that state. Affirmed.

See same case below, 122 Fed. 588.

The facts are stated in the opinion.

Mr. Justice McKenna delivered the opinion of the court:

Suit in equity to establish title in appellant to an undivided one half of northeast quarter of section 6, township 25 north, range 38 east, Washington meridian 2, and for accounting of rents and profits, and for partition between appellant and appellees.

It was originally brought in the superior court in and for Lincoln county in the state of Washington. A demurrer was filed to the amended complaint, and a petition to remove the suit to the circuit court for the district of Washington, eastern division, on the ground that the suit involved the construction of Sec. 2291 and 2292 of the Revised Statutes of the United States (U.S. Comp. Stat. 1901, pp. 1390-1394), and of all statutes of the United States relating to homesteads. The suit was removed. In the circuit court a motion was made to remand, which was denied. The demurrer was sustained, and appellant, electing to stand upon her bill, it was decreed that she had no right, title, or interest in the land. 118 Fed. 273. The decree was affirmed by the circuit court of appeals. 122 Fed. 588.

The facts as exhibited by the bill of complaint are that appellant is the daughter of William McCune, deceased, and his wife, Sarah McCune, now Sarah Donahue, and the stepdaughter of Daniel Donahue, who appears as her guardian ad litem. William McCune and his wife, Sarah, settled on the land in controversy, it being a part of the public domain, and subject to settlement under the homestead laws. On the 4th of April, 1884, McCune filed a claim to the land as a homestead in the proper land district. In the same year he died intestate, leaving surviving as his only heirs appellant and his wife, Sarah. They continued to reside on the land until December 17, 1889, upon which day the mother of appellant made the required proof of full compliance with the homestead laws, and on the 6th of March, 1891, a patent was issued to her. In the year 1892, she, having

become Mrs. Donahue, sold and conveyed the land to appellees, who went into possession of it and have been in possession of it ever since. The value of the land is $6,400. The patent recites:

"Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Spokane Falls, Washington, it appears that, pursuant to the act of Congress approved 20th May, 1862 (12 Stat. at L. 392, chap. 75, U. S. Comp. Stat. 1901, p. 1388), 'to secure homesteads to actual settlers on the public domain,' and the acts supplemental thereto the claim of Sarah Donahue, formerly the widow of William McCune, deceased, has been established and duly consummated, in conformity to law, for the south half of the northeast quarter and the lots numbered one and two of section six, in township twenty-five north of range thirty-eight of Willamette meridian in Washington, containing one hundred and sixty-three and eighty-four hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

"Now know ye, that there is, therefore, granted by the United States unto the said Sarah Donahue the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said Sarah Donahue and to her heirs and assigns forever."

The action of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground; to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the state. Sections 4488, 4489, 4490, and 4491 of the statutes of Washington provide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise, or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. 1 Ballinger's Anno. Codes & Statutes. Relying on these provisions the argument of appellant is, and we give it in the words of her counsel:

"When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry. United States v. Turner, 54 Fed. 228.

"The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent."

But this is begging the question. What interest arose in McCune by his entry, who could, upon his death, fulfil the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. Bernier v. Bernier, 147 U. S. 242, 37 L. ed.

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152, 13 Sup. Ct. Rep. 244. The motion to remand was rightly overruled. On the merits we think the ruling of the lower courts was also right. Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504. Headley v. San Francisco, 94 U. S. 4, 24 L. ed. 34, and other cases relied on by appellant, are not in point.

Chapter 5, title 32, of the Revised Statutes, provides who may enter public lands as a homestead, and the conditions to be observed as to entry and settlement. By Sec. 2291 and 2292 it is provided as follows:

"Sec. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry, or, if he be dead, his widow, or, in case of her death, his heirs or devisee, or, in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated except as provided in section twenty-two hundred and eighty-eight (U. S. Comp. Stat. 1901, p. 1385), that he, she, or they will bear true allegiance to the government of the United States, then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law."

"Sec. 2292. In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children." U. S. Comp. Stat. 1901, pp. 1390, 1394.

It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter, and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die, his widow is given the right of residence and cultivation, and "shall be entitled to a patent, as in other cases." He can make no devolution of the land against her. The statute which gives him a right, gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute, and gives the children an interest paramount to that of the widow through the laws of the state.

The law of the state is not competent to do this. As was observed by Circuit Judge Gilbert: "The law of the state of Washington governs the descent of lands lying within the state, but the question here is whether there had been any descent of land." And, against application of the state law, the learned judge cited Wilcox v. Jackson, 13 Pet. 517, 10 L. ed. 273, and Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244. In the former it was said that whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subject to

state legislation. In Bernier v. Bernier it was said that the object of Sec. 2291 and 2292 was "to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate." See Hall v. Russell, 101 U. S. 503, 25 L. ed. 829. And hence it was decided that Mrs. Donahue took the title free from any interest or right in the appellant under the laws of the state.

Against the effect of the patent donveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted "that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent." But it is contended that a beneficial interest having been created by the state law in McCune when the title passed out of the United States by the patent, it "instantly dropped back in time to the inception or initiation of the equitable right of William McCune, and that the laws of the state intercepted and prevented the widow from having a complete title without first complying with the probate laws of the state." This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which Sec. 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions in the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling.

For Defs.

Decree affirmed.

MAYNARD et al. v. HILL et al.

(125 U. S. 190)
March 19, 1888

Matthews and Gray, JJ., dissenting.

Appeal from the Supreme Court of the Territory of Washington.

This is a suit in equity to charge the defendants, as trustees of certain lands in King county, Washington Territory, and compel a conveyance thereof to the plaintiffs. The lands are described as lots 9, 10, 13, and 14, of section 4, and lots 6, 7, 8, and 9, of section 5, in township 24 north, range 4 east, Willamette meridian. The case comes here on appeal from a judgment of the supreme court of the territory, sustaining the defendants' demurrer, and dismissing the complaint. The material facts, as disclosed by the complaint, are briefly these: In 1828, David S. Maynard and Lydia A. Maynard intermarried in the state of Vermont, and lived there together as husband and wife until 1850, when they removed to Ohio. The plaintiffs, Henry C. Maynard and Frances J. Patterson, are their children, and the only issue of the marriage. David S. Maynard died intestate in the year 1873, and Lydia A. Maynard in the year 1879. In 1850 the husband left his family in Ohio and started overland for California, under a promise to his wife that he would either return or send for her and the children within two years, and that in the mean time he would send her the means of support. He left her without such means, and never afterwards contributed anything for her support or that of the children. On the 16th of September following he took up his residence in the territory of Oregon, in that part which is now Washington Territory, and continued ever afterwards to reside there. On the 3d of April, 1852, he settled upon and claimed, as a married man, a tract of land of 640 acres, described in the bill, under the act of congress of September 27, 1850, "creating the office of surveyor general of public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," and resided thereon until his death. On the 22d day of December, 1852, an act was passed by the legislative assembly of the territory, purporting to dissolve the bonds of matrimony between him and his wife. The act is in these words:

"An act to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.

Section 1. Be it enacted by the legislative assembly of the territory of Oregon, that the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are hereby, dissolved.

"Passed the house of representatives, December 22, 1852.

"B. F. Harding, Speaker of the House of Representatives.

"Passed the council, December 22, 1852.

"M. P. Deady, President Council."

The complaint alleges that no cause existed at any time for this divor that no notice was given to the wife of any application by the husband for a divorce, or of the introduction or pendency of the bill for that act in the legislative assembly; that she had no knowledge of the passage of the act until July, 1853; that at the time she was not within the limits or an inhabitant of Oregon; that she never became a resident of either the territory or state of Oregon; and that she never in any manner acquiesced in or consented to the act; and the plaintiffs insisted that the legislative assembly had no authority to pass the act; that the same is absolutely void. and that the parties were never lawfully divorced. On or about the 15th of January, 1853, the husband, thus divorced, intermarried with one Catheri T. Brashears, and thereafter they lived together as husband and wife until his death. On the 7th of November, 1853, he filed with the surveyor general of Oregon the certificate required under the donation act of September 27, 1850, as amended by the act of the 14th of February, 1853, accompanied with an affidavit of his residence in Oregon from the 16th of September, 1850, and on the land claimed from April 3, 1852, and that he was married to Lydia A. Maynard until the 24th of December, 1852, having been married to her in Vermont in August, 1828. The notification was also accompanied with corrobarative affidavits of two other parties that he had, within their knowledge, resided upon and cultivated the land from the 3d of April, 1852.

On the 30th of April, 1856, he made proof before the register and receiver of the land-office of the territory of his residence upon and cultivation of his claim for four years, from April 3, 1852, to and including April 3, 1856. Those officers accordingly, in May following, issued to him and to Catherine T. Maynard, his second wife, a certificate for the donation claim, apportioning the west half to him and the east half to her. The certificate was afterwards annulled by the commissioner of the general land-office, on the ground that as it then appeared, and was supposed to be the fact, Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.

On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband. From this decision an appeal was taken to the commissioner of the general land-office, and from the decision of that officer to the secretary of the interior. The commissioner affirmed the decision of the register and receiver so far as it awarded the west half to the husband, but reversed the decision so far as it awarded the east half to the first wife, holding that neither wife was entitled to that half. He accordingly directed the certificate as to the east half to be canceled. The secretary affirmed the decision of the commissioner, holding that the husband had fully complied with all the requirements of the law relating to settlement and cultivation, and was therefore entitled to the west half awarded to him, for which a patent was accordingly issued. But the secretary also held that, at the time of the alleged divorce, the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property. He also held that the second wife was not entitled to any portion of the claim, because she was not his wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one-half of the claim under the statute;

and the plaintiffs insist that the decision of the commissioner and secretary in this particular is erroneous, and founded upon a misapprehension of the law.

Subsequently the east half of the claim was treated as public land, and was surveyed and platted as such under the direction of the commissione of theegeneral land-office. The defendants Hill and Lewis, with full knowledge, as the bill alleges, of the rights of the first wife, lodated certai land scrip known as Porterfield land scrip, upon certain portions of the land, and patents of the United States were issued to them accordingly, and they are applicants for the remaining portion. The complaint alleges that the other defendant, Flagg, claims some interest in the property, but the extent and nature thereof are not stated. Upon these facts the plaintiffs claim that they are the equitable owners of the lands patented to the defendants Hill and Lewis, and that the defendants are equitably trustees of the legal title for them. They therefore pray that the defendants may be adjudged to be such trustees, and directed to convey the lands to them by a good and sufficient deed; and for such other and further relief in the premises as to the court shall seem meet and equitable. To this complaint the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and gave judgment thereon in favor of the defendants. On appeal the supreme court of the territory came to the same conclusion,--that the complaint did not state a sufficient cause of action; that no grounds for relief in equity appeared upon it; and that the defendants' demurrer should be sustained. Judgment was accordingly entered that the complaint be dismissed. To review this judgment the case is brought to this court.

Mr. Justice Field, after stating the facts as above, delivered the opinion of the court.

As seen by the statement of the case, two questions are presented for our consideration: First, was the act of the legislative assembly of the territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties? and, second, if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claim?

The act of congress creating the territory of Oregon and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the territory in an assembly consisting of two boards, a council and a house of representatives. 9 St. c. 177, Sec. 4. It declared that the legislative power of the territory should "extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of residents; and that all the laws passed by the assembly should be submitted to congress, and, if disapproved, should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the territory to any loan. These exceptions from

the grant of legislative power have no bearing upon the questions presented. The grant is made in terms similar to those used in the act of 1836, under which the territory of Wisconsin was organized. It is stated in Clinton v. Englebrecht, 13 Wall. 444, that that act seemed to have received full consideration; and from it all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. There were in the Kansas and Nebraska acts, as there mentioned, provisions relating to slavery, and, in some other acts, provisions growing out of local circumstances. With these, and perhaps other exceptions not material to the questions before us, the grant of legislative power in all the acts organizing territories, since that of Wisconsin, was expressed in similar language. The power was extended "to all rightful subjects of legislation," to which was added in some of the acts, as in the act organizing the territory of Oregon, "not inconsistent with the constitution and laws of the United States," a condition necessarily existing in the absence of express declaration to that effect. What were "rightful subjects of legislation," when these acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed; the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained. It will be found from the history of legislation that, while a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. Loan Ass'n. v. Topeka, 20 Wall. 663. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the mar-

riage relation may involve investigations of a judicial nature, which can properly be conducted by the judicial tribunals. Yet, such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual, such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity, or hopeless idiocy, or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the legislature itself from interfering, and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament and treated the subject as one within their province. And, until a recent period, legislative divorces have been granted, with few exceptions, in all the states. Says Bishop, in his Treatise on Marriage and Divorce: "The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written constitution binding the legislative power." Section 664. Says Cooley, in his Treatise on Constitutional Limitations: "The granting of divorces from the bonds of matrimony was not confided to the courts in England, and, from the earliest days, the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases." Page 110. Says Kent, in his Commentaries: "During the period of our colonial government, for more than a hundred years preceding the revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the life-time of the parties but by a special act of the legislature." Volume 2, p. 97. The same fact is stated in numerous decisions of the highest courts of the states. Thus, in Cronise v. Cronise, 54 Pa. St. 260, the supreme court of Pennsylvania said: "Special divorce laws are legislative acts. This power has been exercised from the earliest period by the legislature of the province, and by that of the state, under the constitutions of 1776 and 1790. The continual exercise of the power, after the adoption of the constitution of 1790, cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. Communis error facit jus would be sufficient to support it, but it stands upon higher ground of contemporaneous and continued construction of the people of their own in-

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strument." In Crane v. Meginnis, 1 Gill &J. 474, the supreme court of Maryland said: "Divorces in this state from the earliest times have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of the legislative power." In Starr v. Pease, 8 Conn. 541, decided in 1831, the question arose before the supreme court of Connecticut as to the validity of a legislative divorce under the constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that state on the subject of divorces, passed 130 years before, which provided for divorces on four grounds, said, speaking by Mr. Justice Daggett: "The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the parliament of Great Britain, and passed special acts of divorce a vinculo matrimonii. And at almost every session since the constitution of the United States went into operation, now 42 years, and for the 13 years of the existence of the constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our state. We are not at liberty to inquire into the wisdom of our existing law on this subject, nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the constitution of the United States or by that of the state. In view of the appalling consequences of declaring the general law of the state or the repeated acts of our legislature unconstitutional and void,--consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery,--the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void." It is to be observed that the divorce in this case was granted on the petition of the wife, who alleged certain criminal intimacies of her husband with others, and the act of the legislature recited that her allegation, after hearing her and her husband, with their witnesses and counsel, was found to be true. The inquiry appears to have been conducted with the formality of a judicial proceeding, and might undoubtedly have been properly referred to the judicial tribunals; yet the supreme court of the state did not regard the divorce as beyond the competency of the legislature. The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the legislative assembly of the territory, that it was beyond the competency of a legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation. In most of the states the same legislative practice on the subject has prevailed since the adoption of their constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years, in many constitutions, of provisions prohibiting legislative divorces would also indicate a general conviction that, without this prohibition, such divorces might be granted, notwithstanding the separation of the powers of government into departments, by which judicial functions are excluded from the legislative department.

There are, it is true, decisions of state courts of high character, like the supreme court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their state constitutions. Sparhawk v. Sparhawk, 116 Mass. 315; State v. Fry, 4 Mo. 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are therefore justified in holding--more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature. If within the competency of the legislative assembly of the territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the territory, and, as he acted soon afterwards upon the dissolution and married again, we may conclude that the act was passed upon his petition. If the assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the territory is undoubted, unless the marriage was a contract within the prohibition of the federal constitution against its impairment by legislation, or within the terms of the ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act,--questions which we will presently consider.

The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation, and, if the facts stated had been brought to the attention of congress, that body might and probably would have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the assembly to pass the act. The organic act extends the legislative power of the territory to all rightful subjects of legislation "not inconsistent with the constitution and laws of the United States." The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the supreme court of the territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. As was said by Chief Justice Marshall in the Dartmouth College Case, not by way of judgment, but in answer to objections urged to positions taken: "The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." And in Butler v. Pennsylvania, 10 How. 402, where the question arose whether

a reduction of the per diem compensation to certain canal commissioners below that originally provided when they took office, was an impairment of a contract with them within the constitutional prohibition; the court, holding that it was not such an impairment, said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property, are vested." It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the supreme court of Maine in Adams v. Palmer, 51 Me. 481, 483. Said that court, speaking by Chief Justice Appleton: "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, b but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the wil of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other." And again: "It is not then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress." And the chief justice cites in support of this view of the case of Maguire v. Maguire, 7 Dana, 181, 183, and Ditson v. Ditson, 4 R. I. 87, 101. In the first of those the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations; was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the

second case the supreme court of Rhode Island said that "marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

In Wade v. Kalbfleisch, 58 N. Y. 282, the question came before the court of appeals of New York whether an action for breach of promise of marriage was an action upon a contract within the meaning of certain provisions of the Revised Statutes of that state, and in disposing of the question the court said: "The general statute, 'that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract, to which the consent of parties, capable in law of contracting, shall be essential,' is not decisive of the question. 2 Rev. St. 138. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word "contract" employed in the common law or statutes. In this state, and at common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."

In Noel v. Ewing, 9 Ind. 37, the question was before the supreme court of Indiana as to the competency of the legislature of the state to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage; and the court said: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." In accordance with these views was the judgment of Mr. Justice Story. In a note to the chapter on marriage in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: "But it appears

to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts." Section 108n.

The fourteenth section of the organic act of Oregon provides that the inhabitants of the territory shall be entitled to all the rights, privileges, and advantages granted and secured to the people of the territory of the United States north-west of the river Ohio by the articles of compact contained in the ordinance of July 13, 1787, for the government of the territory. The last clause of article 2 of that ordinance declares "that no law ought ever to be made or have force in said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide and without fraud, previously formed." This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the federal constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the donation act. But that act conferred the title of the land only upon the settler who at the time was a resident of the territory, or should be a resident of the territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. The words of the act, that "there shall be, and hereby is, granted to every white settler or occupant," is qualified by the condition of four years' residence on the land and its cultivation by him. The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title; what is sometimes vaguely called an inchoate interest. In some of the cases decided at the circuit, the fourth section of the act was treated as constituting a grant in praesenti, subject to the conditions of continued residence and cultivation, that is, a grant of a defeasible estate. Adams v. Burke, 3 Sawy. 418. But this view was not accepted by this court. In Hall v. Russell, 101 U. S. 503, the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditions were fully performed. After citing the language of a previous decision, that "it is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress," the court said: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future, and not presently. In all cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law, and actually in existence at

The act [illegible] Leg. Assembly [illegible] T. of Oregon [illegible] 22d of Dec. 1852, declaring [illegible] bonds [illegible] matrimony [illegible] David T. Maynard [illegible] dissolved [illegible] valid [illegible] effectual [illegible] divorce [illegible] parties.

The [illegible] divorces [illegible] rightful [illegible] legislation [illegible] either [illegible] parties divorced is [illegible] a resident [illegible] juris. [illegible] Legislature.

Where a [illegible] married [illegible] order [illegible] secure [illegible] Donation act, his [illegible] divorced [illegible] acquired a vested [illegible] residence [illegible] cultivation required [illegible] Act, is [illegible] entitled [illegible] donation [illegible]. A divorce ends [illegible] not previously vested.

the time." * * * Coming, then, to the present case, we find that the grantee designated was any qualified settler or occupant of the public lands, * * * who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the law. The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory, having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." In Vance v. Burbank, 101 U. S. 521, the doctrine of the previous case was reaffirmed, and the court added: "The statutory grant was to the settler, but, if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband." When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than this. Nothing had then been acquired by his residence and cultivation, which gave him anything more than a mere possessory right to remain on the land so as to enable him to comply with the conditions, upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the courtesy in her lands, unless the statute authorizing the divorce specially confers such right.

It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half she must have continued his wife during his residence and cultivation of the land. The judgment of the supreme court of the territory must therefore be affirmed; and it is so ordered.

Matthews and Gray, JJ., dissented.

Bradley, J., was not present at the argument and took no part in the decision.

What is Separate Prop.

[illegible] section we [illegible] acquired [illegible] spouse [illegible] marriage [illegible] sep. prop. [illegible] sep. funds.

Homestead [illegible] comm. [illegible] filed on, lived on and patent [illegible] marriage.

If he dies [illegible] patent issues it is sep. prop. [illegible] wife by statute. The reverse [illegible] is not true; viz. if [illegible] dies first husband [illegible] homestead [illegible] his sep. [illegible]

Mat. [illegible] case.

[illegible] 81 Cal. 61 [illegible] and [illegible] case. Also 85 Cal. 250

Judgment [illegible] wrong [illegible] is not [illegible] comm. debt.

[illegible] in case [illegible] notary public. This [illegible] notary public [illegible]

Test is, [illegible] debt created for the [illegible] community.

CHAPTER XII

CITATIONS

What is Separate Property?

Eckert v. Schmitt (1910)	60 Wash. 23.
Hall v. Hall (1906)	41 Wash. 186.
Card v. Crini (1915)	86 Wash. 419.
Morse v. Johnson (1915)	88 Wash. 57.
James v. James (1908)	51 Wash. 60.
Chase Baker Co. v. Olmst (1916)	93 Wash. 306.
Webster v. Thorndyke (1895)	11 Wash. 389.
Lanigan v. Miles	102 Wash. 82
Foy v. Pacific Power Light Co. (1919)	105 Wash. 525
Folsom v. Folsom (1919)	106 Wash. 515
Woodland v. First National Bank (1921)	
Chapman v. Bain (1921)	17 Dec. 489.
Guye v. Guye (1911)	63 Wash. 340.
Loerer v. Loerer (1910)	56 Wash. 647.
Curry v. Wilson (1910)	57 Wash. 509.

Prop. acquired by either spouse during Marriage by gift, devise, or descent --

or acquired in exchange for sep. Prop. or funds.

CHARLES R. POWERS et al., Respondents, v. MARY A. MUNSON, Appellant.

(74 Wash. 234, 1913)

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 7, 1912, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Fullerton, J.--The respondents brought this action against the appellant to quiet their title to an undivided one-half interest in certain real property. They had judgment in the court below, and this appeal was taken therefrom.

The property in question consisted of two lots situated in the city of Centralia, on which there was a building used as a rooming and boarding house. The property was acquired by the appellant while she was a single woman. Subsequent to its acquisition, she intermarried with one George N. Munson, and after the marriage deeded to Munson, by a quitclaim deed, an undivided one-half interest in the property subject to two certain mortgages, the one for $400, and the other for $100. The deed was executed on October 23, 1909, and recited that it was made for a "valuable consideration and one dollar." Subsequent to the execution of the deed, Munson resided on the premises with the appellant for some one and one-half years. The court found that the deed was a gift from the appellant to her husband. The evidence, however, we think would have justified a different finding. The appellant testified that Munson agreed to pay as a consideration for the deed the mortgages on the premises and certain other obligations then due the nature of which was not made clear, possibly certain back taxes, and overdue insurance premiums. A portion of these obligations he did pay, but whether all that was due or not the evidence does not show. But whether the deed is founded on a good or a valuable consideration is not very material. A good consideration is sufficient to its validity, it being otherwise regular.

On July 8, 1911, George N. Munson, for a consideration of $800, conveyed by warranty deed to the respondent Charles R. Powers his undivided one-half interest in the property. In this deed the appellant did not join, and when the respondent sought to exercise ownership in the property, she forbade him access thereto, and refused to account to him for the rents, issues and profits thereof.

The appellant defended the action on the ground that the deed of conveyance from her husband to the respondent passed no interest in the property sought to be conveyed. She contends that the property, on the execution of the deed from herself to her husband, became the community property of herself and her husband, and she invokes the rule, heretofore announced by this court, to the effect that a deed of conveyance of community real property executed by only one of the spouses passes no interest in the property to the grantee named in the deed. But we think the appellant where a [illegible] conveyed [illegible] her hus. [illegible] ½ [illegible] lots theretofore her sep. prop., either [illegible] a gift [illegible] consid. [illegible] husband's sep. estate [illegible] conveyed [illegible] sep. [illegible] hus. regardless [illegible] deed, [illegible] thereafter hold [illegible] prop. [illegible] tenants [illegible] common [illegible] comm. [illegible]

under R. & B. § 8766 [illegible] conveyance [illegible] hus. [illegible] comm. [illegible] application [illegible] conveyances [illegible] sep. prop.

under R. & B. § 5915 [illegible] hus. [illegible] convey [illegible] sep. [illegible] joining [illegible] deed.

Law. Supreme Ct. [illegible] Wash. holds [illegible] a deed [illegible] spouse [illegible] either separate prop. [illegible] comm. prop. [illegible] separate prop. [illegible] grantee spouse, mistakes the effect of the deed from herself to her husband. The title to to property acquired by deed, whether separate or community, is determined, not from the form of the deed by which it is conveyed, but from the manner of its acquisition. Property acquired by gift, or purchased with the separate funds of the spouse to whom it is conveyed, is the separate property of that spouse. So this property, whether it was a gift from the wife to the husband as the court found, or whether it was purchased by the husband's individual funds as the court might have found, became the separate property of the husband, and the husband and wife held it thereafter, not as property belonging to them as a community, but as tenants in common; that is to say, each of them hold a separate estate in an undivided half thereof.

There is no objection under the statutes, as the appellant seems to contend, to the form of the conveyance. The statute relating to conveyances between husband and wife of community real property, Rem. & Bal. Code, Sec. 8766 (P. C. 95, Sec. 47), has no application to conveyances of this character. The wife may convey to her husband the whole or any part of her separate property, by any of the recognized forms of conveyances, as fully and freely as she may convey the same to any other person. Id. Sec. 5916, 5925, 5926, 5927 (P. C. 95, Sec. 9, 1, 5, 21). Since, therefore, the deed from the appellant to her husband vested in him as his separate property an undivided half interest in the land conveyed, it follows that the husband could, without his wife joining him, make a valid conveyance of the same to the respondent. Id. Sec. 5915 (P. C. 95, Sec. 25).

It is contended in the brief of counsel that the property was the homestead of the appellant and her husband, and hence no part of it could be conveyed without both of them joining in the conveyance. But there is no suggestion, either in the pleadings or the evidence, of this nature, and were it possible that a homestead could be claimed in property situated as this property is situated, we must decline to enter upon a discussion of the question, since it was not among the issues submitted to the trial court.

The judgment will stand affirmed. For Pl.

Main, Morris, and Ellis, JJ., concur.

MABEL CORBETT, Respondent, v. MATTHEW SLOAN, Appellant.

(52 Wash. 1 1909.)

Appeal from a judgment of the superior court for King county, Morris, J., entered April 2, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to quiet title. Affirmed.

Gose, J.--This action was commenced by the respondent against the appellant and the defendant, to quit title to certain real property, situated in the city of Seattle. From a decree quieting title in the respondent, this appeal is prosecuted.

The appellant relies upon two questions for a reversal: (1) The admission in evidence of a privileged communication; (2) insufficiency of the evidence to support the decree. The view we take of the evidence, aside from that claimed to be privileged, renders it unnecessary to consider the first question.

The respondent and the defendant were husband and wife at the time the property was purchased, and at the time of the trial. On March 10, 1905, the property was purchased, for a consideration of $1,600, and the deed of conveyance was taken in the name of the respondent. At the time of the conveyance, all of the purchase price had been paid, save a small mortgage, which had not been paid at the time of the trial. At the time of the purchase, the respondent and her husband took possession of the property, and the respondent lived on the same for about three years, after which she rented it and collected and retained the rental. In the month of April, 1907, the appellant recovered a judgment against the husband, and on the 8th day of June, 1907, had the property sold under an execution issued upon such judgment. The appellant was the purchaser at such sale and received, and in due time filed for record, the sheriff's certificate of sale. The purpose of this action is to remove the cloud cast upon the title by the filing of such certificate.

The single question presented is whether the property at the time of the rendition of the judgment was the separate property of the respondent, or the community property of the respondent and her husband. The defendant was called as a witness on behalf of the respondent, and testified that, shortly before the purchase of the property, he had recovered a judgment in a personal injury suit, waged in his behalf, and had collected thereon the sum of $3,680; that, upon receiving the money, he took it home, threw it into his wife's lap, and gave it to her; that he and the respondent then went to the bank, and at her suggestion he deposited the money in his name; that he had the deed drawn in favor of the respondent for the purpose of making it her private property; that upon the delivery of the deed to him he gave it to her and told her it was her property; that it was not his intention to have any community interest in the same; that he paid for the property in excess of the mortgage from the money he had given the respondent; that he had theretofore taken legal advice as to the method to be

pursued to vest the title in respondent. The respondent testified that her husband brought the judgment money home and gave it to her; that he also gave her the deed and told her that it was her property; that she put the deed away and kept it. Mrs. Chapman, a sister of the respondent, gave evidence to the effect that, shortly after the purchase, the husband told her that he had given the respondent the money with which to buy the property, and that he had no interest in it. Mrs. Lilligren, one of the grantors, testified that, a few days before the deed was executed, the respondent stated to her that the property when purchased was to be her property, and that the husband thereupon remarked, "All right."

To overcome these facts, it was shown that the deed was not recorded until September 13, 1907, that the husband paid the taxes, and that he paid two installments of interest on the mortgage. Such facts do not impeach the integrity of the original transaction. In the absence of evidence that the appellant was a creditor when the property was purchased, it was competent for the husband to make a gift of the property to the respondent. The respondent's title depends entirely on the intention of the parties, and their good faith at the time of the transaction. Property acquired by either spouse after marriage, by gift, is the separate property of the spouse acquiring the same. Bal. Code, Sec. 4488, 4489 (P. C. Sec. 3875, 3867). The burden of proof is on the respondent to show the bona fides of the transaction. Bal. Code Sec. 4580 (P. C. Sec. 3864).

The evidence herein discussed convinces us that the property in controversy is the separate property of the respondent, and the decree is therefore affirmed.

For [illegible],

Rudkin, C. J., Chadwick, Fullerton, Mount, Dunbar, and Crow, JJ., concur.

It sufficiently appears [illegible] will casting [illegible] burden [illegible] proof [illegible] gift [illegible] hus., [illegible] standing [illegible] impeach testimony [illegible] parties [illegible] secured [illegible] hus. [illegible] personal injuries [illegible] deed [illegible] advice, [illegible] order [illegible] gift thereof [illegible], in [illegible] absence [illegible] creditors [illegible] hus., [illegible] gift [illegible] hus. [illegible] taxes [illegible] two yrs [illegible] deed [illegible] not at once recorded.

F. B. PLATH, as Administrator etc., Appellant, v.
PAT MULLINS et al., Respondents.

(87 Wash. 403)
1915

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered July 1, 1913, upon findings in favor of the defendants, in an action by an administrator to subject an equitable interest in real property to the claims of creditors, tried to the court. Reversed.

Main, J.---This action was brought by the plaintiff, as administrator de bonis non of the estate of A. W. Burnett, deceased. The purpose of the action was to have the equitable interest in certain real estate situated in Yakima county, Washington, subjected to the claims of creditors of the estate. The principal defense was that the interest in the land sought to be reached for the benefit of creditors was the separate property of Mrs. Burnett, wife of the deceased. The cause was tried to the court without a jury. The trial judge was of the opinion that the evidence established the fact that the interest in the property was the separate property of Mrs. Burnett, and entered judgment accordingly. From this judgment, the plaintiff appeals.

The facts are as follows: Some time during the year 1891, A. W. Burnett and Josie Burnett were united in marriage, which relation continued until the death of A. W. Burnett, which occurred on June 4, 1910. At the time of the marriage, and for some years subsequent thereto, Mr. Burnett was engaged in the butcher business at Anaconda, Montana. Some time during the year 1897, the butcher business was discontinued. Thereafter, and in February, 1898, Mr. Burnett went to Alaska, where he remained for a period of approximately eithteen months. During the time Mr. Burnett was in Alaska, Mrs. Burnett conducted a restaurant at Anaconda. The restaurant business was disposed of some time during the year 1903, the business having been operated for a period of five years. The profits from this business amounted to $4,400.

In January, 1904, the Clarence Hotel at Butte, Montana, was acquired by Mr. Burnett, and was conducted thereafter for a period of approximately three years, when the hotel was disposed of. During the month of December 1907, Mr. and Mrs. Burnett came to North Yakima and vicinity, and remained about two weeks. During this time they visited with Mrs. Burnett's sister and her husband, a Mr. and Mrs. Nesley. After remaining at North Yakima for the time mentioned, the Burnetts returned to Butte, where the Braund Hotel was purchased, and was thereafter conducted until Mr. Burnett's death.

Some time during the month of February, 1908, Mr. Burnett returned to North Yakima, where he contracted to purchase from one William L. Lemon and wife 20 acres of land. The contract with Lemon was made with Mr. Burnett only; Mrs. Burnett's name does not appear in it. The contract for this land was executed on the 13th day of that month. The purchase price was $10,000, $3,000 of which was paid at the time the contract was executed and delivered. The balance, as provided in the contract, was to be paid $1,000 August 15, 1908; $2,000 February 15, 1909; $2,000 February 15, 1910; and $2,000 February 15, 1911.

While running the restaurant in Anaconda, Mrs. Burnett had money on deposit in her own name in the Hogue-Daley Bank of that city. This money was derived from the proceeds of the restaurant business. After moving from Anaconda to Butte, and on November 18, 1904, Mrs. Burnett opened an account in the State Savings Bank of that city. This account continued until March 19, 1910, when it was closed. From November 23, 1904, until August 10, 1910, Mrs. Burnett had money on deposit in her own name with Yegen Brothers' Bank in Butte. On or about February 10, 1908, a check for $3,500, drawn by Mrs. Burnett on her account in the State Savings Bank, was received by the Silver Bow National Bank of Butte in exchange for a draft issued by that bank to A. W. Burnett. On February 13, 1908, A. W. Burnett endorsed to the Yakima Valley Bank of North Yakima, Washington, a draft for $3,500, issued by the Silver Bow National Bank to him. At the time, Mr. Burnett opened an account with this bank and received credit for the amount of the draft. On February 14, 1908, the Yakima Valley Bank paid to A. W. Burnett, or to his order, $2,750. This $2,750 apparently went to Lemon, and was applied upon the first payment made upon the contract. Where the other $250 necessary to make up the $3,000 to meet this payment came from does not appear. During the month of March, 1910, the Yakima Valley Bank loaned to A. W. Burnett and his wife $2,000, to secure which a note was given, and the contract with Lemon was assigned to the bank. On May 3, 1910, the $2,000 thus borrowed was paid by the bank directly to Lemon, and was applied upon the purchase price of the land. In addition to the $3,000 paid when the contract was executed, and the $2,000 borrowed from the bank and paid to Lemon, Mr. Burnett paid upon the contract the $1,000 due August 15, 1908, and the $2,000 due February 15, 1909. From what source the money which met these two payments last mentioned was derived does not appear. The only evidence upon the question is the testimony of Lemon that the payments were made by Mr. Burnett.

If the property purchased from Lemon became the separate property of Mrs. Burnett, it is by reason of the facts already stated and declarations made by Mr. Burnett during his lifetime. The evidence touching the declarations relied upon may be briefly summarized as follows: A. G. Burnett a brother of A. W. Burnett, deceased, testified that, about ten days prior to the death of his brother, he had a conversation with A. W. Burnett, in which the latter said: That his affairs were in bad shape, but his wife had money of her own; that she had always taken her part of the business; that the understanding between them was that Mrs. Burnett always took her part of the money or profit from the business, and it was her own personal property; that if anything happened to him, his wife would have her ranch in Yakima; that the property in Yakima was his wife's, and bought with her own money. This conversation, it should be noted, occurred approximately two months after A. W. Burnett had borrowed the $2,000 to make the payment upon the ranch due February 15, 1910.

J. W. Nesley, a brother-in-law of A. W. Burnett, deceased, testified that, while Mr. and Mrs. Burnett were in North Yakima for about two weeks in December, 1907, he heard Mrs. Burnett say to her husband: "You know Alex that this is my money that is buying the ranch." The witness did not remember Mr. Burnett's answer, but testified that the statement was not denied.

One C. P. Flannagan testified that he had a conversation with Mr. Burnett in the bar room of the Ykaima hotel upon one occasion when the latter was showing him some orchard views; and Mr. Burnett said that he wished that the orchard were his, but that it was not, that it belonged to his wife; that she was using her money in the Yakima property, and he was putting his into mining.

A Mrs. Delia O'Niel, the wife of a brother of Mrs. Burnett, testified that she had frequently heard talks between the Burnetts touching business affairs, and that in these talks she heard Mr. Burnett say, after he returned from Alaska, that the profits of the restaurant business were his wife's; that before they moved to Butte she heard him say that his wife was loaning him $4,400, which he was going to pay back out of the profits of the Clarence Hotel business; that his wife was to have one-half of the profits out of this business; that she heard Mr. Burnett speak of the Yakima ranch property as his wife's.

From a reading of this witness' testimony as it appears in the statement of facts, it is very apparent that she was an ardent partisan of her sister-in-law. Referring to her testimony the trial judge in his opinion said: "I believe that she was not wilfully falsifying, but painting the truth in glowing colors."

The first question to be considered is whether, under the facts stated and the testimony bearing upon the declarations made by A. W. Burnett during his lifetime, tthe Yakima property became the separate property of Mrs. Burnett. The property was acquired during the marriage relation. It is a well known rule that property acquired by purchase during the marriage is presumed to be community property, and that the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence. Ballard v. Slyfield, 47 Wash. 174, 91 Pac. 642; Denny v. Schwabacher, 54 Wash. 689, 104 Pac. 137, 132 Am. St. 1140. In the Denny case it was said:

"Property acquired by purchase during marriage is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence. Ballard v. Slyfield, 47 Wash. 174, 91 Pac. 642."

If the property became the separate property of Mrs. Burnett, it was by reason of a gift to her of the profits of the restaurant business conducted in Anaconda, and a part of the profits derived ffrom the conduct of the Clarence Hotel and the Braund Hotel in Butte; and by reason of the further fact that this money, if it became her separate property, can be traced to the land in question. Yake v. Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. 17. The law does not presume a gift. The person who asserts title by gift must prove it by evidence that is clear and convincing, s strong and satisfactory. Jackson v. Lamar, 67 Wash. 385, 121 Pac. 857; Knowles vl Slocum, 83 Wash. 158, 145 Pac. 204. In the case last cited it was said:

"A gift will not be presumed, but he who asserts title by this means must prove it by evidence which is clear, convincing, strong, and satisfactory."

The fact that Mrs. Burnett had kept bank accounts in her own name would not establish the separate character of the funds. Moneys deposited in this way by a married woman are presumed not to be her separate property. McKay, Community Property, Sec. 322. If the separate character of the funds has been established, it must be by virtue of the evidence relative to the declarations of Mr. Burnett during his lifetime. While testimony as to such declarations is competent evidence, it should be received with caution and subject to careful scrutiny. No class of evidence is more subject to error or abuse. 2 Jones, Com. on Evidence, Sec. 295; 14 Ency. Evidence, p. 147; Lea v. Polk County Copper Co., 21 How. (U.S.) 493; Curtice v. Crawford County Bank, 110 Fed. 830; Johnson v. Quarles, 46 Mo. 423; In re Dundas' Estate, 213 Pa. 628, 63 Atl. 45; Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L.R.A. 433.

In the text of Jones, above cited, after stating the general rule, it is said:

"A fortiori, where the admission is that of one deceased, the caution should deepen into suspicion, for reasons that are obvious and without corroboration is of little value."

In the Lea case, supra, it is said:

"Courts of justice lend a very unwilling ear to statements of what dead men had said."

In support of the claim that the property is the separate property of the wife, there are the declarations of the various witnesses as to the declarations of Mr. Burnett that the proceeds of the restaurant business at Anaconda were Mrs. Burnett's; that there was an understanding between the spouses that Mrs. Burnett was to have her share of the profits of the hotel business at Butte; that Mrs. Burnett's money was buying the land, and that the land was hers. Against this evidence is the fact that the contract for the purchase was taken in the name of Mr. Burnett, and the fact that Mr. Burnett borrowed $2,000 to make the payment due February 15, 1910, when at this time and for some months prior thereto, as well as some time thereafter, his wife had on deposit in the Yegen Brothers Bank approximately $2,500 in money, and in the State Savings Bank approximately $400. The contract being in the name of the husband, even though the land were purchased with the separate funds of the wife, would raise a presumption of a gift rather than a trust; and this presumption can be overturned and the trust relation established only by evidence that is clear, cogent, and convincing.

In Denny v. Schwabacher, supra, it was said:

"Where the consideration for a conveyance of property is paid from the separate funds of one spouse and the property is conveyed to the other, a presumption of a gift rather than a trust arises, and this presumption can only be overthrown and the trust relation established by evidence that is clear, cogent, and convincing. Pomeroy, Eq. Jur., Sec. 1041.'

Under the rules of law above stated, we think the evidence was not of that clear and convincing character necessary to establish title to the real estate in question by gift of the moneys mentioned. In addition to

this, as already stated, the evidence fails, with the exception of $2,750 mentioned, to trace the money which it was claimed belonged to Mrs. Burnett into the property. As sustaining the respondent's contention that the evidence shows a gift, Yake v. Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. 17, is cited. That case was tried to a jury. A verdict was returned finding that the property in question had become the separate property of the wife by gift. Upon appeal it was held that it was not error for the trial court to refuse to give a peremptory instruction directing that the jury find that there was no gift. It was also there said: "The proofs were sufficient to support the verdict of the jury to the effect that the goods were the separate property of the wife." The distinction between that case and this is, that there the question was tried to the jury; and this court does not disturb the finding of a jury upon a question of fact when there is substantial evidence to sustain it. In the present case the cause was tried to the court without a jury, and is here tried de novo. It might also be mentioned that the facts in that case are somewhat stronger in sustaining a gift than are those in the present case.

The respondent contends that the complaint does not state a cause of action. The basis of this contention is the claim that the complaint does not allege that A. W. Burnett did not have property sufficient to pay all his debts. No demurrer was interposed to the complaint in the superior court, and the question is presented here for the first time. Under the liberal rule applied to pleading in such cases, Liscomb v. Exchange Nat. Bank, 80 Wash. 296, 141 Pac. 686, and Richardson v. Brotherhood, etc., 70 Wash. 76,126 Pac. 82, 41 L. R. A. (N.S.) 320, we think the objection to the complaint is not well founded. Especially is this true in view of the fact that the complaint alleges:

"That said estate of A. W. Burnett, deceased, has no other property or means wherewith to pay the claims of said creditors, save and except the interest and equity in the said lands and premises under said contract."

It is also contended by the respondent that the evidence does not establish that there was not sufficient property left by the deceased in Montana to pay his debts. Upon this question, one H. C. Smetters testified that he had a conversation with Mrs. Burnett probably a month after her husband's death, and that Mrs. Burnett stated to him that she did not know of any property in Silver Bow county, Montana, and referred him to her attorney, on Frank C. Walker, of Butte; that in conversation with Mr. Walker, the latter said that there was no property left there that claims could be filed against. Mrs. Burnett having referred the witness to the attorney, what the latter said was competent evidence against her. In 2 Jones, Commentaries on Evidence, Sec. 263, it is said:

"When a party to any proceeding expressly refers to any other person for an answer on a particular subject in dispute, such answer is in general evidence against him, for the reason that he makes such third person his accredited agent for the purpose of giving such answer."

The respondent also claims that the appellants cannot prevail because they did not present their claims to the administrator or administratrix of the estate in Montana within the statutory period of one year. The laws of the state of Montana were neither pleaded nor proven, and are therefore presumed to be the same as the laws of this state. Mantle v. Dabney, 44

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Wash. 193, 87 Pac. 122; Ongaro v. Twohy, 49 Wash. 93, 94 Pac. 916. The statute of this state, Rem. & Bal. Code, Sec. 1472 (P.C. 409 Sec. 339), provides, that if a claim be not presented to an executor or administrator "within one year after the first publication of the notice, it shall be barred." The record in this case fails to show when, if at all, in the administration proceedings in Montana, the first publication of notice to creditors to present their claims occurred. It follows, therefore, that the bar of the statute cannot be invoked against the claimants.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment in favor of the appellant.

Morris, C. J., Fullerton, and Ellis, JJ., concur. For Pl.

where a hus. [illegible] ♀ acquired real [illegible] [illegible] marriage relation [illegible] presumed [illegible] comm. [illegible] [illegible] burden rests [illegible] spouse asserting its sep. [illegible] fact [illegible] clear [illegible] satisfactory ev.

where hus. [illegible] ♀ [illegible] profits [illegible] conducted in Mont., [illegible] real [illegible] [illegible] husband's [illegible] sep. [illegible] ♀ [illegible] season [illegible] gift [illegible] her [illegible] profits [illegible] Mont. [illegible] tracing it [illegible]; which gift [illegible] presumed [illegible] shown [illegible] clear, convincing, strong [illegible] satisfactory ev.

The fact [illegible] married [illegible] kept bank accounts [illegible] her [illegible] sep. [illegible] presumption [illegible] comm. [illegible].

[illegible] hus., even [illegible] sep. funds [illegible] ♀ raises a presumption [illegible] gift [illegible] husband rather [illegible] trust [illegible] overcome [illegible] clear, cogent [illegible] convincing ev. [illegible] contrary.

GEBHART v. GEBHART.
(61 S.W. 964)

Court of Civil Appeals of Texas. 1901.

Appeal from district court, Dallas county; J.J. Eckford, Judge.

Suit for divorce by Bettie Gebhart against J. C. Gebhart. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bookhout, J. This is a suit for divorce brought by the appellee against the appellant in the district court for the Fourteenth judicial district of Texas upon allegations of excesses, cruel treatment, and outrages by defendant. The plaintiff asked that the custody of Margaret Myrtle Gebhart, infant daughter of the parties, should be awarded to her; alleged that defendant was indebted to her in the sum of $2,500 or more, and asked that said indebtedness should be considered in a division of the property; that the homestead in the city of Dallas, Tex., occupied by the parties, and 71 acres of land in Kaufman county, Tex., should be decreed to her as her separate estate; and that all the household and kitchen furniture, horse, carriage, cows, etc., owned by plaintiff and defendant, should be decreed and given to her for her sole and separate use and benefit, and that of her daughter, Margaret Myrtle. The defendant filed a cross bill, praying for divorce from the plaintiff on the ground of cruel treatment by her of him of such a nature as to render their living together insupportable. The defendant prayed for the custody of his infant daughter Margaret Myrtle; alleged that all of the property described in plaintiff's petition was community property; set out a list of community debts amounting to $3,739.05; asked that the court should set apart property out of the community estate sufficient to pay said debts, to which purpose it should be applied; that the remainder of the property should be equally divided between plaintiff and defendant; and that the name which plaintiff bore before she married the defendant should be restored to her. The cause was tried without a jury, and judgment was rendered by the court granting a divorce to plaintiff; awarding her the custody of the minor child; adjudging the homestead in Dallas, Tes., and the tract of 71 acres of land in Kaufman county, Tex., to be the separate estate of plaintiff; and awarding to her all the personal community property, including all household and kitchen furniture, books, horse, carriage, water tank, etc., except 15 head of Jersey cattle, which were subject to a mortgage of $600, one bureau, one washstand, one rocking-chair, and the medical works and instruments and family heirlooms of defendant, which were decreed to him. From this judgment the defendant has duly taken his appeal.

The court filed conclusions of fact, the first nine of which are as follows: "(1) I find that the plaintiff, Bettie Gebhart, and the defendant J. C. Gebhart, were married in Kaufman county, Texas, on the 22d day of December, 1886. (2) I find that plaintiff and defendant were at the time of the filing of this suit actually bona fide inhabitants of this state, and that they have resided in Dallas county, Texas, as husband and wife, continuously from the time of said marriage to the date of the institution of this suit. (3) I find that, during the time plaintiff and defendant lived

together as husband and wife, the said defendant was guilty of the excesses, cruel treatment, and outrages towards plaintiff as alleged in her first amended original petition, and that said excessed, cruel treatment, and outrages are and were of such a nature as to render the further living together of plaintiff and defendant as husband and wife insupportable to plaintiff. I find that alllthe material facts alleged in plaintiff's first amended petition as cause for divorce are true. (4) I find that as the result of said marriage of plaintiff and defendant there is one female child, Margaret Myrtle Gebhart, aged four years. (5) I find that plaintiff is a proper and suitable person to have the care and custody of said minor child, Margaret Myrtle, and that defendant is a wholly unsuitable person, and that it is for the best interest of said child that she should be placed in the custody of her mother, the plaintiff in this case. (6) I find that on the 28th day of August, 1889, Frank Field and Thomas Scurry, by general warranty deed, conveyed to plaintiff the property on Ross Avenue occupied by plaintiff as a homestead, being 150 by 130 feet, and fully described in plaintiff's first amended original petition; that said deed recited the consideration, 'Paid by Bettie Gebhart out of her separate funds, as follows: $2,880 cash in hand,' and the execution of notes by plaintiff and defendant for the balance of the purchase money, $2,880; that the said deed conveyed said property to the plaintiff, 'Bettie Gebhart, * * * for her sole and separate use'; that at the time of said conveyance, and prior thereto, the defendant was indebted to plaintiff in the sum of $4,000 or more. I find that said property was deeded to plaintiff at the request and under direction of the defendant. I find that it was the intention of defendant, in having the said property conveyed to the sole and separate use of his wife, to pay off, discharge, and satisfy the amount of his indebtedness to her, and to make the same her separate estate and property. I further find that defendant agreed with his wife to pay off and discharge the deferred payments due on said homestead, and that it was his intention to vest the title to said property in his wife as her sole and separate estate. I find that $1,600 of said purchase money is still unpaid. (7) I find, with reference to the 71 acres of land in Kaufman county First, that, at and prior to the date of the purchase of the alleged outstanding title by the defendant, the title in plaintiff, as her separate estate, had already become vested and complete in her by the statute of five years' limitation, by reason of the fact that the testimony shows that she had held, used, and occupied the same in peaceable possession, under and by virtue of a deed convying the same, duly recorded and had paid all taxes thereon for more than five years; second, I further find, from the evidence in the case, that the purchase of the outstanding alleged title made by defendant was made by him for the sole and exclusive use and benefit of his wife, the plaintiff herein, and that such conveyance os such outstanding title was procured by defendant to be made for the purpose of merging such outstanding title in the plaintiff herein as her separate estate, and not as community property. I further find that said 71 acres is subject to a mortgage for $1,050. (8) I find that plaintiff and defendand have personal community property as follows: Household and kitchen furniture; horse and carriage; water tank; books; one herd Jersey cattle, consisting of about thirteen head, which herd of cattle is subject to a mortgage for about the sum of $600. (9) I find that all the other personal property is the separate property of plaintiff."

a husband [illegible] [illegible] intention [illegible] vesting [illegible] title [illegible] her sep. estate, [illegible] deed conveying [illegible] her [illegible] her sole [illegible] sep. use, [illegible] reciting [illegible] cash consid. [illegible] her [illegible] her sep. estate. The deposed [illegible] secured [illegible] note executed [illegible] hus. [illegible] comm. estate, [illegible] intention [illegible] discharging a debt owing [illegible] hus. [illegible] loaned [illegible] marriage.

Hold: [illegible] divorce [illegible] property [illegible] award [illegible] her sep. [illegible]

Note: not un. [illegible]

The evidence is sufficient to support the facts as found by the trial court embraced in the above conclusions.

There is no assignment of error presented in the brief of the appellant challenging the correctness of the judgment decreeing a divorce in favor of plaintiff. Nor is there any complaint made of the court's refusal to decree a divorce in favor of defendant upon his cross bill. No complaint is made to that part of the decree awarding the custody of the minor child to plaintiff.

Appellant contends (1) that the court erred in adjudging the land on Ross avenue to plaintiff as her separate property; (2) in adjudging the 71 acres in Kaufman county to plaintiff as her separate property; (3) that the court erred in excluding certain testimony offered by defendant.

The property on Ross avenue was purchased by defendant for the purpose and with the intention of vesting the title in plaintiff as her separate estate. He caused the same to be conveyed to her. The deed recites that the cash consideration was paid by her out of her separate estate. The deferred payments were secured by notes executed by both plaintiff and defendant, and payments were afterwards made on these out of the community estate. The deed on its face placed the title of the property in Mrs. Bettie Gebhart for her sole and separate use. The status of the title of the property then was fixed by the deed. The fact that the deferred payments were made out of the community fund would not change the status of the title, especially when it was the intention in making such payments to discharge a debt owing to the wife by the husband for money loaned by her to him before their marriage. Schuster v. Jewelry Co., 79 Tex. 179, 15 S. W. 259; Aultman, Miller & Co. v. George (Tex. Civ. App.) 34 S. W. 652; Cavil v. Walker (Tex. Civ. App.) 26 S. W. 855. We conclude that there is no error in that part of the judgment awarding the property on Ross avenue to plaintiff.

2. The 71 acres of land in Kaufman county was the property of plaintiff before her marriage to the defendant. The title had become fully vested in her under the statute of limitations of five years. The money expended by the defendant in purchasing the title of the Rankin heirs was to perfect plaintiff's title to the land. It is not shown that the plaintiff's title was bettered by the conveyance procured by him. The fact that the defendant expended $557 out of the community fund for the purpose of acquiring the title of the Rankin heirs gave him no interest in the land. The most that could be claimed by appellant would be that the community had a claim against the separate estate of the wife for the amount so expended. But it appears that defendant was largely indebted to plaintiff for money loaned him by her prior to their marriage, and it does not appear that the amount expended by him, even if the same would be considered a charge against her estate, is more than the amount that he owed her.

The second assignment is only partially copied. In the part copied complaint is made to that part of the judgment which awards appellant certain personal property, in that the same is indefinite in not specifying the goods and chattels awarded to him. We have carefully examined the judgment, and do not think it subject to this criticism. Finding no reversible error in the record, the judgment is affirmed.

For Pl.

SHANAHAN v. CRAMPTON et al. (No. 14,167)
(92 Cal. 9)

(Supreme Court of California. 1891)(Pac. Rep. Vol. 28)

Commissioners' decision. Department 2.

Appeal from superior court, Sacramento county; John W. Armstrong, Judge.

Action to quiet title to land by Shanahan against Crampton et al. From a judgment of nonsuit plaintiff appeals. Affirmed.

Vanclief, C. This is an action founded upon section 738 of the Code of Civil Procedure to quiet plaintiff's alleged title to a block of land in the city of Sacramento. The plaintiff brings this appeal from a judgment of non suit against him, rendered upon the evidence on which he rested his case. The substance of the complaint is that the plaintiff is, and for a long time has been, the owner of the land in question, and that the defendants, without any right or title whatever, claim and assert an interest therein adverse to the plaintiff. Prayer that the adverse claims of defendants may be determined; that plaintiff be adjudged to be the exclusive owner of the land, etc. The complaint was not verified. The separate answers of the defendants each specifically denies the alleged ownership of the plaintiff, and claims an interest in a portion of the land, derived from Coleman and Bates through a conveyance from Julia K. Shanahan, the wife of the plaintiff; and further alleges that the plaintiff is estopped from denying defendants' title, and specially sets forth the grounds of the alleged estoppel. At the commencement of the trial it was admitted by all the parties that Coleman and Bates were the owners of the land on February 27, 1884. The plaintiff then put in evidence the following deed from Coleman and Bates to plaintiff's wife: "We, William P. Coleman and Geo. E. Bates, of the county of Sacramento, state of California, grant to Julia K. Shanahan of the same place, as her separate property and estate, all that real estate, all that real property situate in the city of Sacramento, state of California, and designated as lots Nos. one, two, three, four, five, six, seven, and eight, in square bounded by S. and T and Twenty-Ninth and Thirtieth streets, (29th and 30th streets.) City taxes now due to be paid by the grantee. Consideration, $400. Witness our hands this 27th day of February, 1884. (Seal.) Geo. E. Bates, (Seal.) W. P. Coleman." This deed was duly recorded on the 18th day of June, 1884. The plaintiff next put in evidence his own deposition, in which he deposed that he and Julia K. Shanahan were husband and wife, having been married in October, 1882, and having lived together as such ever since; that his wife never had any separate property; that the whole consideration for the deed of Coleman and Bates to his wife was paid from his earnings since his marriage; that it was his intention to have said deed executed to himself and wife, and he did not know that it was executed to her alone until about three months after it was executed; that he had never sold or disposed of the land, nor authorized any other person to do so; and that he had made and paid for improvements on the land, and had paid the taxes thereon until July, 1887. On cross-examination he deposed that his wife had sold the land to the defendant Crampton in July 1887, without his knowledge or consent, but that he had notice of such sale

about one month thereafter, and more than two years before the commencement of this action, yet had never asked his wife to convey the land to him, because he thought it was all right; that he had never notified Crampton that he (plaintiff) claimed any interest in the land, nor that his wife had no authority to sell it, until he did so by the commencement of this action; that he had never restored, or offered to restore, to Crampton any part of the purchase money paid by the latter to his wife; that he had never received any part of that purchase money; that his wife had always claimed the land as her separate property, and claimed the right to do as she pleased with it and the purchase money received for it; that hedid not notify Crampton of his claim to the land before commencement of this action because he did not know that he was entitled to any remedy until a short time before this suit was commenced; and he further deposed that his wife, without his knowledge or consent, executed a mortgage on the land in June, 1885, to the Germania Building & Loan Association, to secure a loan of $550, of which he had no notice until eight months thereafter, Plaintiff next put in evidence a deposition of Maurice Dwyer, who deposed that he was the father of plaintiff's wife; that she had no separate propertywhen she married, and had acquired none since to his knowledge; and that the sale of the land in question by plaintiff's wife has caused much trouble between her and the plaintiff. The foregoing is the substance of all the evidence on which plaintiff rested his case.

The motion for nonsuit was made on the following and other grounds: (1) That it appears by the deed from Coleman and Bates to Mrs. Shanahan that it was the intention of the grantors to convey the property to her as her separate property, and that it was so conveyed, and, if plaintiff has any equitable rights to the property, he cannot assert them in this action to quiet his title; (2) that the plaintiff has not restored, or offered to restore, to Crampton the purchase money paid by him to plaintiff's wife; and (3) that, under the circumstances appearing, the plaintiff is estopped from denying that the land was the separate property of his wife. I think the nonsuit is justifiable on the ground first above stated. The legal title was conveyed to the wife. Swain v. Duane, 48 Cal. 359. If, as testified by the plaintiff, the purchase money was paid from community property, (his earnings after marriage,) and the wife took the title in her name, without his knowledge or consent, and held it adversely to him, she took and held it in trust for the marital community. The trust resulted from the fact that the purchase money was community property. Civil Code, Sec. 853; Hill v. Bugg, 52 Miss. 401; Bent v. Bent, 44 Vt. 555, Having at least the legal title, she could convey it to the defendants; and, if the plaintiff is entitled to any relief against them, it can be only an adjudication that they hold the legal title in trust for the benefit of the marriage community. But it is well settled that such relief is not appropriate in an action merely to quiet plaintiff's title under section 738 of the Code of Civil Procedure. Learned v. Welton, 40 Cal. 349; Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. Rep. 518; Brewer v. Houston, 58 Cal. 345; Harrigan v. Mowry, 84 Cal. 457, 22 Pac. Rep. 658, and 24 Pac. Rep. 48. I think the judgment should be affirmed.

We concur: Belcher, C; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J. I concur in the judgment solely upon the ground of Swain v. Duane, 48 Cal. 559. If the question were an open one, I should be of opinion that land conveyed to a wife for a money consideration is presumptively community property, subject to the control of the husband and that its character could not be changed by any language which the grantor might choose to put into the deed.

For Def.

where [illegible] husbands' savings [illegible] marriage [illegible] conveyed [illegible] "as her sep. [illegible] estate" [illegible] contrary [illegible] intention [illegible] conveyance [illegible] assert [illegible], equitable [illegible] quiet title [illegible] grantee founded [illegible] Code Civ. Proc. Cal. § 738, [illegible] provides [illegible] person [illegible] estate [illegible] adverse [illegible] adverse claim."

In the Matter of the Estate of Anna Deschamps.

(77 Wash. 514, 1914)

Appeal from a judgment of the superior court for King county, Frater, J., entered April 23, 1913, upon excepting to the final account of an executor. Affirmed.

Chadwick, J.--Mrs. Deschamps died on the 24th day of December, 1909, leaving a will, by the terms of which she devised and bequeathed to Mrs. McCabe, a daughter by a former husband, all of her estate, except certain real property situated in Pierce county, which she willed to her husband, Samuel Deschamps, upon condition that he relinquish any claim which he might have in the estate devised to her daughter. The will was duly admitted to probate and pronounced valid. Deschamps was ordered to elect whether or not he would abide by the provisions of the will. In compliance with this order, Deschamps filed a notice in which he declined to accept under the will, and stated his intention of retaining his separate and community interest in the property so devised. He also filed objections and exceptions to the final account of the executor, which were overruled and denied. On April 23, 1913, the court entered a decree awarding the real property to the daughter Mrs McCabe. From an order overruling objections and exceptions to the final account this appeal is taken.

The only question for our determination is whether or not the real property in controversy is community property. Appellant bases his claim upon the facts that, in the deed of conveyance, he is named as joint grante that part of the consideration was his separate property, and that the property was acquired during the time he and the dedeased were living together.

At the time of her marriage Mrs. Deschamps was the owner of the Olympic Apartments, in Seattle, Washington. Appellant claims that they were in bad condition, and that he paid out some of his own money in repairs and up-keep. This would not give him a community interest. The status of the property was fixed at the time it was purchased. Katterhagen v. Meister, 33 Wash. Dec. 58, 134 Pac. 673. It was in Mrs. Deschamps, and unless divested by deed, by due process of law or the working of an estoppel, must remain there, subject to a possible equity under the case of Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, as distinguished in Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 Pac. 1088, and United States Fid. & Guar. Co. v. Lee, 58 Wash. 16, 107 Pac. 870, in which case the court said: "We do not desire to extend the rule in that case." The amount advanced, if any, was small, and entirely disproportionate to the value of the property and it nowhere appearing that it was advanced with the understanding on the part of either husband or wife that it carried an interest in the property, it ought to be disregarded under the rule of Worthington v. Crasper, 63 Wash. 380, 115 Pac. 849.

Mrs. Deschamps traded a one half interest in the apartments to one Crow for the property in controversy, consisting of two lots and a dwelling house, described as Lots 31 and 32, Block 174 Gillman's Addition to

Seattle. This property was mortgaged for $2,286.70, which the grantees assumed. The other half interest in the Olympic Apartments was traded for a farm in Pierce county, also mortgaged. This mortgage was later foreclosed, and with this property we are not concerned. In both these transactions, appellant is named as joint grantee. Appellant says that he gave Grow, as a part consideration for the Gillman Addition property, mining stock worth $600, and about $100 in cash, and that he paid out of his own money over $200 in installments to be applied on the mortgage. The stock was not shown to have had any value; it had never paid any dividends. The grantor does not seem to have been sufficiently impressed with its value to consider it a factor in the purchase price. While appellant's testimony as to the payments made by him is undisputed, it is also unsupported. It is probable that appellant furnished the money to make six payments of $35.17 each, as he claims; no reciepts were offered in evidence. Assuming however, that appellant did expend the sums claimed to have been spent, the total amount would not exceep $500. This, under the authorities cited, would not give him a community interest in the property. The conduct of the husband after the death of his wife is such as to warrant a belief that he did not at the time regard the property as his own. The beneficiary under the will met all payments due on the mortgage and in the way of t taxes and assessments. He allowed her to proceed apparently on the theory that the property was the sole and separate property of her mother and that she was the sole devisee.

Appellant contends that he is the owner of a community interest in virtue of the deeds. He is named as a common grantee. The testimony upon which the husband depends to show his interest in the property, as he claims it to be evidenced by the deed, is as follows:

"Q. Do you recall how the deed came to be given to Mr. and Mrs. Deschamps, both names being mentioned here? You may have forgotten it, Mr. Grow, I will submit it to you. It is 'Exibit B' and this is your signature J. A. Grow? A. Yes. Q. And I call your attention to the body of the deed which makes the grantees Samuel Deschamps and Anna Deschamps. Now do you recall anything about why that was? A. Why, as we were going down to get the deed signed up, Mr. Deschamps asked Mrs. Deschamps if she was willing for his name to appear in the deeds both the same, and she said Yes, to have them; he wanted his name in the deed. That was about all . there is to it."

Another witness testified as follows:

"I had a client that had two hundred acres over at Roy, Washington, and wanted to get into a rooming house. I was up there one evening at Mr. Deschamps' and Mrs. Deschamps' place and I submitted a proposition to them. So, of course, they says: 'Well, we will look into the matter.' So I brought my client up there to look at the house and after we got through looking through the house, we took a trip to Roy, Washington, to look at the land. So when we got over there, why, coming back, why everything was satisfactory. We were going to take Mrs. Deschamps along with us at the time but she says the both of them cannot leave the house at the same time. So Mr. Deschamps went over there to look at the land and he explained it to her just as he saw it and, of course, they agreed to make the deal. So we made the deal. Q. Now, what talk, if any, had you with Mrs.

The status [illegible] sep. [illegible] fact [illegible] hus. [illegible] repairs [illegible] upkeep except [illegible] possible equity therefor, [illegible] disregarded [illegible] small [illegible] advanced [illegible] understanding [illegible]

The fact [illegible] sep. real estate [illegible] her hus. [illegible] grantee [illegible] deed, [illegible] comm. [illegible] when [illegible] he furnished a [illegible] apparent [illegible] regard [illegible]

[illegible] he ev. [illegible] insufficient [illegible] show [illegible] deed [illegible] hus. [illegible] comm. [illegible] undisputed [illegible] consid. [illegible] sep. real [illegible] hus. furnishing [illegible] very little [illegible] show [illegible] deed [illegible] herself [illegible] hus., intended [illegible] a ½ [illegible] prop. [illegible] hus. [illegible] assert, [illegible] represented [illegible] advances.

Deschamps with reference to making the deal? A. Well, when we got through taking the invoice up at the house and we came down to--I asked them to come down to the office; I had my office at 605, Third Avenue, at that time . . . I asked them to come down to close up the deal. So when the time comes they were down at the time . . . .. so when the deed was drawn, I asked Mrs. Deschamps, . . . 'Now Mrs. Deschamps, do you want this deed in your name or in your husband's? I asked Mr. Deschamps first, 'Do you want this deed in your name?' He says, ' Ask my wife. Whatever she says.' . . . So she says, 'Why certainly,' . . . the property belongs equal between us both."

Appellant's main reliance is put upon the case of In re Tresidder's Estate, 70 Wash. 15, 125 Pac. 1034. In that case, the husband, attended to the purchase of the property and there was much testimony to support the contention that the property was purchased with the separate funds of the wife. We held that the husband having taken the deed and having directed the insertion of the name of his wife as grantee, together with the recitation that the property was sold and conveyed to the wife "as and for her sold and separate property, use and benefit, and not as community property," was sufficient to bind the husband, and that we would not hear him in denial of his own act. In this case, the consideration paid for the property was almost, if not entirely, paid out of the property of the wife. It is not shown that the wife ever intended to give up a one-half interest in the property or that she understood that her husband could assert a greater interest in the property than would be represented by his advances, if any. The mouth of the wife is closed in death, and there is no one to speak for her unless it be the law, so often declared, that where property standing in the name of either spouse or in the name of both spouses, is presumed to be community property, that such presumption is rebuttable and that courts will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties. Having this principle in mind, and considering the whole record, we are not satisfied that the husband has made out a case that would warrant this or any other court in decreeing him to be the owner of a one half interest in the property.

Certain personal property was involved in the trial below. The court in rendering its decision said:

"In the matter of the estate of Anna Deschamps, deceased, the ruling of the court in that case is, and the real property described in the City of Seattle, was the separate property of the deceased. That the furniture was, of course, community property, and it being frittered away and lost, the executor of the estate will be held to account for it, and you may take testimony as to the value of it."

No testimony seems to have been taken as suggested by the court and no findings were made. The state of the record is such that we do not feel warranted in passing on the value of the personal property.

The judgment of the lower court is affirmed.

Crow, C. J., Ellis, Main, And Gose, JJ., concur.

KATHERINE FIELDING, Respondent, v. H. L. KETLER et al Appellants.

(86 Wash 194, 1915)

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered September 15, 1914, upon findings in favor of the plaintiff, in an action for money loaned, tried to the court. Affirmed.

Holcomb, J.--Numerous assignments of error are made by appellants on this appeal, but the only question argued is whether or not the debt is a community debt and should stand as a lien against the community property of appellants. The trial court so found and concluded and rendered judgment accordingly.

Katherine Fielding is the mother of appellant Martha Ketler. Appellants had been married some thirty-one or thirty-two years prior to the original transaction involved in this action, and were living together as husband and wife at the time and since. On October 7, 1911, Martha Ketler obtained from respondent three hundred dollars, which she claimed and testified was an advancement or gift to her. Respondent testified it was a loan, produced a letter from her daughter admitting it was a loan, the court so found, and the evidence fully justifies the finding. Appellants claimed, however, that the money was used by the wife as part purchase price of a hotel business, not the real estate, which she bought and managed as her own sole and separate property, and with which the husband had nothing to do.

The legal presumption is, of course, that the money being borrowed, it became a community liability. Our statutes define separate property as that acquired by either spouse, (1) before marriage, or (2) by gift, devise or inheritance, and the rents, issues and profits of property so acquired. Rem. & Bal. Code, Sections 5915, 5916 (P.C. 95 Sections 25, 9). Exceptions are also made in favor of the wife as to her earnings by personal labor, and as to the earnings and accumulations of herself and minor children living with her, or in her custody, while she is living separate and apart from her husband, by the provisions of Rem. & Bal. Code, Sections 5920 and 5921 (P.C. 95 Sections 17, 35). The hotel was occupied by the appellants together, though the husband was away much of the time at other work he had, and the wife ran the hotel.

In this case, appellants in reality sought to establish that the money was acquired by the wife as a gift from the mother, so as to come under the provisions of Sec. 5916, supra, and failed. It was established as a loan to the wife, during the existence of the status and relations of the community. In such case it is a community obligation. Rem. & Bal. Code, Sec. 5917 (P.C.95 Sec. 27); Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398; Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176; Main v. Schell, 20 Wash. 201, 54 Pac. 1125; Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937; Graves v. Gravew, 48 Wash. 664, 94 Pac. 481.

The judgment entered was correct in giving judgment against Martha Ketler personally, and against the community consisting of herself and husband.

Affirmed. For 101

Morris, C. J. Mount, Chadwick, and Parker, JJ., concur.

The loan [illegible] hotel [illegible] her hus., [illegible] she [illegible] hotel, constitutes a com. debt.

Note :- not [illegible] case.

IN THE MATTER OF THE ESTATE OF WILLIAM
C. FINN. MARGARET FINN, Appellant,
v. GEORGE L. FINN et al., Executors etc., Respondents.

(106 Wash. 136 1919.)

Appeal from a judgment of the superior court for Benton county, Truax, J., entered January 3, 1918, upon findings in favor of executors, in probate proceedings to determine the widow's interest in real estate. Modified.

Mackintosh, J.--The respondents were appointed by William C. Finn in his last will and testament as executors of his estate. The appellant, his widow, filed a petition praying that the S. 1/2 of Section 28, Township 8, N., Range 24 E., W. M. Benton County, be declared her sole and separate property, and that respondents, as executors of her deceased husband's will, be enjoined from administering upon this portion of the land as his estate. The trial court determined that the S. E. 1/4 of Section 28, and 420/1320ths of the S. W. 1/4 of Section 28 were community property, and that 900/1320ths of the S. W. 1/4 of Section 28 were the separate property of the appellant. The S. E. 1/4 of Section 28 we will hereafter call the Lucille Dawson tract and the S. W. 1/4 of Section 28 will be called the Will Drew tract.

Lucille Dawson, the appellant's daughter, made a homestead entry on the tract designated by her name. After having obtained title, she sold the property to the appellant, the agreement being that the appellant would pay $400 cash and that $600 should be paid by the appellant to Lucille Dawson's daughter. There was upon the property a mortgage of $1,000. The appellant borrowed $400 on her personal note from the bank with which she did business and received a warranty deed from Lucille Dawson and her husband; the $600 is still held in trust by the appellant for her grandchild. The appellant had a bank account at that time in her own name and had a credit of her own which she used at various times in obtaining loans. She also was the sole owner of one hundred and sixty acres of which about one-fourth was under irrigation and in cultivation. The note for $400 was signed by the appellant alone, and after running for three or four years, was paid in the latter part of 1912 by the deceased, at the same time that he paid several other notes. The original note was replaced by renewal notes, some of which, it would appear from the record, were signed jointly by the appellant and William C. Finn. The mortgage of $1,000 was paid by Finn in May, 1913.

The other tract was acquired by the purchase of script; Will Drew, a son of the appellant, having relinquished his homestead thereon. The script for the tract cost $1,320. The appellant borrowed $420 of this amount from the bank upon her individual note signed by herself alone, and the balance of $900 she obtained by mortgaging her separate property, the mortgage company, however, compelling Mr. Finn to sign both the note and mortgage. The $420 note was renewed from time to time, the amount of the note was increased to $525, and it was finally paid, along with

the $400 note already referred to. Mr. Finn appears to have joined in making the renewal notes which replaced the original note, and the mortgage upon appellant's separate property was paid by Finn in May, 1913.

The appellant bases her claim that these tracts are hers separately upon the fact that, at the time they were procured, her separate credit was used to obtain the funds which made the initial payments. The claim of the respondents is that the property was community property for the reason that it was ultimately paid for by community funds. The testimony shows that William C. Finn owned one tract of land in his own name, but was engaged in extensive farming operations upon property which he leased on shares, and included in his operations were the tracts here involved. The appellant's witnesses testify that Finn, at all times, recognized the tracts here in controversy as being his wife's property, and referred to them as such, and an effort was made to show that the rental which she was entitled to for that property, but which had not been paid to her by her husband, was used by him in retiring the indebtedness which she had created in making the purchases.

There will be no presumption indulged in that this indebtedness was paid out of community funds, but where the husband has in his possession both community and separate funds, the presumption is that he pays debts from the fund from which properly they should be met. Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186. We are of the opinion, however, from the testimony, that her share of the crops raised upon the property was not sufficient to have created any such funds during the years in which it was operated by her husband, and that those crops were not more than sufficient to have paid the taxes and interest during that time, and that the funds which ultimately paid off the indebtedness were community funds created by the husband in his general community operations. Those facts, then, present to us the question as to whether the status of the property is to be fixed as of the time of its acquisition or is to be determined by the nature of the funds which ultimately pay off the obligations originally incurred to acquire such property. An interesting argument can be made in support of either view, but, as we take it, the question is foreclosed by our decisions in the cases of Katterhagen v. Meister, 75 Wash. 112, 134 Pac. 673; In re Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009; Morse v. Johnson, 88 Wash. 57, 152 Pac. 677; Graves v. Columbia Underwriters, 93 Wash. 196, 160 Pac. 436. In the Katterhagen v. Meister case, above, it is said:

> "He paid $1,600 upon the purchase price from his separate funds. To that extent the property was separate. The remainder, or $5,050, was paid by the community. When the husband and wife united in the promissory note, the debt created was a community debt, and the money borrowed upon the note belonged to the community. It is not material whether they borrowed the money of a third party and paid it to the vendor or gave their note direct to him as a part of the purchase price. The rule would be the same in either case. Nor does the fact that the husband later paid the note out of his separate funds change the situation. The status of the property was fixed at the time of the purchase."

In this case, so far as the Lucille Dawson tract is concerned, we may say that the appellant paid $400 upon the purchase price from her

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separate funds; to that extent the property was separate, the remainder, or $1,000 was paid by the community. When she gave her separate promissory note, the debt created was a separate debt and the money borrowed upon the note belonged to her separately. This money was borrowed from a third party, and the fact that her husband later paid off the note by substituting a note signed by both, and that later the note was paid out of the community funds, does not change the situation; the status of the property, so far as the payments made thereon were concerned, was fixed at the time of purchase. The presumption that property acquired during coverture is community property is not overcome as to the share of the property represented by the $1,000 mortgage; no community credit or property was used in securing that share; in fact, the presumption is aided by the fact that community funds were used in paying the mortgage and to that extent this tract must be held to be the property of the community. The reason for this result appears more fully later in this opinion where we deal with the Will Drew tract. The obligation to pay the remaining $600 being solely the appellant's, it follows that one-half of the Lucille Dawson tract is the appellant's separate estate and one-half is community property.

In reference to the Will Drew tract, $420 of the $1,320 purchase price was obtained upon the strength of the appellant's separate estate, and to that extent the property acquired by her was her separate property, although later the obligation which she assumed may have been liquidated out of the community funds, but the $900 balance of the purchase price was obtained upon a note signed by both members of the community. This note was secured by a mortgage upon the appellant's separate property. It is true that the husband became a joint maker of the note because of the mortgage company's refusal to advance the money to the wife upon her sole signature.

The cases of Yesler v. Hoschsteller, 4 Wash. 349, 30 Pac. 398; Main v. Scholl, 20 Wash. 201, 54 Pac. 1125, and Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, are cited to the point that funds borrowed by a wife, even though borrowed on her separate property or on property in which she had invested her separate funds, are community property; but this court in United States Fidelity & Guaranty Co. v. Lee, 58 Wash. 16, 107 Pac. 870, referring to the Heintz case, says:

"We do not desire to further extend the rule announced in that case. In that case, and in the cases from this court there followed, the separate estates were not sufficient to make the purchases, and the credit of the community was drawn upon to complete the purchases. Money was actually borrowed and used for that purpose, so that a community obligation was created and a resulting community interest followed. The property thus purchased was not acquired by separate property, or the rents, issues, and profits thereof;"

and proceeds to demonstrate in the case then under consideration that the wife was not required to create a community obligation and did not intend to do so when she entered into the contract, and that she entered into a contract which she could amply protect from her separate estate, and distinguishes that case from the Yesler, Main and Heintz cases, laying down this rule:

"Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is community property, but this presumption may be rebutted by proof."

In Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 Pac. 1088, the Heintz case was again distinguished, the court saying that in the Heintz case the contract was presumably in the interest of the community, while in the case then under consideration the community did not contribute but that the separate funds of the wife were exclusively used,

"notwithstanding there may possibly be a technical sense in which it could be said the loan, evidenced by the note and mortgage executed by both husband and wife, contributed to the acquisition of the Aberdeen property."

In Graves v. Columbia Underwriters, 93 Wash. 196, 160 Pac. 436, it was held that the husband joining in a note secured by a mortgage on his wife's separate property, having been compelled to do so by the person loaning the money, did not make the money so obtained community property unless it was put to community uses; that, the wife being a married woman, the presumption is that property acquired during the marital relation would be community property, but that that presumption is a rebuttable one. So here, although by signing the note, the husband might have rendered himself liable to the payee, this was done as a matter of accomodation to the wife under the compulsion exercised by the lender; and, as between the husband and wife, the obligation created was not a community obligation but remained as it was originally intended, her separate obligation, although as to third parties the husband and wife would both have been liable had the mortgage security been waived and an action begun to collect upon the note itself. Where it cannot be said that community credit was called upon to assist in the purchase of the property, and that, therefore, the community was not interested in the property, although subsequently community funds were used in paying the obligation evidenced by the note and mortgage, the rule is, as we have heretofore stated it, that the status of the property is to be determined as of the time of its acquisition. The early cases which might seem to indicate that money borrowed by one spouse upon the pledge of separate property becomes community property, it will be discovered, were cases which held, as is noted in cases thereafter decided, that, where the spouse borrows the money upon the pledge of separate property and uses that money for the purpose of acquiring and completing the purchase of property, that does not, of itself, make the property so acquired community property, but merely that the presumption is that property acquired during coverture is community property and that its separate status can be determined by satisfactory evidence. In the instant case, as concerns the Will Drew tract, we are satisfied that such evidence has been produced and that the presumption has been met and overcome; that there was no intention at the time the property was acquired to involve the community in any obligation for its purchase; the entire payment having been made by money which the appellant secured on her personal liability and for which the community did not become liable except as to third parties.

The decree of the lower court will be modified to conform with the views herein expressed.

Mitchell, Main, and Tolman, JJ., concur.

The presumption [illegible] bus. [illegible] [illegible] sep. [illegible] comm. [illegible] indebtedness [illegible] fund [illegible] met. where [illegible] partly [illegible] sep. funds [illegible] extent [illegible] sep. [illegible] comm. funds [illegible] the [illegible] comm. [illegible].

where [illegible] partly [illegible] sep. funds [illegible] secured [illegible] joint note [illegible] sep. [illegible] its status [illegible] sep. [illegible] presumption [illegible] comm. [illegible] overcome, [illegible] subsequently comm. funds [illegible] obligation [illegible] intention [illegible] bus. [illegible] status [illegible] prop.

FREESE v. HIBERNIA SAV. & LOAN SOC. et al. (S.F. 3,210.)

Supreme Court of California. June 20, 1903.)
(73 Pac. Rep. 172.)
(139 Cal. 392)

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. C. Freese, administrator of the estate of Ellen Denigan, deceased, against the Hibernia Savings & Loan Society and another. From a judgment for defendants, plaintiff appeals. Reversed.

Angellotti, J.--Plaintiff administrator brought this action to recover the sum of $1,000, which, it was alleged, belonged to the estate of his intestate, and had been converted by the defendants to their own use. The action was tried without a jury, and the court granted a motion for a nonsuit, on the ground that the money sued for was not shown to have been the separate property of Ellen Denigan. From the judgment entered in favor of the defendants, plaintiff appeals, and the only ground alleged for reversal is that the court erred in granting the motion for a nonsuit.

The facts shown by the evidence, material to this controversy, are as follows, viz.: Ellen Denigan was, prior to her marriage, Ellen McCabe. She and Francis Denigan (whose name was also pronounced "Donegan" or "Dunnigan"), intermarried on the 19th day of January, 1862, and they continued to be husband and wife to the time of her death, which occurred July 3, 1896. At the time of her marriage, she was the owner of two parcels of real estate in San Francisco, one on Bryant street, conveyed to her in May, 1860, and one on Shipley street, conveyed to her in September, 1861. By a deed executed August 13, 1884, she and her husband conveyed the Shipley street lot for $2,000 cash. On August 18, 1884, there was deposited with Father Maraschi, treasurer at St. Ignatius College, to the credit of "Frank or Ellen Dunigan," the sum of $1,800. No other deposit was ever made on this account, and on July 6, 1886, the balance of principal remaining, viz., $1,700, was withdrawn. On the same day July 6, 1886, account No. 133,269 was opened by the Hibernia Savings & Loan Society with "Frank Denigan or Ellen Denigan" by a credit of cash of $1,700. On February 24, 1888, she conveyed the Bryant street land for a consideration of $6,750, which was paid her in cash, and on Monday, February 27, 1888 a deposit of $1,300 was made to the credit of said account. This account (133,269) continued to October 19, 1896, a little over three months after the death of Ellen Denigan, when it was closed, the balance at that date being $2,413.33. The only two deposits made to the credit of this account were the $1,700 deposit of July 6, 1886, and the $1,300 deposit of February 27, 1888, all the other credits being dividends of interest earned on these two deposits. On the day this account was closed with a payment by the bank of the balance of $2,413.33 (October 19, 1896), account No. 212,145 was opened by the defendant bank with "Francis Denigan or James Denigan," by a credit of cash, $2,413.33, the Francis Denigan therein mentioned being the surviving husband of said Ellen Denigan. The only other deposit to the credit of said account was one of $250 on July 9, 1897, the other credits being of interest dividends. On November 29, 1897, there

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was paid by the bank on this account to defendant M. D. Connolly, on the written order of said Francis Denigan, dated November 28, 1897, the sum of $1,000. It is not disputed, and cannot well be under the decisions, that a motion for a nonsuit should not be granted where plaintiff's evidence is such that, if the case had gone to a jury on that evidence and a verdict had been rendered for him, the evidence would be held sufficient to support the judgment upon the verdict. The rules as to nonsuit are the same whether the trial is by the court or by a jury. Goldstone v. Merchants' I & C. S. Co., 123 Cal. 625, 56 Pac. 776.

The question then is whether, if the court below had, upon the evidence hereinbefore set forth, found that the property in question was the separate property of Ellen Denigan, such finding could be held to be supported by the evidence. We entertain no doubt that this question must be answered in the affirmative. While the presumption attending the possession of property by either husband or wife is that it is community property, such presumption is a disputable one, and may be controverted by other evidence. Respondents contend that the evidence of plaintiff was not legally sufficient to overcome this presumption. They rely upon expressions of this court in various cases to the effect that the fact that property is separate property of one of the spouses must be affirmatively established "by clear and decisive proof," "by clear and satisfactory evidence," and "by clear and convincing evidence." Speaking of expressions of this nature, some of which were stronger in terms than any used by this court, such as "clear and conclusive proof," and "conclusive proof." Ballinger, in his work on Community Property, says, in section 167: "It is not believed, however, that these terms should be considered as going to the length that their general meaning might import. Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency, in order to counterbalance the naked presumption that the property was acquired with the funds of the community. The property is merely considered as the property of the community until the contrary is shown by legal proof, and legal proof would seem to be a preponderance of the testimony under all the facts and circumstances of the particular case." See, also, 6 Am. & Eng. Ency. of Law (2d Ed.) p. 327. Clearly, it was never intended by this court to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. Civ. Code Proc. Sec. 1826. Such proof is never required. Generally, moral certainty only is required or that degree of proof which produces conviction in an unprejudiced mind; and evidence which ordinarily produces such conviction is satisfactory. Id. Sections 1826, 1835. Even in criminal cases, where life and personal liberty are involved, the law goes no further than to require that guilt shall be proved beyond a reasonable doubt, the accepted definition of which is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind, and that in the face of such evidence the naked

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presumption, unsupported by any testimony, must fall. In considering whether or not such a degree of proof has been attained, we have the right to consider such presumptions and inferences as are authorized by the law of evidence. That a presumption declared by law has its place in such a dispute was acknowledged by this court in Denigan v. San Francisco Savings Union, 127 Cal. 142, 147, 59 Pac. 390, 78 Am. St. Rep. 35. An inference is simply a deduction which the reason of the judge or jury makes from the facts proved, and, in considering a question of the character here involved, we have the same right to make such reasonable deduction from the facts proved as we have in considering other questions. Measured by these rules, it is difficult to understand how it can be held that the evidence given on the trial was not legally sufficient to support a finding that the property was separate property. There was not a single circumstance shown by the evidence in aid of the presumption of community property, unless it be the form in which the account was kept, and, in view of what was said by this court in Denigan v. Hibernia S. & L. Soc., 127 Cal. 137, 59 Pac. 389, a case involving the deposit here in question. and Denigan v. S. F. Sav. Union, supra, it is apparent that the form in which the deposits were made does not materially assist.

It was established beyond doubt by the evidence that Ellen Denigan was the owner of two parcels of real estate at the time of her marriage, and that the same were therefore her separate property. It is presumed by direction of law that they continued to be her separate property as long as she owned them, and that the proceeds of the sale thereof were and continued to be her separate property. The only question, then, concerning which there could be the slightest doubt, is as to whether these proceeds were sufficiently traced into the account with the defendant bank that existed at the time of her death, for, under the evidence in the record, there can be no reasonable doubt in the mind of any unprejudiced person that the account opened October 19, 1896, with "Francis Denigan or James Denigan," with a credit of $2,415.33, was opened by a deposit of the $2,415.33 that day taken from that account. That account, prior to the death of Ellen Denigan, had, exclusive of interest dividends, but two credit items, one of July 6, 1886, of $1,700, and one of February 27, 1888, of $1,300. It is fairly inferable, from the circumstances shown, that the first deposit was the $1,700 on the same day withdrawn from the account of "Frank or Ellen Denigan" with Father Maraschi, and that the second was a portion of the proceeds of the sale made February 24, 1888, of Ellen Denigan's Bryant street property, and such, we think, would be the natural conclusion from the uncontradicted facts. It is also fairly inferable, from the evidence before the court, that the $1,800 deposited with Frank Marasbhi, to the credit of "Frank or Ellen Ducigan." on August 18, 1884, and which was the only credit item except a dividend for interest, was a portion of the $2,000 paid her not earlier than August 15, 1884, for her Shipley street property. In the absence of evidence of circumstances the effect of which would be to impair the showing made, we are satisfied that the proceeds of the sales of the separate property have been traced clearly enough to support a finding that the money on deposit with defendant bank at the time of Ellen Denigan's death was her separate property. It appears that $250 was deposited to the credit of the "Francis Denigan or James Denigan" account on July 9, 1897, and it is said that this certainly was not the separate property of Ellen Denigan, and that

this must be held to be a part of the $1,000 paid to defendant Father Connolly. If this be granted, it would simply reduce plaintiff's claim by $250, and would not take away his right of recovery of the remaining $750. It is suggested by appellant that the $250 was probably deposited in this account to partially compensate for $600 withdrawn from the original account after death of Ellen Denigan, but it is doubtful if any such inference is warranted by the evidence in the record. There was no merit in either of the other grounds specified in the motion for nonsuit. Plaintiff is the administrator of the estate of Ellen Denigan, and, so far as appears, the only administrator that said estate has ever had, and, as such, he is entitled to the possession of all her personal property as against the world.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: Shaw, J,; Van Dyke, J.

For Pl.

A [illegible] her marriage [illegible] 2 parcels [illegible]. One [illegible] lots & sold [illegible] $2,000 [illegible] 5 days later $1,800 & deposited [illegible] treasurer [illegible] college [illegible]. Subsequently [illegible] deposit & withdrawn [illegible] day $1,700 & deposited [illegible]. Later she conveyed [illegible] lot [illegible] $6,000 cash, [illegible] 3 days later $1,300 & deposited [illegible] names [illegible] deposits. After [illegible] deposits withdrawn, [illegible] redeposited [illegible] person.

Held: sufficient [illegible] support a finding [illegible] money [illegible] deposit [illegible] sep. Cy.

MARY HESTER, Respondent, v. O. M. STINE,
Appellant.

(46 Wash. ~~496~~ 469 1907.)

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered March 29, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

Dunbar, J.--Action in replevin for the recovery of personal property The suit was brought by respondent Mary Hester for the recovery of the possession of several hundred sacks of barley, or for the value thereof in case recovery could not be had. The respondent was a married woman, but the complaint was in the ordinary form, not disclosing the fact that she was a married woman, but alleging ownership and right of possession, demand, and refusal. The answer of the sheriff, appellant here, set up the fact that the property was taken under execution; also alleging that the plaintiff was the wife of one R. M. Hester, and that they had been living together in the community for a period of about ten years; and alleged the other ordinary facts in defense of an officer's right to take the property under execution. There was no reply to the answer, and motion was made by the defendant for a judgment on the pleadings, for the reason that the answer affirmatively set forth a full and complete defense to the cause of action, and that there had been no reply filed thereto. This motion was overruled, the cause proceeded to trial, and the court found, among other things, that the plaintiff was a married woman; that at the time of her marriage she was possessed of separate property to the amount of $2,200 in money, and twenty-five head of horses, and some promissory notes, and that at the time of her marriage her husband Robert M. Hester had no property and was largely in debt; that the plaintiff afterwards purchased the land upon which the barley was raised, and said land was paid for by the plaintiff out of her separate means and property; that the said barley was raised on said real estate, and was the rents, issues, and profits thereof during the year 1903; that the indebtedness and judgment upon which the execution issued under which the barley was levied upon was the separate debt of the husband R. M. Hester, contracted prior to his marriage with the plaintiff, and that the barley at the time of the commencement of the action was of the value of $656.71. From such facts the court announced its conclusions of law, to the effect that the said real estate and the said barley raised thereon were the separate property of the plaintiff Mary Hester; that she was entitled to a judgment for the return of the barley described in her complaint, and in case delivery could not be had, to a judgment for the sum of $656.71, the value thereof, with legal interest and costs. The plaintiff excepted specially to all the findings of fact made by the court, and to the conclusions of law.

It is plain from the testimony in this case that there was no commingling of separate and community property, which would bring it within the rule announced in Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398. Unquestionably the respondent purchased the land upon which the barley

was raised with her own separate money, earned by teaching school, clerking in stores, and working upon a farm, prior to her marriage. She conducted the farming of the land in her own name and in her own separate interest, and without any assistance from her husband who was most of the time absent from the state. The barley was deposited in her own name, and was in reality her separate property. The facts found by the court are so plainly established by the proofs that we do not deem a special review or analysis of the testimony necessary. Conceding the correctness of appellant's contention, that where the property is acquired after marriage the burden of proof is upon the one alleging its separate character, we think the proof in this case is ample to sustain such burden.

But it is contended by the appellant that the court should have sustained his motion for judgment on the pleadings, for the reason that the complaint did not contain any allegation of coverture or separate interest in the property in litigation, and that the answer of the sheriff showed a justification for the taking, and alleged that the respondent was the wife of one R. M. Hester, that they had been living together in the relation of husband and wife for about ten years, and that the property seized by him had been acquired by the said R. M. Hester and respondent since their marriage. The appellant is mistaken as to the allegation of the answer in this respect. The record shows that the allegation is, not that the property had been acquired by the said R. M. Hester and respondent since their marriage, but "that the said personal property had been acquired since the marriage of plaintiff and said R. M. Hester," and, of course, it is true that the particular property, to wit, the barley, had been acquired since that time. But the respondent alleged that she was the owner of it and was entitled to its possession, and the allegation of the answer, that the respondent was a married woman--which allegation was not denied--could not, under our laws, work a deprivation of respondent's right to sue for her own property. Bal. Code, Sec. 4502 (P.C. Sec. 3863), provides that every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried. In this case the respondent, in conformity with this law, sued as if she were unmarried. Section 4504 (P.C. Sec. 3873), provides that contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried; and Sec. 4505 (P.C. Sec. 3868), goes to the extent of authorizing a husband and wife to sue each other.

In the light of these provisions, it seems certain that the wife in this instance had the undoubted right to sue for the recovery of her property. Nor was she compelled, under the broad provisions of the law, to plead more specifically than she did. A case which cannot be distinguished in principle from the one under consideration is Freeburger v. Caldwell, 5 Wash. 769, 32 Pac. 732. There, as here, the action was by a married woman to recover the possession of personal property, and the defendant justified his taking by answering that he was a constable and had served a lawful writ of attachment upon the property; also, alleging, as the officer does in this case, that one of the plaintiffs was a married woman. Upon this state of facts appearing, the court rendered judgment for the defendant, on the ground that, since one of the alleged partners was a married woman, there was shown by the pleadings a want of legal capacity to sue in the plaintiff for the reason that it was not

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pleaded that the wife acquired her interest in the alleged partnership property through one of the channels through which the statutes of this state provide that a married woman may have separate property. The judgment of the court was reversed, for the reason that, under the liberal provisions of our statutes concerning the right of married women to do business for themselves, they should not be required to deraign their title when they sued for the possession of property and alleged ownership.

But even if the complaint could be held to be faulty in this particular, when the question was raised the plaintiff asked leave to amend her complaint, setting up ownership of the property in her own separate right. This request was refused, the trial court deeming the complaint sufficient. So that the appellant was not misled as to the true issues presented, and, under such circumstances, this court, if it deemed it were necessary, would consider the complaint amended to correspond with the proof.

The judgment is affirmed. [illegible] Pl,

Hadley, C. J., Rudkin, Fullerton, Mount, Crow, and Root, JJ., concur.

Barley raised [illegible] real estate [illegible] 6. [illegible]
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conducted [illegible]
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UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent, v. CORDIE C. LEE, Appellant.

(58 Wash. 16 1910)

Appeal by intervener from a judgment of the superior court for Adams county, Kennan, J., entered December 8, 1909, upon findings in favor of the plaintiff, in garnishment prodeedings, after a trial on the merits before the court without a jury. Reversed.

Mount, J.--Cordie C. Lee, the appellant here, intervened in a garnishment proceeding, and claimed as her separate property certain money on deposit in the Old National Bank of Spokane, which money had been garnisheed upon a debt owing by her husband, O. M. Lee, to respondent. Upon trial the court found that a part of the money garnisheed was the separate property of the appellant, and that the balance was community property belonging to the appellant and her husband. The appeal is from the order adjudging the community interest.

There are no disputed facts in the case. Stated in chronological order, the facts are, in substance, as follows: On April 4, 1902, O. M. Lee, then an unmarried man, became a surety to the respondent United States Fidelity and Guaranty Company upon an indemnity bond. On May 24, 1902, Mr. Lee was married to the appellant. At the time of the marriage, appellant was possessed of about $6,500, which she had inherited from her mother's estate. On November 9, 1905, appellant purchased a section of land from John Bovee for an agreed price of $3,200. She paid $640 in cash from her separate funds, and agreed to pay the balance in annual payments of $512 each, with interest at six per cent on deferred payments, and when the purchase price was fully paid a deed was to be delivered to her. She signed a written contract to that effect, and executed her personal notes for the deferred payments. At the time of this transaction, she had separate property in the hands of her brother in Kentucky sufficient to make the whole payment, and she intended to and did use this money to meet the payments when due. On December 1, 1906, she made the second payment of $512, and $153.60, interest, out of her separate property. In June, 1907, a judgment in the sum of $3,250 was obtained by the respondent against O. M. Lee, her husband, by reason of the indemnity bond above mentioned. On December 1, 1907, appellant paid out of her separate funds $512, and $122.88, interest, being the installment due on her contract at that time.

On March 4, 1908, appellant sold to R. L. Ford the land above referred to, for $6,400, and she and her husband joined in the contract of sale and deed. Appellant objected to her husband joining in the transaction, but upon the request of the purchaser and the advice of her attorneys that this would prevent any question of the community interest of her husband, the joinder was made. On March 30, 1908, a supplemental contract was made by which Mr. Ford agreed to pay to Mr. Bovee direct the balance due by appellant upon the purchase price of the land. This contract and deed were placed in escrow in the Old National Bank of Spokane. On December 1, 1908, Mr. Ford paid to Mr. Bovee $512 principal and $92.16

interest, being the fourth installment due Mr. Bovee on the contract with appellant. On December 28, 1908, a writ of garnishment was served on the Old National Bank, in the action wherein the respondent had a judgment against O. M. Lee. Thereafter the appellant intervened in the garnishment proceedings, and claimed the whole of the property in the hands of the bank as her separate estate. Pending the trial, Mr. Ford paid the balance of the purchase price of the land into the bank. The court concluded that $1,664, and certain interest, paid by the appellant out of her separate funds, entitled her to 1664-3200 interest in the funds as her separate estate, and that the balance paid by Mr. Ford into the bank was community property subject to the payment of the judgment against Mr. Lee. The question in the case is whether, under the facts stated, the proceeds of the sale of this land are wholly the separate property of the appellant.

The appellant acquired the property after marriage. She acquired it with her separate funds; that is, she made the contract in her own name without her husband joining her, and made three payments thereon out of her separate funds. It is true that she gave her individual notes for deferred payments, but at that time she had separate funds sufficient to make the whole payment. She did not desire to pay cash, and credit was extended for her accommodation. The record does not show directly that the vendor who took the contract and the notes relied upon her separate estate. The record is silent upon that question. No deed passed, and it was agreed that the deed should not be delivered until payments were fully made or until a mortgage was given back. The vendor probably relied upon the land as security for the deferred payments, and therefore made no inquiry as to the responsibility of the appellant in her separate right. The appellant, however, had money available sufficient to make the payments, and intended to do so out of her separate funds without assistance from her husband, but before the time when all the payments became due she sold the land for double the purchase price, and thereby made a profit of $3,200 upon an investment of $1,959.40. The statutes of this state provide:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will such property, to the same extent and in the same manner that the husband can, property belonging to him." Bal Code, Sec. 4489.

Property not owned or acquired as above stated, but acquired after marriage, is community property. Bal. Code, Sec. 4490.

"Every married person shall have hereafter the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried." Bal Code, Sec. 4502.

"Contracts may be made by a wife, and liabilities incurred, and the same my be enforced by or against her to the same extent and in the same manner as if she were unmarried." Bal. Code, Sec. 4504.

It seems clear from these provisions that a married woman may deal with her separate property as if she were unmarried, and that money or other property owned by her at the time of her marriage together with the "rents, issues and profits" of such money or property shall not be subject to the debts or contracts of her husband, and that she may manage lease, sell, convey, and incumber such property in the same manner as her husband can property belonging to him. It is clear, therefore, that if the appellant had paid her separate cash for the section of land which she acquired by contract from Mr. Bovee, the profits arising from the sale thereof would have been her separate property. She did not pay cash. She entered into a contract in her own name, without her husband joining her, to purchase the land. She made the first payment of $640 out of her separate estate. She agreed to pay the balance in five annual installments, and gave her personal notes for the deferred payments. She had the money or property in her separate estate which would be available and sufficient to meet these obligations when they matured. She afterwards paid the second and third installments out of her separate funds, but before the maturity of the fourth installment she sold the land, or more accurately speaking, the contract, thereby making a profit on the investment.

The evidence is reasonably certain that the transaction was the personal contract of the appellant dealing with her separate estate; that no community funds were invested, and there was clearly no intent to involve the community of herself and husband therein. If the personal notes signed by the appellant had not been given, it could not be said that there was any liability against either the appellant personally or against the community, for the contract was one by which the vendee agreed to convey the land to appellant when the payments were fully made. Time was made the essence of the contract, and it was provided that a failure to make any payment when due forfeited all payments made as liquidated damages. If a married woman may manage, sell, and incumber her separate property, and have the same right to acquire, manage and dispose of said property, and to sue and be sued, as if she were unmarried, and if contracts may be made by the wife, and liabilities incurred and the same enforced by or against her, to the same extent and manner as if she were unmarried, as the statutes quoted above provide, it is difficult to understand why the appellant was not acting within and for her separate rights when she made the contract stated.

The presumption is that property acquired during the marital relation is community property, but this presumption may be rebutted. Weymouth v. Sawtelle, 14 Wash. 32, 44 Pac. 109; Brookman v. State Ins. Co., 18 Wash. 308, 51 Pac. 395. This presumption has been met and clearly overcome in this case. The case of Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, was thought by the trial court to control this case. That case and the authorities therein cited are relied upon by the respondent for an affirmance of the judgment rendered in this case. In that case we said:

"From the foregoing statement it will be seen that the property acquired from the railway company and the mortgage company was paid for in part by the separate funds of the wife and in part by money borrowed on the property in which she had invested her separate funds. Under the rule announced by this court in Yesler v. Hochstettler, 3 Wash. 349, 30 Pac.

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[illegible] Same case.

398, and reaffirmed on rehearing in Main v. Scholl, 20 Wash. 201, 54 Pac. 1125, the funds borrowed by the wife, even though borrowed on her separate property, or on property in which she had invested her separate funds, was community property, and to that extent at least the property in controversy was paid for with community funds and became community property."

We do not desire to further extend the rule announced in that case. In that case, and in the cases from this court there followed, the separate estates were not sufficient to make the purchases, and the credit of the community was drawn upon to complete the purchases. Money was actually borrowed and used for that purpose, so that a community obligation was created and a resulting community interest followed. The property thus purchased was not acquired by separate property, or the rents, issues, and profits thereof. In the case at bar the appellant borrowed no money. Her separate estate was amply sufficient to meet the whole contract at the time it was entered into. She was not required to create a community obligation, anddid not intend to do so. She entered into a contract which her separate estate was sufficient to protect, and which she partly perfomed with separate funds, and without doubt intended to carry out as her separate contract without community liability. In these respects this case is distinguishable from Heintz v. Brown, supra. If we apply the rule in that case to the facts in this case, we must hold that married persons may not purchase property as separate property, except for cash, and may not make contracts and incur liability to the same extent as though unmarried, which is squarely in the face of the statutes above quoted. Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is community property, but this presumption may be rebutted by proof. Tested by this rule, we are satisfied that the property in question here was wholly the separate property of the appellant. We are therefore of the opinion that the contract in this case created no community obligation which would necessarily take the case within the rule of the Heintz case.

The judgment appealed from is therefore reversed, and the cause remanded with directions to the lower court to declare the whole fund in the bank the separate property of the appellant.

Rudkin, C. J., Dunbar, and Parker, JJ., concur.

Crow, J., took no part.

DORA HARRIS, Respondent, v. A. T. VAN De VANTER, Appellant.
(17 Wash. 489)
1897.

Appeal from Superior Court, King County.--Hon E. D. Benson, Judge. Affirmed.

The opinion of the court was delivered by

Dunbar, J.--This action is brought by respondent, Dora Harris, against A. T. Van de Vanter, as sheriff of King county, for damages for the conversion of certain cattle taken by him under a writ of replevin, at the instance of one Daniel O'Leary, in an action wherein Daniel O'Leary was plaintiff, and James Harris, the husband of the plaintiff in this action, was defendant. The facts are briefly as follows: The plaintiff and James Harris were married in 1879, and in 1881, while living on a community farm, the father of the plaintiff presented her with a cow and a heifer calf, stating to her that the cow and calf and their increase should be her separate property. It seems that at the time the husband, James Harris, assented to this arrangement, the father, at the time of the gift saying, "Dora, bear in mind these are your cattle, that the increase from now on will be your separate property." The cattle levied upon and which are the subject of this action are conceded to be the increase of the cow and heifer thus donated. Some of the increase have been sold by the husband, and the money thus obtained expended on the farm and for the support of the family. The stock was maintained and cared for by both husband and wife.

The complaint, of course, alleges the property to have been the separate property of the plaintiff, while the answer denies that the property was the property of the plaintiff. On these issues the case went to trial and a verdict was rendered in favor of the plaintiff for $625. Upon the opening statement of the plaintiff's counsel, the defendant moved the court to dismiss the action, on the ground that from such statement it appeared that the property, for the alleged conversion of which the action was brought, was community property of the plaintiff and James Harris. This motion was denied. At the close of the testimony the defendant again moved the court to dismiss the case on the ground that the property involved was community property and that plaintiff could not maintain the action, which motion was denied.

That portion of the instruction which is objected to by the appellant is as follows:

"Gentlemen of the jury: If you believe from the evidence in this cause, and by a preponderance of the evidence, that all of this stock in question was raised from stock that was originally the separate property of Mrs. Harris, that is, if it were property donated to Mrs. Harris by her father, after her marriage, but was a gift to her, and that all of this stock was the increase of that former gift, and that it has never been commingled with the property of the community at all; and if you believe from a preponderance of the evidence further, that there was an arrange-

ment between Mrs. Harris and her husband by which he was to keep this property and have the use of it for its feed and care, but that the increase was to remain the separate property of Mrs. Harris, then your verdict will be for Mrs. Harris, the plaintiff, for the value of these cattle at the time they were taken."

By our law (Gen Stat., Sections 1397, 1398), either spouse is given all property acquired by "gift, devise or descent, with the rents, issues and profits thereof." Any other property is community property. It is contended by the appellant that the words "rents, issues and profits" apply only to real property and tenements, and that, in any event, they do not embrace the increase of live stock, and some cases are cited from Texas and Louisiana to sustain this contention. Those cases are not in point, for the statutes in those states provide especially that such increase shall be common property. It is true that in Howard v. York, 20 Tex. 672, the court say:

"The increase of cattle is an acquisition of property not specified in the said second section, and is therefore made by the statute community property."

Sec. 2 was to the effect that "All property both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent," should be separate property of the wife. And the inference of the court was that the increase of cattle would not fall within that provision. But there was no occasion for any expressions of opinion by the court on that subject, for the statute specially provided that such increase should be community property. We think the instruction complained of in this case correctly stated the law, for our statute is broader than the original Texas statute, and especially makes the "rents, issues and profits" separate property, and, while in a strictly etymological sense, it might be that neither of the words, "rents, issues or profits would embrace the increase of cattle, yet to give this narrow and restricted construction to the statute would lead to results inconsistent with the evident intention of the legislature, which passed the community property law. It was the evident intention of the legislature that the wife should have the fruits of her separate estate, in whatever form they might come.

In Marx v. Lange, 61 Tex. 547, the rule is expressed as follows:

"It matters not how many mutations the separate money of the wife may have undergone, how often it has been invested in personal or real property; how often it has been loaned, collected and reinvested; as long as the substance thereof can be traced and indentified as the result of the money, it is her separate property."

Under the constitutional provision of California that "All the property, both real and personal, of the wife, owned or claimed by her before the marriage, and that acquired afterwards by gift, devise or descent shall be her separate property," a statute which provided that the rents and profits of the separate property of either husband or wife should be deemed common property was held to be in conflict with the provisions of the constitution above set forth, the court holding that the legislature had not the constitutional power to say that the fruits of the property of

the wife should be taken from her and given to the husband or his creditors. George v. Ransom, 15 Cal. 324.

In Lewis v. Johns, 24 Cal. 98 (85 Am. Dec. 49), the court say:
"All property which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband."

In Bongard v. Core, 82 Ill. 19, it was held that:

"A married woman may own real and personal property under the statute, and have her husband act as her agent in transacting the business growing out of such property, such as preserving and transferring the same, without subjecting it to the payment of his debts,"

and that

"The products of the lands of a married woman, the rents of her real estate, the increase from her stock, the interest on her money, etc., are all hers as absolutely as the capital or things from which they arise."

The language of the court was as follows:

"It would be but a mockery to say that a married woman might own and control her property, but all the increase or products arising from it should belong to her husband. To so hold would be to render her ownership useless, and to defeat the very purpose of ownership of property."

And while these cases were cases which did not involve the increase of stock, the principles announced by them are as applicable to this case as to the cases which were under consideration by the courts quoted.

However, in Hanson v. Millett, 55 Me. 184, which is a case involving the ownership of the increase of live stock, the court held that the natural increase of a mare possessed by a married woman belonged to the wife, and, as bearing on the proposition involved in this case, that the husband had given a bill of sale to this property, it also held that

"The naked declarations of the husband, as to the ownership of personal property claimed by the wife, are inadmissible."

Russell v. Long, 52 Iowa, 250, is also a case involving the increase of live stock. There it was directly held that

"The increase of live stock owned by the wife is her property and is not liable for the debts of the husband, though it is kept and cared for by him."

Paden v. Goldbaum (Cal.), 37 Pac. 759, is a case squarely in point on all the propositions that are raised in this case. There it was held

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"In an action by a wife to recover for cattle alleged to be her separate property, but sold on execution by a judgment creditor of her husband, although the evidence shows that her husband returned the stock for taxation in his name, and had the use thereof for dairy purposes, and represented to the judgment creditor that he was the owner thereof, if it appears that the stock was bought by the wife with money earned before marriage, and its increase was reversed as her property, a finding that the stock was in fact hers will not be disturbed."

Also, that

"Where a husband pastures his wife's cattle in return for their use for dairy purposes, she reserving the increase, such use by the husband, accompanied by a representation on his part that they were his, cannot, in the absence of any such representation on her part, or any act tending to mislead one holding a judgment against her husband as to the ownership of the stock, estop the wife from setting up ownership to defeat an executio levied on the stock under such judgment."

In this case there are no acts of the wife which would tend to create an estoppel, and the circumstances are altogether different from those in the case of Abbott v. Wetherby, 6 Wash. 507 (33 Pac. 1070, 36 Am. St. Rep. 176), cited by appellant, because there are accretions from respondent's estate in this case, and the community was not charged with all the expenses of the business, as it was in the case cited above, for one of the complaints of appellant here is that the community received the benefit of the sales of a portion of the increase of the cattle donated originally to the wife, and that it so received it with her consent. But the fact that she allowed the community to receive a portion of the profits of the business of stock raising could in no way estop her from claiming those unsold as her separate property.

The minor objections to the admission of testimony and the refusal of the court to admit, we think, are not meritorious. The excess of judgment, the testimony being that the value of the property was $600 and the judgment being for $625, was not called to the attention of the lower court on the motion for a new trial, and will therefore not be considered here.

The judgment is affirmed.

Scott, C. J., and Anders, J., concur.

In the Matter of the Estate of Sarah A. Buchanan.
(89 Wash. 172)
1916.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered March 29, 1915, upon findings in favor of the petitioner, in an action to subject property to administration as part of a community estate, tried to the court. Affirmed.

Parker, J.--This is a proceeding in the administration of the estate of Sarah A. Buchanan, deceased, wherein Earl McCoy, a son and heir of deceased, seeks to have brought into the estate, and administered as part thereof, certain property which he claims was the community property of his deceased mother and her husband, James Buchanan, at the time of her death, which property James Buchanan claims as his separate property and that it is therefore not subject to administration as part of the estate of the community. The relief prayed for by Earl McCoy is, in substance, that James Buchanan, who is the administrator of the estate of deceased, be required by the court to inventory this property and administer the same as the property of the community which was dissolved by the death of Sarah A. Buchanan. Issues were joined and trial had upon the merits, before the superior court without a jury, resulting in findings and judgment as prayed for by Earl McCoy, from which James Buchanan, both personally and as administrator, has appealed. The principal question, and the only one which we deem it necessary to here notice, is, Was the property the community property of deceased and James Buchanan at the time of her death?

The trial court made findings covering the facts in considerable detail. Contention is made in behalf of appellant that these findings are not in accordance with the evidence in a number of particulars. Because of the nature of the case, we have deemed it wise to look to the evidence as found in full in the statement of facts as certified by the court, rather than to the abstracts thereof prepared by respective counsel, in which they seem to be at variance. We have, therefore, read all of the evidence as found in the statement of facts, and are convinced therefrom that we should now take the same view of the facts as the trial did, especially since the court's conclusions rest largely upon the oral testimony of witnesses whose credibility is involved. In other words, we cannot say that the evidence does not preponderate in favor of the court's findings. We shall not analyze the evidence here, but state the facts, in substance, as found by the trial court, and some additional facts which we think the record shows and are worthy of note. The quotations in our statement following are from the findings.

Sarah A. Buchanan was married to James Buchanan on April 15, 1901. She was then a widow and had five children living, one of whom was Earl McCoy, the petitioner in this proceeding.

"Shortly prior to her marriage to James Buchanan and in January, 1901, the deceased sold a timber claim then owned by her as her sole and separate property, and received therefor the sum of approximately $885, over

and above all sums necessary to pay encumbrances upon said property, and that prior to her marriage she was the owner of the furniture in the hotel known as the Brunswick Hotel, located on East 25th and D streets, in the city of Tacoma; that said hotel had from thirty to thirty-six rooms furnished, and the furniture was worth from five hundred to six hundred dollars; and that just prior to her marriage, the deceased sold the furniture, the exact amount which she received therefor being unknown to the court.

"Prior to his marriage to deceased, James Buchanan had been a laborer working in various saw-mills in the state of Washington and British Columbia for a period of about four years and had saved but little if any money. James Buchanan and one Clinton McDaniel, in April, 1901, executed articles of incorporation of the Puget Sound Lumber Company, being filed on April 11, 1901. On April 13, 1901, James Buchanan paid into the treasury of the said company $600 in payment for six shares of its capital stock, and deceased and James Buchanan then went to Victoria, British Columbia, and were married on April 15, 1901, and continued to live together as husband and wife until her death. Three hundred dollars additional, was paid in by James Buchanan in payment of three aditional shares of stock in said company in August, 1901, and in July, 1902.

"James Buchanan, at all times after the mill was put into operation and until the death of his wife, Sarah A. Buchanan, devoted his entire time and attention to work in connection with the operation of said mill. Of the sum of $900 in money paid for said stock, $500 or more of the same was paid with money furnished by the deceased, and not more than $400 of said money was furnished by the said James Buchanan. The money furnished by the deceased and paid in payment for stock on April 13, 1901, was furnished by the deceased in contemplation of an immediate marriage with the said James Buchanan and for the purpose of helping finance the said lumber company as a community enterprise, and the remaining money was paid for the same purpose. The said lumber company was financed to a large extent by borrowed money raised from notes signed by the corporation and by the members thereof, including James Buchanan; and largely by the use of money so borrowed, the original mill was practically rebuilt or changed several times, greatly increasing its value and capacity, and one time, after it had been destroyed by fire, it was entirely rebuilt, partly from money collected from insurance and partly from money so borrowed.

"The capital stock of said company was divided into fifty shares of the par value of $100 each, and about the year 1909, 16 2-3 shares had been issued and stood in the name of James Buchanan, 16 2-3 shares had been issued to, and stood in the name of, Wade Hampton, and 16 2-3 shares had been issued and stood in the name of E. V. Wintermote, who had purchased the stock formerly owned by Mr. Daniel, and that about said time James Buchanan and Mr. Wintermote purchased the stock of Mr. Hampton for $17,000, paying him therefor in cash out of the corporate funds, but that at said time Mr. Hampton delivered his certificates of stock to the officers of the company, and since said time no transfer has been made of said certificates, and at the time of the death of said deceased and continuing to the present time, all of the outstanding stock was owned by the community composed of Mr. Buchanan and the deceased owning one-half thereof and Mr. Wintermote owning the remaining one-half.

"Through the money borrowed on the credit of James Buchanan and the other members of the said lumber company while the deceased and James Buchanan were husband and wife, and through the work, energy and skill and management of the said mill by the said James Buchanan and his associates during the time that Mr. Buchanan and said deceased were married, the said mill plant and equipment increased many times in value; a dividend of thirty percent upon the capital stock was declared in 1905, and the same amounting to $500, was credited to the amount of James Buchanan upon the books of the company in the same account in which the salary account of Mr. Buchanan was credited, and out of this fund the community expenses of the deceased and Mr. Buchanan were paid.

"Deceased and James Buchanan did not in their lifetime treat said property as the separate property of either of them, but as their community property, and when compared to the value of said mill plant at the time of the death of deceased, the original investment in said stock was so small and its part in creating the final result was so uncertain and insignificant that, taken in connection with the impossibility of ascertaining its proportion in the value of the capital stock of said mill at the time of her death, and the fact that the salary of the said James Buchanan in conducting said mill and the dividends derived from said stock were intermingled, whatever of separate funds entered into said property was so intermingled with the community property as to have lost its identity and separate character, and all of said stock and all interest in the said mill plant constituting a one-half interest therein was the community property of the said deceased and Mr. Buchanan at the time of her death."

We do not overlook the fact that the conclusions of the court as to the property being community property, in the above quoted portions of the findings, can hardly be regarded as findings of fact, but rather as conclusions of law. We therefore do not adopt them as findings of fact. Sarah A. Buchanan died April 12, 1911, within three days of ten years after her marriage to James Buchanan. Thereafter James Buchanan was duly appointed administrator of her estate and that of the community which was dissolved by her death.

The facts above summarized are gathered from the findings of the co court. There are other facts shown by the record which we deem also worthy of note here, as follows: The Puget Sound Lumber Company was, during the lifetime of Sarah A. Buchanan, what might be designated a close corporation, its stock being owned by those very few persons, who were actively engaged in promoting its business. Indeed, when the manner of its operation and financing is considered, it might be said to have been operated much as a partnership, though it can hardly be said that it was not technically a corporation. James Buchanan was at all times its active manager and one of its principal officers; and while he received a salary, as appears from the books of the company, the growth of its business and the accumulation of its property was manifestly the result of his personal efforts, apparently, more than that of any one else, and in any event, much more that the result of the small amount of capital invested at the beginning by himself and wife. He was manifestly more t than a mere employee for wages or salary. His whole attitude and demeanor towards the business of the company points to his efforts in its

management as being more for the purpose of making money as a part owner thereof than as being interested only in receiving wages or salary for his work as an employee. The property here involved is a one-half interest in this corporation, its business and property, in so far as such interest is evidenced by one-half of the capital stock thereof standing in the name of James Buchanan. Of course, this stock is personal property, and it may also be noted that the property of the corporation is now, and at all times has been, substantially all personal property. Some of these facts may seem irrelevant, but we think none of them are wholly so, in view of the involved nature of our problem.

Counsel for appellant rely upon that line of decisions holding that the status of property as to its being community or separate is determinable from its status at the time of its acquisition by either member of the community, and that its "rents, issues and profits" go to its owner. Counsel proceed upon the theory that this stock was the separate property of appellant in the beginning because of his claimed ownership of the money which then purchased it, and that its increased value because of the growth of the business and property of the Puget Sound Lumber Company also became his separate property. In this behalf our attention is called to the decisions of this court in: Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677; Harris v. Van De Vanter, 17 Wash. 489, 50 Pac. 50; Hester v. Stine, 46 Wash. 469, 90 Pac. 594; Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N.S.) 186; Teynor v. Heible, 74 Wash. 222, and In re Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009, which decisions have to do with real property, the increased value thereof during coverture, and crops raised thereon; and also with live stock and their natural increase. The theory and nature of counsel's argument is evidenced by their quotations from our decisions in Guye v. Guye, supra, at page 348, as follows:

"Counsel argue, however, that the natural enhancement in the value accruing while the marital relation existed, should be treated as community property. They point out that the tracts adjudged to be separate property by the trial court have enhanced in value practically three hundred and fifty thousand dollars since the marriage of the appellant and Francis M. Guye, and contend that it is property acquired during marriage within the spirit and intent of the statute. But we think this contention untenable also. Since by the statute the spouse owning separate property is entitled to the rents, issues, and profits thereof, so such owner must be entitled to the natural increase in value, as such increase is as much the issue of such property as would be the rents derived therefrom. So, also, under such a rule, the ownership of a specific tract might be constantly changing. As long as its value remained stationary or decreased it would be separate property. But the moment it increased in value it would become mixed property; that is, in part separate and in part community. And so, again, property that is separate property today might be mixed property tomorrow, and on the next day again be separate property, owing to its fluctuation in value. We cannot think this the meaning of the statute. We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed."

We are unable to gather from these observations of the court any rule more favorable to counsel's contention than that specific real or personal property once becoming separate property remains so, unless by voluntary act of the spouse owning it its nature is changed. But this, it seems to us, does not solve the question of when profits or gains resulting largely from personal efforts of one of the spouses become separate or community property. It is by no means always clear that such profits and gains are or are not rents, issues and profits of separate property, though separate property may have, in a measure, contributed to such gains.

The property here involved is not real property; nor do we think that the original investment, from which in a measure it comes, was in any event at the beginning more than four-ninths the separate property of appellant, five-ninths at least being the then separate property of deceased. Nor can we concur in the view that the same twenty fold increase in value of this original investment resulted as a natural increase apart from the personal efforts of appellant while a member of the community. We are constrained rather to the view that such change, increase and growth in the business and its property was very much more the result of the personal efforts of appellant during the ten years of his married life, in the performance of which he was the servant of the community. As we view it, we are then confronted with the question, What was the principal producing cause of these profits and gains? This may not be a very exact or satisfactory rule of determining whether property is community or separate. But where a small original investment of separate funds is united with the personal efforts of a member of the community, and therefrom profits and gains to the extent of some twenty fold are returned, the property being personal and undergoing many changes, we know of no other rule by which the question of such gains being community or separate property can be determined other than by taking into account the relative contributing force of the original investment and the personal efforts of a member of the community. The authorities do not furnish us much light upon this question, in so far as decisions directly in point are concerned. However, in Yesler v. Hochstettler, 4 Wash. 349, 366, 30 Pac. 398, observations were made by Judge Stiles, speaking for the court, quite in harmony with this view as follows:

"In this case the land purchased with the borrowed money paid for itself, and a large profit in land and money besides. It was a speculation purely personal in which the energy, skill and business prudence of Mrs. Yesler certainly were greater factors than the credit given by the mortgage of her land. But these mental forces, whether of husband or wife, are servants of the community, and their products are its property, to be shared in equally by the members of the community, and to follow the channels of devise and descent provided by the statute."

In Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 728, 7 Pac. 74, the question was presented somewhat as it is here, and was reviewed at some length. Justice Leonard, speaking for the court, observed:

"And in this or any other case, if profits come mainly from the property, rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor

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and skill of one or both may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community. It may be difficult in a given case to determine the controlling question, owing to the equality of the two elements mentioned, but we know of no other method of determining to whom the profits belong. In the use of separate property for the purpose of gain, more or less labor or skill of one or both must always be given, no matter what the use may be; and yet the profits of property belong to the owner, and in ascertaining the party in whom the title rests, the statute provides no means of separating that which is the product of labor and skill from that which comes from the property alone."

The following decisions, while not directly in point, we think lend support to this view: Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176; Sherlock v. Denny, 28 Wash. 170, 68 Pac. 452; Boggess v. Richards' Adm'r. 39 W. Va. 567, 20 S. E. 599, 45 Am. St. 938, 26 L. R. A. 537; Penn v. Whitehead, 17 Gratt (Va.) 503, 94 Am. Dec. 478; Glidden, Murphin & Co. v. Taylor, 16 Ohio St. 509, 47 Am. Dec. 386.

It may also be said that our decision in Katterhagen v. Meister, 75 Wash. 112, 134 Pac. 673, and decisions therein noticed, are in harmony with our conclusions here reached touching the question of investments of funds borrowed during coverture becoming community property though borrowed upon the credit of one spouse, the theory being that such gains are the product of community individual efforts.

These observations, we think, in any event, lead to the conclusion that the gains and profits produced by the personal efforts of appellant, though added to, in a measure, by the original investment, become community property. We agree, however, with the trial court that the funds, though at the beginning separate property of appellant and Sarah A. Buchanan, in the proportion of four-ninths and five-ninths, which purchased the stock in the first instance, have during the ten years of coverture become so intermingled with community property and lost their identity as separate property that all of the stock and interest in the Pugot Sound Lumber Company, standing in appellant's name, became the community property of appellant and his deceased wife, Sarah A. Buchanan.

The proper disposition of the case is fraught with great difficulty, but upon the whole record we cannot escape the conclusion that the trial court properly disposed of the rights of the parties, and that its order and judgment must be affirmed. It is so ordered.

Morris, C. J., Main, Holcomb, and Mount. JJ., concur.

I knew Buchanan very well -
He's broke now -
lumber mill at Tacoma -

In re PEPPER'S ESTATE. (S.F. 5,107.)

(Supreme Court of California. Nov. 21, 1910.
Rehearing Denied Dec. 21, 1910.)

(112 Pac.Rep. 62.)

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

In the matter of the estate of William H. Pepper, deceased. From a decree of distribution, according to the will, Phebe Pepper appeals. Affirmed.

Sloss, J.--William H. Pepper died testate, leaving an estate which was appraised at $113,000 and over. By his will he gave to his widow, Phebe Pepper, $26,000, and a house and lot valued at $4,000. In due course the executors petitioned for distribution of the estate in their hands in accordance with the terms of the will. The widow appeared and answered, claiming that all of the estate was community property, and that she was entitled to one-half thereof, in addition to the legacy and devise given her by the will. The trial court, after hearing evidence on this issue, decided that the entire estate was the separate property of the decedent, and decreed distribution in accordance with the terms of the will. Tho widow appeals from the decree of distribution. The point most strongly urged by the appellant is that the evidence fails to support the finding of the separate character of the estate.

William H. Pepper came to Sonoma county in 1858 or 1859. He settled upon a tract of land in Green Valley, containing 160 acres. He took up his residence upon this land and commenced at once to cultivate it, putting in a nursery and an orchard, and devoting part of tho land to pasturage and the growing of grain. Later, and prior to his marriage to the appellant, he acquired additional land adjoining his original holding, until his ranch or farm comprised about 291 acres. He was married to the appellant in 1874. At that time he had put upon his land various improvements, and was conducting thereon an active nursery business. His course of procedure was to grow plants, principally fruit trees, either from seed or from stock imported from France or the Eastern states, until they had attained the age of one or two years, and then to sell the plants so grown. From the time of his marriage until his retirement in 1900, he lived upon the land mentioned, and devoted his entire time and energy to the conduct of the nursery and the farming operations which were being carried on there. During all this time the appellant lived with him, and performed her household and other duties as a faithful wife should. The area of land applied to nursery purposes was, from time to time, increased by Pepper. There is the direct testimony of several witnesses, including Mrs. Pepper herself, to the effect that during all the years of his marriage Pepper was engaged in no business other than that which he conducted on the ranch. In January, 1900, he sold the land, with the nursery and the personal property thereon, to one Robinson for $20,000, and took up his home in Petaluma. In March, 1906, he died.

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His estate consisted of the house and lot devised to his widow, of cash in bank to the amount of $51,121.92, of interest-bearing notes to the amount of $57,400, and of bank stock and furniture appraised at $1,350. The bank deposits were made, and the notes and other personal property acquired, so far as appears, after his marriage. The presumption is, th therefore, that all of these items were community property. In re Boody, 113 Cal. 682, 45 Pac. 858; Fennel v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361. Was the trial court justified in finding that this presumption was overcome? There are to be found, in many of the decisions of this court, expressions to the effect that the separate character of property acquired by either of the spouses after marriage is to be established only by "clear and convincing evidence," "clear and decisive proof," or the like. Meyer v. Kinzer, 12 Cal. 252, 253, 73 Am. Dec. 538; Mott v. Smith, 16 Cal. 557; Adams v. Knowlton, 22 Cal. 288; Morgan v. Lones, 78 Cal. 62, 20 Pac. 248; In re Boody, supra; Davis v. Green, 122 Cal. 364, 55 Pac. 9; Bowe v. H. S. & L. S., 134 Cal. 405, 66 Pac. 569. But, as is said in Freese v. Hib. S. & L. Soc., 139 Cal. 392, 73 Pac. 172, "it was never intended by this court to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. Code Civ. Proc. Sec. 1826. Such proof is never required. Generally, moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind, and evidence which ordinarily produces such conviction is satisfactory." Code Civ. Proc. Sec. 1826, 1835. And, in speaking of a similar question in Couts v. Winston, 153 Cal. 686, 96 Pac. 357, we said that "whether or not the evidence offered * * * is clear and convincing is a question for the trial court. * * * In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court."

While the respondents were unable to trace with exactness the transmutations of Pepper's acquisitions into the items of property which he left at his death, we think it can hardly be questioned that the record authorized an inference that his entire estate consisted of the proceeds of the sale of property owned by him at the time of his marriage, together with such profits and earnings as he had made in conducting his ranch. It was shown that he held the ranch before his marriage, and had been occupying it under a claim of ownership for many years. The mere fact that his title to a part of the land was not perfected by conveyance from the source of paramount title until a later date would not alter the character of the land itself as separate estate. Lake v. Lake, 52 Cal. 428; Estate of Higgins, 65 Cal. 407, 4 Pac. 389; In re Lamb, 95 Cal. 397, 30 Pac. 568; Estate of Boody, 119 Cal. 402, 51 Pac. 634. It was also shown that he had been engaged in no business other than that of conducting the ranch. In this testimony the court had a sufficient basis for the conclusion that whatever Pepper had at his death, over and above the property owned by him when he married, had been acquired in the business or occupation carried on by him on said ranch.

There can be little question, on the evidence, that the principal par of such business consisted of the conduct of his nursery. The appellant argues with great earnestness that the profits and earnings of such nursery

business after marriage must, as matter of law, be held to be community property. We think this position cannot be sustained. Section 163 of the Civil Code provides that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, is his separate property." The question here is whether the proceeds of the nursery conducted on the land can be considered as "issues" or "profits" of the land. Earnings, acquired by the exercise of the industry or skill of either husband or wife, are to be credited to the community. On the other hand, the products of land, separately owned by either spouse, and cultivated by either or both, become the separate property of the one owning the land. The appellant does not dispute the proposition that, if Pepper had, year after year, sown his land to grain, the resulting crops would have formed a part of his separate estate. But it is argued that, in the case of the nursery, the principal element in the success of the venture was the industry, skill, and attention of Pepper, and that the use of the land was merely incidental to what was, in effect, a commercial enterprise. We are unable to see that this argument furnishes a sufficient ground of distinction. In any agricultural enterprise, the labor and skill of man are essential to success. An orchard or a grain field must be cultivated and cared for. The resultant product is in part due to the processes of nature operating upon the land, and in part to the intelligent application of manual labor to the soil. It is, in the nature of things, impossible to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole, and, if it is the growth of land separately owned, it is the separate property of the owner of the land. See Diefendorff v. Hopkins, 95 Cal. 343, 352, 28 Pac. 265, 30 Pac. 549. The case of the nursery differs from that of the orchard or the grain field, if at all, only in the fact that the enterprise may require the application of personal skill, labor and attention in a greater degree. But the occupation is, none the less, one conducted upon land, and the product sold is the growth of that land. The seed or the cutting is planted in the soil, it is there nurtured and grown until it reaches a certain stage of development, and is then taken up and sold. If the crop of grain sown and harvested by the owner of the land constitutes "issues and profits" of the land, we are unable to see why the same may not be said of young trees and plants raised on the land until they are ready for transplanting. There may be cases in which the business is virtually one of purchase and sale of plants, the ground being used merely to preserve the plants until sales can be effected. In such cases it might well be said that the enterprise is so predominently commercial that the profits are not to be treated as issuing from the land. But on the facts before us, the court below, while it might have regarded the case as coming within this class, was not bound to do so. The decisions of this court are not in conflict with these views. It would not be profitable to review the cases cited by counsel, since none of them deal with facts like those before us.

There was evidence that, soon after his marriage, Pepper has obtained from his wife the sum of $2,000, which he had used in the nursery business. The money was never returned to Mrs. Pepper. This circumstance is not inconsistent with the finding that the entire estate was separate

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property of Pepper. Under the evidence the court might have concluded that Mrs. Pepper made a gift of the $2,000 to her husband. If, however, it was a loan the lender's recourse was to present a creditor's claim to the executors.

The court permitted one of appellant's witnesses to testify that Pepper had stated, some 15 years before his death, that he had accumulated $40,000 since his marriage, and that this was, or that he considered it, community property. The court struck out the declaration that the amount stated was community property. We think there was no error in this ruling. Whether the property was community or separate was a question of law, depending on the manner and time of its acquisition. The opinion of Pepper on this legal question was entitled to no weight. The statement of fact made by him was allowed to stand, and this was all the appellant was entitled to.

The judgment is affirmed.

We concur: Angellotti, J.; Shaw, J.; Lorigan, J.

NEILSON et al. v. KILGORE.

(May 2, 1892.)
(Sup.Ct.Rep., Vol. 12, 943)
(145 U.S. 487)

In error to the supreme court of the state of Tennessee. Affirmed.

Statement by Mr. Justice Harlan.

This action was commenced October 12, 1886, before a justice of the peace of Greene county, Tenn., and involves the right of property in three heifers and one steer, levied upon as the property of Frederick Scruggs, but claimed by his wife to belong to her, and not subject to seizure or sale for the debts of her husband. Judgment having been rendered for her, the case was carried by appeal to the circuit court of that county.

It appears that Scruggs and wife were married about 18 years before the commencement of this action, and lived, during most of their married life, on lands deeded to her, as follows: 130 acres by deed of January 1, 1881; 274 acres by deed of April 19, 1877; 108 acres by deed of May 8, 1886. The deeds to Mrs. Scruggs were in fee simple, but did not create a technical separate estate. Some years prior to this litigation, her husband failed in business, after which he attended to his wife's affairs, trading for her in stock, hogs, etc., and superintending farm work, etc., as her agent. He occasionally traded in live stock for himself. From 1879 to 1881 he engaged, in the name of his father, in merchandising in a house in the yard of the home dwelling lot, and from 1881 to 1884 in the name of his brother William, and with their money, he receiving and keeping all the profits. He and Mrs. Scruggs took from the store whatever each wanted, paid hands on the farm partly out of it, and put back into the store the proceeds of the farm, but without strict account being kept between them as husband and wife, or between them and William Scruggs, as in the case of strangers. The husband did not keep the wife's funds strictly separate from his own, but often commingled them.

In the spring of 1884 he sold some cattle belonging to the wife for about $200, and afterwards bought two head of young cattle for her with part of this money. In September or October following he purchased one other steer for her with the proceeds of what was raised on her farms, and, while the cattle were pasturing together, another calf came from one of her cows. They were levied on as the property of the husband under an execution issued September 10, 1886, which was based upon a judgment against him, in favor of one Scott, rendered September 22, 1876. At the execution sale, Baker, the testator of the plaintiffs in error, became the purchaser of the cattle, having, at the time, notice from Mrs. Scruggs that they belonged to her, and, if sold, would be replevied as her property.

The trial court found that the cattle in question were the property of the wife, having been bought with the proceeds of her estate; that a cer-

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tain act of the general assembly of Tennessee, passed March 26, 1879, c, 141, upon which the wife relied, -- and which will be presently referred to, -- was not, as claimed by the defendant, in violation either of the constitution of the United States or of that of Tennessee, prohibiting the impairment of the obligation of contracts, and did not deprive the husband or his creditors of any vested rights; and that said act protected the cattle from any execution sued out against the property of the husband. Judgment was accordingly rendered for Mrs. Scruggs.

Upon appeal to the supreme court of Tennessee the judgment was affirmed, the court holding that the act of 1879 was not obnoxious to the constitution off the United States.

F. A. Reeve, for plaintiffs in error. H. H. Ingersoll, for defendant in error.

Mr. Justice Harlan, after stating the facts in the foregoing language, delivered the opinion of the court.

By the law of Tennessee in force when the judgment of September 22, 1876, was rendered against Scruggs, the interest of a husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise, descent, or in any other mode, could not be sold or disposed of by virtue of any judgment, decree, or execution against him; nor could the husband sell his wife's real estate during her life without her joining in the conveyance in the manner prescribed for conveyances of land by married women. Laws Tenn. 1849, o. 36, Sec. 1; Code Tenn. 1858, Sec. 2481; Code Tenn. 1884, Sec. 3338. In Lucas v. Rickerich, 1 Lea, 728, it was held that the act of 1849 did not affect the right of the husband to take the rents and profits of the wife's real estate. This decision, it was said in Taylor v. Taylor, 12 Lea, 490, 495, led to the passage of the act of March 26, 1879, which, repealing all prior laws in conflict with it, provided: "Hereafter the rents and profits of any property or estate of a married woman, which she now owns or may hereafter become seised or possessed of, either by purchase, devise, gift, or inheritance, as a separate estate, or for years, or for life, or as a fee-simple estate, shall in no manner be subject to the debts or contracts of her husband, except by her consent, obtained in writing: provided, that the act shall in no manner interfere with the husband's tenancy by the curtesy." Acts Tenn. 1879, c. 141, p. 182; Mill. & V. Code, 1884, sec. 3343.

The cattle in dispute were, withint the meaning of that act, profits of the wife's lands.

The plaintiffs in error contend that, when the act of 1879 was passed, the judgment creditor of Scruggs had a right, of which he could not be deprived by legislation, to subject to his demand any property vested in the husband; and that it was not competent for the legislature to exempt the rents and profits of the wife's estate from liability for the debts and contracts of the husband, existing at the time such immunity was declared.

We do not doubt the validity of the act of 1879, as applied to the

judgment previously rendered against Scruggs. The particular profits of the wife's estate here in dispute had not, when that act was passed, come to the hands of the husband. They were not, at that time, in existence, nor, in any legal sense, vested in him. Nor were they ever vested in him. He had a mere expectancy with reference to them when the act was passed. Moreover, his right, prior to that enactment, to take the profits of his wife's estate, did not come from contract between him and his wife or between him and the state, but from a rule of law established by the legislature, and resting alone upon public considerations arising out of the marriage relation. It is entirely competent for the legislature to change that rule in respect, at least, to the future rents and profits of the wife's estate. Such legislation is for the protection of the property of the wife, and neither impairs nor defeats any vested right of the husband. Marriage is a civil institution, a status, in reference to which Mr. Bishop has well said: "Public interests overshadow private,--one which public policy holds specially in the hands of the law for the public good, and over which the law presides in a manner not known in the other departments." 1 Bish. Mar. & Div. Sec. 5. The relation of husband and wife is therefore formed subject to the power of the state to control and regulate both that relation and the property rights directly connected with it, by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference.

If the act of 1879 did not infringe any vested right of the husband, much less did it infringe any right belonging to his creditors.

The views we have expressed are supported by the judgment of the supreme court of Tennessee in Taylor v. Taylor, 12 Lea, 486, 498, where it was held that the acts of 1849 and 1879, above referred to, were enacted for the benefit of married women, not of their husbands, and that a husband has no vested right to the future profits of his wife's land that prevents the enactment of such a statute as that of 1879.

As the judgment did not withhold or deny any right or privilege secured by the constitution of the United States, it must be affirmed.

It is so ordered.

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STRINGFELLOW v. SORRELLS.

(Supreme Court of Texas. Nov. 17, 1891.)
(82 Tex. 277.)
(S. W. Rep., Vol. 18, 689.)

What Constitutes Community Property.

Commissioners' decision. Section A. Appeal from district court, Morris county; John L. Sheppard, Judge.

Action by C. V. Sorrells against W. M. Stringfellow "to try the rights of property" under the statute. Judgment for plaintiff. Defendant appeals. Affirmed.

Marr, J.--Before and at the time of her marriage to W. J. Sorrells in the year 1884 the appellee, Mrs. C. V. Sorrells, owned in her own right, together with other separate property, two mules. These animals were then colts, and worth $35 each; and a portion of their present value, as a result of their growth and avoirdupois as the years rolled on, is the subject of this controversy. The appellant, in the year 1888, held a just debt, merged into a valid judgment, for a small sum against the husband of the appellee, and in satisfaction of which he caused a writ of execution to be levied upon these mules of the wife during that year. At the time of the levy the animals were grown, and each of them worth in the market $75, instead of $35, as originally. The husband had managed and cared for the mules since the marriage, and the community estate furnished the provender for the animals during the intermediate time. The appellee replevied the property, and duly made her claim thereto under the statute, "to try the rights of property." The case came up to the district court from a justice court, and the former court rendered a judgment in favor of the wife. The appellant insists that the enhanced value of the mules, which has resulted from the attention of the husband and the food furnished by the community since the marriage, and amounts to $80, is an increase of the separate estate of the wife, and consequently is community property, and liable to his execution. There is a modicum of plausibility in his contention, based upon the construction given by the supreme court to "the increase of the lands" of the wife, but these decisions were inspired by the necessity of protecting, not of destroying, her estate. De Blanc v. Lynch, 23 Tex. 25; Forbes v. Dunham, 24 Tex. 611; White v. Lynch, 26 Tex. 195; Cleveland v. Cole, 65 Tex. 402; Epperson v. Jones, Id. 425; Bradon v. Gose, 57 Tex. 37; Carr v. Tucker, 42 Tex. 336. The supreme court has often decided what is not "the increase of the wife's lands," but, so far as we are aware, have not decided what is; and we are not required to do so now. The rule contended for would be most impracticable in application. The equitable criterion, if any were admissible in cases like the present, should be the expenses to the husband or the community, regarded as an investment of rearing the mules, not the increased value, which may be due to other causes, subject to be offset by the value of their use, if anything. This would add to "confusion worse confounded." As applied to live-stock belonging to the wife, "the increase" of such property has been invariably (ever since the decision of the supreme court

in Howard v. York, 20 Tex. 670) recognized in the reported cases to denote the progeny of the original stock or their descendants. This construction comports with the etymology of the term, and accords with the universal understanding. De Blane v. Lynch, supra. The record therefore develops no "increase" of these particular mules in the sense that would add to or constitute a part of the community estate. They are still the same animals which the wife owned at the time of her marriage, and, mule-like, they have stubbornly refused "to bring forth after their kind." The sex of these particular mules, nor their capacity for reproduction, if any, is not disclosed by the record, but the general rule, founded on common knowledge, with possibly some sporadic exceptions, must be recognized that mules do not "increase, multiply, and replenish the earth," according to the ordinary laws of procreation and the generic command. It would seem, therefore, that there can be no "increase" of the wife's separate estate, if composed solely of specific mules at the time of her marriage. In cases of other live-stock, his interest, recognized by law, in the offsprings thereof, compensates the husband and the community, but the erratic mules standeth apart, "like patience on a monument, smiling at grief." It would tend to entirely destroy the corpus of the wife's estate, consisting of live personal property, to declare that an augmentation in weight or value should be deemed an "increase" of the property itself, so as to constitute a part of the community to that extent. Suppose it should decline under the ministrations of the husband, what, then, would compensate the wife? Fortunately she does not hold her separate property by so precarious a tenure as to depend upon the fluctuations of weight or the prices in the market. If she did, then the alert creditor would only need to abide his time in confidence of ultimately seizing, upon a ruthless execution, the flock, the drove, and feathered tribe of the wife. The law too closely guards "with flaming sword and cherubim" the sacred rights of the good housewife in her own "separate property" to admit of such grave consequences. We need only to add that the use of the mules, and the products of their labor, may be supposed to compensate the community for the provender consumed, and the husband would scarcely demand any recompense for the felicity of teaching them how "to work in the traces." We conclude that the judgment of the district court is a most righteous one, and ought to be affirmed.

Stayton, C. J.--Affirmed, as per opinion of commission of appeals.

Presumption [illegible] acquired [illegible] marriage [illegible] presumption [illegible] overcome [illegible] clear [illegible] convincing [illegible] Man [illegible] standing [illegible] is [illegible] acquired [illegible] bequest [illegible] profit [illegible] characters [illegible] status [illegible] it is acquired

CHAPTER XIII.

CITATIONS.

Property and pecuniary rights acquired by either spouse during marriage by gift, devise, or descent.

Re Estate Slocum (1915)	83 Wash. 158.
Worthington v. Crasper (1911)	63 Wash. 380.
Hipkins v. Ester (1908)	51 Wash. 1.
Re Estate of Bushnell (1919)	107 Wash. 331.
Ahern v. Ahern (1903)	31 Wash. 334.
Sackman v. Thomas (1901)	24 Wash. 660.

(a) Property rights acquired by either spouse in exchange for separate property or funds.

Denny v. Schwabacher (1909)	54 Wash. 689.
Katterhagen v. Meister (1913)	75 Wash. 112.
Meyers v. Albert (1913)	76 Wash. 218.
Dobbins v. Dexter Horton Bank (1911)	62 Wash. 423.
Holly Street Land Co. v. Beyer (1908)	48 Wash. 422.
Main v. Scholl (1898)	20 Wash. 201.
Heintz v. Brown (1907)	46 Wash. 387.
Smith v. Weed (1913)	75 Wash. 452.
Balkema v. Grolimund (1916)	92 Wash. 326.
Graves v. Columbia Underwriters (1916)	93 Wash. 196.
Dart v. McDonald (1921)	114 Wash. 448.
Rawlings v. Healy (1920)	111 Wash. 218.
Boyd v. Bondyn (1920)	113 Wash. 384.

(b) The rents, issues, and profits of of separate property.

Guye v. Guye (1911)	63 Wash. 340.

ILIZA W. P. GUYE, Appellant, v. JOHN W. GUYE et al., Respondents.

(63 Wash 348 1911)

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 19, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title and for partition. Affirmed.

Fullerton, J.--Francis H. Guye and Eliza W. P. Guye intermarried at the city of Seattle on March 21, 1872, and thereafter, until the death of Francis H. Guye on May 25, 1908, lived together as husband and wife. There was no issue of their marriage. Francis H. Guye had been formerly married and was the father of children born of such marriage. At the time of his death he left estate in the state of Washington consisting of real property of great value, which he specifically devised by will to the different members of his family as if the property, one tract excepted, was his separate property. The will was in form a nonintervention will, and was duly entered for probate as such. In the will he named his son John W. Guye and one Rolland H. Denny as executors. The executors named accepted the trust and proceeded with the due administration of the estate. The widow, Eliza W. P. Guye, claimed that the entire property was community property, and on her claim being disallowed by the executors, brought this action to have the status of the property determined and her rights therein adjusted. In the final decree the trial judge found somewhat more of the property to be community property than the devisor or the executors recognized as such, but did not allow the claim of Mrs. Guye to its fullest extent. From so much of the decree as is adverse to her interests, she appeals.

Based on differences between the time and manner of its acquisition, counsel have divided the land left by the deceased into five distinct classes: First, certain tracts of land acquired by the deceased by purchase and for which deeds had passed prior to his marriage with the appellant; second, a tract of land acquired by the deceased by purchase prior to his marriage with the appellant, but for which the deed passed after such marriage; third, a tract of land acquired from the United States by the deceased after his marriage, under a coal land entry; fourth, certain tracts acquired from the United States by the deceased after his marriage, under the mining laws; and fifth, certain tracts acquired by the deceased by purchase from private holders subsequent to his marriage.

The claim that the land first described is community property is based principally upon the somewhat peculiar common property statute of 1871. Laws 1871, p. 67. By section 1 of that act it was provided that all property owned by the husband or wife at the time of the marriage, and all the property acquired by either of them during the marriage by gift, devise, descent, bequest or inheritance, and all property purchased or acquired with the separate funds of either during marriage, and designated as separate property as per deed or inventory in accordance with the provisions of the act, should be the separate property of the spouse acquiring it, the same as though no marriage existed. Section 2. provided

that all property acquired during the marriage by the joint labors of the husband and wife; or by their individual labors, together with all "rents, profits, interest or proceeds of the separate property of both accruing during the marriage," should be common property. Sections 8,9,10 and 11, defined the class of debts for which the common and separate property might be sold. Section 14 provided that the husband should have the sole control and management of his own separate property, and need not be joined by the wife in any sale, transfer or encumbrance thereof. Section 15 provided that the wife should have the sole control and management of her own separate property, and need not be joined by the husband in any sale, transfer or encumbrance thereof, unless the property be that acquired by gift from the husband. Section 22 provided that the "common property being partnership property" the wife's share should be one-half thereof and should be hers and her heirs forever. Section 23 provided that neither dower nor curtesy should thereafter accrue. Section 26 provided that the husband should not by will deprive the widow of any rights under the act.

This statute remained upon the statute book but two years. At the next session of the legislative assembly it was repealed and a new law enacted. It is not necessary to point out all the differences between the new law and the one cited, but the radical changes were that the new law failed to provide that the rents, profits, issue or proceeds of the separate property of the spouses should be common property, and it eliminated section 22, which declared the common property to be partnership property. This act remained in force until 1879, when the present community property law was enacted. By the terms of the latter act the rents, issues, and profits of separate property are expressly declared to be separate property. By the latter act also, the name "common property" was changed to "community property," and it was expressly provided that the property rights of the spouses were thereafter to be governed by the act, in the absence of a marriagesettlement or post-nuptual agreement, "any act to the contrary notwithstanding."

By reference to the dates above given, it will be observed that Francis M. Guye and the appellant intermarried while the act of 1871 was in force. Based on this fact, the appellant argues that the act of 1871 fixed the rights of property between the appellant and her husband, "and that any subsequent law could in no way alter or change it;" and "that inasmuch as section 2 of thar act provides that allproperty acquired during marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest or proceeds of the separate property of both accruing during marriage, shall be common property, it means nothing else than that real property of the husband and wife, when taken in consideration of section 22, becomes partnership assets and the husband and wife each become partners, and the capitalization is what each person puts into the property, and any increase or unearned increment becomes partnership or common property." In other words, it is contended that a marriage during the existence of the act of 1871 impressed the separate property with which each of the contracting parties were then seized with a trust to pay the income thereof to the common use of both spouses during the continuance of the marital relation or until such time as they could mutually agree on some other disposition of it.

We are not able to agree with this contention. That such was not the intent of the statute is plain from the very statute itself. The statute does not in express words devote the income of the separate property of each of the spouses to the common use of both, nor does it in express words charge such separate property with a trust to that effect. In so far as the intent is expressed, it does nothing more than provide that the income of separate property, when it comes into existence, shall be common property. And that no such intention is implied is clear from the fact that such a construction is inconsistent with other express provisions of the statute. It is provided, it will be observed, that the spouse owning or acquiring separate property during the marriage relation shall have the sole control and management thereof, and need not be joined by the other spouse "in any sale, transfer, or encumbrance thereof." It is provided also in the act that the separate property of a spouse shall be liable for the separate debts of that spouse, whether contracted before or subsequent to the marriage. These provisions are wholly inconsistent with the idea that the separate property of one spouse is, in virtue of the marital relation, impressed with a charge or trust of any kind in favor of the other or in favor of the common use of both, and to our minds conclusively determines the contrary. There can be no trust in property for the common benefit of two persons where one of them has power at any time to destroy the trust by disposing of the property, or by putting it to another use. In so far as the rents, profits, interest or proceeds of the separate property of either came into being during the existence of this statute, we have no doubt that they belonged to the husband and wife in common, and that it was not competent for the legislature, by subsequent enactment, to declare such property to be the property of the one or the other; but as to rents, issues, and profits of such property accruing subsequently to the passage of the act, we have no doubt that the power existed.

Counsel, however, call attention to the word "interest" in the phrase "rents, profits, interest and proceeds," and argue therefrom that something more than the mere income from the real property was meant thereby. But it must be remembered that the framers of the act used the phrase with reference to personal property as well as real property, and could possibly have had reference to a very common source of income from that character of personal property known as money. Be this as it may, however, even a casual perusal of the act will show that its framers had no very accurate conception of the meaning of words or very great skill in their use; at least, there is nothing in the wording of the act elsewhere that would imply that they had any such nicety in their use as this construction would imply. We rather think, from the context, that this phrase was the somewhat labored effort of the draughtsman of the law to convey the idea that the entire income of the property described should become common property.

As this act stood on the statute book but two years, and as we hold that it was within the power of the legislature to say that the further income and proceeds of the separate property of the spouses should be the property of the spouse owning the separate property, it is not necessary that we discuss the effect of section 22 of the act, which declared common property to be the partnership property of the spouses, there being no showing in the record that any of the income of the property now under

discussion was put back into the property in the way of permanent fixtures of improvements which enhanced its value. Counsel argue, however, that the natural enhancement in the value accruing while the marital relation existed should be treated as community property. They point out that the tracts adjudged to be separate property by the trial court have enhanced in value practically three hundred and fifty thousand dollars since the marriage of the appellant and Francis M. Guye, and contend that it is property acquired during marriage within the spirit and intent of the statute. But we think this contention untenable also. Since by the statute the spouse owning separate property is entitled to the rents, issues and profits thereof, so such owner must be entitled to the natural increase in value, as such increase is as much the issue of such property as would be the rents derived therefrom. So, also, under such a rule, the ownership of a specific tract might be constantly changing. As long as its value remained stationary or decreased it would be separate property. But the moment it increased in value it would become mixed property; that is, in part separate and in part community. And so, again, property that is separate property today might be mixed property tomarrow, and on the next day again be separate property, owning to its fluctuation in value. We cannot think this the meaning of the statute. We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed.

The cases relied upon by counsel to support this contention we shall not notice specifically. They call special attention, however, to the case of White v. White, 5 Barb. 474, and as that case if illustrative of the others, we will point out wherein we think the question at bar differs from the question there determined. The case cited was a suit by the wife against the husband. It appears that, subsequent to the marriage between the parties, the wife inherited from her father's estate a considerable tract of land situated in the state of New York. That after she had thus acquired the title, the legislative assembly of that state passed an act, the second section of which read as follows:

"The real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." Laws New York 1848, p. 307.

The suit was based upon this provision of the statute. The complaint set forth that the wife took possession of the inherited land soon after it was set apart to her by the commission appointed to make partition, and that she had continued to reside thereon until the last few weeks prior to the filing of the complaint; during which time she had been prevented from occupying the premises by her husband. It was further alleged that since she had acquired the property her husband had had the management and control of the same, and had enjoyed the rents, issues, and profits thereof; that he was a man of idly habits and addicted to the use of spirituous liquours; that he had been careless and improvident in the management and cultivation of the farm and had greatly negledted it; that after the passage of the act above named, he had avowed his determin-

ation to exercise the exclusive control of the land, and had prevented the plaintiff from exercising any control thereof, and had finally, by personal force and violence, expelled her therefrom. A demurrer was interposed to the complaint, and the court held that it did not state facts sufficient to constitute a cause of action, basing its decision on the ground that, by the common law, and the law in force in the state of New York prior to the passage of the act in question, the husband, by virtue of the marriage contract, became seized of a freehold estate in the realproperty of his wife, and was entitled to take the rents, issues, and profits of the land during their joint lives; and, further, since children had been born alive to them, hehad a free hold estate during his natural life as tenant by curtesy in the property, which right was a vested right and could not be taken away by any subsequent enactment of the legislature This case, it is at once apparent, has no analogy to the case at bar, unless we are to hold that the statute of 1871 gave the wife, at the time of the marriage, a vested interest of some sort in the separate property of the husband. But this, as we have said, we are unable to do. Had the husband in the case at bar attempted to claim as his separate property, by virtue of the subsequent statutes, rents, issues and profits of his separate property which had come into being during the time the act of 1871 was in force the case cited would have bearing, but no such question, as we have said, is pointed out by the record. The case furnishes no aid by which to determine the proper construction of the statute of 1871. We conclude, therefore, that the property of the first class cited was rightly adjudged to be the separate property of the husband.

The tract of land forming the second class, as classified by counsel, was purchased from the executors of the estate of Charles C. Terry. The record shows that Charles C. Terry died February 17, 1867; that he left a will in which he named Franklin Mathias and Erasmus Smithers as executors, with power to sell and convey the real estate of which he died seized, at such times, at such prices, and on such terms as the executors should deem wise; that pursuant to the power conferred by the will, the executors sold the lot of which the tract now in question is a part to Francis M. Guye and one Charles Burnett on March 20, 1870, some two years prior to the marriage of Francis M. Guye to the appellant; that thereafter the lot was divided between the purchasers, Francis M. Guye taking the west half; that Guye took possession of the land awarded him, erected buildings thereon and otherwise improved the same; that he subsequently rented the same to tenants and collected rents therefrom, all prior to his marriage with the appellant; that a deed to the property was made by the executors January 7, 1873, nearly one year after the marriage of Francis M. Guye and the appellant; that some two years later a return to the probate court was made by the executors of the sale, reciting that a sale of the property was had on March 29, 1870, to Guye and Burnett for $500, and asking that the sale be confirmed. The record made by the executors does not show when the purchase price of the lot was paid. Burnett, however, testified that the negotiations leading up to the purchase of the lot were transacted by Guye, and that some part of the purchase price was paid at the time of the purchase, but whether all or not he did not remember. There was no evidence of any other payment.

The appellant bases her claim of a community interest in this tract on the fact that the deed to the same passed after her marriage with Guye,

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[illegible]

[illegible]

and the presumption, arising from the manner in which business is ordinarily conducted, that the purchase price was paid at the time the deed was delivered. But we cannot think this a just deduction from the facts shown. Clearly, Guye had a valid subsisting interest in this property at the time of his marriage. He had taken possession of it and improved it, and paid a part at least of the purchase price. Had it been shown that the balance of the purchase price had been paid with community funds after the marriage, it might well be that, under the doctrine of Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, the property would have been community property "to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest in the property in proportion to the amount of his or her investment," but clearly, the entire property could not be community property. But there is no evidence in the record that community funds entered into the purchase price of the property. Therefore, for the want of some rule with which to measure such interest, if for no other, the court cannot hold that the community had any interest in this property.

The appellant calls attention to the fact that during the forty years of her married life with Francis M. Guye large sums were paid in taxes on this separate property, and she asks the court to presume that the money with which they were paid was community funds, and to charge the land with one-half thereof for her benefit. But we cannot presume that the funds used to pay the taxes were community funds. What would have been the rule had it been shown that the husband had no separate income with which to pay these taxes, we do not need to discuss; but where, as here, it is shown that he did have such separate income, there can be no presumption that he used community funds for the purpose of paying his separate debts. The presumption is always in favor of honesty and fair dealing, rather than to the contrary. Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.

Nor do we think that fact that the spouses have joined in mortgaging property sufficient evidence on which to found a claim that the property mortgaged is community property. While the statute allows a husband or wife to sell and encumber his or her separate property, yet no prudent purchaser or mortgagee will ever take the separate deed or mortgage of a married man or woman even when the other spouse sits by and disclaims i interest. Such a deed or mortgage always requires explanation in subsequent dealings with the property whenever either of them forms a part of the chain of title, rendering the property less easy of disposition than it otherwise would be. The fact that both spouses joined in the encumbrances put on the property in this instance is, therefore, little or no evidence that the property was community rather ahan separate property.

The third class of lands claimed by the appellant to be community property are the lands acquired under coal land entries made by the husband during the existence of the marital relation and patented to him while the relation existed. In Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L.

R. A. 671, we held that land acquired by the husband under the homestead laws of the United State, where the entry was made, the necessary residenc had, and the final proof made, during the existence of the marital relatio was community property. In subsequent cases we have applied the rule to preemption entries. On the other hand, we have held that land acquired under the stone and timber acts from the United States by the husband during the marital relation was his separate property. Gardner v. Port Blakely Mill Co., 8 Wash. 1, 35 Pac. 402; James v. James, 51 Wash. 60, 97 Pac. 1113. The decisions were based on distinctions existing between the several acts providing the manner of entry and the persons entitled to enter. Under the homestead and preemption acts but one entry was allowed to a family, which must be made by the head of the family, and it was required that the family live on the land and make a certain amount of improvements thereon before final proof could be made. The land was granted ostensibly for the benefit of the family, and the intent of Congress in passing the act was to induce men with families to settle upon and make their homes upon the public lands. Under the timber land acts no settlement upon or living upon the lands was required. The entryman was required to take an oath that he had made no other application under the act; that he did not apply to purchase the land for speculation, but for his own use and benefit; and that he had not made any agreement, directly or indirectly, in any way or manner with any person or persons whomsoever by which the title he should acquire would inure to the benefit of any person other h than himself. Each of the spouses could make such an entry, and there was nothing in the act itself which indicated a purpose to grant the land as a place of residence of the individual making the entry. True, after title was acquired, the entryman could make such use of it as he pleased, but it was not the primary purpose of the grant, as it was under the homestead and preemption acts, to furnish a home for the entryman and his family. These differences we thought, and still think, are fundamental, and justify the distinction made with reference to the character of the peoperty on its acquisition.

The method of acquiring land under the coal land acts is analogous to that of the timber and stone acts and not that of the homestead and preemption acts. Each of the spouses can make an entry and acquire title under it. No residence on the land is required. The entryman must take and subscribe to an oath to the effect that the entry is made for his own benefit, and not directly or indirectly for the benefit of any other person. By analogy, therefore, the property should be held to be separate property rather than community property. But the appellant argues that this court has expressed its dissatisfaction with the decisions under the timber and stone act holding property so acquired to be separate property, and has adhered to the rule on the doctrine of stare decisis rather than on principle, thinking that to disturb the earlier rule would disturb property rights acquired under it; that here there is no precedent to interfere, as this is a case of first impression in this court and the court is at liberty to adopt such rule as it thinks most agreeable with the community system of property adopted in this state. But while it is true that the first decision under the timber and stone act was by a divided court, and it may be that individual members of the court have expressed doubt as to whether the correct rule was adopted in that case, the majority of the court has always felt that the case was correct in principle, and should be adhered to on that ground rather than on the

The [illegible] enhancement [illegible]

[illegible] marriage [illegible] spouses

[illegible] acquired [illegible] marriage [illegible]

[illegible] statutes,

[illegible] laws, [illegible]

[illegible]

[illegible] marriage [illegible] sep. [illegible]

[illegible] marriage, [illegible]

absence [illegible] showing [illegible] funds

[illegible]

Imp. Lands acquired cost [illegible]

entries [illegible] laws, [illegible] sep. [illegible] in

view [illegible] providing [illegible] each spouse

[illegible] entry [illegible] acquire title

[illegible] entryman [illegible] entry, [illegible]

[illegible] directly [illegible]

indirectly [illegible] person [illegible]

requiring [illegible] residence [illegible]

Imp. Mining [illegible] acquired [illegible] laws

[illegible] sep. [illegible] in view [illegible]

permitting either spouse [illegible]

entry [illegible] acquire [illegible] title [illegible]

[illegible] aid [illegible] intervention [illegible] ground of stare decisis. By analogy, therefore, we hold that the land here in question was the separate property of the husband, and not the community property of the husband and wife.

The fourth class involve the mining claims. The laws relating to the acquisition of mines containing the precious metals are similar to those relating to the acquisition of timber and coal lands. Either spouse can make entry under them, and acquire a full title from the Unite States without the aid or intervention of the other, and that such propert is the separate property of the locator and not the community property of the husband and wife we held in Phoenix Min. & Mill Co. v. Scott, 20 Wash. 48, 54 Pac. 777.

The fifth class was adjudged by the trial court to be community property, and no question concerning the correctness of the decision is suggested on the appeal.

These conclusions require an affirmance of the judgment of the court below, and such affirmance will be ordered.

Dunbar, C. J., Chadwick, Mount, Parker, Crow, Morris, and Gose, JJ. concur.

JACOB SCHWEITER, Respondent, v. JOSEPH J. HOOKER et al., Appellants.

(94 Wash. 642, 1917)

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered July 3, 1916, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Fullerton, J.--This is an appeal from a decree foreclosing a mortgage held by respondent. The record discloses that appellants, J. J. Hooker and wife, owned 480 acres of land in Klickitat county, Washington. R. L. Hooker, a brother of J. J. Hooker, was a real estate agent with offices at Spokane, and through his activities the land in Klickitat county was traded for an apartment house in Spokane. By some means, not clearly pointed out in the evidence, R. L. Hooker fraudulently caused his own name to be inserted as grantee in the deed which conveyed title to the apartment house in consideration of the land in Klickitat county. Subsequently R. L. Hooker traded the apartment house for the land in controversy, taking a deed thereto again in his own name. At the time he received title to this land he was a married man. On April 12, 1913, he executed a note, and to secure the same he also executed a mortgage on the premises in question. This mortgage appears, in part at least, to have been an extension of a previous mortgage on the premises, and was signed "R. L. Hooker" and "Frona Hooker". Shortly afterwards R. L. Hooker and wife executed a deed purporting to conveyetitle to these premises to J. J. Hooker, and the same was delivered to him some time in May or June, 1913. This deed specifically provided that the land was conveyed free from all incumbrances except the mortgage in question. J. J. Hooker accepted the deed and paid interest on the mortgage for a period of time approximating two years. Respondent then instituted this action for the purpose stated above. R. L. Hooker, Frona Hooker, his wife, and J. J. Hooker and wife were named as defendants therein. R. L. Hooker and wife failed to appear and allowed a default to be taken against them, but J. J. Hooker and wife appeared and set up the defense that Frona Hooker's signature to the mortgage was a forgery and that the mortgage was therefore void. From a decree foreclosing the mortgage, J. J. Hooker and wife alone have appealed.

Appellants argue that, since the signature of Frona Hooker was a forgery and she had a community interest in the property, the mortgage is absolutely void and cannot be ratified. Several cases are cited to support this contention, but they are all cases where the injured wife is complaining against her husband. Here neither Frona nor R. E. Hooker is a party to the appeal, and this is a oontroversy between an innocent mortgagee and a subsequent grantee. In any event, even granting that the signature of Frona Hookeř was forged, appellants' contention cannot prevail. We think it erroneous to assume that this property was the community property of R . L. Hooker and wife, for from the very inception of these transactions gross fraud was practiced by R. L. Hooker in getting paper title to the apartment house and the land in question in his own name. In equity and good conscience he had no title to this land, and the best that can be

said of his alleged interest therein is that he held it as a naked trustee for J. J. Hooker. This being true, it follows that it was not the community property of R. L. Hooker and wife, and the mortgage, therefore, was not invalid because not signed by Frona Hooker.

The fact that J. J. Hooker accepted a deed to these premises providing that the land was subject to this mortgage, and paid taxes on the same tends to support this theory of the case. As he got exactly what this deed purported to convey, he should not be allowed to use as a defense in an action to foreclose the mortgage, instituted by an innocent mortgagee, the fact that Frona Hooker's signature thereto was forged; thus getting more than the deed purported to convey, viz., the land without this incumbrance, and also depriving the mortgagee of this land as security for the money loaned in good faith. It is not disputed that Frona Hooker signed the deed of these premises to J. J. Hooker subject to this mortgage. By so doing she ratified the same, and by defaulting in this action she impliedly admits the validity of the mortgage. It becomes apparent, therefore, that J. J. Hooker is not entitled to raise the question of the validity of the mortgage, since he would not be injured if the mortgage were declared valid; and the only person who would be injured, viz., Frona Hooker, has ratified and admitted the validity of the same.

To allow appellants to prevail would also violate the well established rule that whenever one of two innocent persons must suffer, he who has enabled a third person to occasion the loss must sustain it. As J. J. Hooker by his lax business methods permitted R. L. Hooker to obtain paper title to the premises in question, and by accepting a deed from him ratified such paper title, and by waiting three years and paying interest to respondent during that time misled respondent, he is guilty of laches.

The judgment is affirmed. For 71,

Morris, Parker, Holcomb, and Webster, JJ., concur.

where [illegible] record title [illegible] fraud, [illegible] comm[illegible] [illegible] hence [illegible] thereon [illegible] invalid [illegible] signed [illegible] innocent mtge.

BERTHA VOLZ, Appellant, v. JOHN ZANG, Respondent.

(113 Wash 378, 1920)

Appeal from a judgment of the superior court for King county, Hall, J., entered February 17, 1920, upon findings in favor of the defendant, in an action to quiet title, after a trial to the court on the merits. Affirmed.

Mackintosh, J.--John and Martha V. Zang, then husband and wife, on February 16, 1915, entered into the following agreement:

"Know all men by these presents:--That I, John Zang of the city of Seattle, county of King, and state of Washington, husband, and Martha V. Zang, of the same place, wife, for and in consideration of the love and affection we each bear, one toward the other, and further, in consideration of the mutual helpfulness we have been one to the other in the past, and for and in consideration of the co-mingling of our joint efforts and earnings and properties heretofore, do hereby mutually agree one with the other that every piece, parcel, lot and tract of land, whether situated in the city of Seattle, or elsewhere, and each and every part of the personal property, whether situated in the city of Seattle, or elsewhere, and each and every particle of mixed property wheresoever situated, shall be by us and all other persons whomsoever, deemed, esteemed, regarded, treated and known as community property. In this agreement so made one with the other, the date of acquiring, the manner of acquiring and all statements by either of us heretofore made respecting alleged separate property, or affecting any property, is to be regarded and esteemed as of no effect, the full intent and purpose of this instrument is to be construed by the courts, our heirs, executors and assigns and by all other persons whomsoever, as a voluntary conveyance from one to the other and unitedly to the community all of our earthly possessions in such form and manner that the same shall from this date be the property of the community of ourselves as husband and wife."

This agreement was signed by both parties and duly acknowledged.

At that time, John Zang was the owner of certain real estate, which he held as his separate property, and Martha V. Zang was the owner of certain other parcels of real estate which were her separate property. On January 24, 1916, Martha V. Zang died intestate. The appellant in this action was her mother, who is claiming an interest in the real estate which was, she contends, the separate property of Martha V. Zang; her clai being that the agreement of February 16, 1915, could not have the effect o changing the separate property of the Zangs into community property, for the reason that the purchase, sale, disposition and status of real property in this state is regulated by statute; and that community property cannot be acquired except as provided in Sec. 5917, Rem. Code; and there being no statute allowing husband and wife to create community property by contract, or to change separate property into community property by deed, that the agreement as set out is ineffectual.

In this case there is no question of the rights of creditors or the interests of any third persons to be affected. If the appellant's contentions are right, she would be entitled to certain rights in the property of her daughter as her heir, but if her contentions are incorrect, the entire estate goes to the respondent, the husband. The agreement expressly provides that

"the full intent and purpose of this instrument is to be construed by the courts, our heirs, executors and assigns and by all persons whomsoever, as a voluntary conveyance from one to the other and unitedly to the community."

The intention of the parties is clear and beyond the shadow of question, and if this conveyance is a nullity it is impossible for the members of the community to change the status of their separate property into that of community property. In Yoakum v. Kingery, 126 Cal. 30, 58 Pac. 324; In re McCauley's Estate, 138 Cal. 432, 71 Pac. 458; and Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94, the supreme court of California has held that a deed from husband or wife was sufficient "to transmute the separate estate of either of them into community property, if it was properly executed." Sections 158 and 159 of the California Code provide:

"Either husband or wife may enter into any engagement or transaction with the other, or with any person, respecting property which either might if unmarried - - - " (Sec. 158.)

"A husband and wife cannot, by any contract with the other, alter their legal relations, except (1) as to property . . ." (Sec.159.)

Our statutes are not identical with those of California; but under our statutes, the rights of husband and wife are no more restricted than those enjoyed under the California statutes. Section 5915, Rem. Code, provides:

"Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried."

Section 5916, Rem. Code, reads:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

Section 5925, Rem. Code, is as follows:

"Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued as if he or she were unmarried."

Section 5927, Rem. Code, provides:

"Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried."

It would seem from these statutes that the husband and wife have been given a right to deal in every possible manner with their property. Broad general powers are given which must include the lesser and more restricted powers. Moreover, this court has already indicated that the husband or wife may change the status of separate property to community property. In In re Buchanan's Estate, 89 Wash. 172, 154 Pac. 129, this court said:

"We are unable to gather from these observations of the court any rule more favorable to counsel's contention than that specific real or personal property once becoming separate property remain so, unless by voluntary act of the spouse owning it its nature is changed."

In Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N.S.) 186, we said:

"We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed."

Here, by the voluntary act of the parties, their separate property was conveyed to the community. The appellant argues that, by virtue of Sec. 5919, Rem. Code, which provides that husband and wife may enter into an agreement as to the status or disposition of their community property to take effect upon the death of either, the only contract allowed between husband and wife with reference to real property is that provided in this section. This court, however, has held that community property, both real and personal, has been changed to separate property irrespective of any reference to Sec. 5919.

In Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 Pac. 1088, an oral agreement that a wife's personal earnings should be her separate property was sustained. In Gage v. Gage, 78 Wash. 262, 138 Pac. 886, a similar agreement was pronounced valid. In Union Securities Co. V. Smith, 93 Wash. 115, 160 Pac. 304, Ann. Cas. 1918E 710, an oral agreement was involved which provided that all property acquired by husband and wife should be their separate property. This court said, "Such agreements, made after marriage and mutually observed, are valid."

In Lanigan v. Miles, 102 Wash. 82, 172 Pac. 894, the property was purchased by the community and the deed taken in the name of the wife. The court held that the property became the separate property of the wife by virtue of an agreement between the husband and wife, and that he should have no interest in it. This court said:

"Reference to the opinions of this court will show that we have built up two lines of decisions covering the right of one or the other of married persons to assert a separate interest in property. In the one line, the court has had to do with the claims of creditors or the interests of third persons having some tangible equity in or lien upon the property sought to be recovered or levied upon. In the other line, the court has had to deal with husband and wife as free contracting agents unhampered and unhindered by the claims of creditors or by any one having direct interest in, or lien upon, the property. In all of the first line of cases, the court has had to deal with circumstances which, if unexplained by testimony at once clear and convincing, would amount to badges of fraud. In the second line of cases it appears that a husband and wife may freely contract, or give one to the other, and thus provide for the holding of property then or thereafter to be acquired as a separate estate."

These cases hold that community property may be changed to separate property regardless of Sec. 5919, Rem. Code. If this is so, the converse must be true, that separate property may be changed by a proper conveyance or agreement into community property. The policy of the law is in favor of community property, and there is no provision in the law operating against the agreement of February 16, 1915, taking effect as it was intended.

Moreover, separate property has often been held to have been changed into community property by reason of its having been commingled with community property; and, also, property once separate has been held to have become community under the doctrine of estoppel. If the law allows separate property to be changed by commingling or estoppel, it should be allowed to change when the parties intend such a change to take place and evidence this intention by a conveyance, conforming in all essentials to the requirements of the law affecting the transfer of real property.

For the reasons stated, the judgment of the lower court is affirmed.

For Def.

Holcomb, C. J., Bridges, Fullerton, and Parker, JJ., concur.

Cf. [illegible] comm. prop. [illegible] Rem. §§ 5916, 5925, 5927 [illegible] conveyances [illegible] [illegible] sep. prop. [illegible] comm. prop. [illegible] prop. [illegible]

JOHN KLOSTERMAN, Respondent, v. T. S. HARRINGTON et al., Appellants.

(11 Wash. 138, 1895.)

Appeal from Superior Court, Lewis County.

The opinion of the court was delivered by

Hoyt, C. J.--This action was brought to set aside a deed made by the defendant T. S. Harrington to his wife, Martha E. Harrington, the other defendant. This deed was made on the 16th day of October, 1891. It appears from the findings of fact that prior to said 16th day of October, 1891, the defendant T. S. Harrington was indebted to the plaintiff in the sum of $210; that an action was brought thereon against the said T. S. Harrington in 1892, and in 1893 judgment for such indebtedness and interest thereon was duly rendered; that thereafter execution was issued to the sheriff to collect the same, and was returned unsatisfied for want of property out of which to make the money. It further appeared that such indebtedness was for goods used in the hotel business conducted by said T. S. Harrington and his wife, Martha E. Harrington.

The superior court found that the conveyance was in fraud of the rights of the plaintiff, as a creditor of the community, and made an order that the execution issued upon such judgment should be satisfied out of the property conveyed by such deed. From this decree defendants have appealed, and urge here as reasons for its reversal the alleged facts that it was not made to appear that the indebtedness was incurred prior to the date of the execution of the deed and that it was made to appear that the deed was not a voluntary one, but was made in payment of certain indebtedness of the community to the wife. It is also urged that it was shown that the defendant T. S. Harrington had other property out of which the execution could have been satisfied.

If we could consider the testimony which is set out in the statement of facts as the defendants do, some important questions of law would be presented for our consideration. But, whatever might have been shown by the statement of facts, if settled in accordance with the contention of the defendants, the facts shown by the statement actually settled, which are all that we can consider, fail entirely to establish the defendants' contention. As we have before stated, it was found by the court that the indebtedness was incurred before the date of the deed, and such finding was supported by the direct testimony of the plaintiff, and in no manner contradicted by anything which appears in the statement of facts. It did appear by such statement that the defendant T. S. Harrington testified that his wife had received certain moneys from a relative in Utah; that the same had been used by the community, and that the community had never repaid the amount. But it was not made to appear that at the time the deed was executed it was understood by both, or even one of the parties thereto, that it was to be in satisfaction of the indebtedness of the community to the wife. On the contrary, it appeared that it was made for an entirely different reason. It further appeared that no consideration passed at the time of its execution. We must, therefore, agree with the conclusion of the lower court, that it was a voluntary conveyance, and

. where [illegible] conveyance [illegible] comm. [illegible] bus. [illegible] consid. [illegible] comm., [illegible] indebted [illegible] ~~sales~~ creditors, [illegible] retained [illegible] comm., [illegible] satisfy [illegible] conveyance [illegible] voluntary one [illegible] comm. [illegible] fact [illegible] indebted [illegible] fraudulent [illegible] existing creditors.

Since [illegible] conveyance [illegible] bus., [illegible] its comm., [illegible] sep. [illegible] conveyance [illegible] fraud [illegible] creditors [illegible] comm., [illegible] deed [illegible] set aside [illegible] executions [illegible] binds [illegible] comm. [illegible] estate [illegible] title.

could have no effect as against creditors who at the time of its execution had claims against the community, unless there was sufficient property retained by the community to satisfy such claims. As to the amount of property retained by the community, the proofs fail to show that there was anything which could be reached to satisfy the judgment, and in view of the fact that an execution had been issued and returned unsatisfied for want of property upon which to levy, it must be presumed, in the absence of express proof to the contrary, that the community had no property with which to satisfy the judgment.

Under our statute the conveyance by the husband to the wife had the effect of changing its community character to that of separate property of the wife. Hence, it was necessary that the deed should be set aside in order that purchasers at a sale under an execution which only bound community property should be informed as to the state of the title.

The decree entered is somewhat unusual, but no objection on that account was raised in the court below, nor has it been suggested here; and as we find nothing therein, nor in the proceedings upon which it is founded, which could affect adversely the rights of the appellants, such decree will be in all things affirmed.

Scott, Dunbar, Anders and Gordon, JJ., concur.

SHERMAN W. EVES et al., Respondents, v.
GEORGE R. ROBERTS et al., Appellants.

(96 Wash. 99, 1917.)

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered January 19, 1915, upon findings in favor of the plaintiffs, in an action to quiet title, tried to the court. Affirmed.

Chadwick, J.--Reuben H. Eves and wife, Mary J. Eves, were the owners of a certain tract of land in Vineland, Asotin county, Washington. Mary Jane Eves died on or about October 19, 1904, leaving surviving her, her husband and four children. Two of the children, Sherman W. Eves and Alvin L. Eves, were minors. On September 28, 1903, Mrs. Eves and her husband had mutual deeds drawn by a notary public. The form of the deeds was such that each conveyed to the other as if the grantor was the sole owner. There can be no question that the parties intended, at the time, to defeat the statute of wills and make an administration of the estate of the one dying first unnecessary. They said, according to one witness, that the property was so fixed that their children would not get it; and according to another, it was so fixed that they would not have to pay out anything for lawyers' fees if one of them should drop off.

The record title was not encumbered at the time by the recordation of either deed. Reuben H. Eves testifies that each deed, when prepared, was given to the grantor; that is, he retained the deed executed by himself, and Mrs. Eves retained the deed that she had executed; that they took them home and placed them in a bureau drawer. He further testified that he left home shortly after the time when the deeds were executed, and his absence continuing over the time appointed for his return, his wife took the deed which he had executed out of its place of deposit and put it of record. Shortly after the death of his wife, Reuben H. Eves took the deed which his wife had executed and filed it for record. This was the state of the record title on the 15th day of September, 1910, when Reuben H. Eves and his later wife, Jane P. Eves, united in a conveyance of the property to George R. Roberts. No administration was ever had of the estate of Mary J. Eves. This action was brought by her children to recover an one-half interest in the property.

From a decree dismissing the action as to two of the heirs, who were of age at the time of the death of Mrs. Eves and against whom the statute of limitations had run, and a holding that the respondents Sherman W. Eves and Alvin L. Eves were each entitled to an undivided one-eighth of the property, appellants have prosecuted this appeal.

It seems to us that the only question is whether the deeds were delivered. That there was no present intention to deliver them is best evidenced by the circumstances attending their form and execution. Each purported to convey the whole title. They were executed simultaneously, and had they been filed for record at the same time, the one would have cancelled the other. The title would have been unaffected. The taking of the deed made by Reuben H. Eves from its receptacle by Mrs. Eves, and

the filing of it during his absence, rather negatives the presumption of delivery, for if it had been delivered when executed or before Mr. Eves' departure, Mrs. Eves would probably have recorded it at once instead of waiting until she had become nervous and worried over the continued absence of her husband.

There is no circumstance from which a delivery by the husband to the wife can be inferred that would not sustain the same inference that the deed by the wife was, at the same time, delivered to the husband. It follows, then, that the recording of the deed from the husband to the wife would convey no title as against an outstanding deed simultaneously executed and simultaneously delivered by the wife to the husband.

We understand the rule to be that when a deed, formally executed and acknowledged, is found in the possession of the named grantee, a delivery will be presumed, and if one would overcome such presumption he must do so by testimony that is strong and convincing. Richmond v. Morford, 4 Wash. 337; 30 Pac. 515. See, also, 8 R.C.L. p. 999; 13 Cyc. 733; Jackson v. Lamar, 58 Wash. 384, 108 Pac. 946; In re Slocum's Estate, 83 Wash. 158, 145 Pac. 204; Brown Brothers Lumber Co. v. Preston Mill Co., 83 Wash. 648, 145 Pac. 964.

But that presumption cannot be applied with all its force, or even in a measureable degree, where a husband and wife make mutual deeds to the same property with intent to pass title in the event of the death of one or the other, and, in which event, the deed to the one deceased is not to be used as a conveyance.

Whether such conveyances could be sustained as deeds if placed in some escrow, independent of the parties, we are not called upon to decide. We are quite satisfied to hold, however, that where, as in this case, we have two deeds made simultaneously, and for the avowed purpose of defeating the jurisdiction of the courts and expense of administration upon the estate, that the presumption is against delivery, and that the one depending upon it must show the fact by testimony rising to the same dignity as that required to overcome the presumption attending the possession of a deed, formally executed, by a stranger to the title.

The circumstances of this case invite the application of the same rules that apply in cases where one comes into possession, or discloses the possession, of a deed after the death of a grantor, and his possession is challenged by one who would take under a will or the statutes of descent. We but recently had occasion to review these principles. In Showalter v. Spangle, 93 Wash. 326, 160 Pac. 1042, we said:

"In every case there must be something from which it clearly appears that there was an intention to make the deed a presently operative conveyance vesting title in the grantee within the grantor's lifetime. Atwood v. Atwood, 15 Wash. 285, 46 Pac. 240."

When Mrs. Eves recorded the deed in which she was named as grantee, she either became the sole owner, for one spouse can convey to another, (Rem. Code, Sec. 8766) or the deed accomplished no more than to cloud the record, depending entirely upon whether the deed has been delivered.

That it lacked the element of delivery is best evidenced by the act of Eves, who, in seeming obedience to his first intention and understanding that the deeds were to be operative only as testamentary writings, placed his deed of record after the death of his wife.

We have not overlooked the fact that the reputation of Eves' truth and veracity was successfully attacked, but the decree of the court may be sustained by reference to the exhibits and collateral circumstances which do not depend upon Eves' testimony.

Counsel charge respondents with laches. They brought their action within three years after coming of age, and are within the statute. Rem. Code, Sec. 158. Laches is an equitable doctrine and will not ordinarily be resorted to to defeat an action brought within the limit of an express statute. Cordiner v. Finch Inv. Co., 54 Wash. 574, 103 Pac. 829; Roger v. Whitham, 56 Wash. 190, 105 Pac. 628; 134 Am. St. 1105; McDowell v. Beckham, 72 Wash. 224, 130 Pac. 350.

We find no error and the decree is affirmed.

For Pl,

Ellis, C. J., Morris, Main, and Webster, JJ., concur.

Where hus. & w simultaneously executed deeds [illegible] prop., [illegible] intent [illegible] title [illegible] survivor [illegible] creat. [illegible] presumption [illegible] delivery [illegible] fact [illegible] deeds [illegible] intent [illegible] deed presently operative [illegible] title [illegible] heirs. [illegible] deeds [illegible] void in [illegible], as attempt to avoid testamentary dispositions, [illegible] deed nullifies [illegible]

Imp.

ISABELLA K. BLOOR, Respondent, v. LOREN C. BLOOR et al., Appellants.
(105 Wash.110, 1919)

Appeal from a judgment of the superior court for San Juan county, Pemberton, J., entered May 1, 1918, upon findings in favor of the plaintiff in an action to quiet title, tried to the court. Reversed.

Chadwick, J.--On April 24, 1916, J. T. Bloor and his wife, Isabella K. Bloor, executed several mutual deeds purporting to convey, the one to the other, all of the community property then owned by them. The deeds when executed were given to, or rather left with, O. J. Bruhns, a justice of the peace, "to keep." Mrs. Bloor testifies, and, of course, it must have been so understood, that the deeds were to be kept until the death of one of the parties, and the appropriate deeds were then to be put on record or delivered to the survivor. It was the intention of Mr. Bloor to arrange the community affairs so as to avoid the expenses of an administration in the event of his wife's death, and to save his wife the like trouble and expense in the event that she should survive him. He had inquired among some of his neighbors and friends and was advised that the better and least expensive way to dispose of his estate would be to prepare "community deeds."

After the death of Mr. Bloor, the respondent went to Mr. Bruhns, and with him to the auditor's office and filed the deeds from the deceased husband to the respondent for record. The children of Mr. Bloor by a former wife, the appellants here, having murmured against the title, respondent brought this action to quiet her title to all of the lands described in the deeds.

There is a serious question in the minds of some of the judges as to whether a delivery such as the law demands in cases of this kind was ever had, but we have decided to treat the deeds as if they were in fact delivered within the rule of Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162; Atwood v. Atwood, 15 Wash. 285, 46 Pac. 240, and Showalter v. Spangle, 93 Wash. 326. 160 Pac. 1042, because we are conscious of the fact that a custom has grown up among the people of this state to fix the status and disposition of community property in a testamentary way by the execution of mutual deeds, the one or the other to be delivered to the survivor in case of death.

We had a similar state of facts in Eves v. Roberts, 96 Wash. 99, 164 Pac. 915, in that deeds had been executed with like intent. In that case we held that there had been no delivery, but we did raise and leave unanswered the question that occurs in this case.

It is fundamental that a deed will not operate as a conveyance unless there is a present intention to part with the title, although possession may be withhold for a time certain or during the lifetime of the grantor.

"It is essential to the delivery of a deed that there be a giving by the grantor and a receiving by the grantee with a mutual intention to pass

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a present title from the one to the other. It may be made through the hands of an agent and it may be accepted through the hands of an agent, but there must be a mutual intention presently to pass the title. This mutual intention is the cardinal requisite. . . . This is an essential to a deed of gift as to any other. It is elementary that a deed cannot perform the functions of a will, hence cannot be effectually delivered after the grantor's death. When, however, the grantor delivers the deed to a third person in excrow to be held until the grantor's death and then delivered to the grantee, the grantor retaining no dominion or control over it, the delivery is valid and an immediate estate is vested in the grantee at the date of the delivery in escrow, subject to the grantor's life estate." Showalter v. Spangle, supra.

It is not enough that a deed be put in safe keeping. Atwood v. Atwood, supra. It must be put beyond the dominion and control of the vendor so that, as between all parties except purchasers for value and in good faith, the title is presently vested and it can be said, as a matter of law, that it has passed out of the one hand into the other, subject only to the grantor's life estate, which equity will preserve pending the contingency upon which the deed is to be put in the hand of the grantee for record and with right of immediate possession.

Deeds to community property by husband to wife, and by wife to husband, in anticipation of death, are necessarily intended to operate as testamentary bestowals of property. Were the separate property of the grantor involved, or had one member of the community made a deed to a third party, no particular complication would arise, although the question of delivery would occur in almost every case, for those who have direct or collateral interest in the property of deceased persons, and in virtue of their interest have incubated the vice of great expectations, are prone to question the disposition of property where their expectations have not been met.

But the conveyance of community property by the method here employed raises complications which are not so easy of solution. For, although a husband may now deed directly to the wife, and the wife to the husband, Rem. Code, Sec. 8766, if deeds to the same property are executed simultaneously, they must of necessity negative one the other, for they must take effect as of the date they are executed, if they are effective at all. We said in Eves v. Roberts, supra, "had they been filed for record at the same time the one would have cancelled the other." The leaving of such deeds with a third party, the one to become effective and the other a nullity in the order of time, cannot change the legal effect of the instruments or give them better standing than if they were executed, delivered and filed for record on the same day. For it is not the future effect, but the present intention, that sustains deeds of gift or of testamentary character. Therefore, it must be held that mutual deeds to the same property cancels the subject-matter, for it cannot be said that one having an entire title--we understand that the community property is held by the half, and, by the whole, subject to division and partition in case of death--can convey by one deed and take by another in the same transaction and establish a new relation to, or change the character of, the title.

Deeds made and delivered, or delivered, although it be to a third party, and put beyond the control of the grantor, are sustained solely

upon the ground that they are present conveyances. This result is impossible where husband and wife execute mutual deeds to community property for from the very nature of things, one of the two deeds, they being made the one in consideration of the other, must fail and become a nullity, for it is not within the fore-knowledge of the parties which one may die, leaving the other surviving.

The common law, so far as it throws light upon our present inquiry, the decisions of this and other courts, and our statutes, compel the holding that this manner of disposing of community property in anticipation of death cannot be sustained, for the transaction is tinctured by an element of weakness which goes to the very marrow of the transaction, for, notwithstanding the written documents, the intention of the parties at the time is that a part of their contract must fail, otherwise they would not have agreed, as of necessity they must have agreed, that one-half of their contract should in the end be a nullity as of the time of its execution.

This same question has arisen in the state of California. In Kenney v. Parks, 125 Cal 146, 57 Pac. 772, the deeds were delivered to a certain bank. The court said:

"Was the delivery of the husband's deed to the cashier sufficient to pass the title to the wife? Upon mature consideration, we have arrived at the conclusion that no title whatever passed. While it is not so expressed in the agreement, yet the intention of both parties is plain that the party surviving should have his or her deed returned in case the other party should die, and that no title to the property described in the deed of the party surviving should vest. In other words, the plaintiff having survived her husband, her deed is to be returned to her, and the title to her property remain vested in her. Under the law of this state, the title to the property vestee presently when the deeds were delivered, or did not vest at all. Yet, as to the plaintiff's property it is not apparent that no title ever vested in the husband under her deed. Such being the case as to her property, it is most difficult to see how title to his property, by his deed, ever vested in her. The general principles of law involved in this case are quite fully discussed in Bury v. Young, 98 Cal. 446, 35 Am. St. 186. In the decision of that case many authorities are cited supporting the conclusion declared, and with that conclusion we are entirely satisfied. It is there said: 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that when it is placed in the hands of a third party it has passed beyond the control of the grantor for all time.' In the present case, by the agreement of the grantor and grantee, it was understood that the grantor's deed was to be returned to him upon the happening of a certain event, to-wit: The death of the other party. And at this time it may be assumed that the plaintiff's deed has been returned to her or at least has been treated as of no force and effect. In the Bury case it is also said: 'In every case where the deed has been declared invalid by reason of the failure of delivery, it will be found that the grantor reserved some rights over the instrument; that upon the happening of some event, or contingency, or condition, he had the right, if he so disposed, to reach out and take it from the possession of the depositary.' The present case comes squarely within that description. Here the grantor reserved the right to recall his deed upon the happening of a certain event; when that event happened, he

had the right to reach out and take back the deed, and such reservation is fatal to a valid delivery. The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title vest under it."

In Long v. Ryan, 166 Cal. 442, 137 Pac. 29, it was held that an agreement to return the deed of the survivor was not the disqualifying element, for that the law would imply. The logic of this conclusion cannot be doubted, for whether the deed which has become nullis juris is returned under a contract made at the time of its execution, or is left with a third party under an implied contract to return it, can make no difference. So whether we follow the theory of contract, as has the California court, or just put ourselves in the place of the parties and admit that the deed made by the surviving spouse was understood to be without force to convey after the death of the other spouse, we reach the same result.

While not an authority for this case, there is much said in In re Edwall's Estate, 75 Wash. 391, 134 Pac. 1041, to bear out our argument. In that case deeds were executed in Jqnuary. In July the parties made mutual wills. The wills were held void under the statute of frauds. It was contended that the deeds furnished written evidence of the contract which would have otherwise been evidenced by the wills. The court said:

"The trouble with this contention is that these deeds in this respect, are in exactly the same condition as the wills. They are simple warranty deeds in form, as we have noticed, and prove nothing upon their face other than that they signed and acknowledged as the individual deed of each; and, like the wills, the languate is wholly devoid of any suggestion that they were executed in pursuance of any such contract as is here relied upon. As deeds they, of course, never became, nor were either of them ever intended to become, effective while both their makers lived. Indeed, it was not intended that the deeds of the survivor ever became effective under any circumstances. Each deed rested for its ultimate effectiveness upon a contingency which might never occur."

Whether it was because there was no way of logically working out the idea of mutual deeds for community property, the one to fail and the other to become effective after the death of one of the parties, or whether it was to avoid the question that must, in any event, occur in every case, and of its own strength lead to vexations litigation, we do not know; but we do know that the legislature has passed a law under which contracts of testamentary character may be made by a husband and wife, of and concerning community property.

Spouses having no right to convey the one to the other, in the absence of legislation, Rem. Code, Sec. 8766, the legislature wisely provided a way by which the parties could contract so as to save their contract from all questions of delivery or negation.

"Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly

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entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: Provided, however, that such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior cour to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party." Rem. Code, Sec. 5919.

Counsel for respondent have found asylum in this statute. They say:

"These deeds should be construed together, they were made at the same time, constituted one transaction, and when thus considered, we have the husband and wife entering into an agreement concerning the status and disposition of their community real property, to take effect upon the death of either; this agreement is made by the execution of instruments in writing under their hands and seals, acknowledged and certified as deeds of real estate are required to be under the laws of the state. A full compliance with Sec. 5919.

"Give to this transaction the liberal construction required by Sec. 5923 of Rem. Code, and nothing else can be made of it than the making of an agreement in compliance with the provisions of Sec. 5919. There is here every element required in the making of an agreement as to the status and disposition of community real property--their acts are entitled to a liberal construction--and the intent of the parties to consummate the very objects of this section is voiced from the beginning to the end of this record, and this respondent should not be robbed of the result of her and her husband's worthy intentions, simply because there were two instruments instead of one, when under all rules of law the two should and must be construed together, and when so construed, no matter what may be said of the transaction had it not related to community property, it must be held that the title to the real estate in controversy was, at the time of the commencement of this action, in the plaintiff Isabella K. Bloor, free from the claim of these appellants.

"Agreements made in conformity with Sec. 5919, supra, are valid contracts. McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060."

It may be granted that the parties contracted as they would have contracted if they had followed the statute, but still respondent cannot prevail, for they have not evidenced their contract in the way the statute has said that it should be evidenced. If our reasoning be correct, there are not two deeds, nor even one legal deed, to evidence the contract, for they can have no more legal effect to voice the contract than on the day they were executed, and that, as we have shown, amounted to nothing, for one and both of the deeds were tainted with a virus that poisoned them to their death, in their inception as well as in their end.

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Furthermore, the statute contemplates a contract complete in itself, and in writing. It seems to have been drawn with certain intent to avoid the necessity of oral testimony or proof by fragmentary writings. The instrument drawn to evidence the contract must concern the status and disposition of the property, and must be in writing and under the hands and seals of the parties, and witnessed and acknowledged, if it is to be potent as a deed or a will. The writing must state the terms of the contract. It must be mutual and bilateral. A single unilateral contract--granting that one of the deeds so made is effective, for the other must die with the dead man--will not suffice.

But granting, for the sake of argument, that the deed executed by the deceased spouse would otherwise become operative at death, it still falls far short of the contract intended by the statute, for at best it would evidence no more than the contract of the one party, for as said in In re Edwall's Estate, supra:

"They are simple warranty deeds in form. . . and prove nothing upon their face other than that they were signed and acknowledged as the individual deed of each; and . . . their language is wholly devoid of any suggestion that they were executed in pursuance of any such contract as is here relied upon."

So far as we are advised, the court has made but two references to Sec. 5919. But we take it that it must have been in the mind of the court, and especially in the mind of the writer of the concurring opinion, in Board of Trade of Seattle v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. 919, 16 L. R. A. 530, that the statute having provided a way for the husband and wife to contract with reference to the status and disposition of community property to take effect after death, the way provided is exclusive. Judge Stiles says in the body of the opinion:

"By that section husband and wife, when they attempt to make any agreement as to the status or disposition of the community property, must do so by the execution of an instrument in writing, and under seal, which must be acknowledged and certified, as a deed to real estate."

And Judge Scott says in his concurring opinion:

"This seems to me to clearly preclude the idea of their entering into any such agreement, affecting their property interests to take effect prior to the dissolution of the community, except as expressly provided otherwise."

In McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060, the law was sustained, but the insinuation that, if the parties are to avoid the making of wills, they should follow the "special contract provided for by statute," is strong.

Counsel contend further that, in any event, respondent is entitled to the half-interest conveyed to her by the husband's deed, absolutely and in fee, and is further entitled to a life estate in the remaining half of the property reserved to herself when she executed the deed to

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her husband. We think this contention has been answered by what has already been said, namely, that the deeds and the manner of their delivery, if there was delivery, do not of themselves establish that the grantor in each passed a present title to the grantee, subject only to a reserved life estate in the grantor, and resort must be had to parol evidence to establish such a condition. The very nature of the transaction carries the presumption that the vesting of title was dependent upon survivorship, and that until the death of one, neither deed should take effect, and then only the deed of the one who had died. As it could not be known before the death of one, which would survive, we have here a parol testamentary disposition attempted, which fails because not in accordance with the statute. The respondent's deed to her husband was not executed with a present intent to convey in any event, but only upon a possible contingency, and therefore lacks an essential element of a deed of gift or testamentary deed; and further, the deed does not purport to reserve a life estate; so that if we give to the deed the effect which is contended for, we would be led into the position of making a new contract which was not in the mind of either party at the time the deeds were executed. The form of the instruments precludes the idea that either party intended to convey anything less than a fee simple title.

Being convinced that the title of respondent cannot be sustained under the deed executed by her husband; that the writing, whether considered as one deed or two deeds, does not evidence a contract such as is permitted under the statute, and that the deed relied on does not vest a life estate in the respondent, we conclude that the decree of the lower court must be reversed, and the cause remanded with directions to dismiss the suit.

For Def.

Main, C. J., Mackintosh, Mitchell, and Tolman, JJ., concur.

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NILSON v. SARMENT.
(S.F. 4,530.)
(153 Cal. 524)

(Supreme Court of California. May 11, 1908.)

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Carl August Nilson against Antonio A. Sarment. From a decree in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

Sloss, J.--This is an action to quiet title to a parcel of land in the city of Oakland. The complaint alleges that plaintiff and Emma Christina Nilson were married in 1877, and ever since have been husband and wife; that in July, 1884, plaintiff purchased the land in question from one John Ziegenbein; that the deed from Ziegenbein named Emma Christima Nilson, as sole grantee, but that the whole consideration for the conveyance was paid by plaintiff out of moneys earned by him during his marriage; and that the deed was taken in the name of Emma Christina Nilson, as grantee, for the marital community of plaintiff and his said wife. It is further alleged that in January, 1905, Emma Christina Nilson executed and delivered to defendant an instrument purporting to convey said land to him, and that defendant claims as interest in the land by virtue of said instrument. The answer alleges that Emma Christina Nilson purchased the property with her separate funds, that the deed to her was made with plaintiff's consent; and that plaintiff, at the time of the purchase from Ziegenbein, gave to his wife whatever interest he had in the property. It is further averred that Emma Christina Nilson entered into possession and retained possession of the property until her deed to defendant; that during all that time she, with plaintiff's knowledge, approval, and consent, asserted her separate ownership of the land and dealt with it as her separate property; that she insured the building on the land, and had the loss mentioned in the policies made payable to her; and that on various occasions she borrowed money, giving as security therefor deeds of trust executed by herself and the plaintiff, such deeds of trust providing that, in the event of payment, the property should be reconveyed to her, and, in case of default and sale, any surplus of the proceeds should be paid to her. The defendant alleges that the plaintiff's wife represented to him that the property was her separate property, that he caused the title to be searched and was advised that the title was in her, and, upon careful inquiry as to the ownership, learned that she had, with plaintiff's consent, claimed the property as her own and dealt with it as her separate property, whereupon the defendant purchased it of her, paying her the sum of $2,300. The defendant also filed a cross-complaint, asking judgment for the possession of the property and damages for its withholding. The court found against plaintiff's allegation that the land was, or ever had been, the community property of himself and his wife. It found that the whole consideration was paid by plaintiff out of moneys earned by him during his marriage with his said wife, but that plaintiff directed

Ziegenbein to execute the deed to Emma Christina Nilson and gave to her whatever interest he had in said property. Judgment in favor of defendant, quieting his title against plaintiff and awarding him the possession of the premises, together with the value of their use and occupation, followed. The plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The principal point urged by appellant is that the evidence is insufficient to justify the finding that the property was not community property, but that it was the separate property of plaintiff's wife. Sections 162 and 163 of the Civil Code define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterward by gift, bequest, devise, or descent. By section 164 all other property acquired after marriage by husband or wife, or both, is declared to be community property. In 1889 this section was amended by the addition of the words, "but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Prior to the adoption of this amendment the presumption was just the opposite; that is to say, property conveyed to either husband or wife after their marriage by a conveyance (other than a deed of gift) was presumed to have vested the title in the marital community. Tolman v. Smith, 85 Cal. 280, 24 Pac. 743; Smith v. Smith, 12 Cal. 224, 73 Am. Dec. 533; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Ramsdell v. Fuller 28 Cal. 38, 87 Am. Dec. 103; Morgan v. Lones, 78 Cal. 58, 20 Pac. 248; Jordan v. Fay, 98 Cal. 264, 33 Pac. 95; Gwymn V. Dierssen, 101 Cal. 563, 36 Pac. 103; Lewis v. Burns, 122 Cal. 358, 55 Pac. 132. The property in question was acquired by the Nilsons (or one of them) in 1884. It is thoroughly settled that the amendment of 1889 is not retroactive, and has no application to property acquired by husband or wife before its enactment. Jordan v. Fay, supra; Gwynn v. Dierssen, supra; Lewis v. Burns, supra. In Jordan v. Fay the court, speaking of this amendment, said: "But the rule declared by the statute was more than a rule of evidence. It was a rule of property as well; and we do not think the Legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested."

Was the finding as to the separate character of the property in question supported by any substantial evidence tending to overthrow the presumption resulting from the conveyance to a married person? To make the land the separate property of the wife, it was necessary, either that it should have been acquired with her separate funds or that it should have been given to her. It is to be remembered that the court finds, contrary to the averment of the answer, that the property was paid for with community funds, and the conclusion that it became the separate property of the wife must, therefore, rest upon the further finding that plaintiff gave to his wife whatever interest he had in said property. There is nothing in the evidence before the court to show that any such gift was ever made. It appears that plaintiff's wife left his home about the time she made her deed to defendant, and she was not a witness at the trial. Nor was any testimony given by Ziegenbein, the original grantor. The only witnesses who could give direct testimony regarding the circumstances surrounding the making of the deed in 1884 were the plaintiff and

his brother. Both testified that the deed was made to run to Emma Christina Nilson at the suggestion of Ziegenbein, who said that "it would make no difference," and that neither she nor the plaintiff could sell the land without the signature of the other. This explanation, which is not in itself improbable, was not contradicted, but, even if we disregard it, we are left with the deed itself, which, if unexplained, raises the presumption that the land became community property, notwithstanding the fact that the wife was named as grantee. The plaintiff testified that he bought the property for a home for himself and his family, and that it was not his intention to make a gift of it to his wife. This clear and positive testimony regarding the transaction is not directly contradicted, and there is no support for the finding against it unless it can be found in some circumstances which are claimed to justify the inference that the land became the separate property of the wife.

Much stress is laid on the fact that Ziegenbein's conveyance described the land as "incumbered by a mortgage * * * on which there is now due the sum of $2,900 to be paid by the party of the second part." The party of the second part was the wife, and it is argued that this shows that the wife became bound to pay the mortgage, and thus tends to support the contention that the husband intended to make the property hers. It appears, however, that the entire purchase price was only $2,900. Nothing was to be paid over and above the face of the mortgage, and, in fact, $1,200 of this had been paid by plaintiff before he ever received the deed. The most that can be claimed for the clause quoted is that it shows that the consideration was to be paid by the wife from her separate property. In view of the uncontradicted evidence that no part of the consideration was so paid, but that the plaintiff paid part of it before the execution of the deed, and eventually paid it all with community property (as is found by the court), the insertion of this clause by the grantor cannot be regarded as supporting the finding that the land was the separate property of the wife. It certainly does not tend to show a gift, which alone can be contended for under the findings. No greater force is to be attributed to the evidence that insurance was effected by the plaintiff, and that by the policies the loss was made payable to the wife. In view of the fact that the title stood of record in her name, this was the natural and ordinary course to pursue. If the house and lot, although standing in her name, were not her separate property, the cirstance that insurance money would have been payable to her in the event of loss by fire would not make that money her separate property any more than the burnt house was. In Lewis v. Burns, supra, assessment lists, assessing certain lots to the wife, were sworn to by the husband. This was held not to be an admission that they were her separate property. The method of insuring in this case stands on the same ground. The same reasoning applies to the deeds of trust made by plaintiff and his wife to secure loans of money. The provision for reconveyance, or any reconveyance actually made, had no legal effect beyond that of making the record title clear, since upon payment of the debt the purposes of the trust ceased, and the property at once, without any reconveyance, revested in the party or parties who had owned it before. Tyler v. Currier, 147 Cal. 31, 81 Pac. 319; MacLeod v. Moran (Cal.) 94 Pac. 604. The provisions for reconveyance or payment of surplus, contained in these deeds of trust, like the mode of effecting insurance, merely indicated that it was not desired to change the record title. That title was in the wife, but these in-

struments are no evidence that she held it, or that her husband recognized her as holding it, as separate rather than as community property.

The only other circumstance relied on by respondent is that the wife claimed the land as her separate property. Her claims are, of course, in no way binding on the plaintiff, except in so far as they may have been made with his knowledge and assented to by him. All that appears in this connection is that plaintiff's wife told him several times within a year or two before her sale to defendant that she would like or was about to sell the property, to which he had objected, saying that she could not sell it unless he signed the deed. This cannot be construed as an admission on his part that the land was her separate property or that she had the right to sell it. It is not questioned that where a husband purchases property with community funds, and directs the conveyance to be made to his wife, with the intent to make it her separate property, the deed will operate to vest the property in her as her separate estate. Peck v. Brummagim, 31 Cal. 441, 89 Am. Dec. 195; Woods v. Whitney, 42 Cal. 358; Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695. But, to have that effect, there must in the case of a deed executed before the amendment of 1889 have been something more than the mere fact that the wife was named as grantee. There must be something appearing either in the deed or elsewhere to show an intent to make the property the separate estate of the wife. Here we find that the plaintiff, desiring to purchase a home for himself and family, bought the land in question, there being a house upon it; that, at the suggestion of the vendor he took the deed in the name of his wige; that, with his family he occupied the premises continuously from the time of the purchase; that he paid, out of his earnings the purchase price of the property, the premiums on insurance, and all loans secured by the property. He testifies that he never intended to make a gift to his wife. His dealings with the property were such as would, in the ordinary course of business, boddictated by the fact that the record title stood in his wife's name, and were in no way inconsistent with the community character of the property. There is no substantial evidence tending tosshow that he made a gift to his wife of his interest in the property, and the presumption that it was community property, aided, as it was, by the undisputed testimony of a party to the transaction, cannot therefore be said to have been overthrown.

It is urged that plaintiff is estopped, as against defendant, to show that the property is community property. This contention is based in part on the provision in the deeds of trust that, in case of sale, the surplus, if any, should be paid to the wife. Such provision was held, in Hoeck v. Greif, 142 Cal. 119, 75 Pac. 670, to constitute an estoppel in favor of the wife. But this ruling was not necessary to the decision, and this court in denying a rehearing in Tyler v. Currier, 147 Cal. 31, 81 Pac. 319, so stated, adding that in its opinion what was said in this connection in Hoeck v. Greif, was "not a correct statement of the law." Indeed, it seems clear that neither the execution of the deed of trust nor any of the other dealings of plaintiff with the property should be held to estop him from asserting its character as community property. Apart from other considerations, two essential elements of an estoppel are, first, that the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them; and, second, that he must have relied upon the statement or admission of the

party whom he seeks to bind by such statement or admission. Biddle Boggs v. Merced Mining Co., 14 Cal. 279. Neither of these elements existed in this case. The respondent knew from the Ziegenbein deed, which was of record, that his grantor was a woman. He had actual notice that she was a married woman. This was enough to put him on inquiry, and to compel him to ascertain, at his peril, whether the property was community property. Ramsdell v. Fuller, 28 Cal. 44, 87 Am. Dec. 103; McComb v. Spangler, 71 Cal. 418, 12 Pac. 347. Furthermore, plaintiff was actually residing on the property, but defendant, before purchasing, made no inquiry of him as to the state of the title. Nor did the defendant in fact rely upon any supposed admissions of plaintiff that the property belonged to his wife in her separate right. He took from Mrs. Nilson a deed containing a covenant of warranty of title. It is a matter of common knowledge that such deeds are unusual in this state. A real estate agent who represented the defendant in the transaction with Mrs. Nilson testified that he had drawn the deed, and that the reason he had made it in the form of a warranty deed was because Mr. Nilson did not sign it. There could be no stronger proof that the defendant (who was bound by the knowledge and the acts of his agent) knew that Mrs. Nilson had a husband who might have some claim upon the property, and that, instead of replying upon any presentation that she was the sole owner of the property, he tried to protect himself against a possible claim on the part of her husband by taking a warranty deed. Under these circumstances there is no ground for a claim of estoppel.

It is unnecessary to consider the other points made by appellant.

The judgment and order appealed from are reversed.

Angellotti, J.--I concur.

Shaw, J. (concurring)--I concur solely because under the decision in Tolman v. Smith, and the other cases cited in the opinion of Judge Sloss, it has become settled law that the presumption was that property conveyed to the wife with the knowledge and consent of the husband was community property; that the fact that the conveyance was so made to her with his consent did not raise an inference that it was intended by him as a gift to her, or, at all events, that such inference was not sufficient to overcome the said presumption; that this had become a rule of property; and that the amendment of 1889 (St. 1889, p. 328, c. 219) to section 164 of the Civil Code, declaring that a conveyance to the wife should be presumptive evidence that the property conveyed is her separate estate, is not retroactive, and does not apply to conveyances previously made. Were it an original question, I should say the rule, prior to the amendment, should have been that such conveyance to the wife with the husband's consent was prima facie evidence that he intended the property to be a gift to her, and that the property thereby vested in her as her separate estate, that this was a rule of evidence, and that the effect and purpose of the amendment of 1889 was to declare the correct rule of evidence and abrogate the false rule previously followed by the courts, and hence that said amendment was applicable to prior transactions and was so intended. If the law had not thus been settled, it seems clear that the natural inference that a gift was intended, arising from the conveyance to the wife in this case would be presumptive evidence thereof and would support the conclusion of the trial court, notwithstanding the testimony of the husband, manifestly to his interest, that it was not so intended.

CORA E. NIXON, Appellant, v. MARY
D. POST et al., Respondents.

(13 Wash. 181, 1895)

Appeal from Superior Court, Pierce County--Hon. W. H. Pritchard, Judge. Affirmed.

The opinion of the court was delivered by

Hoyt, C. J.--This action was brought by Cora E. Nixon, in her own right and as administratrix of the estate of her husband, Thomas L. Nixon, to set aside and cancel two deeds and to obtain a decree vesting in her the title to lots 19 and 20 in block 5 of Tacoma, the property described in said deeds. One of these deeds purported to have been made by plaintiff and her husband to the defendant Mary D. Post, for the consideration of $6,000, and was dated February 8, 1889. The other was made by the defendant Mary D. Post to the defendant Phillip V. Caesar, as trustee, to secure the payment of certain notes made by said Mary D. Post and her husband. The complaint contains other allegations relied upon to acquire possession of the property and damages for its detention, but this ground of relief received no attention at the hands of the lower court and needs none here.

The deed from Nixon and wife to Mary D. Post was not recorded until March 4, 1890. On April 16, 1891, Thomas L. Nixon, the husband of plaintiff, died and thereafter she was appointed and qualified as administratrix of his estate. This action was commenced December 12, 1892. The deeds with an exception which will be hereafter noticed, were sufficient in form and were duly acknowledged, and when introduced in evidence prima facie placed the title in the defendant Mary D. Post, subject to whatever interest was conveyed by the trust deed to Phillip V. Caesar.

It is not contended that the deed to Phillip V. Caesar was not sufficient for the purposes for which it was made, if by the deed to Mary D. Post from the plaintiff and her husband she acquired title as her separate property. The material inquiry is as to the force and effect of this latter deed. It is attacked by the plaintiff upon three grounds, (1) for the reason that it was never executed and acknowledged by the plaintiff; (2) that there was no consideration therefor, and (3) that if any title passed by said deed it did not so pass to the defendant Mary D. Post as her separate estate, but was in her name for the benefit of the community composed of herself and her husband.

It will be seen from the above statement that the principal questions to be determined are those of fact, and little or no discussion of legal propositions will be necessary in arriving at a determination. The superior court, after full hearing, found as facts that the deed from the plaintiff and her husband was duly executed and delivered to the defendant Mary D. Post, and vested the title to the property in her as her separate estate. Upon this finding but one conclusion of law could be founded, and that was that the plaintiff was not entitled to any relief. Hence,

if this finding is supported by the evidence, the judgment dismissing the action must be affirmed.

The deed having been found in the possession of the defendant Mary D. Post, and being in due form, prima facie established the fact of its regular execution and delivery. But this prima facie case was met by the testimony of the plaintiff to the effect that she never executed the deed, and if this testimony is to be taken as true, it was in our opinion sufficient to overcome the presumption above stated. But public policy will not allow a presumption of this kind to be overcome without clear and convincing proof, and testimony offered for that purpose must be carefully examined in the light of all the surrounding circumstances, and must be of a nature to convince the court of its reliability, before it can be given such force as will overturn a presumption upon which the stability of titles to real estate so largely depends. It was, therefore, the duty of the trial court, before accepting the testimony of the plaintiff as absolutely true, to investigate it in the light of the other circumstances which appeared from the proofs. From such proofs it appeared that the plaintiff knew of the execution of this deed as early as August, 1890; that her husband knew that it had been placed of record at or before the same date; that at that time and for months thereafter, the defendant Mary D. Post and her husband resided in the city of Tacoma where the plaintiff and her husband also resided; that nothing was ever said by the plaintiff or her husband to the defendant Mary D. Post as to the deed which was of record not having been properly executed and delivered to her; that no objection was ever made to said defendant and her husband occupying the property without the payment of any rent; that after the death of the plaintiff's husband she made representations to the husband of the defendant, Mary D. Post, as to favors which he had received from her husband, and sought to have him do something by way of aiding her pecuniarily; that while seeking such aid, which she did not claim was due to her excepting as a proper return for favors received, she made no claim tending to show that the title to the lots in question was not properly vested in the defendant Mary D. Post. It further appeared from undisputed testimony, that up to the time of the making of the deed in question, the defendant Linus E. Post was interested in Certain property at or near the city of Ellensburg, with the husband of the plaintiff, and there was testimony tending to show that this interest was the consideration paid by said Post for the property in question. It also appeared that the defendant Mary D. Post and her husband continued in possession of this property for a long time, and that substantial changes and improvements were made in the buildings thereon at their expense; that they paid all taxes thereon; and that the plaintiff frequently referred to it as the "home of the Posts." There was also testimony tending to establish numerous other circumstances, which, if true, were inconsistent with the present claim of the plaintiff as to her never having executed the deed in question. There was some attempt on the part of the plaintiff to explain some of these circumstances, but in our opinion the attempted explanation was not at all satisfactory. It follows that her testimony must be weighed in their light, and, when thus weighed, we are of the opinion that it did not so clearly establish her allegation, to the effect that she had never executed the deed, as to overcome the presumption flowing from its having been found in the possession of the grantee, appearing to have been regularly executed. The finding by the superior court to the effect that the

deed had been duly executed and delivered by the plaintiff and her husband, was warranted by the proofs.

UUpon the question as to the nature of the title conveyed by such deed must also depend the further question presented by the appellant as to the right of the husband to take an acknowledgment of a deed in which his wife was named as grantee. It is not claimed that he could not properly take such acknowledgment if the property was deeded to the wife under such circumstances that it became her separate estate. Hence the determination of the nature of the title conveyed by the deed will also determine the question as to the regularity of the acknowledgment.

The proofs as to the intention of the husband at the time the deed was delivered, as shown by his acts, were that the trade was by him consummated and the execution of the deed procured on the anniversary of the wedding of himself and wife; that he desired to make her a present of the property for a home; that in pursuance of this desire he had the deed made out in her name and immediately after its execution took it to their home and delivered it to her with the statement that it was an anniversary gift. That this would have been suffient to have passed the title conveyed by the deed, to the wife as her separate estate, if all had been done in the presence of the grantors and at the time of the execution of the deed, is not denied by the appellant, but she founds her claim that the title conveyed became community property upon the fact that the proofs fail to show that anything was said in reference to the character of the title to be conveyed between the grantors and the husband of the grantee at the time the deed was executed. But in view of the fact that the husband of the plaintiff, the grantor who transacted all of the business, is dead, and of the further fact that the husband of the defendant Mary D. Post has disappeared, such testimony could not be obtained, and the action of the husband in at once delivering the deed to the wife as a gift, taken in connection with the consummation of the trade on the anniversary of their wedding, sufficiently indicated his intention to have the wife take the title as her separate property. Especially is this true when the question is raised as between the grantor and the grantee, and not diredtly by a creditor who was such at the date of the deed.

The superior court properly found that the deed had been duly executed and delivered by the plaintiff and her husband to the defendant Mary D. Post, and that the circumstances surrounding the making and the delivery were such that the title conveyed vested in her as her separate estate.

The decree must be affirmed.

Scott, Anders, Dunbar and Gordon JJ., concur.

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IN re ESTATE of MARTHA J. TRESIDDER.

(70 Wash. 15, 1912.)

Appeal from a judgment of the superior court for King county, Frater, J., entered November 6, 1911, upon findings in favor of a contestant of the probate of a will, affirmed.

Chadwick, J.--Martha J. Tresidder and Thomas W. Tresidder were married in the state of New York, in the year 1880. At the time of their marriage, Mrs. Tresidder was a widow, with one son, Richard Seymour Conklin. A short time after they were married, Mr. Tresidder came west, and after a time he was followed by Mrs. Tresidder and her son. It is contended that the major part of the property owned by Mr. and Mrs. Tresidder at the time of her death was the accumulated earnings of the sums she brought with her from New York. Her son testifies that she had about her person a sum in excess of $9,000, when she left New York. We are inclined to believe that he is mistaken in this, for it seems that Mrs. Tresidder pawned her diamond earings to bring the two of them from Bonner, Montana, to Seattle. The son, who was employed in a hotel, was left behind for a time. So far as the record shows, Mr. and Mrs. Tresidder struggled against adverse circumstances for several years. He followed various employments, and Mrs. Tresidder kept roomers and for a time worked in a real estate office.

In 1897, Mr. Tresidder induced a party with some capital to bank it against his experience, and they started a small lumber business. This was sold out in January, 1901, Mr. Tresidder receiving $8 400 for his share. On the 9th day of March, 1901, there was deeded to Mrs. Tresidder two lots in Union addition to the city of Seattle. The consideration was $2,700, and the deed recites that the property was sold and conveyed to Martha J. Tresidder "as and for her sole and separate property, use and benefit, and not as community property." There is much controversy over the status of this property, but it is our judgment that, wherever the money may have come from, the form of the deed (Mr. Tresidder having had charge of the transaction) would bind him to its terms, and that the property become the separate property of his wife. Propperity measured in dollars seems to have followed the Tresidders from this time on. Mrs. Tresidder died May 22, 1910. The appraised value of the whole estate was about $67,000.

The decision of the lower court is affirmed, and the case remanded with instructions to proceed to execute the will proposed by the contestant.

Gose, Crow, and Parker, JJ., concur.

W. A. FREEBURGER and FANNIE Q. FREEBURGER, Appellants, v. W. L. GAZZAM et al., Respondents.

(5 Wash. 772, 1893.)

Appeal from Superior Court, Mason County.

The opinion of the court was delivered by

Stiles, J.--This was a case similar to Freeburger v. Caldwell, ante, p. 769, except that the proceeding was initiated by affidavit under Code Proc., chap. 4, title 8. The first affidavit was sufficient to try the case upon. It stated that the property belonged to the claimants, and was verified by one of them. Sec. 491 does not require the evidence of ownership to be pleaded, as was attempted in the subsequent amended affidavits, and all that was attempted was surplusage. Everything that was necessary to sustain the allegation of ownership could be shown under either of the affidavits; and if it was true that Mrs. Freeburger had funds accumulated in the State of Kansas which were there subject to her own disposition, and were not liable for her husband's debts, and she brought them to this state and invested them in these goods, the goods are not community property or subject to the husband's debts here. Whatever the property may have been called in Kansas, it was in effect her separate property, and the laws of this state do not undertake to change the status or liability of such property merely by its coming across our border. Having alleged in the amended affidavit that Mrs. Freeburger was a married woman, the only proper additional matter was that the interest which she had was her separate property. Thomas v. Desmond, 63 Cal. 426.

The value of the property was laid at $218, which gives this court jurisdiction.

The judgment must be reversed, and a trial had. So ordered.

Dunbar, C. J., and Hoyt, Anders and Scott, JJ., concur.

where [illegible] sup. [illegible] seized [illegible], executions [illegible]. [illegible] title [illegible] affidavit. §491 Code Proc. [illegible] plead [illegible] ownership.

JOHN U. BROOKMAN et al., Appellants,
v. EUGENE W. DURKEE et al.,
Respondents.

(46 Wash. 578, 1907.)

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 14, 1906, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to quiet title. Reversed.

Fullerton, J.--In 1849 Eugene R. Durkee, then domiciled and having his residence in the state of New York intermarried with one Cynthia H. Durkee, and thereafter lived with her as his wife in that state until 1889. In the year last named Mrs. Durkee died intestate, leaving as her sole heirs at law the respondents in this action. During the time the marriage existed Eugene R. Durkee conducted a manufacturing business in the state of New York, and accumulated as the profits of such business a considerable fortune. In 1888, a year prior to the death of his wife, he used a portion of the fortune so accumulated in the purchase of certain real property situated in Pierce county in this state, and in 1902 died in the state of New York leaving a will by which he devised the property to the appellants. Neither the husband or wife ever resided or had a domicile in this state. The respondents claim that the real property mentioned was the community property of Eugene and Cynthia Durkee, and that they have an undivided half interest therein as heirs of their mother. The appellants claim that the property was the separate property of Eugene R. Durkee, and that they are the owners of the whole thereof by virtue of the will. At the trial it was conceded that the rules of the common law governed the ownership of personal property acquired by a husband in the course of trade or business in the state of New York, and that money and other personal property accumulated by him in that state became his sole and separate property subject to his absolute dominion, and that the wife had no interest therein which would descend to her heirs on her death during the lifetime of her husband. The court held, nevertheless, that the real property purchased in this state during the lifetime of the wife with the funds so accumulated became the community property of the husband and wife, and that the wife's heirs inherited an undivided one-half interest in the property on her death. The correctness of this holding presents the sole question to be determined on this appeal.

The statutes of this state defining separate and community property read as follows (Quotations from Ballinger's Code):

"Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or incumbrance, as fully and to the same

effect as though he were unmarried."

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." Bal. Code, Sec. 4488, 4489, and 4490 (P. C. Sec. 3875, 3867, 3876).

These statutes, the respondents assert, make no distinction between property acquired within this state and property acquired in another state and brought into this state; but that under these statutes all property acquired after marriage by either husband or wife, not acquired by gift, devise or inheritance, or from the rents, issues or profits of property so acquired, whether the same be acquired wholly within this state or in some other state and brought into this state, is community property.

But while the statute broadly construed gives countenance to the contention of the respondents, we cannot think it was the intention of the legislature that no distinction should be made between property acquired wholly within this state by the joint efforts of husband and wife, and property acquired by them elsewhere and brought within this state. If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership and vest an interest therein in the other, and if the spouse should be the wife it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them. Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if he be money, is also the separate property of such spouse.

While this question has not been directly before this court, analogous cases sustaining the rule can be found. In Freeburger v. Gazzam, 5 Wash. 772, 32 Pac. 732, certain personal property had been seized on

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an execution against the husband for which the community was liable. The wife sought to recover the property seized, on the ground that it was her separate property, having been acquired by her by purchase with money which she acquired in the state of Kansas and brought into this state. The court held the property was her separate property in the state of Kansas and did not change its status by being brought across our state border. In Elliott v. Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. 1016, it was held that real property purchased in this state by a married woman living with her husband, with money earned by her in Alaska, was her separate property, since the money itself was by the laws of that territory her separate property, and its status in that respect was not changed by being brought into this state. This case is precisely in point and would be controlling were it not for the fact that the decision of the question was not necessary to a decision of the case, as the result must have been the same had the property been determined to be community property. But the case, taken with the case first cited, shows that it has been the uniform opinion of this court since its organization that property acquired in the manner the property in question here was acquired is separate property. See, also, Dormitzer v. German Sav. & Loan Society, 23 Wash. 132, 62 Pac. 862.

The rule that property acquired in a foreign jurisdiction, which is there the separate property of one of the spouses, maintains its separate character when brought into a state having community property laws prevails also in California, Texas, and Louisiana. Kraemer v. Kraemer, 52 Cal. 302; In Re Burrows' Estate, 136 Cal. 113, 68 Pac. 488; Oliver v. Robertson, 41 Texas 422; Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 S. W. 290; Thayer v. Clarke (Tex. Civ. App.), 77 S. W. 1050; Tanner v. Robert, 5 Martin (N.S.) 255; Young v. Templeton, 4 La. Ann. 254.

We conclude, therefore, that the property in question was the separate property of Eugene R. Durkee, and passed to the appellants on his death by virtue of the terms of his will.

The judgment is reversed and the cause remanded with instructions to enter a judgment in accordance with this conclusion.

Hadley, C. J., Mount, and Crow, JJ., concur. [illegible]

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ZENAIDE MEYERS, Appellant, v. JOHN H. ALBERT et al., Respondents.

(76 Wash. 218, 1913)

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 11, 1913, in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

Main, J.---This action was brought for the purpose of having determined the interest of the plaintiff in and to certain real estate.

The plaintiff is the widow of Joseph Meyers, deceased; the defendants are the executors of his last will and testament, and his six sons, devisees and legatees in his last will and testament.

On August 19, 1908, the plaintiff and Joseph Meyers were married, in Portland, Oregon. They had been residing in Portland something over a year at the time of their marriage. They had previously resided in Salem, Oregon, for many years, where each had conducted a business. Mr. Meyers was a widower and the father of the six sons hereinbefore mentioned, the issue of a former marriage. The plaintiff was the mother of two children by a previous marriage. A few days prior to the marriage, the plaintiff and Mr. Meyers entered into a written antenuptial agreement by which she was to receive the sum of $10,000 at his death.

On August 29, 1908, Mr. Meyers, accompanied by the plaintiff, went to The Bank of California, in Portland, where he opened a joint checking account in his and his wife's name. At this time $4,000 was deposited in the account. Both were authorized to, and thereafter did, draw checks on the account in their individual names. Thereafter certain sums were deposited aggregating several thousand dollars. The sum of $200, money the plaintiff received from the sale of furniture prior to her marriage, may have gone into this fund; also $1,000 which the plaintiff testified Mr. Meyers gave her as a wedding present on the day of their marriage. All of the other deposits with the exception of the rentals from the Olive Apartments, were the proceeds of property acquired by Mr. Meyers prior to his marriage to the plaintiff. The plaintiff and Mr. Meyers continued to draw from this account upon their individual checks until the latter's death. After his death the plaintiff drew from the account the small balance remaining. On and prior to the date of the opening of this account, and up to the date of his death, Mr. Meyers also had an account with the Capital National Bank, at Salem, Oregon. This account was in his name only, and he alone drew checks upon it.

Early in September after the marriage, Mr. and Mrs. Meyers went to Salem, Oregon, where they remained for two or three weeks, then returned to Portland, and immediately thereafter went to Toppenish, Washington, to visit the daughter of the plaintiff. From Toppenish they went to Seattle, arriving probably early in October. During the greater portion of the four weeks that they remained in Seattle, they were residing with a relative of Mr. Meyers. While in Seattle they purchased the property in

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question known as the Olive Apartments. The purchase price was $35,000, all of which, except the first payment of $1,000, and a later payment of $8,500, was paid out of the joint account in the Bank of California. The $1,000 payment was made with a clearing house certificate, where and by whom issued does not appear. The $8,500 was paid out of the account of Mr. Meyers in the Capital National Bank at Salem. The property was leased, and the monthly payments of rent appear to have all been deposited in the Bank of California account. Some repairs were later made upon the apartments, amounting to about $2,500, which were paid for out of this account.

The plaintiff testified, in substance, that when she and Mr. Meyers left Portland for Toppenish, it was their intention to go to Seattle, buy property and make their home there; that the purchase of the Olive Apartments was in pursuance of this plan. They however departed from Seattle about November 1st, going to Portland, where they lived at the Portland hotel for a few weeks. They then went to Salem. While at Salem, Mr. Meyers destroyed the will which he had made shortly after the death of his first wife, and also the antenuptial contract executed prior to his marriage with the plaintiff. He thereupon executed a will in which the plaintiff was bequeathed the sum of $20,000. They then returned to Portland, and shortly thereafter went to California, where they remained until April, 1909.

During the spring of 1909, they caused to be constructed a house upon a lot which the plaintiff owned at the time of her marriage to Mr. Meyers. This house cost about $5,000, which, with the cost of furnishing the same, was paid out of the Bank of California account. Thereafter Mr. Meyers deeded, by quitclaim, this property to the plaintiff. Mr. Meyers at different times purchased other real estate in Oregon which was paid for out of this same account. No claim, other than under the will, has been made by plaintiff to such property. After returning from California, Mr. and Mrs. Meyers lived at the Portland hotel until July, 1909, at which time they moved into the house which they had constructed on the plaintiff's lot as aforesaid. Here they lived until the death of Mr. Meyers on January 29, 1911.

On the 19th day of May, 1910, at Portland, Oregon, Mr. Meyers revoked his former will hereinbefore mentioned, and executed a will by which the plaintiff was given all of his household goods, and with the exception of a few small bequests, a one-fifth interest in the remainder of his estate, both real and personal. This will on February 2, 1911, was admitted to probate in Multnomah county, Oregon, of which county the decedent at the date of his death was an inhabitant. The executors hereinbefore mentioned were, by the county court of that county and state, duly appointed as the executors of the will. Thereafter, upon application made to the superior court of the state of Washington for King county, the will was, on April 4, 1911, admitted to probate in this state. On March 18, 1912, the plaintiff filed in the superior court for King county her complaint claiming to be the owner in fee simple of a one-half interest in the real estate in Seattle known as the Olive Apartments. The cause was tried to the court without a jury. Thereafter, and on March 11, 1913, the court entered a decree wherein, among other things, it was adjudged that the property in question, together with the appurtenances, was the

sole and separate property of Joseph Meyers at the date of his death, and decreeing the plaintiff to be the owner in fee simple of an undivided one-fifth thereof under the will. From this judgment, the plaintiff has appealed.

The ultimate question to be determined in this case is the ownership of the Olive Apartments. This must be determined from the character of the fund out of which the purchase price was paid.

Where money earned in a foreign jurisdiction is brought to this state and invested in real property, the title to the property purchased inures to the person whose money was invested therein. In Brockman v. Durkee, 46 Wash. 578, 90 Pac. 914, 123 Am. St. 944, 12 L. R. A. (N.S.) 921, it is said:

"Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if it be money, is also the separate property of such spouse."

Under this rule, it is plain that, if the appellant had no ownership in the fund from which the property was purchased, she would have no title to the property. It must therefore be determined what interest, if any, the appellant had in the fund from which the purchase price was paid. From the facts stated, it appears that Mr. Meyers had two accounts, one in a bank at Salem, Oregon, which stood in his own name, and one in the Bank of California at Portland which was in the following form: "Bank of California, national association, Portland, Oregon, in account with, J. Meyers or Zenaide Meyers." It appears that, in making the purchase, resort was had to some extent to the funds in each of the banks. The appellant claims no interest in the account in the Salem bank, and to this no further consideration need be given. As to the account in the Bank of California, it appears that the money deposited therein, other than a small amount, was the separate property of the deceased. If the appellant acquired any interest in this fund, it must be by reason of either a contract or a gift. There is no interest claimed resulting from a contract. But the contention is made that, inasmuch as the account was opened in the name of the two, and that Mr. Meyers expressed an intention that it should be for the two of them, that it became a joint account, and that property purchased within this state with funds drawn therefrom would be community property. The subject matter of the gift, if there were a gift, was the right to withdraw or recover the money on deposit with the bank. In order to constitute a gift, it is necessary that there be a delivery, actual, constructive or symbolical, which will pass the dominion and control of the subject-matter from the donor to the donee. In Jackson v. Lamar, 67 Wash. 385, 121 Pac. 857, it is said:

"While it is true the courts have relaxed the rigor of the old rules, they have never departed from holding that something more is required to constitute a gift, either inter vivos or causa mortis, than the expression

of an intent or purpose to give. Evidence of such intent is admissible to prove the act, but it does not constitute the act, and delivery, either actual or constructive, is as essential today as it ever was. The donor must not only signify his purpose to give, but he must deliver, and as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory. Although it may not be true that the law now presumes against a gift, it certainly does not presume in its favor, but requires proof."

In Liebe v. Battman, 33 Ore. 241, 54 Pac. 179, 72 Am. St. 705, speaking of the essentials of a gift, it is said:

"There must be a parting with the dominion over the subject-matter of the pretended gift, with a present design that the title shall pass pass out of the donor and to the donee, and this so fully and completely, to all intents and purposes, that, if the donor again resumes control over it without the consent of the donee, he becomes a trespasser, for which he incurs a liability over to the donee except after revocation of a gift causa mortis. And so essential is delivery as a factor in the transaction that it is said: 'Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensible requisite without which the gift fails, regardless of the consequences.' (Citing authorities). The reason for the rule requiring delivery is obvious, and is founded upon 'grounds of public policy and convenience, and to prevent mistake and imposition.'"

From the facts stated, it is obvious that dominion and control of the account in the Bank of California never passed from the deceased to the appellant. Mr. Meyers might at any time have withdrawn every dollar of the account up to the moment of his death, and used the same in any manner that he deemed proper. Where an account in a bank is opened in the name of two persons, the money being supplied by one, but each having the equal right to draw upon it, the title to the account does not pass from the one supplying the funds to the one to whom the right to draw is jointly extended. Denigan v. Hibernia Sav. & Loan Soc., 127 Cal. 137, 59 Pac. 389; Denigan v. San Francisco Sav. Union, 127 Cal. 142, 59 Pac. 390, 78 Am. St. 35; Schick v. Grote, 42 N. J. Eq. 352, 7 Atl. 852; Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486.

In the case last cited, it is said:

"Here, the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus retained the power to draw out the money, the deceased did not divest himself of dominion and control over the fund. He could have drawn out every dollar the day after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the suppose gift of the brother; and the only evidence relied on to support the factum of the supposed gift, is the form of the entry in the bank-book. But, as will be observed, there are no terms in the entry that import of themselves

an actual present donation by the brother to the sister; and the dominion retained by the brother over the fund enabled him to displace and utterly destroy all power conferred upon the sister in respect to the fund."

It follows that, since the appellant acquired no title to the fund, the property into which it went would be the separate property of the deceased, and subject to his disposal by will.

The judgment will therefore be affirmed. For Defs.

Crow, C. J., Morris, Ellis, and Fullerton, JJ., concur.

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LOTTIE P. ABBOTT, Respondent, v. JAMES WETHERBY,
Administrator of the Estate of George F.
Abbott, deceased, Appellant.

(6 Wash. 507, 1893.)

Appeal from Superior Court, King County.

The opinion of the court was delivered by

Dunbar, C. J.--Respondent and George F. Abbott were married in the State of Ohio, in 1852, and have ever since lived together as husband and wife until the death of Abbott in the State of Washington in 1890. At the time of the marriage respondent had no property, at least the testimony convinces us that she had none worthy of consideration; none which has been the source of any accumulations. As husband and wife, respondent and Abbott lived together in several different states, and with varying fortunes, until in 1883, when Abbott came to Washington, respondent following in due course of time, since which time this state has been her home, and was the home of her husband until he died. They had but little means when they came to Washington. The property in controversy consists of lots 5 and 6 in block 1, of Burke's Second Addition to the city of Seattle. On July 2, 1883, George F. Abbott took a bond for a deed from Lyman M. Wood for lot 6, and the south half of lot 5, and paid thereon sixty dollars, the price agreed to be paid being $275, the remainder of which was paid in small payments. A deed was executed and delivered to respondent by Lyman M. Wood and wife in pursuance of this bond for a deed on the 28th day of April, 1887, for the consideration of $450. The north half of lot 5 was conveyed to George F. Abbott by Lyman M. Wood by deed dated October 11, 1888, expressing a consideration of $250. August 22, 1889, George F. Abbott and respondent executed and delivered to Cassa Osgood, without consideration, a deed purporting to convey to Mrs. Osgood the last described tract, under an agreement between Mrs. Abbott and Mrs. Osgood that the latter should re-convey this land to the former without consideration, whenever the former should request it. In pursuance of this arrangement Mrs. Osgood, on the 29th day of March, 1890, re-conveyed this tract to respondent, At the time of the delivery of the deed from Mr. and Mrs. Abbott to Mrs. Osgood, Mrs. Abbott furnished Mrs. Osgood $100 to pay Mr. Abbott as a part of the consideration. After the conveyance of lot 6 to respondent, she and her husband deeded to the First Baptist Church a portion of lot 6. Afterward they entered into an agreement with the First Baptist Church to exchange for the property in lot 6, deeded to it, lot 1, in block 6, of Jackson Street Addition to the city of Seattle, and did afterwards make such exchange. The property exchanged with the church under said agreement, and which constituted the consideration for said conveyance, stood in the name of George F. Abbott. In July, 1888, the appellant and George F. Abbott entered into a copartnership as contractors and builders, and continued in that relation until about January, 1889. Being unable to agree upon a settlement of their copartnership affairs, they submitted their differences to arbitration, which resulted in a judgment in favor of the appellant and against Mr. Abbott in the sum of $350.63, and $14 costs, a copy of which judgment was

filed and recorded in the office of the county auditor of said King county, and this suit was instituted by respondent against the appellant as administrator of the estate of the said George F. Abbott, deceased, to prevent him from administering upon the property above described, and to remove the cloud from the title to said land which she alleged the recorded judgment to be; so that it will be seen that it is necessary to determine at the outset whether the property in dispute is community property or the separate property of the respondent.

The debt upon which the judgment was based was contracted in the ordinary course of the husband's business for the benefit of the community, and is therefore a community debt. Oregon Improvement Co. v. Sagmeister, 4 Wash. 710 (30 Pac. Rep. 1058). Hence if the property was community property it was properly listed by the administrator, and should be made to respond to the community debt.

We must look to our statutes alone to determine what constitutes separate property. See 1398, Gen. Stat., provides what property is the separate property of the wife, viz., the property and pecuniary rights of every married woman at the time of her marriage and afterwards acquired by gift, devise or inheritance, with the issues and profits thereof. Sec. 1399 provides that all other property is community property. As we have already seen, the respondent had none of this property at the time of her marriage; she has not acquired it by devise or inheritance, and it follows that, if she has not acquired it by gift, under the provisions of Sec. 1399 it is community property. We are unable to find anything in the record even tending to support a conclusion that the money with which the payment for this land was made was given to the respondent. The husband was industrious and so was the wife, the testimony showing that the labor of both contributed to the fund with which this property was purchased; that as members of the community they were both working for the interests of the community. The respondent's idea of a gift is illustrated by her testimony. When asked how she obtained certain money which she claims to have paid for the land, she replied:

"I obtained it in this way: He would give me money for the house, and whatever was over, was mine. He gave me money to purchase things; I used to spend part of what he gave me, and the rest of it was mine; and doing that, I very soon accumulated money."

This surplus, respondent says, she loaned to her husband when he was in need of a little ready money, and as he did not pay it back to her she takes credit for the amount which her husband paid on the purchase price on the land in question. This is, to say the least, a novel and ingenious method of attempting to convert community property into separate property. Counsel for the respondent seems to think that his client is entitled to great credit on account of her economical habits, and for being able to save something out of the bountiful provision made by the husband for the household expenses; and no doubt she should have, if the economy had been practiced in the interests of the community which was furnishing the funds; but in this instance the beneficiary was a stranger to the community; and the encouragement of a practice working such results might lead to habits of economy so rigid that the comfort of the community would be a consideration secondary to that of the thrifty condition of the separate estate.

Ordinarily, it would seem that the overplus furnished by any particular fund to meet any expenses should be returned to the fund which furnished it. We see no good reason for upsetting this well established principle in law and morals in this case. So far as the transaction with Mrs. Osgood, in which the record title was transferred from Abbott to his wife, is concerned, the same principle obtains. It was the community funds which were, through a deception practiced on Abbott, paid to him, and which it may be fairly presumed was by him again furnished to his wife to meet the current expenses of the community. And, according to respondent's own testimony, the whole object of that transaction was not to change the property from community to separate property, but to get it into such a condition that her husband could not dispose of it, which she feared he would do, and by so doing secure it for the use of the community. This is the theory which places the respondent in the most favorable light in her dealings with her husband, and the one on which we believe she acted.

It is true that Abbott stated to Mrs. Woolen and Mrs. Osgood that his wife had selected these lots, and that she had always worked hard and earned a great deal of money, and that he intended the land as a home for her; but such expressions are common with husbands who have not a thought of separate property. Most husbands are considerate enough of their wives to allow them to make a selection of their residence, and to accord to them the credit of having worked hard and helped to accumulate what they possess; but such expressions cannot be construed either as a gift, in the sense of creating a separate estate, or as a payment for money had and received. Indeed it is hard to tell what the theory of the respondent in this case is, whether her claim is based upon a gift, or upon a debt. If upon a gift, the evidence of a gift must be clear, and it must be apparent that the husband intended to divest the community of all rights, and to set the property apart to the separate use of the wife. Evans v. Covington, 70 Ala. 440. If upon a debt, that transaction must be as clearly proven.

It is, however, claimed that a large portion of the funds which paid for these lots was earned by the wife, and that such earnings were her separate property under the provisions of the statute. The statute, in addition to the property described in Sec. 1398, provides a way in which a married woman can obtain separate estate. Section 1403 provides that the earnings and accumulations of the wife and of her minor children living with her, or in her custody, while she is living separate from her husband, are the separate property of the wife. It is true that Sec. 1402 provides that the wife may receive the wages of her personal labor; but these sections must be construed together, and thus construed we must conclude that her earnings only become her separate property while she is living separate from her husband. Any other construction would render meaningless Sec. 1403, for if Sec. 1402 created her earnings into a separate estate the enactment of Sec. 1403 would have been absolutely useless, as all its provisions under this construction are embraced in Sec. 1402. And the same reason would apply to Sec. 480, Code Proc. While the personal earnings of a wife are exempt, it must be construed to be a statute of exemptions, and in no sense defines separate property. The statute seems to definitely distinguish the rights acquired by wives who are living with their husbands, from the rights acquired by wives who are living separate from their husbands.

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The case of Carter v. Worthington, 2 South. Rep. 516, which is cited and relied upon by respondent, is not a parallel case with the one at bar. In that case a married woman, who had been conducting a millinery establishment before her marriage, continued the business for many years after marriage with her husband's consent, and took a conveyance of land in payment of an account for goods sold the grantor. Held, That such goods being purchased with the profits of the business were to be considered as accretions to her separate estate, which had already accumulated, and that the land so purchased could not be subjected to the payment of a judgment against her husband on a debt incurred before the sale of the goods to the grantor. There is no question of accretions from respondent's estate here. There was in reality no conducting of any distinct business, the husband and wife were both industrious and both no doubt added something by their labor to the common fund; the wife sometimes kept boarders, but it appears that the house and supplies were furnished by money earned by the husband. They were both doing their share; doing what is common for husbands and wives to do to prosper and to accumulate a competency for the community. It is the duty of each spouse to contribute his or her industry, energy and intelligence to the community; and it would encourage a sorry state of affairs in our domestic relations, if each one of the spouses were allowed, as seems to us to be attempted in this case, to charge the community with all the expenses of the living and expenses of the business, and credit the separate estate with the gross earnings.

Our conclusion is that the property listed by the administrator was properly listed as community property; and the judgment is, therefore, reversed, and the cause remanded to the lower court with instructions to dismiss the same at respondent's cost.

Hoyt, Scott, Stiles and Anders, JJ., concur.

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J. D. SPURLOCK, Respondent, v. PORT TOWNSENT SOUTHERN RAILROAD COMPANY, Appellant.

(13 Wash. 29, 1895)

Appeal from Superior Court, Thurston County.---Hon M. J. Gordon, Judge. Affirmed.

The opinion of the court was delivered by

Hoyt, C. J.--This action was brought to recover damages caused by fires alleged to have been occasioned to the property of the plaintiff by the negligence of the defendant in the operation of its railroad. It resulted in a judgment against the defendant, to reverse which this appeal has been prosecuted.

Three reasons are assigned why the judgment should be reversed: (1) The overruling of the objection of the defendant to the introduction of parol proof as to the title to the land upon which the property was situated; (2) the admission of testimony by the plaintiff as to what he had offered a man to lay up rails to replace those destroyed by the fire; and (3) the refusal of the court to grant the motion for non-suit on the ground that it affirmatively appeared that the plaintiff was not the sole owner of the premises.

If it had been necessary in order to enable the plaintiff to maintain the action that he should have shown a record title to the land in question, there would be force in the first contention of the appellant; but in our opinion it was not necessary that he should show a fee simple title. That he was in the actual possession of the premises clearly appeared from uncontradicted testimony, and such possession was sufficient proof of title until appellant had shown a better title in itself or in some other person. That such is the rule is established by numerous cases cited in the brief of respondent. That of McNarra v. Chicago, etc., Ry. Co., 41 Wis. 69, so fully covers the question that we are content to cite that alone. If the premises had been unoccupied, it would have been necessary for the respondent to have shown title in himself; but his undisputed possession was in itself prima facie proof that he had such title as would authorize him to recover the damages set out in his complaint.

The claim that it affirmatively appeared that the respondent was not the sole owner of the property grows out of the fact that he testified that he was a married man and that he had acquired title to a portion of the property since his marriage; from which it is argued that its character as community property was established, and the fact made to appear that the wife was a necessary party, and that the husband alone could not maintain an action for damages to the realty; the case of Parke v. Seattle, 8 Wash. 78 (35 Pac. 594), being cited to sustain the contention. In that case it was held that injuries which had substantially decreased the permanent value of the real estate were injuries to the community property and could not be recovered for in an action by the husband alone. But whether or not the rule should be so extended as to include damages

of the nature of those for which this action is brought, even if it should be conceded that the property destroyed was a part of the freehold, is a question which we do not deem it necessary now to decide. It affirmatively appeared that the property had been owned and occupied by the respondent for thirty-five years, and this being so, the fact that it was acquired after marriage did not show it to have been the property of the community. The undisputed testimony showed that the respondent had owned the property and been in the possession thereof from a date long anterior to the passage of the first statute as to community property, and such being the fact, it should not be presumed that the wife had such an interest as would make her a necessary party to an action to recover the damages claimed.

We find no error of sufficient magnitude to warrant a reversal of the judgment, and it will be affirmed.

Scott, Anders and Dunber, JJ., concur.

Gordon, J., presided on trial below.

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RAFAEL ENRIQUEZ, in His Own Name and as Administrator of the
Estate of Antonio Enriquez, Deceased, et al., Appts.,
v.
FRANCISCO SAEZ GO-TIONGCO, Florencia Victoria, Francisco
Enriquez, and Cho Jan- Ling.

(31 Supreme Court Rep. 423)
(220 U. S. 307)

Argued March 13, 1911, Decided April 3, 1911.

Appeal from the Supreme Court of the Philippine Islands to review a decree which affirmed a decree of the Court of First Instance of the City of Manila, dismissing a suit to set aside a judgment sale of community property. Affirmed.

See same case below, 10 Philippine, 10.

The facts afe stated in the opinion.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a judgment of the supreme court of the Philippine Islands, affirming the judgment of the court of first instance for the city of Manila, which dismissed this suit. The action was brought to set aside a judgment sale of land in Manila, known as the Old Theater, formerly the community property of Antonio Enriquez and his wife, Ciriaca Villanueva. The plaintiffs and appellants are the administrator of the estate of Antonio, including the interest of Ciriaca Villanueva, and all of the heirs of the two, except Francisco Enriquez, one of the defendants. The other defendants now before the court are the purchaser at the sale and a subsequent purchaser from him.

Ciriaca Villanueva died intestate in 1882. Thereafter her husband administered the community properry until his death in 1884. By a codicil to his will, as stated by the supreme court, he provided "that the inventory, valuation, and partition of this estate be made extrajudicially and by virtue of the power which the law grants him, he forbids any judicial interference in the septlement thereof, conferring upon his executors the necessary authority therefor, without any restriction whatever, and extending their term of office for such period as may be required for this purpose." The defendant Francisco Enriquez was the executor, and in April, 1886, was appointed the general administrator of the estate, including the interest of Ciriaca Villanueva, with directions to proceed in accordance with the codicil, which he did until March, 1901, except for a short time in May, 1900. There were no testamentary or other proceedings in court, and could not be, by Spanish law, in view of the codicil, but it lay with Francisco Entiquez to carry out the trust. There were differences among the heirs, and they made an agreement in August, 1897, for an extrajudicial partition, subject to the provisions of the will, in which Jose Moreno Lacalle was to act as an arbitrator. The partition fell through, but Lacalle

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rendered services to the two estates, as both courts have found, and on October 23, 1897, it was agreed by Francisco Enriquez, the defendant, and Rafael Enriquez, on behalf of the plaintiffs, that the land in question should be sold, for the purpose, among others, of paying Lacalle. No sale was made, however, and in 1898 Lacalle sued Francisco Enriquez as executor and administrator, as aforesaid. The defendant admitted the debt, stated that he had no money, and pointed out this land for execution. On September 10, 1899, the land was sold for more than the appraised value to the defendant Co-Tiongco, who bought in good faith, and without notice of any claim unless notice is implied by law.

There is no question that every consideration of justice is in favor of the defendants, from whom the plaintiffs are endeavoring to get back the land without restitution of the purchase price, and after the last purchaser has made costly improvements. The owners of the land agreed to the rendering of the services, but they attempt to avoid the payment on technical grounds. They say that the debt, having been incurred after the death of the husband and wife, did not bind their estates; that if the claim had been good against the estate of the husband, the suit should have been brought against his heirs; and finally, that the judgment against Francisco Enriquez could not bind the estate of Ciriaca, so that the sale must be void, at least in part. But in our opinion these objections ought not to prevail, on the facts as stated by both courts below, and the law as it was administered in the Philippines at the time of the acts.

It seems to have been understood by everybody that Francisco Enriquez was administering both estates in fact, and to have been intended by his appointment in April, 1886, that he should do so by authority of law. The decree under which the plaintiff Rafael Enriquez now is administrator of the estate of both parents, on the face gives him the same authority that Fransisco had had before. The supreme court holds in this case that on the death of the wife, the husband, it surviving, is entitled to settle the affairs of the community, and that, on his death, his executor is the proper administrator of the same. See Alfonso v. Natividad, 6 Philippine, 240; Prado v. Lagera, 7 Philippine, 395; Johnston v. San Francisco Sav. Union, 75 Cal. 134, 7 Am. St. Rep. 129, 16 Pac. 752; Moody v. Smoot, 78 Tex. 119, 14 S. W. 285; Lamm's Succession, 40 La. Ann. 312, 4 So. 53; Crary v. Field, 9 N. M. 222, 229, 50 Pac. 342, s. C. 10 N. M. 257, 61 Pac. 118. We should be slow to disturb their decision, even if we did not believe it to be right, as we do. But when without dispute Antonio was acting, there seems to be no necessity for inquiring whether the appointment could have been avoided if the attempt had been made. The contract with Lacalle, if made by Francisco Enriquez, as seems to have been assumed below, was made, as we have said, by the wish of all. The services were rendered in aid of winding up the community business, and were a proper charge upon the estate. See Civil Code of 1889, art. 1064. Sy Chung-Quiong v. Sy-Tiong Tay. 10 Philippine, 141. Francisco Enriquez was the only representative of the estate. The only practicable means of collecting the debt was by suit against him. The record of the suit that was brought most frequently refers to him as executor, but at times as executor and administrator; and the supreme court says that, as matter of law, the suit was directed against him in the latter as well as the former capacity. The judgment must be taken to have bound the community

estate. Carter v. Conner, 60 Tex. 52; Landreaux v. Loaque, 43 La. Ann. 234, 9 So. 32. Other matters would have to be discussed before we could reverse the judgment below, but we see no ground for doubting that it should be affirmed.

Judgment affirmed.

THERESA ARNETT, Katie Reade, Robert Lea,
Mary Buquor, and Aaron H. Lea,
Appts.,

v.

D. M. READE.

(220 U.S. 311.)(No.98)
(31 Sup. Ct. Rep. 425, 1911)

Appeal from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for Dona Ana County, in that territory, in favor of plaintiff in a suit to quiet title to community property bought from the husband without the wife's participation in the conveyance. Reversed.

See same case below, 14 N. M. 442, 95 Pac. 131.

The facts are stated in the opinion.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to quiet title, brought by the appellee against the widow of Adolpho Lea, for whom her heirs were substituted upon her decease. Adolpho Lea married in 1857. He bought the land in question in 1889 and 1893, and it became community property. In 1902 he sold it to the appellee, shortly before his death in the same year, his wife not joining in the conveyance. By the laws of New Mexico of 1901, chap. 62, Sec. 6 (a), "neither husband nor wife shall convey, mortgage, encumber, or dispose of any real interest or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The courts of New Mexico gave judgment for the plaintiff on the ground that the husband had vested rights that would be taken away if the statute were allowed to apply to land previously acquired; citing Guice v. Lawrence, 2 La. Ann. 226, Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228, etc. The defendants appealed to this court.

There was some suggestion at the argument that the husband acquired from his marriage rights by contract that could not be impaired; but of course there is nothing in that, even if it appeared, as it does not, that the parties were married in New Mexico, then being domiciled there. Maynard v. Hill, 125 U. S. 190, 210, 31 L. ed. 654, 658, et seq. 8 Sup. Ct. Rep. 723; Baker v. Kilgore (Neilson v. Kilgore), 145 U. S. 487, 490, 491, 36 L. ed. 786-788, 12 Sup. Ct. Rep. 943. The supreme court does not put its decision upon that ground, but upon the notion that, during the joint lives, the husband was in substance the owner, the wife having a mere expectancy, and that the old saying was true, that community is a partnership which begins only at its end. We do not perceive how this statement of the wife's position can be reconciled with the old law of New Mexico, embraced in Sec. 2030, 2031 of the Compiled Laws 1897, refer-

red to in the dissenting opinion of Abbott, A. J., that after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property, and subject to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and, in the absence of a will, shall descend, one fourth to the surviving husband, etc. For if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from her, but merely would continue his. The statement also directly contradicts the conception of the community system expressed in Warburton v. White, 176 U.S. 484, 494, 44 L. ed. 555, 559, 20 Sup. Ct. Rep. 404, that the control was given to the husband, "not because he was the exclusive owner, but because by law he was created the agent of community." And notwithstanding the citation in Garrozi v. Dastas, 204 U.S. 64, 51 L. ed. 369, 27 Sup. Ct. Rep. 224, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from Warburton v. White. See 204 U.S. 78. Los bienes que han marido y mujer que son de ambos por medio. Novisima Recopilacion, Bk. 10, title 4, Law 4.

It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French customs. 2 Brissaud, Hist. du Droit Franc, 1699, n. 1. The notion may have been helped by the subjection of the woman to marital power; 6 Laferriere, Hist. du Droit Franc, 365; Schmidt, Civil Law of Spain and Mexico, arts. 40, 51; and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like dominio. See United States v. Castillero, 2 Black, 17, 227, 17 L. ed. 360, 400. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilacion, Bk. 10, title 4, Law 5; Schmidt, Civil Law of Spain and Mexico, art. 51; Garrozi v. Dastas, 204 U.S. 64, 78, 51 L. ed. 369, 378, 27 Sup. Ct. Rep. 224. We should require more than a reference to Randall v. Kreiger, 23 Wall. 137, 23 L. ed. 124, as to the power of the legislature over an inchoate right of dower, to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States. But whether it could or not, it has not tried to destroy it, but, on the contrary, to protect it. And as she was protected against fraud already, we can conceive no reason why the legislation could not make that protection more effectual by requiring her concurrence in her husband's deed of the land.

Judgment reversed.

Mr. Justice McKenna, dissenting:

I dissent from the opinion and judgment of the court for the reasons set forth in the opinion of the supreme court of New Mexico. See also Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 497, 58 Am.St.Rep. 170, 48 Pac. 228.

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CHAPTER XIV.

CITATIONS

Property acquired by either spouse under law which excludes necessary legal incidents of common property.

Gardner v. Port Blakely (1894)	8 Wash. 1.
James v. James (1908)	51 Wash. 60.
Phoenix Min. & Mill Co. v. Scott (1898)	20 Wash. 48.

(a) Property acquired by either spouse by conveyance or transfer directly from the other.

Hayden v. Herbst (1908)	49 Wash. 103.
Powers v. Munson (1913)	74 Wash. 234.
Stewart v. Kleinschmidt (1908)	51 Wash. 90.
Christopher v. Ferris (1909)	55 Wash. 534.
Carkeek v. National Bank (1896)	16 Wash. 399.
Goodfellow v. Le May (1896)	15 Wash. 684.
Petrovitsky v. Smith (1915)	86 Wash. 151.
Sponagle v. Sponagle	86 Wash. 649.
Armstrong v. Armstrong (1918)	100 Wash. 270.
Park v. Case (1920)	113 Wash. 263.
Re Estate of Hubbard (1921)	15 Dec. 3392.
Yeager v. Yeager (1914)	82 Wash. 271.
Mayer v. Frasch (1893)	7 Wash. 504.
Burgess v. Conforth (1919)	109 Wash. 150.
Lincoln County State Bank v. Martin (1920)	112 Wash. 186.
Chapman v. Edwards (1920)	113 Wash. 224.
Brown v. Davis (1917)	98 Wash. 442.

(b) Property acquired by wife by a conveyance directed to be made to her by her husband for her separate estate and uses.

Murphy v. Heylon (1907)	46 Wash. 574.
Ballard v. Slyfield (1907)	47 Wash. 174.

(c) Property acquired in a foreign state or country and there known as the separate estate of one of the spouses.

Witherell v. Frauenfelter (1907)	46 Wash. 699.
Carlson v. Rea (1917)	94 Wash. 218.
Alaska Safe Deposit Co. v. Noyes (1911)	64 Wash. 672.
Huyvaerts v. Roedtz (1919)	105 Wash. 652.

INA BROTTON v. CHARLES LANGERT AND J. H. WILT.
(1 Wash. 73, 1890)

Appeal from District Court, Pierce County.

The opinion of the court was delivered by

Dunbar, J.---The appellant, by her complaint filed in the district court of Pierce county, sought to prevent a judgment lien being extended over community real estate, and to obtain a writ of injunction to prevent the appellee from selling the community property of appellant, under and by virtue of a judgment obtained by the appellee, Charles Langert, in a suit against appellant's husband as constable, he, as said constable, having sold personal property in which appellee had a special property, in execution against a person other than appellee. The appellant obtained a temporary restraining order. On the hearing of the case appellee demurred to the petition, and assigned as grounds of demurrer that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the case dismissed; from which orders and decrees the appellant appealed to this court. In this case it is conceded that the property in question is community property, and that the judgment obtained against M. Brotton was a personal judgment for a tort. Hence, the primary question involved is, whether or not community real estate is exempt from execution on a judgment rendered against an individual member of the community when the debt for which the judgment was obtained was not incurred for the benefit of the community.

The community, composed of husband and wife, is purely a statutory creation; and to the statute alone must we look for its powers, its liabilities and its exemptions. Nor are we much enlightened by quotations from the common law in relation to the property rights and liabilities of husband and wife; for, while we ordinarily look to the rules and maxims of the common law to aid us in the construction and analysis of statutes, it was plainly the intention of the legislature, in the session of 1879, in the passage of the chapter denominated "Property rights of married persons," Code Wash. T., Chap. 183, to depart from the common law and breathe into legal existence a distinct and original creation, partaking, somewhat, of the nature of a partnership and of a corporation, but differing in some essentials from both; and this creature is termed a "community." The statute alone determines who the members of the community shall be, the manner in which it shall acquire property, and defines and limits not only the powers of the members of the community over said property, but protects it from acquisition by others, excepting in the manner specified. It also lays down its own rule of construction in the language of the act itself; "The rule of common law that statutes in derogation thereof are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates; and its provisions and all proceedings under it shall be liberlly construed with a view to effect its object." Then the pertinent and vital question becomes, What was the object sought to be effected?

Section 2396 provides, "That every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property and to sue and to be sued as if he or she were unmarried," and Sec. 2398 abolishes "all laws imposing civil disabilities upon a wife which are not imposed upon a husband," and succeeding sections define what separate property is, and provide how it may be acquired and in what manner disposed of. So far the evident object of the law is, to place husband and wife on an equal footing in relation to property matters. Section 2409 is as follows: "Property not acquired or owned, as prescribed in Sections 2400 and 2408, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business. Section 2407 provides that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. Section 2410 reads as follows: "The husband has the management and control of the community real property; but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; Provided, however, That all such community real estate shall be subject to the liens of mechanics, and others, for labor and material furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon." Construing all the provisions of the chapter together, we cannot escape the conclusion that the object of the law was to protect (so far as is consistent with the transaction of ordinary business, as we before observed) one spouse from the misdeeds, improvidence or mismanagement of the other concerning property which is the product of their joint labors. It is in the nature of an exemption and, as has been well said, "exemption laws are upheld upon principles of justice and humanity." The statute provides the ways in which this property can be alienated: First, the voluntary alienation by the husband and wife joining in the deed; second, by making it responsive to certain demands, constituted liens by the statute; and there is no other way contemplated. In fact, the very object of the law is to prevent its alienation in any other way. It expressly provides that the husband shall not sell, convey or encumber it, and he will not be allowed to do, by indirection or fraud, that which he is directly prohibited from doing. The practical result to the non-contracting spouse would be the same whether the law allowed the other spouse to directly convey the property, or allowed the title to pass through the medium of a sale on an execution flowing from a judgment to which he, or she, was not a party. It is the results the law regards; the modes are not important.

If the theory of the appellee is correct, that a personal judgment against the husband will become a lien on the community real estate, then certainly there is no meaning in the proviso to Sec. 2410, for the liens there specified would attach without the proviso. If a judgment

which is not obtained for a community debt becomes a lien upon community real property without any special proviso, why make a special proviso for a judgment which is obtained for a community debt? It is very evident that the intention of the statute was, that community real estate should not be subject to liens on any judgments excepting those mentioned in the proviso and for the causes mentioned in Sec. 2407; and these exceptions are founded on reason and right, because the labor and material furnished by mechanics in erecting structures on the land enhance the value of the community realty, thereby benefiting the community and becoming practically a community debt; and the reason for charging the expenses of the family or the education of the children to the community are too obvious for discussion. It was held by the supreme court of Oregon in the case of Smith v. Sherwin, 11 Or. 269, that the wife could not be held liable in an ordinary action for goods sold and delivered when such goods were sold upon the order of the husband, although the same were devoted to family use, under a statute which prcides: "That contracts may be made by a wife and liabilities incurred by or against her to the same extent and in the same manner as if she were unmarried:" and which further provides that the property of both husband and wife shall be chargeable with family expenses; being substantially the same as sections 2396 and 2407 of the code. This decision was based on the ground that the complaint did not affirmatively show that the goods sold were for the benefit of the family. In the case of Andrews v. Andrews, 3 Wash. T. 286, the court says: "So long as there is only a judgment lien confessed or suffered by the husband alone, the community interest in real estate is not affected, unless in fact the debt upon which the judgment was given was a community debt. The force and qualification of the lien of a judgment to which the husband only is a party, as affecting real estate, is given in Sec. 2410 of the code, by way of proviso to the restriction on the power of the husband to alienate or encumber such property. In the statute itself, the wife and all the world had notice of the limitation of such a lien in regard to such property. Indeed, the judgment not being determinative of any issue as to the character of the property which is to be included in its lien, the husband himself would be at liberty to contest the extension of the lien over community real estate." But we are met by arguments, in the brief of counsel for appellee, asserting that this construction of the statutes will lead to unsettling business relations, and many supposable cases of hardship to creditors are earnestly dwelt upon; but this is a branch of the subject entirely within the jurisdiction of the legislature. Once it is conceded that this is a rightful subject for legislation, which will scarcely be denied, there is no limit to legislative authority, and it is not the province of a court to speculate or theorize upon the practicability or impracticability of the laws, or the good or bad effects which may result from such laws. These are subjects for legislative consideration, and not for judicial determination. We think the judgment obtained against Brotton was not a judgment for a community debt, that the petition did state facts sufficient to constitute a cause of action, and that the sale should have been restrained.

It follows that the judgment will be reversed, and the cause remanded to the court below, with instructions to proceed in accordance herewith.

Anders, C. J., and Hoyt and Scott, JJ., concur.

Stiles, J. (dissenting).---I dissent. It was contended in this case that the "community debts" mentioned as chargeable upon community real property in the act of 1881 (code, sec. 2410), do not include a judgment against a husband who was a constable, and who, while acting as such officer, took property in execution upon which there was a chattel mortgage and sold the property so that it became scattered and lost to the mortgagee: the judgment being for damages for that wrong. The act in question nowhere undertakes to say what a community debt is; nor does it use any language by which it can be said that a community debt is to be anything different under this act from what it was under the previous community property statutes of 1863, 1871, 1873 and 1879. "Debts" are spoken of in all these acts as liabilities to pay, without any regard to the technical difference between "debts" and "torts." In numerous instances in each of them there are negative provisions like these: "The earnings of the wife are not liable for the debts of the husband;" "the separate property of the husband (or wife) is not liable for the debts of the wife (or husband) contracted before marriage;" and in sections 2400 and 2408 of the act in question the separate property of husband and wife is not subject to the "debts or contracts" of the other. Would it be contended that because these terms "debts" and "contracts" are used, and no reference is made to "torts", therefore, the separate property of the husband and wife would be liable for the torts of the other? In Sec. 25 of the act of 1879, the term "debts" was used as synonymous with "judgment or decree." no matter for what cause of action rendered. And so here, while there may possibly be some purely personal wrongs by a married person that should be first compensated out of the separate property of the wrong doer, where, as in the case at bar, the constable was pursuing his usual avocation for the benefit of the community and not maliciously, but through a mistaken idea of his duty, he incurred a liability to recompense the mortgagee, I see no reason whatever for holding this not to be a liability or debt for which the community real estate is, by the statute, answerable.

The fact that the result of the liability has not been to the pecuniary advantage of the community, certainly can make no difference in a court of justice, where advantages are not material. A good or a bad bargain cannot make the difference between right and wrong, and the community of husband and wife has not yet become so helpless a thing that we need presume in its favor as though it were a minor or an imbecile. Under all former community property acts this judgment could have been made out of community property, without any statute provision on the subject. Section 19 of the act of 1871, which was the least liberal of all these acts, had this provision: "When real estate, common property, shall be sold for indebtedness of the wife or the husband only, no more shall be sold than shall be necessary to satisfy the indebtedness and cover costs," etc. Yet under that act the husband could not sell community property without the wife's joinder. By the act of 1879 no real property, either separate or community, could be sold, encumbered or in any way disposed of without the joinder of the husband and wife in the instrument; but I have never heard or read a suggestion that under the act a separate debt of either husband or wife could not be collected out of the separate real property of either, without the consent or deed of the other. Obviously, it was considered by the framers of that act that the matter of the voluntary alienation of lands had nothing to do with the rights of creditors, and while they hampered the husband and wife to an excessive degree, as between themselves, they placed

no restrictions against the collection of just debts. Yet if we were to hold in this case, that because the husband cannot sell, convey or voluntarily encumber without the wife's joinder, no liability incurred by him, as this one was, can be charged against community property, then we should be bound to hold, in any case arising under the act of 1879, that without the wife's consent, by deed, the husband's debt incurred before marriage could not be collected out of his real property acquired before marriage; for the language of the two acts is precisely alike.

The only ground urged for the decision of the majority seems to be under the claim that the wife has a veto upon voluntary conveyances and encumbrances of community real estate for her protection against her husband; and that the husband must not be allowed to do that by fraud or indirection which he cannot do directly. The same argument would apply to the incurrence of every debt under the act of 1879, and to the collection of ante-nuptial debts as well. But there is no question of fraud in this case, and there is now no propriety in using that argument. Here the question is simply whether the wife shall, while she is fully protected in the possession of her separate property, and of her earnings, take her share of the risk that her husband will conduct the business of the community without loss; nay, it is not that only, but whether the husband himself shall be allowed to hide behind the ample skirts of his wife, in case of his "torts," to the ruin of the victim of his ill-advised action. So far as the proviso at the end of Sec. 2410 is concerned, I fail to see what importance it has there. It is merely declaratory of what would be the law without it, and adds no force to this section of the act. It is a literal copy of a section in the act of 1879, and had all the force in that act which it has in this. It has been argued, however, that since this proviso says that liens for labor and materials and judgments for community debts are chargeable upon community real estate, it is to be taken as an instance of "expressio unius alterum excludit," and therefore no other obligation is to be recognized. But let it be remembered that the argument is one for strictness of construction; whereas it is one of the requirements of the act in question that the common law rules of construction are not to prevail here, and that all its provisions are to be construed liberally; but liberality can certainly not be predicated of a ruling that shields property from levy for a debt of the owner. A community debt, within the meaning of the act of 1881, ought to be any liability incurred by either husband or wife during their marriage, and which is not a separate debt by its express terms, or by reason of its being patently for the exclusive benefit of the separate property of the party contracting it. This has been substantially the construction put upon the term ever since the community property laws have existed here, by the business men of the state as well as the legal fraternity. To depart from it now will, in my judgment, greatly disturb the safety of business interests, and unsettle titles to an alarming extent; and to hold with the appellant is not logically necessary under the terms of the statute.

I cannot believe that it was the intention of the legislature of 1881 to withdraw all this community real estate from liability for accommodation endorsements, guarantees, and especially official bonds, as well as the hundred engagements that married men enter into every day, but

which have no relavancy to their community interests, and cannot be said to benefit them. It is said that these obligations can be made good by securing the signature of the wife; but I deny it. If the signature of a husband to the bond of a county treasurer does not make the obligation collectible out of his community real property, because the debt is not one for the benefit of the community, it is idle to say that adding the signature of the wife will change the character of the debt and make it so collectible. And so on. The combinations and confusions are endless, if this doctrine is once announced.

The judgment should be affirmed.

J. W. DAY et al., Appellants, v. JAMES HENRY et al.,
Respondents.
(81 Wash. 61, 1914)

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered September 20, 1913, dismissing an action to enjoin an execution sale, upon sustaining a demurrer to the complaint. Reversed.

Morris, J.--Appellants brought this action, seeking to enjoin the sale of community lands owned by them upon an execution, issued upon a judgment rendered against appellant J. W. Day for a wrongful levy made by him while sheriff of Yakima county. A demurrer was interposed to this complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was sustained and the action dismissed. It will not be necessary to recite the allegations of the complaint, since the above facts are all that are material to the questions submitted by the appeal.

The trial judge filed a memorandum decision, in which he expressed the view that Milne v. Kane, 64 Wash. 254, 116 Pac. 659, 88 Ann. Cas. 1913 A. 318, 36 L. R. A. (N. S.) 88, controls the judgment, and that Brotton v. Langert, 1 Wash. 73, 23 Pac. 688, which would, if applicable, call for a different rule, is overruled by the latter case. We find no conflict in these two cases. Nor is anything said in the latter case which weakens the authority of Brotton v. Langert, when applied to like facts. Brotton was a constable and, as such, had sold on execution person property in which Langert had a special property as mortgagee. Langert the sued Brotton and obtained a judgment against him for the value of the property. Brotton's wife then commenced an action, seeking to prevent the extension of this judgment over community real estate and to obtain an injunction against the selling of the community property under the Langert judgment. The lower court sustained a demurrer to her complaint and dismissed the action, when she appealed to this court, where it was held that the judgment against Brotton, having been obtained against him upon an official act, was not community debt, and the community property could not be held for its payment. The rule there announced has been cited approvingly in Floding v. Denholm, 40 Wash. 463, 82 Pac. 738, and McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N.S.) 1022.

In the Milne case, it was held that a community liability was created when a husband, diriving an automobile for hire for the benefit of the community, negligently injured a passenger. It was there contended that the Brotton case was authority against the community liability, but we held otherwise, finding a distinction between cases where the wrongdoer was an individual belonging to a community, and where the community itself was the wrongdoer. There is no ground for holding that the Milne case overrules the Brotton case. The court, in finding a distinction between the two case, attempted to lay down a line of demarcation which it seems to us is an easy one to follow. If the community as such does a wrong, it must respond, just as under the same circumstances a corporation, a partnership, or any other legal entity composed of more than one person, must respond. If, on the other hand, an individual member of any of these legal entities commits a wrong, there is no liability attached to

the entity simply because of his relation to it. The liability, if at all, must be based upon the act, and flows against the one who does the act, and that one only, excepting in the cases where the doctrine of respondent superior (not applicable here) has worked out a different rule. The court, unfortunately, in the Milne case, says the logic of the Brotton case was with the appellant in his contention against community liability. This expression is now seized upon an overruling of the Brotton case. Whatever meaning was sought to be conveyed by the use of such language, it is evident it was not intended to be accepted as a departure from the rule announced in the Brotton case, and in announcing our adherence to both cases, we find them harmonious.

We shall not discuss why the rule of the Milne case should be followed as that question is not before us. The sheriff who made the wrongful levy which resulted in the judgment against him was neither a community nor the member of a community. The individual who filled the office of sheriff was a member of a community, but that membership was as to his individual, and not his official, relation. The office of sheriff could be filled only by the one elected to that office. The duties of the office could be performed only by the one elected to that office, or his duly appointed deputies. The levy made was not made by the community but by the official. In the Milne case, the community was running an automobile for hire for its benefit. The community created and maintained the business and profited by it. In this case--and the same is true of the Brotton case--the sheriff's office was not created or maintained by the community. It was an office created by the people for their benefit, and as such they maintained it. The mere fact that the occupant of the office is a married man, and uses the salary of the office to support his family, gives the family no claim on the office. It cannot enforce obligations due the office, nor can obligations against the office be enforced against it. Respondent argues that there is no distinction, in enforcing a liability against a community, between the negligent acts of the husband in driving an automobile and the wrongful act of a sheriff, who happens to be a married man, in making a levy. The distinction is as clear as any distinction can be. The community drives the automobile; the community does not make the levy. The one is a community tort; the other is an official or separate tort.

It does not seem to us that we need say more. The judgment is reversed.

Crow, C. J., Mount, Parker, and Fullerton, JJ., concur.

Sheriff case.

THE COUNTY OF KITTITAS, Respondent, v. JOHN F.
TRAVERS et al., Appellants.
(16 Wash. 528, 1897)

Appeal from Superior Court, Kittitas County.--Hon. Carroll B. Graves, Judge. Affirmed.

The opinion of the court was delivered by

Scott, C. J.--This is an appeal from a judgment obtained by the county upon the treasurer's bond. The default was occasioned by the failure of a bank wherein the treasurer had deposited county funds, and it is conceded, as to one ground of contention, that the case falls within Marx v. Parker, 9 Wash. 473 (37 Pac. 675, 43 Am. St. Rep. 849), and Fairchild v. Hedges, 14 Wash. 117 (44 Pac. 125), unless the fact that the treasurer had deposited the money in such bank with the knowledge, consent and approval of the board of county commissioners would except it therefrom. We do not see how this fact would make any difference. The commissioners had no power to bind the county by thus virtually substituting the responsibility of the bank for the treasurer's bond, even if they undertook to do so. The duties and liability of the treasurer are fixed by law, and he, and not the county commissioners, is the custodian of the county money.

It is further contended by three of the appellants, who signed the bond as sureties and were married women at the time, that the court erred in entering up a personal judgment against them for which their separate estate would be liable, for the reason that, in order for them to incur a charge against their separate estate the intention to do so must be declared in the contract, or the consideration obtained for the benefit of the estate itself, neither of which appeared in this instance. It is contended that their joining in the contract did no more than to subject the community real estate to liability for a judgment obtained upon the bond. But we do not think this position is well taken. While a married woman has not the unlimited right to contract with reference to the community property, or bind the same, she has the right with reference to her separate estate, (Sec. 1410 Gen. Stat.), and the effect of this contract was to subject the entire property, community and separate, to the satisfaction of the judgment obtained thereon, except such property as is exempted by statute.

Affirmed.

Anders, Reavis, Dunbar and Gordon, JJ., concur.

MARY KANGLEY, Respondent, v. NANNIE ROGERS, Executrix
et al., Appellants.

(85 Wash. 750, 1915)

Appeal from a judgment of the superior court for King county, French J., entered May 1, 1914, upon findings in favor of the plaintiff, in an action in tort tried to the court. Affirmed.

Morris, C. J.--Action to recover damages claimed to have been sustained because of the failure of a notary public to faithfully discharge the duties of his office and exercise due diligence in certifying that one Alice A. Gunby, known to him to be the wife of Joseph C. Gunby, personally appeared before him and acknowledged the execution of a real estate mortgage in which the respondent was named as mortgagee. Subsequent to the commencement of the action, the notary died, and the action proceeded against his executrix and the surety on his official bond. That Alice A. Gunby did not execute, nor appear before the notary and acknowledge the execution of this mortgage, and that her signature is a forgery is admitted.

Much is said in the briefs as to the degree of care to be exercised by a notary public in taking and certifying acknowledgments when he does not personally know the party appearing before him, and what, under such circumstances, would be such negligence as to subject the notary and his sureties to liability; but after reading this record, we do not regard it as necessary to answer these questions, as we are satisfied that no one appeared before the notary assuming to be Alice A. Gunby. The lower court so expressed an opinion at the conclusion of the trial, but in the findings contented itself with a finding that the notary failed and neglected to faithfully discharge the duties of his office, and failed and neglected to exercise due diligence. It is admitted by all the authoritie and must necessarily be so, that certifying to a wife of any person, as present, who was not, is such negligence as to render the notary liable on his official bond as for a false certification. State ex. rel. Savings Trust Co. v. Hallen, 165 Mo., App. 422, 146 S. W. 1171.

The next contention is that, under the rule announced in Day v. Henry, 81 Wash. 61, 142 Pac. 439, the judgment cannot be sustained as a community judgment. It was held in the cited case that a judgment rendered against a sheriff, who was at the time a married man, for a wrongful levy made by him as sheriff, was not a judgment that could be enforced out of community property. We attempted in that case to distinguish as between the wrongful act of a member of a community and the wrongful act of a community, finding the line of demarkation in the doing of the act, saying.

"If the community as such does a wrong, it must respond, just as unde the same circumstances a corporation, a partnership, or any other legal entity composed of more than one person, must respond. If, on the other hand, an individual member of any of these legal entities commits a wrong, there is no liability attached to the entity simply because of his relatio

to it. The liability, if at all, must be based upon the act, and flows against the one who does the act, and that one only. . . ."

We are satisfied with the reasoning of that case. It is, we think, apparent that such reasoning has no application here. A community may engage in the business or calling of a notary public just as it may engage in the practice of law or any other business or profession conducted by the husband alone, and when so engaged, it is not a parallel case to a married man elected to fill the office of sheriff, where the duties and responsibilities are fixed by law and can be fulfilled only by those elected to fill them. A community may engage in the business of a notary public if it chooses, and can obtain authority for one of its members to so act, just as it may engage in the practice of law or medicine, providing it obtains authority for one of its members to so act; but a community cannot be elected to an office and discharge the duties of that office.

Error is also predicated upon the rejection of testimony to the effect that the notary was ordinarily careful in taking acknowledgments. This was not error. The act complained of was a specified act in which no question of probability entered; as in cases where evidence of the character of that rejected is admissible. The overwhelming weight of authority excludes evidence of character offered for the purpose of raising an inference of conduct in actions charging negligent acts. Carter. v. Seattle, 19 Wash. 597, 59 Pac. 500; 4 Chamberlayne, Modern Law of Evidence, Sec. 3283. There was no error in the denial of a new trial.

The judgment is affirmed.

Fullerton, Crow, Ellis, and Main, JJ., concur.

Notary Public [illegible]

MARIAN E. LA SELLE and WILLIAM LA SELLE,
Respondents, v. J. H. WOOLERY,
Sheriff, et al., Appellants.

(14 Wash. 70, 1896)

Appeal from Superior Court, King County.--Hon. J. W. Langley, Judge. Affirmed.

The opinion of the court was delivered by

Gordon, J.--This cause was heard and decided by this court at the January term, 1895. (11 Wash. 337, 39 Pac. 663). Respondents' petition for re-hearing having been allowed and the cause re-argued, a majority of the court are of the opinion that a wrong conclusion was reached at the former hearing.

The case is fully stated in the former opinion, in the course of which opinion the court said:

"If a certain right is given in one state as to property of a certain nature, comity would require that those rights should be enforced in another state as to property of the same nature."

Upon further consideration, we think that this is extending the doctrine of comity too far. While comity might require that rights so acquired, against personal property merely, should be enforced in this state as against such property (Harrison v. Sterry, 5 Cranch, 289; Wharton, Conflict of Laws, Sec. 324), we do not think it ought to be extended to property subsequently acquired in this state, although of the "same nature," and this principle is wholly inapplicable to real property. The law of the place where the real property is situated must be held to control its disposition, whether by voluntary or forced sale. McCormick v. Sullivant, 10 Wheat. 192.

Upon this subject no less a writer than Story has said:

"All the authorities in both countries (England and America), so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate." Story, Conflict of Laws, Sec. 428.

"Any title or interest in land or in other real estate can only be acquired or lost agreeably to the law of the place where the same is situate." Id. Sec. 365.

The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses or otherwise, is fixed by the law of the state where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it

arose. If by the law of Wisconsin it was the sole individual debt of the husband, it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce, being by the law of Wisconsin where it arose merely the separate individual debt of the husband, enforcible only against his separate individual property, it follows that the judgment rendered upon that debt cannot be satisfied out of the real property of the community acquired in this state long after the debt arose and judgment was rendered upon it.

The doctrine of the common law is that:

"In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. . . . But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act." Story, Conflict of Laws (8th ed.), Sec. 558.

The settled rule is that the law of the place where the contract was made must govern in determining the character, construction and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to "the nature, extent and form of the remedy, . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of proceeding and the forms of judgment and execution." 2 Abbott's Law Dictionary, p. 36.

In the case of Blanchard v. Russell, 13 Mass. 1 (7 Am. Dec. 106), the supreme court of Massachusetts, speaking by Chief Justice Parker, say:

"But the courtesy, comity or mutual convenience of nations, among which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the state in which they are made. unless from their tenor it is perceived that they were entered into with a view to the laws of some other state. . . The rule doesnnot apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a state other than that in which the contract was made. For the remedy must be pursuant to the laws of the state where it is sought; otherwise great irregularity and confusion would be introduced into the form of judicial proceedings."

The rule has long been established in this court that the community real property is not liable for the separate or individual debt of the husband. Brotton v. Langert, 1 Wash. 73 (23 Pac. 688); Stockand v. Bartlett, 4 Wash. 730 (31 Pac. 24). And it would be productive merely of confusion and disorder to limit the application of this rule to those debts only which are contracted within this state.

One result of such limitation would be that the court would be re-

quired in every case to resort to the law of the state where the debt arose in order to determine what property in that state would be liable for such debt, and then to permit such judgment creditor to have his judgment satisfied out of like property of the judgment debtor in this state, without regard to our own law upon the subject. And it would follow logically from such a rule that property of a judgment debtor which is by our law exempt from levy and sale on execution could be subjected to the payment of a judgment for a debt incurred in some sister state where the exemption laws were different from our own. All these questions relate to the character and extent of the remedy, and not to the construction or validity of the contract, and they are governed and controlled by the lex fori, and not by the lex loci contractus; and to avoid interminable confusion the distinction must be observed.

For these reasons the order and judgment of the superior court will be affirmed.

Scott, Dunbar and Anders, JJ., concur.

Hoyt, C. J. (dissenting.)--The results which will flow from the rule announced in the foregoing opinion are such as to satisfy me that it cannot be the one required by comity. A husband residing in a sister state, possessed of ever so much property which, though the title is vested in him, is held for the benefit of himself and wife, and would from the manner of its acquisition be here held to be community property, and was there subject to debts for the benefit of the family, which would here be held to be community debts, can escape the payment of all the debts which may have been contracted on the faith of the property which he owned by converting such property into cash and removing to this state and investing it in real estate. That the laws of one state should be so construed as to allow a debtor in another, possessed of abundant means with which to pay all of his creditors, to evade the payment of just debts in this way, does not correspond with my ideas of comity. In my opinion the conclusion reached upon the former hearing was the correct one and should be adhered to.

ADELIA McGLAUFLIN, Appellant, v. RUFUS MERRIAM and F. K. PUGH, Respondents.

(7 Wash. 111, 1893.)

Appeal from Superior Court, Spokane County.

The opinion of the court was delivered by

Scott, J.--The respondents move the court to strike from the record in this case the statement of facts, and for an affirmance of the judgment upon the following grounds: Because appellant did not give notice to respondents of the time and place of settling said statement of facts within the time required by law, and because the court had no jurisdiction to settle the same. It is contended that the decree was rendered in this case on the 10th day of November, 1892, upon which date the findings of fact were filed, and notice to settle the statement of facts was not given until the 23d day of December following. The judgment is dated on the 10th day of November, but it appears by the record that it was not filed until the 2d day of December, and consequently could not have been entered before then. We are of the opinion that the notice to settle the statement was within the time prescribed by law.

The notice to settle the statement required respondents to appear on the 2d day of January, 1893, and it appears that the statement was settled on the following day, January 3, and as the record fails to show that the settlement of such statement was continued or adjourned from the 2d day of January until the 3d day of January, it is contended by the respondents that the court had no jurisdiction to settle it at said time. It appears, however, that the respondents appeared before the judge upon the 3d day of January, and objected to the settlement thereof because the time provided by statute for giving notice of settlement had expired before notice was given. No point was made of the fact that the notice had been given to settle the statement on the day preceding. The court overruled the objection raised, which we have sustained, and the respondents having appeared and not having raised the further objection urged here, waived the same, and the motion to dismiss is denied.

The respondent, Rufus Merriam, brought suit against one George McGlauflin, appellant's husband, to recover a commission for finding a purchaser for certain real estate, the community property of said McGlauflin and the appellant, and a judgment therefor was rendered in his favor. An execution was issued upon this judgment, which was by the respondent Pugh, as sheriff, levied upon community lands, and appellant brought this action to enjoin a sale thereof. She had originally been joined as defendant in the action brought by Merriam against her husband, but a demurrer upon her part to the complaint was sustained, and the action was dismissed as against her. In this action she sought to enjoin the sale of said land upon the ground that the same was her separate property. It is not necessary to pass upon the question of fact as to whether such real estate was her separate property, for it is admitted by the respondents that it was the community property of the plaintiff and her husband.

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[illegible]

[illegible]

There was nothing to show that George McGlauflin, the execution debtor, had any authority from his wife to sell, contract to sell, or to find a purchaser for said community lands, and the lands were not in fact sold. The husband having no authority to sell community real estate, cannot bind the same for any indebtedness incurred by him in employing a broker to find a purchaser therefor, and consequently the judgment obtained by respondent Merriam was not a charge upon the community lands. For that reason the Plaintiff should have been granted the relief prayed for, and it is immaterial whether or not such real estate was her separate property, as such relief was fairly within her prayer for general relief if the property was community property.

The decree rendered against her in the court below is reversed, and the cause remanded.

For Pl.

Dunbar, C. J., and Hoyt, Anders and Stiles, JJ., concur.

Where, hus. [illegible] commission [illegible] com. lands, [illegible] [illegible] enjoin [illegible] comm. [illegible] execution.

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JULIUS HORTON et ux., Respondents, v. THE
DONOHOE KELLY BANKING COMPANY et al.,
Appellants.

(15 Wash. 399, 1896)

Appeal from Superior Court, King County.--Hon. J. W. Langley, Judge. Reversed.

The opinion of the court was delivered by

Anders, J.--Stripped of technicalities, the real question presented for our decision upon this appeal is as to whether or not the consideration moving to a corporation of which the husband is an officer and stockholder under such circumstances that his relations as such are in connection with the business of the community, composed of himself and wife, will authorize the enforcement of a liability incurred by him as surety for such corporation against the property of such community. That the benefit to the corporation would furnish a sufficient consideration to the husband, so that the contract could be enforced against him, is conceded, but it is strenuously contended that the liability thus incurred is not that of the community and cannot be enforced against the community property; and Spinning v. Allen, 10 Wash. 570 (39 Pac. 151), is cited to sustain the contention.

In that case the husband was really but a nominal stockholder. The stock had been given to him and was his separate property, and the case should be viewed in that light, although the opinion there rendered fails to state this and it was not published in a statement of facts. In the case at bar a different question is presented. Here the surety had a substantial interest in the corporation, which he held for the benefit of the community. Hence, when he saw fit to incur liability as a surety for its benefit, it will not be presumed that it was from pure friendship to the corporation, but rather for the purpose of protecting his interest therein. Hence the liability incurred was in the course of business, and this business did not relate to his own separate estate but to property rights belonging to the community. If to aid the corporation in which he was thus interested he had performed services and such services had resulted in a benefit to the corporation, such benefit would have inured to the community and not to the husband alone. This being so, the converse must be true, and a liability incurred for the benefit of the corporation should be enforcible against the property of the community.

As said in this court in the case of Oregon Improvement Co. v. Sagmeister, 4 Wash. 710 (30 Pac. 1058), it will not do to hold that the community occupies such a relation to the business done by the husband that it is entitled to reap all of the benefits thereof without at the same time holding that it is subject to all its liabilities. Under the allegations of the answer in the case at bar, to which the superior court sustained a demurrer, it must be presumed that the husband in all his relations with the corporation was acting for the community, and that any benefits which might have grown out of his connection with such corpora-

The [illegible] comm. [illegible] liable [illegible] obligation [illegible] suretyships incurred [illegible] bus. [illegible] behalf [illegible] corp. [illegible] officers [illegible] stock holders, [illegible] protect [illegible] corp., [illegible] circumstances [illegible] relations [illegible] corp., [illegible] presumed [illegible] comm., [illegible] grown [illegible] corp. [illegible] comm.

Where comm. [illegible] bus., [illegible] being [illegible] enforced [illegible] comm. authority [illegible] prop. [illegible] comm.

tion would have belonged to the community. It must further be presumed that when he incurred the liability as surety for such corporation he did it as a matter of business to protect the property and business of such corporation. It must follow that in all he did in the matter he bound the community.

It is claimed that even if the community property was liable, the form of the levy made by the sheriff was insufficient, and the case of Stockand v. Bartlett, 4 Wash. 730 (31 Pac. 24), is cited to sustain the claim. What was held in that case was that the husband had no such separate interest in the community property that it could be reached upon an execution for a debt which could not be enforced against the community. But no such question is raised by the form of the levy in this case. The property presumably stood in the name of the husband, and a levy upon all of his interest in the property upon a judgment which could be enforced against the community would authorize a sale of the property standing in his name for the benefit of the community. But whether or not this is so, the decree from which the appeal was prosecuted enjoined the enforcement of the judgment against the community property, and, under the law which we have found to govern the case, was unauthorized. It will, therefore, be reversed and the cause remanded with instructions to overrule the demurrer to the answer.

Hoyt, C. J., and Dunbar, J., concur.

Scott, J.--I concur in all that is said except as to the manner of enforcing the judgment.

On Petition for Re-hearing.

Per Curiam.--The respondents' petition for rehearing in this case is so discourteous and unprofessional that we deem it unfit for consideration. It will therefore be stricken from the files of the court.

For Deft.

ERIC FLODING et al., Respondents, v.
J. A. DENHOLM, as Sheriff of
Pierce County, Appellant.

(40 Wash. 463, 1905.)

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered February 24, 1905, after a hearing on the merits before the court without a jury, enjoining the sheriff of Pierce county from selling community property under a judgment against the husband on appeal and supersedeas bonds. Reversed.

Mount, C. J.--In the year 1903 three several judgments were obtained in the superior court of Pierce county, against the Washington Match Company, a corporation. The corporation appealed from each of these judgments to this court. A supersedeas bond on appeal was given in each of the cases. Eric Floding, one of the respondents herein, was a surety on each of said supersedeas bonds. All of said judgments were afterwards affirmed by this court, and judgments were rendered against the Washington Match company and the sureties on the appeal and supersedeas bonds. Thereafter executions were issued, and levies made upon lots 1 to 11, inclusive, in block 26, second amended plat of Hosmer's addition to Tacoma. These lots were advertised for sale by the sheriff of Pierce county, when this action was brought to restrain the said sale. Upon the trial of the case it appeared, that Eric Floding was a stockholder in the Washington Match Company at the time he became surety upon the supersedeas bond above-mentioned; that he owned one thousand shares of the stock of said corporation, for which he had paid $1,000, from community funds of himself and wife; that this stock was purchased against the will of his wife; and that the corporation, at the time of the trial, was insolvent. After hearing the evidence, the trial court rendered a decree enjoining the sheriff from selling the property to satisfy the judgments against Eric Floding. From this decree the sheriff prosecutes this appeal.

Respondents move to strike the statement of facts and dismiss the appeal upon several grounds, all of which are based upon the fact that the appellant's opening brief was served and filed before the statement of facts was settled and certified by the trial court. The condition of the record is as follows: The decree appealed from was rendered on February 23, 1905. It was entered on the next day. Notice of appeal was served on February 27, 1905, and the appeal bond was filed on the same day. The proposed statement of facts was filed and served on March 18, 1905. Within time thereafter, respondents served and filed proposed amendments to the proposed statement of facts. The transcript was filed in the superior court and certified on May 22, 1905. The appellant's opening brief was served upon respondents on June 28, 1905. At this time the proposed statement of facts had not been settled or certified by the trial court. On July 25, 1905, before the statement of facts had been settled, respondents served and filed their answer brief, which contained motions to dismiss because the statement of facts had not at that time been settled or certified, and no notice to settle the same had been given. Thereafter, on July 15, 1905, appellant gave notice to

respondents that he would apply to the trial court on the 19th day of July, 1905, to settle and certify the statement of facts. On July 19th the settlement of the statement of facts was continued until the 25th of the same month, and respondents were served with notice thereof. On the 25th of July, 1905, the court settled the proposed statement of facts and incorporated therein all the amendments proposed by respondents.

It will be readily seen that the only imperfection in the record was the failure of the appellant to notice the proposed statement of facts for settlement prior to the time of filing his opening brief. The statute, Bal. Code, Sec. 5058, fixes no time within which a proposed statement of facts must be settled and certified, or within which notice of the settlement must be given. Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791. It simply provides that, after amendments have been proposed to the statement, "either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the case is pending or was tried, . . . to settle and certify the bill or statement." The burden is, no doubt, upon the appellant to perfect his statement of facts, and he must act within a reasonable time or be held to have abandoned his appeal. In this case all the steps except the notice to settle the proposed statement were taken promptly and within time, indicating that there was no abandonment, or intention on the part of the appellant to abandon the appeal. Under these circumstances we think we should not dismiss the appeal. The motion is therefore denied.

Upon the merits of the case there is but one question, viz., is community real estate liable for a surety debt, contracted by the husband for the benefit of a corporation in which he is a stockholder, and where such stock is community property of himself and wife? This question is no longer an open one in this state. This court has repeatedly held that the community property is liable for a community debt. (Oregon Improvement Co., v. Sagmeister, 4 Wash. 710, 30 Pac. 1058, 19 L.R.A. 233), and that the community property is liable for an obligation of suretyship, incurred by the husband in behalf of a corporation in which he is a stockholder, when the stock belongs to the community. Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; McKee v. Whitworth, 15 Wash. 536, 46 Pac. 1045; Allen v. Chambers, 18 Wash. 341, 51 Pac. 478; Allen v. Chambers, 22 Wash. 304, 60 Pac. 1128; Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402; Shuey v. Adair, 24 Wash. 378, 64 Pac. 536.

The case of Brotton v. Langert, 1 Wash. 73, relied upon by respondent, is readily distinguished from the case at bar by reason of the fact that the liability of the husband in that case arose on account of a trespass, and it was held, for that reason, that the community property was not liable in cases of that kind, or in cases where the debt was not created for the benefit of the community, or was a separate debt of the husband. Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540.

The case of Spinning v. Allen, 10 Wash. 570, 39 Pac. 151, in so far as it is applicable to the case at bar, was substantially overruled in the late cases above cited, particularly in Horton v. Donohoe-Kelly Banking Co., and Allen v. Chambers. So that the rule now is that community property is liable for a debt created by the husband for the benefit of the community. But such property is not liable for a debt created by a

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cys. [illegible] invested comm. [illegible]

stockholders [illegible] investment [illegible]

[illegible] protest [illegible]

tort of either spouse, or one which is not for the benefit of the community. The fact that the wife was opposed to the purchase of the stock, or that the corporation was insolvent at the time of the levy of the execution upon the property, would not change the liability of the community property to respond to the debt of the community.

The judgment appealed from is therefore reversed, and the cause remanded, with instructions to the lower court to deny the restraining order as to the property hereinbefore described.

Dunbar, Rudkin, and Crow, JJ., concur.

Fullerton, J., dissents.

Hadley, J., (dissenting)--I dissent, particularly on the ground that the wife did not consent to the purchase of the stock, but expressly opposed it. She did not assent to the community ownership of the purchased stock. The majority opinion holds that the community real estate is liable, on the theory that the husband's surety obligation was for the benefit of the community in protecting the stock, the ownership of which the wife had refused to assume. Such holding, in effect, permits the community real estate to become incumbered without the wife's consent, and against her express protest. While it is true that in this state the wife is practically helpless, so far as dominion over the community personal property is concerned, yet her interest in the community real estate is protected by statute and may not be incumbered without her consent. The husband should not, therefore, be permitted, without the wife's consent, to manipulate the community personal property so as to result in incumbering the real estate. If it be said that such a rule would interfere with commercial and business transactions in that it would permit the wife to urge lack of consent to the prejudice of good faith creditors, the answer is that the consent need not necessarily be expressly given, but may be implied from acquiescence, circumstances, and a course of conduct.

SARAH A. SPINNING, Appellant v. H. F. ALLEN et al., Respondents.

(10 Wash. 570, 1895.)

Appeal from Superior Court, Pierce County.

The opinion of the court was delivered by

Scott, J.--Frank R. Spinning, the husband of the plaintiff, was a stockholder in the Hastie Lumber Company, a corporation organized and doing business in this state. On June 13, 1892, he delivered to one N. M. Singleton the following instrument:

"Messrs. Allen & Lewis,
"Portland, Ore.

"Dear Sirs:- The bearer, N. M. Singleton, visits Portland for the purpose of purchasing supplies for the Hastie Lumber Company of Puyallup, Washington. I will guarantee the payment of goods sold to them until further notice.

"Please keep me advised of the amount of goods sold to them, and oblige,
Yours truly,
Frank R. Spinning."

Thereafter Allen & Lewis sold to the Hastie Lumber Company goods to the amount of $1,000, and the company failing to pay therefor, suit was brought against said Frank R. Spinning on his guaranty, and he suffered judgment to go against him by default. An execution was issued thereon and levied upon a certain tract of land which was the community property of the plaintiff and her husband; and this action was brought to enjoin the sale. Judgment was rendered against the plaintiff and this appeal was taken.

The conclusion at which we have arrived with reference to two of the questions involved decides the case in favor of the plaintiff, and it is unnecessary to pass upon others which are raised. The first one is as to the character of the debt. The plaintiff contends that said Frank R. Spinning was simply a surety of the Hastie Lumber Company and therefore the debt contracted must be considered as his separate debt; while the respondents contend that the community should be held upon the said guaranty, and that said debt should not be considered as a separate debt of said Frank R. Spinning, on the ground that he was a stockholder in said corporation. We are of the opinion that said debt must be considered as the separate debt of Frank R. Spinning, notwithstanding the fact that he was such a stockholder, as the corporation was really a third and independent party. There was no individual liability upon the part of said Frank R. Spinning for any debt incurred by the corporation, and the pledge of his individual credit in guaranteeing the debt of the corporation as aforesaid was the assumption of a new, independent and additional liability for and in the interests of such third party.

The contract being one of suretyship, of course the judgment stands

upon the same footing, and the further question is presented as to whether community real estate can be held on a judgment obtained upon a contract of suretyship entered into by the husband. We have held that debts contracted by the husband in carrying on a business which is prosecuted in the interests of the community are community debts, on the ground that as the community receives the benefits of such a business it should be held liable for the losses. But we have never held the community real estate liable for a suretyship debt. The code (Gen. Stat., Sec. 1413) expressly provides that neither spouse shall be liable for the separate debts of the other. When the community is not liable for a debt contracted by the husband concerning his separate property, for which he receives a consideration, how can it be said that the community should be held for a debt contracted where there was no consideration received or implied, moving to either the husband separately or to the community, as in the case of a suretyship where the consideration moves, and is intended to move, entirely to a third party? Certainly there can be no presumption in any way that the community is or could be benefited by the husband's becoming a surety. There would be much more reason in holding the community where the husband contracts a separate debt for which he receives a consideration, for indirectly the wife or the community might receive some benefit therefrom. But the statute aforesaid shuts off any such liability. It would be going a step beyond this to hold the community responsible on a suretyship debt contracted by the husband.

Reversed.

[illegible]

Dunbar, C. J., and Anders, J., concur.

Hoyt, J. (dissenting).--I think that the debt was created in the interest of the community and for that reason am compelled to dissent.

Stiles, J., concurs with Hoyt, J.

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thereof, [illegible] comm, [illegible] liable

Note [illegible] all debts [illegible] marriage

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OREGON IMPROVEMENT COMPANY, Respondent, v. JOHN SAGMEISTER and MATILDA SAGMEISTER, Appellants.

(4 Wash. 710, 1892.)

Appeal from Superior Court, King County.

The opinion of the court was delivered by

Hoyt, J.--The only question presented in this case is as to whether or not a certain judgment recovered by respondent against John Sagmeister, one of the appellants, could be properly satisfied out of the community property of said appellant and his wife, Matilda Sagmeister, the other appellant. That the property of the community can only be sold for a community debt has been so often decided by this court, and is so clear, under our statute, that we do not deem it necessary to here say anything in that regard.

We will proceed at once to the consideration of the other question presented: Was the debt for which the judgment in question was recovered a community debt? The undisputed facts showed, and the court below found, that it was for materials furnished to the husband in the prosecution of his business as a contractor and builder. Is a business prosecuted by the husband in the interest of the community, and from which the community will receive the benefits and profits, if any there are, a community business? We think it is. We cannot conceive that it was the intention of the legislature to have created an entity, and to have provided that all property coming into the hands of the husband should be prima facie the property of such entity, without at the same time having intended that the action of such husband in his efforts to obtain property should be prima facie in the interest of such entity. If the husband obtained any property by virtue of his exertions, it would, prima facie at least, be the property of the community, and we think it must follow that in his efforts to obtain property it must prima facie be presumed that he acts for the community. Applying these principles to the case at bar, it must be held that the husband, in conducting such business of contractor and builder, was acting for the community; and, thus holding, it would not only be an anomalous, but an unconscionable, position to hold that the community was not at least prima facie responsible for the results of such business. If the business resulted in profit, such profit would belong to the community. Can it with good conscience be said that, if it resulted in loss, the community should not be responsible? We think that every legal business conducted by the husband is prima facie in the interest of the community, and that, unless something appears to establish the contrary, the community is entitled to the profits thereof, and must bear the losses incident thereto. It follows that, under the circumstances of this case, the property of the community must be held to respond to the judgment in question.

Judgment of the lower court must be affirmed.

Anders, C. J., and Stiles and Scott, JJ., concur.

Dunbar, J., concurs in the result.

JAMES E. BALKEMA, Respondent, v. LENA GROLIMUND et al., Appellants.

(92 Wash. 326, 1916.)

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 11, 1915, upon findings in favor of the plaintiff, in an action to recover over upon a judgment paid by plaintiff, tried to the court. Reversed as to one defendant; modified as to the other.

Bausman, J.---The complaint against a husband and wife alleges merely that Mrs. Grolimund while married gave one Seeds her promissory note, that the latter transferred it before maturity to plaintiff and another who in turn sold it to one Wagner, and that Wagner reduced it to judgment against her and her immediate endorsers including plaintiff Balkema. The latter, having paid the judgment, now sues Mrs. Grolimund and her husband too for the amount of the note with costs and an attorney's fee, which last the note authorized but the judgment had not included. In this aggregate the court gave judgment against husband and wife who both appeal.

The only allegation connecting the husband with this transaction was that when Mrs. Grolimund gave this note she was "acting for herself and the use and benefit of the community then and now existing between herself and her husband," but this mere conclusion of law unattended by facts means nothing. Killingsworth v. Keen, 89 Wash. 597, 154 Pac. 1096. The defendants, after demurrer overruled, answered with denials of this and other allegations besides setting up that Seeds had obtained the note from Mrs. Grolimund by fraudulent representations about lands which he was selling her.

Plaintiff's testimony is but a bare repetition of the complaint, while defendants on their side tendered no testimony except a certain offer rejected. There is consequently nothing at all to show whether the cash paid to Seeds was acquired by either of the spouses before or after marriage, whether the transaction with Seeds ever passed beyond the contract stage, what the property was to be used for or by whom, whether Mrs. Grolimund had any separate estate, or finally whether the husband had so much as heard of either contract or note before he was sued. Neither is there any evidence whatever of the husband's adopting any part of this bargain. What defendants offered to prove and was rejected was that the only consideration for the note was Seeds' agreement to have a Federal land office accept a desert land application of the wife's, and that she executed the note without the consent of her husband, who has ever since refused to sign or be bound by it. Indeed, except for mere allegations and rejected offers of proof we should not be able even to guess why Seeds and Mrs. Grolimund had any business together, plaintiff being at no pains either to plead or prove anything more than the note and how he came by it. The court made a finding that the cash had been paid out of family funds and that the contract was a family asset, but on such meager testimony these findings, though of facts, we must pronounce erroneous conclusions of law.

The learned trial judge was perhaps misled or carried too far by

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some expressions of this court on presumptions from post marital acts of a wife. Summed up, a husband is here held liable personally on his wife's note without plaintiff's showing whether the husband knew of it, authorized or ratified it, or whether the community estate ever got the proceeds. In a word, the wife undertakes to buy land after marriage and he is liable. We have no precedent for this. Even if we consider this note as a borrowing and not for deferred payments (as in United States Fidelity & Guaranty Co. v. Lee, 58 Wash. 16, 107 Pac. 870), we could not here sustain a personal judgment against him. The cases in which expressions were it is true, let fall that a wife's borrowing creates both community proceeds and community liability, were none of them cases in which the husband was sued personally, but only of attack by third parties upon the family assets or of internal settlements in marital estates with accounting upon reciprocal endeavors and contributions. Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398; Main v. Scholl, 20 Wash. 201, 54 Pac. 1125; Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937.

Nowhere has this court intended to countenance the idea that a person from whom the wife borrows has from the mere circumstance of her borrowing a personal claim upon the husband as well. Indeed, we held in Conley v. Greene, 89 Wash. 39, 153 Pac. 1089, that even when the wife's post marital note was reduced to judgment in her marital name but in hers only, there was no lien or presumed lien on the family estate. To hold that the wife's separate note is presumptively the joint liability of the husband would be at war with our statute which makes him, except in instances extreme and peculiar, sole manager of the family affairs. Nor is the present ruling to be supported even if we should assume, without showing of when it was acquired or where it came from, that the cash paid to Seeds by the wife must be considered as family money, since to disburse family money, save for necessities, the presumption is that she has no right. Consider it as family money, still the wife shall not, for instance, seize secretly upon $10,000 family cash and buy with it, however, valuable, a yacht, or a herd of cattle, or a farm, and the husband's mouth be shut against this because he speaks half an hour too late, a few moments after the property is delivered to her. Such property, indeed, quickly becomes community property if he acquiesces, but that it can thus be thrust on him is not to be tolerated, tearing down, as that would, a statute which makes him sole manager in order to protect them both against her inexperience.

Of course, we do not say the holders of the wife's note may never hold the husband personally too, since there may be instances where her borrowing is so clearly essential to the common estate, where it is so plainly ratified by the husband, or where the purchased property is so knowingly shared in or enjoyed by the husband that he also should personally respond. Fielding v. Ketler, 86 Wash. 194, 149 Pac. 667. But this is not matter of presumption. It must be shown by the facts none of which are offered here. The law is not unwilling but ready to fasten acquiescence on the husband, yet until the contrary is shown a wife's note is presumed to be hers alone. If any encouragement was given to another doctrine in Williams v. Boebe, 79 Wash. 133, 139 Pac. 867, it was promptly corrected in Hammond v. Jackson, 89 Wash. 510, 154 Pac. 1106.

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Accordingly, the motion of the husband for a nonsuit should have been sustained, and the judgment of the lower court must be modified so as to stand only against the wife. As to her also it is modified so as to exclude her attorney's fee. Her contract was that it should be adjudicated against her in the suit upon the note which was not done, and the result must be the same whether we consider this action as the indorser's suit upon the note or upon a judgment assigned. If it is upon the assigned judgment, plainly no attorney's fee is carried with it, for there was none to carry; if it is a suit upon the note, it is still only a suit upon a note as paid and not as assigned, because assigned it could not be after it was merged in a judgment.

The cause is accordingly remanded with instructions to the lower court to enter a judgment modified as above stated.

Morris, C. J., Holcomb, Parker, and Chadwick, JJ., concur.

Imp. Neither [illegible] comm. nor [illegible] liable, [illegible] personally. [illegible] executed [illegible] as mere [illegible] obligation, [illegible] herself [illegible] community, in absence [illegible] showing [illegible]. [illegible] satisfied [illegible] community, [illegible] proceeds [illegible] obligation, [illegible] conclusion [illegible] presumption, [illegible] alone.

MARCUS A. SAWTELLE, Receiver, Appellant,
v. ANDREW WEYMOUTH et al.,
Respondents.

(14 Wash. 21, 1896.)

Appeal from Superior Court, Jefferson County.--Hon. R. A. Ballinger, Judge. Affirmed.

The opinion of the court was delivered by

Gordon, J.--The respondents, Andrew Weymouth and Margaret E. Weymouth, are, and for upwards of twenty years last past have been husband and wife. On April 18, 1890, the respondent Andrew Weymouth, with one George Moffatt, executed and delivered a promissory note to the Port Townsend National Bank of which the appellant Marcus A. Sawtelle is receiver. The indebtedness thus incurred by said Andrew Weymouth was for the benefit of the community consisting of himself and wife. On July 21, 1892, said community was the owner of various town lots in and adjacent to the city of Port Townsend in Jefferson county, and also of eighty acres of land in Clallam county in this state. On said last mentioned day the said Andrew Weymouth executed to the said Margaret E. Weymouth a deed of conveyance to the premises which are the subject of this litigation, and on the 1st of June thereafter judgment was rendered against the said Andrew Weymouth in favor of said Port Townsend National Bank upon the indebtedness heretofore mentioned, which judgment amounted to the sum of $1,375. On June 7, 1893, the judgment creditor caused a transcript of said judgment to be filed in the offices of the county auditors of said Jefferson and Clallam counties. On December 11, 1893, the respondent Margaret Weymouth, her husband joining with her, conveyed a part of this property to the respondent William DeLanty, and on the following day, viz., December 12, 1893, the remainder of said property in dispute was conveyed by the respondents Weymouth to the respondent William G. Strong. The conveyances herein referred to were duly recorded.

This action was commenced by the appellant as receiver to set aside as fraudulent said conveyances, viz., the conveyance from Andrew to Margaret E. Weymouth, also the conveyances from respondent Margaret E. Weymouth and her husband to the respondents William DeLanty and William G. Strong, and to subject the property to levy and sale for the purpose of satisfying the judgment obtained by said bank against said respondent Andrew Weymouth. In the court below the cause was sent to a referee to take and report the testimony, and thereafter the court, having made its findings and conclusions, rendered its judgment and decree in favor of respondents, from which appellant has appealed.

In addition to what has already been stated the court below found that, "the conveyance of the property by Andrew Weymouth to Margaret E. Weymouth was a voluntary conveyance and without consideration." Further, "that at the time of the conveyance . . . from said Andrew Weymouth and Margaret E. Weymouth to William DeLanty, the said defendants, Andrew Weymouth and Margaret E. Weymouth, were and had been for a long time prior

thereto indebted to said William DeLanty in a large sum of money, to-wit, about the sum of $1,400, which said sum was the consideration for said conveyance, and said indebtedness was canceled and paid by said conveyance." Further, "that at the time of the conveyance by Andrew Weymouth and Margaret E. Weymouth to defendant William G. Strong, . . . the said defendants, Andrew Weymouth and Margaret E. Weymouth, were, and had for a long time prior thereto been, indebted to the defendant William G. Strong in a large sum of money, to-wit, the sum of $1,200, and that said conveyance was made in consideration of said indebtedness, and said indebtedness was canceled and paid thereby." The court also found that DeLanty is an uncle of the defendant Margaret E. Weymouth, and defendant Strong is a son-in-law of the said Weymouths.

The court concluded, as matters of law, that by virtue of the conveyance from Andrew to Margaret E. Weymouth, the property described therein "became the separate property of Margaret E. Weymouth." Also, that the conveyance from respondents Margaret E. Weymouth and Andrew Weymouth, her husband, to DeLanty, "was upon a valuable consideration and that said DeLanty has ever since been and now is the sole owner of said property free from all claims of the plaintiff (appellant) made in this cause." A like conclusion was reached concerning the conveyance from the respondent Margaret E. Weymouth and her husband to the respondent Strong. Also, "that at the time of the conveyances from said defendants Andrew Weymouth and Margaret E. Weymouth to William DeLanty and William G. Strong, respectively, the said plaintiff (appellant) had no lien upon the land described in said conveyances by virtue of the judgment referred to (recovered by the bank against Andrew Weymouth) or by virtue of any proceedings therein or at all." To each of the foregoing findings and conclusions the appellant excepted and predicates assignments of error upon them.

As to the findings, we are entirely satisfied that they are fully supported by the evidence. A more important question is, did the findings warrant the conclusions which we have noticed. The respondents contend that the conveyances to DeLanty and Strong, having been executed six months after the rendition of the judgment and filing of the transcript, were subject to the prior lien of the bank's judgment. Section 460, Code Proc., provides that:

> "From and after said filing of transcript (of the judgment) by the county auditor of any county in the state, such judgment shall be a lien upon all real estate of the judgment debtor in such county, for the period of five years commencing from the date on which said judgment was rendered."

Appellant further contends that the debt for which the judgment was obtained against the husband, being a community debt, constituted "an existing equity" and could not be affected by the subsequent transfer of the property to the respondent Margaret E. Weymouth; that the property in the hands of the husband was by operation of law impressed and charged with the trust in favor of community creditors, of which trust the wife became charged with full notice; that the property in her hands was still impressed with that trust and subject to sale to satisfy the community debts incurred before its transfer; that by the transfer she "became the trustee and it was her duty to hold the property subject to the obligations of the trust."

Assuming these positions to be well taken, in what way do they affect the respondents, DeLanty and Strong? Certainly not at all, unless by the entry of the judgment and filing of the transcript the appellant obtained some lien upon the premises. The question is not whether this land could be subjected to sale for the purpose of satisfying appellant's judgment, had the title remained in the Weymouths, or either of them, but we have now to deal with the rights of parties who for a full and adequate consideration purchased the property from one who was apparently clothed with the full legal title and authority to convey. But appellant insists that the conveyance from the husband to the wife was without consideration and in fraud of creditors. Supposing that we concede all this, such a conveyance is not absolutely void but only voidable as to creditors. It "is good as against the grantor, and as respects himself vests all his interest in the land, equitable as well as legal, in the grantee." Rappleye v. International Bank, 93 Ill. 396; Lyon v. Robbins, 46 Ill. 276; Thames v. Rembert's Adm'r., 63 Ala. 561; Mansfield v. Dyer, 131 Mass. 200; Dunn v. Dunn, 82 Ind. 42; Hill v. Pine River Bank, 45 N. H. 300; Walton v. Tusten, 49 Miss. 569. As between the parties such a conveyance is as if a full and adequate consideration had been paid. Wait, Fradulent Conveyances (2d ed.) Sec. 395.

The conveyance from Andrew to Margarot E. Weymouth was in form legally sufficient to pass all the title and interest of the husband to the lands in question. As between the parties the conveyance was absolute and good as against the grantor, and no interest, legal or equitable, remained in the grantor upon which a lien of a judgment subsequently rendered could attach. Miller v. Sherry, 2 Wall. 237; Howland v. Knox, 59 Iowa, 46 (12 N.W. 777); Lippencott v. Wilson, 40 Iowa 425; Shorten v. Drake, 38 Ohio St. 76; In re Estes, 3 Fed. 134; Bump, Fradulent Conveyances (3d ed.), p. 496; Fletcher v. Peck, 6 Cranch, 87.

In Miller v. Sherry, supra, the court say:

"The judgment obtained by Mills & Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

In Fletcher v. Peck, supra, the Supreme Court of the United States, speaking by Chief Justice Marshall, at page 133, say:

"If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him."

The [illegible] lien provided [illegible] Code Procedure § 460 as attaching [illegible] real estate [illegible] debtor [illegible] filing [illegible] transcript thereof [illegible] office [illegible] auditor [illegible] attach [illegible] conveyed [illegible] debtor [illegible] prior [illegible] creditor [illegible] comm. dist. [illegible] conveyance [illegible] prior [illegible] any proceeding [illegible] ~~debtor~~ creditor attaching [illegible] hrs. [illegible] free [illegible] claims [illegible] creditor

In Bump on Fraudulent Conveyances, supra, at page 496, that learned author says:

"In the case of a fraudulent transfer of land, a subsequent judgment against the grantor is not constructive notice to a purchaser from the grantee, for upon searching the records and finding the transfer, the person who is about to purchase is not bound to go further and search the records for the purpose of ascertaining whether subsequent judgments may not have been recovered against the debtor."

In re Estes, supra, Judge Deady, after a full review of the authorities upon the question, says, at page 141:

"In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title."

At the date of the entry of the judgment in favor of the bank, and the filing of the transcript, the legal title to the premises in question was in Margaret E. Weymouth and not in the judgment debtor. Hence, no lien attached to the land as a consequence of said judgment or of the filing of the transcript, and the subsequent conveyances by the respondent Margaret E. Weymouth and her husband, to DeLanty and Strong, for value, prior to any proceedings taken by said judgment creditor attacking the transfer from the husband to the wife, were sufficient and must be upheld.

For these reasons the decree will be in all things affirmed.

Anders, Dunbar and Scott, JJ., concur.

Hoyt, C. J., dissents.

CALVIN PHILIPS & COMPANY, Respondents,
v. LOUIS LANGLOW et al., Appellants.

(55 Wash. 385, 1909.)

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 13, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Mount, J.--Respondent brought this action to recover upon a written contract for the payment of commissions in procuring a loan of $35,000 for the appellant Louis Langlow. The defense was based upon two grounds, (1) that the application for the loan was a mere tentative inquiry as to the terms upon which a loan could be procured, and (2) that the loan was to be secured by mortgage upon community real estate, and that the contract to pay a commission upon the loan was made by Louis Langlow without knowledge or authority of his wife. The case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for $365, and judgment was entered thereon. The defendants appeal.

It seems that the appellant Louis Langlow and his brother owned certain real estate in Tacoma. They desired to construct a building upon this real estate. In January, 1908, they caused a letter to be written to the Penn Mutual Life Insurance Company of Philadelphia, Pennsylvania, inquiring whether that company would make a loan of $40,000 upon their Tacoma property. The company replied that it had no funds at the time, but referred appellant to respondent Calvin Philips & Company, at Tacoma, through whom it said its loans were being made. Thereafter, on April 16, 1908, Louis Langlow applied to Calvin Philips & Company and signed an application for a loan from the Penn Mutual Insurance Company, for $35,000, for the term of five years, at five and one-half per cent per annum, to be secured by a first mortgage lien upon certain real estate. At the same time Louis Langlow signed an agreement to pay Calvin Philips & Company for its services in procuring the loan a commission of one and one-half per cent of the amount of the loan, and to permit Calvin Philips & Company to write the insurance carried on the buildings during the life of the mortgage. Thereafter the Penn Mutual Life Insurance Company accepted the application and agreed to make the loan as applied for, and directed the borrowers to report to Messrs. Fogg & Fogg, attorneys, for an examination of title and the completion of the loan. Some objections were made by the attorneys to the title of the lots offered as security, and suggestions were made in order to make the mortgage lien good. The borrower desired money to be advanced for the construction of the building. The insurance company, in that event, required a bond to protect it against liens. While these negotiations were pending, the appellant obtained a loan from another party, and then declined to complete the loan with the insurance company. Calvin Philips & Company thereupon demanded its commission, which was refused, and this action followed.

Appellants contend that the facts show that the application was a mere tentative application to determine whether the loan would be made. A careful reading of the evidence convinces us, as it evidently convince

the jury, that the application was what it purported to be, and was not a mere inquiry. After the application was accepted, the applicants proceeded to carry out the loan, which they no doubt would have completed had they not obtained the money elsewhere, at the same rate of interest and upon substantially the same terms it was offered by the insurance company, but without the payment of any commission. It is true the contract with respondent for commissions provided: "If this application is not accepted, the said Langlow to be at no expense in connection therewith." But this clearly referred to the acceptance by the insurance company, and not the acceptance by the appellants. The application for the loan was accepted by the insurance company. It was not carried out, but the failure was not the fault of either the insurance company or of Calvin Philips & Company to comply with the agreements contained in the application and in the acceptance thereof. The conditions insisted upon by the insurance company were covered by the terms of the application. The fact that the respondent procured the loan, or a party ready and willing to make it upon the terms proposed in the application, was sufficient to entitle the respondent to its commission. 19 Cyc. 255; Barnes v. German Savings & Loan Society, 21 Wash. 448, 58 Pac. 569.

It is contended that the evidence shows that Calvin Philips & Company was the agent for the insurance company, and therefore not entitled to a commission from appellants. The evidence does show that the loans of that company were made through Calvin Philips & Company, but it is not shown that Calvin Philips & Company was compensated by the insurance company. It clearly appears that all the parties knew that Calvin Philips & Company was to be paid by the appellants for negotiating the loan. The rule is that an agent may act for both parties, where the parties have full knowledge of the facts and consent thereto. 31 Cyc. 447-9.

Appellants also contend that, because Ingeborg Langlow, the wife of Louis Langlow, did not sign the application for the loan, or the contract to pay for the services rendered in procuring the same, and did not know of the contract, she was therefore in no way bound, and the respondent was not entitled to a judgment against her. Her separate property would not be liable for such a debt, but the debt is clearly a community debt contracted by the husband in the management of the community estate for the benefit of the community. The rule is that community property is liable for the payment of community debts. Oregon Improvement Co. v. Sagmeister, 4 Wash. 710, 30 Pac. 1058, 19 L.R.A. 233; Floding v. Denholm, 40 Wash. 463, 82 Pac. 738. The judgment against her as a member of the community was therefore proper.

The case of Holyoke v. Jackson, 3 Wash. Ter. 235, 3 Pac. 841, and other cases cited by the appellants, to the effect that a husband cannot enter into a valid contract for the sale of community real estate without his wife joining therein, are not in point. That case is clearly distinguished from this in the case of Andrews v. Andrews, 3 Wash. Ter. 286, 1 Pac. 68, where the court said that case "determined nothing as to the power of the husband to bind the community real estate by a judgment recovered against himself for a community debt." The fact that the judge who tried the case ruled differently upon this question from the judge who passed upon the demurrer to the original complaint is of no conseque

for the last ruling was correct. Shephard v. Gove, 26 Wash. 452, 67 Pac. 256.

Appellants further argue that the court erred in giving and in refusing to give certain instructions. The points made upon these instructions are in substance decided above and need not be further considered.

We find no error in the record, and the judgment must therefore be affirmed.

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Rudkin, C. J., Dunbar, and Crow, JJ., concur.

The [illegible] liable [illegible] comm. [illegible] husband's [illegible] commission [illegible] securing [illegible] loan [illegible] comm. [illegible] comm. estate.

Note: husband [illegible] agreed to [illegible] real-estate brokers a commission [illegible] selling community realty [illegible] frauds and [illegible] wife [illegible] (bound [illegible]) [illegible] frauds [illegible] comm. [illegible]

Must (element of bad faith — [illegible] held liable a lawyer [illegible] handling a case

F. W. BAKER et al., Respondents, v.
M. E. MURREY et al., Appellants.

(78 Wash. 241, 1914.)

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 21, 1913, upon findings in favor of the plaintiffs, after dismissing the jury, in an action on contract. Affirmed.

Mount, J.--On July 20, 1909, the Puget Sound Land Development Company, a corporation, entered into a written contract with M. E. Murrey by which that corporation agreed to sell to Mr. Murrey certain real estate for the price of $5,400. The contract provided that the purchase price should be paid in installments. It also provided that time was of the essence of the contract, and in case of the failure of the vendee to make the payments, the vendor, at its election might terminate the contract and forfeit all payments made thereon.

At that time, M. E. Murrey was married and living with his wife. Mrs. Murrey declined to sign, and objected to her husband entering into the contract. When the contract was executed, Mr. Murrey paid to the vendor, in accordance with the terms of the contract, $1,074. It is conceded that this money was the community funds of Murrey and wife.

Thereafter, on February 23, 1910, the Puget Sound Land Development Company assigned all its right, title, and interest under the contract to F. W. Baker and wife and F. D. Black and wife. After the assignment of the contract, Mr. Murrey continued to make payments until he had paid something over $2,000 thereon. He then neglected or refused to make further payments, when this action was brought by Baker and wife and Black and wife to recover the entire unpaid balance upon the contract. The cause was tried to the court and a jury. At the conclusion of the evidence, which shows the facts above stated, the court concluded that the only question in the case was one of law, to wit, whether the contract could be enforced against the community of Murrey and wife; and therefore dismissed the jury, holding that the plaintiffs could maintain their action against the community of Murrey and wife. Judgment was thereupon entered in favor of the plaintiffs for the amount due at that time under the contract. The defendants, Murrey and wife, have appealed from that judgment.

Two questions are presented by the appellants upon the brief: First, did these appellants, as a community, enter into the contract sued upon; and second, are the respondents the owners of the contract and the land sold so as to enable them to maintain the action?

It is argued by the appellants that, because the contract was signed by M. E. Murrey only, and because Mrs. Murrey objected to her husband entering into the contract, therefore the contract was the separate obligation of the husband, and the community is not bound thereby. This is the substance of the argument of the appellant.

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[illegible]

The statute provides, Rem. & Bal. Code, Sec. 5917 (P.C. 95 Sec. 27), that:

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

The two preceding sections referred to provide that property acquired by either the husband or the wife before marriage or afterwards, by gift, devise or descent, is the separate property of the husband or wife so acquiring such property. All other property is made community property by the provisions of Sec. 5917, supra.

It is conceded in this case that the appellant M. E. Murrey entered into this contract. It is also conceded upon the record that the first payment of $1,074 was made from community funds. It is also admitted upon the record that all the property belonging to Murrey and wife was acquired by them after their marriage. It is plain, therefore, that this contract, whether considered as personalty or realty, is community property under the statute, unless the mere fact that Mrs. Murrey objected to the purchase of the property or to the contract entered into by Mr. Murrey makes it the separate property of the husband. We are satisfied that such objection of the wife does not change the character of the property acquired. This is plain, we think, from the statute above quoted.

In the case of McDonough v. Craig, 10 Wash. 239, 38 Pac. 1034, where a suit was brought upon promissory notes executed by the husband in the prosecution of community business, this court said:

"There are but two questions of substance which seem to us to be involved in the decision of this case; one is as to whether or not the community property is liable for a debt incurred for its benefit by the husband alone; and the other is as to the effect upon the status of such debt of the giving of a negotiable promissory note therefor by the husband in his own name. . ."

"In our opinion the first question above stated has been settled by the decisions of this court. In the case of Oregon Improvement Company v. Sagmeister, 4 Wash. 710 (30 Pac. 1058), we held that community property could be sold upon a judgment against the husband, rendered for an indebtedness incurred by the husband by reason of losses in business in which he was engaged, with which the wife had no connection further than that cast upon her, by the law, as a member of the community . . . .

"A further consideration of the question has confirmed our convictions that everything rightfully done by the husband will be presumed to have been done in the interest of the community, and that such presumption will obtain unless it is made affirmatively to appear that the transaction in question related to his separate property.. . . Under the law as established by that case, it must be held that any liability incurred by the husband in the prosecution of any business is prima facie a charge

against the community; and that the presumption to that effect will continue in force until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit, if profit had been realized therefrom."

In Ballard v. Slyfield, 47 Wash. 174, 91 Pac. 642, we said:

"Property acquired by purchase during the marriage is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory proof."

And in Graves v. Graves, 48 Wash. 664, 94 Pac. 481, where property was acquired by the community and improved with community funds earned after marriage, we held that such property was community property and that an oral agreement that such property might be held as separate property by one of the spouses did not change the character which the law gave to the property. See, also, Denny v. Schwabacher, 54 Wash. 689, 104 Pac. 137, 132 Am. St. 1140.

We think the rule in these cases clearly fixes the character of this contract, even though signed by the husband alone; because it cannot be reasonably argued that this property was not acquired for the benefit of the community. If the purchase price had been paid, or shall be paid in the future, there can be no doubt that the property when acquired will be the community real estate of the appellants. And there can be no doubt that, when Mr. Murrey entered into the contract against the protests of his wife, he did so with the conviction that the contract was a good investment for the community. Under the statute, he has the management and control of the personal property. He had in his possession $1,074 of community funds which he desired to invest in this real estate. His wife objected. But he persisted in his desire and purchased the property. He had a right to do so, under the statute which gives him the management and control of the personal property. It will not do to say that, where one member of the community uses community funds against the wishes of the other member of the community and makes an investment, a mere objection of the other makes the property acquired the separate property of the one making the investment. And yet, if the contention of the appellants is sustained in this case, that would be the result; for it is argued that, because Mrs. Murrey objected to the contract, it became the separate contract and liability of her husband.

No authorities from this court are cited by the appellants to sustain this position except the case of Brookman v. State Ins. Co., 18 Wash. 308; 51 Pac. 395. That was a case where there was a question of fact to go to the jury whether a lease of property by a married woman became her separate property. Evidently in that case there was evidence which tended to show at least that the wife had a separate estate, and that she was dealing with her separate property, and made the lease for the benefit of her separate property and not for the community. There is not such contention in this case, and there is no evidence of the fact that Mr. Murrey purchased or dealt with this property as his separate property. The evidence is conclusive that the contract was made for the benefit of the community and was a community obligation. So that case has no bearing upon this one.

It is next argued by the appellant that the assignees had no right to maintain this action because this contract was assigned to the respondents as security for a debt. No authorities are cited to sustain this position. We have held to the contrary, and the general rule is that a vendor has a right to assign his rights under such a contract so as to entitle the assignee to enforce the same. Big Bend Land Co. v. Hutchings, 71 Wash. 345, 128 Pac. 652.

We are satisfied, therefore, that the trial court was right in his conclusions. The judgment is affirmed. The respondents have made no appearance in this court; therefore no costs will be taxed in their favor.

Crow, C. J., Morris, and Parker, JJ., concur. [illegible]

Fullerton, J., dissents.

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comm, personally [illegible] is comm, [illegible]
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hus, [illegible] comm. [illegible]

LYDIA S. DIAMOND, Appellant, v. FIDELIA B. TURNER et al., Respondents.

(11 Wash. 189, 1895)

Appeal from Superior Court, Thurston County.

The opinion of the court was delivered by

Hoyt, C. J.-In the brief of appellant will be found the following statement of the material facts, in the light of which the rights of the parties must be determined:

"The plaintiff, Lydia S. Diamond, and one of the defendants, J. C. McFadden, were married at Olympia, on the 9th day of December, 1882, and continued as husband and wife until June 6th, 1888. The land in controversy was acquired on the 12th day of December, 1885, by the defendant J. C. McFadden. On the 6th day of June, 1888, by a decree of divorce, the marriage relations between Lydia S. Diamond and J. C. McFadden were terminated, but no division, separation or disposition was made of their community real estate. On March 26th, 1885, a judgment was recovered by one F. G. Turner against the said J. C. McFadden and one D. P. Ballard, which judgment was for the reformation of a lease of certain real property made andexecuted by D. P. Ballard and J. C. McFadden as a partnership known as Ballard & McFadden, and the money judgment was for costs in such action. On March 6th, 1886, an execution was issued upon the cost judgment in such action, and levy was made upon the property in controversy, and upon such levy and proceedings had thereunder defendants' title is based. The sheriff's deed was issued to G. G. Turner after his death. The defendant Fidelia B. Turner claims title by virtue of a will conveying G. G. Turner's property to her."

The facts thus stated are supplemented by others shown by the record, and referred to in the brief of the respondents, which are relied upon by them to sustain their title, if it is necessary to invoke their aid. Upon such facts many questions have been elaborately argued, but the conclusion to which we have come as to the rights of the parties upon the facts stated in appellant's brief makes it unnecessary for us to say anything as to these questions. It will be seen by a reference to such statement, and the argument of appellant founded thereon, that the important question to be decided is as to whether or not the judgment under which the sale was made was of such a nature that it could be satisfied out of the community property of the defendant J. C. McFadden and his wife.

We held in the case of Oregon Improvement Co. v. Sagmeister, 4 Wash. 710 (30 Pac. 1058), that a liability incurred by a husband in the prosecution of any business the profits of which would belong to the community could be enforced against the community property, and that it would be presumed that any business in which the husband might be engaged was for the benefit of the community until the contrary was shown. It must follow that if the husband alone had entered into the lease which was

Comm. Co., liable)
partnership debts incurred b.
[illegible] comm. conducting
profits if any, belong comm.

the foundation of the action in which the judgment in question was rendered such judgment would have been enforceable against community property. The judgment would have been rendered upon a liability incurred in the prosecution of a business which would be presumed to have been conducted for the benefit of the community.

Does the fact that the business, in furtherance of which the lease was made, was to be prosecuted by the husband in connection with another in a partnership name, so change the rule as to make a liability incurred therein by the husband only enforceable against his separate property? We think not. The community, and not the husband alone, would have been benefited if the business of the partnership had resulted in gain. Hence, its losses should fall upon the community, and not upon the husband alone. It is a well settled rule that the property of the individual members of a partnership can be made available for the payment of its debts when there is not sufficient partnership property available for that purpose. It would seem to follow as a necessary consequence that process which would reach the property of the individual members would be of such a nature as to be enforceable against the community to the same extent as though the judgment upon which it was issued had been against such member for a liability incurred by him in the prosecution of a like business on his own account.

The facts stated compel us to hold that the liability upon which the judgment in question was rendered was incurred in the prosecution of a community business, and that such judgment could be satisfied out of the community property.

Such being the fact, but two reasons have been suggested why the sale under the execution did not vest a perfect title in the defendant Fidelia B. Turner, or those under whom she claims, as against the community and each of its members. One is that there was property belonging to the partnership out of which the execution could have been satisfied. That there was sufficient partnership porperty for that purpose does not clearly appear from the allegations or proofs, but if there was it would furnish no grounds for a collateral attack upon the proceedings which culminated in the sale. Such fact might have furnished sufficient reason for setting aside the sale in a direct proceeding for that purpose. But after it had been confirmed it was invulnerable to collateral attack on account of facts not appearing in the record unless a want of jurisdiction was thereby shown.

The other is that the deed executed in pursuance of the sale was void for the reason that it was executed in the name of a dead man. It is no doubt true that a deed so executed could have no force whatever, but it follow that no title was acquired by the purchaser at the execution sale. The certificate of purchase and confirmation of sale were alone essential to pass the substantial title of the defendant in the execution to the purchaser at the sale. The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser, of those claiming under him, at any time in a proper proceeding for that purpose. Until the sale had been set aside, a certificate of purchase would be as fully protected as though the legal title had been conveyed by deed made in pursuance of the statute.

The judgment will be affirmed.

Dunbar, J., concurs in the result. Scott and Anders, JJ., concur.

H. O. SHUEY, as Receiver of Seattle Savings Bank,
Respondent, v. H. E. HOLMES et ux., Appellants.

(22 Wash 193, 1900)

Appeal from Superior Court, King County.--Hon. E. D. Benson, Judge. Affirmed.

The opinion of the court was delivered by
Gordon, C. J.--This is a second appeal. Froma statement of the case, see Shuey v. Holmes, 20 Wash. 13 (54 Pac. 540). Subsequent to the reversal of the former judgment, the plaintiff, by leave of the court, amended his complaint to meet the objections pointed out in the former opinion. As amended, his complaint shows that the bank of which he is the receiver was at the time of his appointment, and ever since has been, an insolvent corporation; that the appointment of a receiver was necessary to secure justice to the creditors of the bank; that the note sued upon was given in payment of thirty shares of the capital stock of the bank; that the maker was one of the incorporators of the bank and ever since its incorporation has been a stockholder and trustee thereof. Several affirmative defenses were interposed, to which demurrers were sustained, and the sufficiency of the defenses, as pleaded, presents the only question arising upon this appeal.

The plaintiff in the present action has joined the wife of the maker as a party defendant, and asks that the judgment be declared to be as for a community debt and satisfied out of the separate property of the maker, or out of the property of the community, consisting of the husband and wife. The defense to this demand is that the note sued on was executed as an accommodation to the bank, and not for the benefit of the community. The demurrer was properly sustained, upon the authority of Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399 (46 Pac. 409), and the ruling is in accord with what was said upon this branch of the case in our former opinion. Shuey v. Holmes, supra. The demurrers to the affirmative defenses were properly sustained.

The judgment must be affirmed.

Dunbar, Fullerton and Reavis, JJ., concur.

The [illegible] community [illegible] liable [illegible] note executed
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JOHN W. BARNETT, Appellant, v. J. V. O'LOUGHLIN
et ux., Respondents.

(14 Wash 259, 1896)

Appeal from Superior Court, Lewis County.--Hon. W. W. Langhorne, Judge. Reversed.

The opinion of the court was delivered by

Scott, J.--The respondents are husband and wife, and one G. W. Hunt became indebted to them in the sum of $800 for board and lodging of his employees. Respondent J. V. O'Loughlin individually began suit to recover said sum, and sued out a writ of attachment against the property of Hunt This writ was delivered to appellant as sheriff, and was by him levied on certain personal property which was thereafter claimed by one Dixon. Barnett demanded of O'Loughlin an indemnity bond. This demand was complied with, a bond being given by O'Loughlin as principal, with two sureties. Afterwards Dixon recovered a judgment against Barnett for the value of said property, the same having been sold under the attachment proceedings; and thereafter Barnett brought suit upon the indemnity bond to recover the amount he had been compelled to pay to Dixon, and obtained judgment therefor and this action wasbrought to subject the community real estate of the reppondents to the satisfaction of said judgment.

The court found that the original claim for which O'Loughlin sued Hunt was a community debt due the respondents, and this finding is not questioned; but the court further found that the indemnity bond given by O'Loughlin was his individual debt, for which the real estate of the community was not liable. We think this latter finding was erroneous. The prior action was commenced in the interests of the community, although by the husband individually. The giving of the indemnity bond was in furtherance of that suit and became necessary therein to maintain the claim against the property attached. This was as much a community obligation as was the debt sued upon, and the community real estate is liable for its satisfaction.

Reversed and remanded.

Hoyt, C. J., Anders, Dunbar and Gordon, JJ., concur.

An indemnity bond necessary to [illegible],
[illegible] attachment [illegible],
prosecuted [illegible] individually [illegible],
being [illegible] community, [illegible],
obligation [illegible], and [illegible]
[illegible] satisfaction

[illegible] foreclosure [illegible] subsequently conveyed [illegible] assumed [illegible] grantee [illegible] comm [illegible] deficiency [illegible] enforced [illegible] comm [illegible] 14 – 507

THE SOLICITORS' LOAN & TRUST COMPANY, Appellant,
v. SAMUEL C. ROBINS et ux., Respondents.
(14 Wash 507, 1896)

Appeal from Superior Court, Douglas County.-- Hon. Wallace Mount, Judge. Reversed.

The opinion of the court was delivered by

Scott, J.--This action was brought to foreclose a mortgage on certain real estate, executed by the defendants Tyler and wife to the plaintiff. Subsequent to giving the mortgage they conveyed the land to respondent Samuel C. Robins. The deed excepted the mortgage in question from the warranty clause and contained a statement that the grantee assumed and agreed to pay the mortgage debt. The complaint alleged this and also that the same was the community debt of Robins and his wife. This allegation was not denied by either of them, but they disclaimed any interest in the lands, and the court dismissed the action as to them, whereupon the plaintiff appealed.

No brief has been filed or appearance made by the respondents in this court, and we are called upon to decide the case on the brief and arguement of the appellant. From the authorities cited, only one of which we shall call attention,to, we are of the opinion that the plaintiff was entitled to a personal judgment against the respondents, Samuel C. and Helena Robins, enforcible against their community property and the separate property of Samuel C. Robins, for any deficiency that might remain after selling the mortgaged property.

In Keller v. Ashford, 133 U. S. 610 (10 Sup. Ct. 494), it is held that, under the weight of authority, the mortgagee is entitled in some form to enforce such an agreement against the grantee, on the ground that as between a mortgagor and his grantee in such instances the grantee becomes the principal for the payment of the debt, and as between them the position of the mortgagor is that of a surety, and that in equity a creditor is entitled to the benefit of any obligation or security given by the principal to the surety for the payment of the debt.

It is not necessary in this case to decide more than that the plaintiff is entitled to a deficiency judgment against the respondents Robins and wife, for that is all the plaintiff seeks.

The judgment is reversed and the cause remanded for disposition in accordance with the foregoing.

Hoyt, C. J., and Gordon, J., concur.

Dunbar, J. (dissenting).--I am unable to agree with the conclusion reached by the majority in this case, and, while conceding that probably the weight of authority sustains that conclusion, it seems to me to be illogical and wrong. There is no privity between the mortgagor and the

grantee. They are strangers to each other, and under what principle of law or by what legal deduction the mortgagor has a right to claim a judgment against the grantee I am at a loss to understand, even from a perusal of the cases sustaining the doctrine, and from the case decided by the United States Supreme Court, cited by the majority. It cannot, it must be conceded, be based on the theory of privity. The clause in the deed providing for the payment by the grantee is purely for the benefit of the mortgagor, if it can be construed for the benefit of any one. It is in reality only a recital in the deed which is unsigned by the grantee, and if it can be construed to be a promise at all it is a promis not in writing and therefore falls within the statute of frauds. But, conceding it to be a binding promise on the grantee so far as the mortgagor is concerned, how can it be possible that the security, which the mortgagee saw fit in his original contract and in fact the only contract he has made, to take for the payment of his debt, can be increased by the sebsequent action of the mortgagee, at least so as to bind a stranger to the original contract? It must be conceded that no action of the mortgagee could lessen or destroy the security of the mortgagor, and it is just as illogical to conclude that the action of the mortgagor by transfe to a third party can increase said security.

The court in Keller v. Ashford, supra, admits the general doctrine that in equity as at law the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee; but states that-

"It has been held by many state courts of high authority, in accordance with the suggestion of Lord Hardwicke in Parsons v. Freeman, Ambler, 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser."

This suggestion, it seems to me, is exactly in conflict with the rule above stated, but the court says:

"This result has been attained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt."

To my mind there has been no development here at all, but one doctrine is squarely opposed to the other, both in reason and effect. To allow a mortgagee to bring an action against a stranger to the contract and obtain against him a deficiency judgment, thereby increasing the security which he was entitled to under his contract, is opposed to every well established principle of law, and I cannot consent to it until it becomes the established rule of law in this state.

H. F. LOUTZENHISER, Respondent, v. HUGH PECK et al., Appellants.

(89 Wash. 435, 1916.)

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 19, 1915, upon findings in favor of the plaintiff, in an action for an injunction, tried to the court. Modified.

Ellis, J.--Action to enjoin the violation of a covenant not to engage in a certain business for a limited time in a limited locality, and for damages. It is conceded that, prior to July 1, 1913, both the plaintiff and the defendant Hugh Peck were engaged in the retail meat business on Monroe street at Nos. 02817 and 02721, respectively, in the city of Spokane; that on that date, Hugh Peck sold his stock, tools and fixtures to the plaintiff, and executed a bill of sale thereof containing a covenant as follows:

"Party of the first part hereto hereby agrees not to engage in the retail meat business as owner, manager or clerk within one mile of New York Market at 02721 Monroe street, Spokane, Spokane county, Washington, for not less than two years."

It is conceded that the defendant Hugh Peck, prior to the sale, had been supporting his family from the business so sold. The defendant Katherine Peck avers in her answer that, about January 1, 1914, her husband had conveyed to her, by bill of sale, certain fixtures, tools and implements for running a meat market at 02721 Monroe street; that the conveyance to her was a gift from her husband, the defendant High Peck; that the property was thereafter her separate property; and that since that time she has been conducting, either personally or through a renter, a retail meat market at that place. The defendant husband testified that he purchased the fixtures and equipped the new market with his separate funds and gave it to his wife. The evidence further shows that he purchased the market sold to the plaintiff with funds acquired prior to his marriage.

The court made findings of fact and conclusions of law in favor of the plaintiff, and thereon entered a decree enjoining the defendants and each of them from engaging in the retail meat business within one mile of 02721 Monroe street, in Spokane, for a period of two years from July 1, 1913, and awarding the plaintiff judgment against the defendants and each of them for the sum of $350 and costs. The defendants have appealed.

The appellants' first claim is that the covenant was invalid, in that it was without limitation as to when the two years should begin or cease. Construing the contract as a whole, the covenant is not even ambiguous. No one reading the contract could have a doubt as to what was meant. It shows an intention, by clear implication, not to engage in the specified business within the specified limits within the period of at least two years from the date of the contract. The intention of the parties as expressed or reasonably implied in a written contract must prevail.

The appellants next complain that both the injunction and the judgment, if any, should have been against the defendant husband alone, because the sale in connection with which the covenant was made was a sale of his separate property. Though the property sold was the property of the husband, it is conceded that it was being used in support of the community. This fact furnished a sufficient consideration for an undertaking, binding upon the community, not to enter into the same business, at least upon the same capital, for a limited time in the same locality. Stating it in another way, the husband could not avoid the covenant, even conceding it his separate covenant, by turning his property over to his wife as a gift and setting her up in the same business at the same place. To permit him to do so would be to sanction the use of his own property in fraud of the respondent's rights and in palpable evasion of his own covenant. Looking through technicalities to essentials, that is the ultimate end of appellants' position. It is unsound. The court committed no error on the admitted facts in running the injunction against the appellant Hugh Peck and the community. It is equally clear that, under the evidence, there is no error in enjoining the wife also. She was aiding the husband in violating his covenant. A different case would be presented if there had been any evidence that she invested in the new venture money from any other source than the alleged gift from her husband. On such a case, we express no opinion.

It is asserted that the complaint was insufficient to sustain any judgment for damages, in that it contained no allegation of any specific amount of damages suffered, as required by Rem. & Bal. Code, Sec. 258, subd. 3 (P.C. 81 Sec. 223), the last clause of which reads:

"If the recovery of money or damages be demanded, the amount thereof shall be stated."

The claim is untenable. In the complaint it is alleged, in substance, that the ultimate damages cannot be estimated, and the prayer is for an injunction and that the damages already suffered be ascertained and allowed, and for such other relief as may be consistent with equity and good conscience. All the facts from which the damages flowed were pleaded. The appellants were advised of the exact nature of the recovery sought. No demurrer was interposed nor any motion to make the complaint more specific. On tardy objection, every intendment will be indulged in favor of the pleading. Substantial justice is the criterion imposed by statute. Rem. & Bal. Code, Sec. 285, 307 (P.C. 81 Sec. 259, 303). This is specially true where, as here, the action is one of equitable cognizance. In such a case, under a prayer for general relief, the court is justified in granting any relief consistent with the equities of the case sustained by the facts alleged and proved. Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123. This even though the prayer for special relief be defective. MacKay v. Smith, 27 Wash. 442, 67 Pac. 928; Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 Pac. 862.

It is stoutly urged that no damages were proven. It was shown by a comparison of respondent's sales for the months of August, September, October and November in the year 1913, with his sales for the same months for the year 1914, that the former exceeded the latter in the sum of $2,409.40. Respondent testified that about the same ratio of loss pro-

vailed during the other months of the year 1914 after appellants reopened their market. There is also evidence that the appellants were taking in from $20 to $25 a day after they reopened their market. This would more than equal the falling off of respondent's trade at the same time. This coincidence in a suburban district such as this, where the public to which the markets catered was necessarily limited, had a strong tendency to show that the one was the result of the other. There was evidence that the profits of retail meat markets generally amount to from twenty to twenty-five per cent of the gross sales. No evidence was offered to the contrary. The loss of profits so computed, even in the four months mentioned, would much exceed the amount of damages awarded by the court. But it was also shown that there was a general decline in the retail meat business in Spokane during the year 1914. The court evidently, and we think properly, took this into consideration. Considered as a whole, the evidence fairly, and with as much certainty as can usually be attained, established a loss of profits due to the appellant's violation of the covenant in an amount at least equal to the damages awarded.

It is now generally held that lost profits when reasonably ascertainable are recoverable as damages for breach of contract, whenever from the nature of the case they were reasonably within contemplation of the parties as the probable result of its breach when the contract was made. An established business is not a commodity with a fixed market value. It is an investment for the purpose of producing profits. Both the vendor of such business who covenants not to enter into competition for a given time and in a given locality and the vendee who, as the evidence here shows, pays more for the business because of the covenant, must certainly contemplate at the time, that a breach of the covenant will result in damages by causing a loss of profits. The evidence adduced was the best evidence of the damages of which the case in its nature was susceptible. Such evidence is always admissible. For a decision in a case closely analogous so holding, see Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842. In Hitchcock v. Anthony, 83 Fed. 779, another cognate case, Judge Lurton, in a well considered opinion touching evidence of the same character as that here assailed, said:

"The evidence offered was relevant and competent. It related directly to the business conducted by Anthony both before and after the contract, and before and after its breach, and did not touch any mere collateral business or anticipated collateral profit. The admission of evidence as to the past profits of that business as bearing upon future profits prevented was not error. It was a most important circumstance, which any business man would look to as a factor in any estimate of the future value of a business; and no reason occurs why a jury may not equally as well look to that element in considering whether there were any profits prevented by competition."

As said by the supreme court of New Hampshire in Salinger v. Salinger, 69 N. H. 589, 45 Atl. 558:

"During the term of the contract, each day of the defendant's competition constituted a continuing wrong done to the plaintiffs. Their rights were constantly violated, and in such a way that the ensuing loss of profits must have been contemplated by the parties. The plaintiffs

are to be compensated for all such damages, if they are capable of computation. Hurd v. Dunsmore, 63 N. H. 171, 173, and cases cited; Crawford v. Parsons, 63 N. H. 438, 444. That it cannot be demonstrated to a mathematical certainty what profits have or have not come from a certain source of business, is no objection to their recovery."

Finally, it is claimed that no personal judgment should have been entered as against the defendant Katherine Peck binding her separate estate. This contention must be sustained. She was not a party to the contract. Though the circumstances were such as to warrant an injunction against both members of the community personally and as a community, and to warrant a judgment for damages against the defendant husband and the community, there was no evidence warranting a judgment against the wife.

The cause is remanded with direction to modify the judgment in accordance with this opinion. Appellant Katherine Peck may recover her costs in this court.

Morris, C. J., Mount, Fullerton, and Chadwick, JJ., concur.

[illegible]

[illegible]

[illegible]

[illegible]

ADDIE M. CONLEY, Respondent, v. WILLIAM K. GREENE, Appellant.

(89 Wash. 39, 1916.)

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 17, 1914, in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Parker, J.--The plaintiff, Addie M. Conley, seeks to quiet her title to lots one and two of Denny Fuhrman's Addition to the city of Seattle, as against a claim of judgment lien thereon made by the defendant William K. Green. Trial in the superior court resulted in a decree in the plaintiff's favor, from which the defendant has appealed to this court.

The decisive facts, as we view the case, are not in dispute. They may be summarized as follows: During all times involved in this controversy, Mr. and Mrs. W. G. King were husband and wife, living together as such in Seattle, and constituting a community under the laws of this state. In September, 1912, this appellant, as plaintiff, in an action commenced and prosecuted in the superior court for King county, entitled "William K. Greene v. Mrs. W. G. King," procured a judgment against Mrs. King for the sum of $400, upon a loan of money made by William K. Greene to her in September, 1910, as evidenced by a promissory note signed by her alone. At the time of the rendering of that judgment, Mr. and Mrs. King owned, as their community property, the lots here involved, the title thereto being of record in the name of W. G. King. Thereafter, in the year 1914, respondent purchased the lots of Mr. and Mrs. King, paying a valuable consideration therefor, who conveyed the same to her, though with knowledge upon her part of the judgment against Mrs. King and the claim of William K. Greene that such judgment was a lien upon the lots by reason of Mr. and Mrs. King's community ownership thereof at the time of the rendering of that judgment. It is as against the claim of lien under this judgment, made by William K. Green, that respondent, the grantee of Mr. and Mrs. King, seeks to quiet her title, and in whose favor decree was rendered accordingly in this case.

It is contended by counsel for appellant that the lots are subject to the lien of the judgment rendered against Mrs. King, upon the theory that the judgment was rendered for a community debt of Mr. and Mrs. King. It seems to us, however, that the problem here for solution is, first, as to the nature of that judgment, and as to whom it was rendered against. If not rendered against the community nor against the managing agent of the community, this case would, in any event, seem to call for decision in favor of respondent, as it was so decided by the trial court. We have seen that W. G. King was not a party defendant to the action in which that judgment was rendered, neither as an individual nor as the managing agent of the community. We have also seen that Mr. and Mrs. King have at no time lived separate and apart, so as to make her the managing agent of the community for the purpose of prosecuting or defending actions in its name or in its behalf.

[illegible] a [illegible] [illegible]
comm. [illegible] [illegible]
[illegible] being [illegible] comm. [illegible]
standing [illegible]; in view [illegible]
C. + 3, §§ 5917, 5918 [illegible],
[illegible] comm. [illegible]
[illegible] Ed. § 151 providing [illegible] a
married [illegible] property, [illegible]
[illegible] joined unless [illegible]
[illegible] sep. [illegible] husband
[illegible] herself [illegible]
[illegible] sep. [illegible] granted [illegible],

By the express terms of Rem. & Bal. Code, Sec. 5917 and 5918 (P.C. 95 Sec. 27, 29), "the husband shall have the management and control of community personal property" and "has the management and control of the community real property," with no restrictions except those touching the conveyancing and encumbering of community real property. These provisions of themselves seem to render it plain that the community cannot be sued, nor can judgment be rendered against it, without the husband being made a party to such suit, since it is only by the husband being made a party that the community is made a party, except in certain cases otherwise provided for by Rem. & Bal. Code, Sec. 181 (P.C. 81 Sec. 11), which reads:

"When a married woman is a party, her husband must be joined with her, except,--1. When the action concerns her separate property, or her right or claim to the homestead property, shy may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone; 3. When she is living separate and apart from her husband, she may sue or be sued alone."

This, it seems to us, argues conclusively that the judgment rendered against Mrs. King is not a judgment against the community and does not create any lien against the community property, real or personal.

We are of the opinion that the question of whether the debt contracted by Mrs. King, upon which the judgment was rendered in favor of William K. Greene, was a community debt is of no moment in this case, in view of the fact that neither the community nor W. G. King, as managing agent thereof, was made a party defendant in that action.

Our attention is called to the recent decision of this court in Fielding v. Ketler, 86 Wash. 194, 149 Pac. 667, where a debt contracted by the wife was held to be a community debt and the judgment rendered thereon a community judgment. But that decision does not touch the question here involved, since the husband and wife were both made defendants in that case, thereby, of course, resulting in the community being defendant, and the judgment was rendered in terms against the community as well as the individuals composing the community.

It seems quite clear to us that the judgment of the superior court must be affirmed. It is so ordered.

Morris, C. J., Main, Holcomb, and Mount, JJ., concur.

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

C. E. McLEAN, Respondent, v. BERTHA BURGINGER,
Appellant, PATRICK O'TOOLE, Defendant.
(100 Wash. 570, 1918)

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 1, 1917, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Reversed.

Webster, J.--This action was brought by respondent to recover a judgment against Patrick O'Toole and the appellant, his former wife, for the amount of four certain promissory notes executed by the husband alone during the existence of the marriage relation, which was thereafter and before the commencement of this action dissolved by decree of divorce. The cause was tried before the court without a jury, and findings made in plaintiff's favor, upon which the court rendered a joint judgment against both defendants and a several judgment against defendant Patrick O'Toole. The defendant Bertha Burginger has appealed, assigning as error the finding that the debts evidenced by the notes were community obligations, and the entry of the joint judgment.

From the record it appears that the notes were given for loans made by respondent to Patrick O'Toole for the benefit of the community. There was no evidence to the contrary. The finding, therefore, that the notes were community obligations was the only one the court could make.

The second assignment of error is well taken. The judgment as rendered was a joint judgment against appellant and her former husband, Patrick O'Toole, and, as suvh, could be satisfied out of the separate property of either of them. 23 Cyc. 1105, 15 R. C. L. 804.

It is well settled in this state that neither the wife, personally, nor her separate estate is liable for the payment of community debts contracted by the husband. Upon the dissolution of the community by divorce, the common property awarded to the parties is subject to the payment of community debts. If not disposed of by the decree, the common property passes to the former spouses as tenants in common, likewise subject to the satisfaction of community obligations. In neither event, however, does the divorced wife or her separate estate become liable for community obligations contracted solely by the husband. Such obligations must thereafter be satisfied out of the same property or fund against which the creditor would have had the right to proceed during the existence of the community. Judge Ballinger in his work on community property, at Sec. 120, states the rule in this language:

"As heretofore stated, the debts of the community are likewise the husband's debts. All debts contracted by him he is liable to pay, not only from the community estate, but also from his separate property, and is subject to be sued therefor both before and after the dissolution of the community. Those debts are his debts, but are not ordinarily the debts of the wife, except in the sense that her interest in the community is burdened with the liability for their payment. . . . The separate estate of a wife by mere operation of law can never be made liable for community debts, while both the community estate and the separate estate of the husband will be liable for any debt he may contract."

In Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777, Judge Rudkin said

"It is not seriously contended on this appeal, nor could it be successfully contended, that the original judgment against the wife was authorized or proper, for in an action on a promissory note executed by the husband alone the utmost relief the plaintiff is entitled to, as against the wife, is a judgment establishing the community character of the indebtedness."

To the same effect are the following: Clough v. Monroe, 86 Wash. 507, 150 Pac. 1190; Bimrose v. Matthews, 78 Wash. 32, 138 Pac. 319; Bird v. Steele, 74 Wash. 68, 132 Pac. 724; White v. Ratliff, 61 Wash. 383, 112 Pac. 502; Philips & Co. v. Langlow, 55 Wash. 385, 104 Pac. 610; Freundt v. Hahn, 28 Wash. 117, 68 Pac. 184; Goodfellow v. Le May, 15 Wash. 684, 47 Pac. 25; Sweet, Dempster & Co. v. Dillon, 13 Wash. 521, 143 Pac. 637; Ambrose v. Moore, 46 Wash. 465, 90 Pac. 588, 11 L. R. A. (N.S.) 103; McKay, Community Property, Sec. 413.

The judgment appealed from, so far as it affects the appellant, Bertha Burginger, is reversed, and the cause remanded with directions to enter a judgment adjudicating the community character of the indebtedness, and providing that the joint and several judgment rendered against the defendant Patrick O'Toole may be satisfied out of any common property owned by him and appellant and which constituted community property prior to the dissolution of the marriage, and also out of such of the community property, if any, as was awarded the former spouses, or either of them, by the divorce decree which is otherwise subject to execution.

Ellis, C. J., Fullerton, Main and Parker, JJ., concur.

Notes signed [illegible] hus. alone [illegible] community, [illegible] indicating [illegible]

A joint [illegible] divorce [illegible]
[illegible] comm. [illegible] sep. [illegible]

Note:- when hus. signs, note binds [illegible] comm., [illegible] his sep. [illegible] not her sep. [illegible]

BUSH & LANE PIANO COMPANY, Appellant, v. MRS. M. V. WOODARD
et al., Respondents.
(103 Wash. 612, 1918)

Appeal from a judgment of the superior court for Grant county, Hill, J., entered October 25, 1917, upon the verdict of a jury rendered in favor of the defendants, in an action on a promissory note. Affirmed in part, and reversed in part.

Fullerton, J.--This action was instituted to recover upon a promissory note. In the complaint it is alleged that the respondents, M. V. Woddard and J. C. Woodard, are wife and husband; that the wife, at Ruff, Washington, on April 26, 1916, made and delivered to the appellant for and on behalf of the community composed of the respondents, a promissory note wherein and whereby, in her own behalf and on behalf of the community she promised to pay to the appellant the sum of $599 on November 1, 1916, together with interest at the rate of six percent per annum, and a reasonable attorney fee in case suit or action should be instituted to collect the note. It is also alleged that the note was given to evidence the purchase price of a Victor Player piano, delivered on the date of the execution of the note; that the piano had been and is used and enjoyed by the respondents jointly, and is a family expense. The prayer is for a recovery against the respondents, and each of them, for the amount of the note with interest, and the further sum of $100 as attorney's fees.

The respondents answered, putting in issue by a general denial all of the allegations of the complaint, save and except the allegation that the respondents were husband and wife. For a further and separate answer they alleged that, on April 26, 1916, the respondent wife entered into a conditional sale agreement with the appellant for a Victor Player piano, at the agreed price of $600; that the agreement was entered into on her own account, she agreeing to pay for the same out of her own separate property, and for or on behalf of the community composed of herself and her husband; that the respondent J. C. Woodard expressly refused to purchase the piano or to in any way become liable therefor, and refused to permit the same to be purchased for or on account of the community composed of himself and wife; that, if the appellant has a note evidencing the purchase price of the piano signed by the wife, the same was obtained by fraud in manipulating the papers so as to secure her signature without her knowledge; and that the wife has no knowledge of having signed a note, and denies that she did sign the same. The prayer is that the appellant take nothing by its action and that the respondents recover costs. For reply the appellant admitted the execution of the conditional sale contract, and denied the other allegations of the affirmative answer.

The evidence introduced at the trial, which was had before a jury, tended to support in the main the respondents' version of the transaction. It is not disputed that the husband, when broached to purchase the piano, declined positively to make the purchase; that he did not know for some time after the transaction took place that his wife had entered into a contract for its purchase; that, both before and after that time, he thought the piano was kept in his house in the hope of a sale, and that

he ordered the salesman to take it away. The evidence was sufficient also, we think, to justify a finding that the wife purchased the piano on her own responsibility, intending to pay for it out of funds she expected to derive from property left her by a deceased brother; that this method of paying for the instrument was talked over between herself and the salesman, and that the salesman himself understood that it was from funds so derived that the purchase price of the piano would ultimately be paid. The wife denies her signature to the note, and while a comparison of the signature théreto with her admitted signatures casts a doubt upon her statement, there is testimony in the record tending to show that she signed the note without knowledge of its purport. There is no question, however, that she signed the contract and thus obligated herself to pay for the piano, promising also in the contract to pay not only interest upon the obligation assumed, but a reasonable attorney fee in case suit or action should be instituted to enforce its payment. The verdict of the jury was for the respondents, and from the judgment entered thereon, this appeal is prosecuted.

It is the appellant's first contention that the obligation sued upon is a family expense chargeable upon the property of both husband and wife, and that the court erred in refusing to so charge the jury, and in refusing to grant his motion for a judgment notwithstanding the verdict. The contention is founded upon Sec. 5931 of Rem. Code, which reads:

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

This section was enacted by the territorial legislature of 1881, and first appears in our official publications in the code of that year as a part of ch. 183. An examination of the chapter cited will show that the section is a part of a general act relating to the rights of married persons, and contains many other provisions on the same subject-matter with which this section must be read and construed. Among other things, it is provided that neither the husband nor the wife is liable for the separate debts of the other, and that contracts may be made by the wife and liabilities incurred by her which may be enforced against her to the same extent and in the same manner as if she were unmarried. The act also defined what should constitute community property of husband and wife, and gave the husband the management and control of the community personal property, with a like power of disposition as he has of his own separate property, except that he was not permitted to devise by will more than one-half thereof. Other provisions of the act might be cited as bearing upon the point, but these are enough to show that it was not intended by the section in question to make every article of personal property purchased by the wife and used in connection with the family a family expense. This would be to read out of the act the provision giving the wife the right to deal with her own separate property, and would nullify the provision exempting the husband's separate property from the separate debts of the wife. The section must be read also in connection with the section of the act giving the husband the management, control and disposition of the community personal property. While he may not deny to his family the necessities of life or deny to his children an education, it is manifest that he must have a large voice in determining whether his separate

property or the community property shall be liable when the proposed expenditure goes beyond necessities or is not for the education of the children. To hold otherwise would be to deny to him the right which the statute expressly gives him; namely, the right to manage, control and dispose of the community personal property. We cannot think, therefore, that the purchase of this instrument by the wife on her own behalf after the husband had declined to make the purchase, even though used by the family, makes it a family expense chargeable upon either the husband's separate property or the property of the community. The instrument does not partake of the nature, nor is it such a common ordinary household article as to be a subject of purchase by that spouse who can only contract on behalf of the family for the usual and ordinary requirements of the family. It follows that there was no error on the part of the court in refusing to charge the jury that the obligation sued upon was a family expense, or in refusing to enter judgment for the appellant against the defendant husband notwithstanding the verdict.

It is true also the court refused to submit to the jury as a question of fact whether or not the obligation incurred in the purchase of the piano was a family expense, and that error is assigned thereon. But we find no error in this. In our opinion, the question in the particular case, because of the nature of the evidence, was one of law, not a question upon which opinions might reasonably differ. The court did charge the jury that, if they found that the husband had in any way ratified the purchase, they might find the community liable. This was as favorable to the appellant as the facts warranted.

We have not overlooked the citations from other jurisdictions holding that an obligation incurred by the purchase of a piano is a family expense when the piano is retained and kept for use by the family, and, under statutes containing provisions similar to our own, is chargeable to the property of both husband and wife. But an examination of the cases will show that they are from states where the property of married persons is not held under a tenure like our own, that is, states where the community doctrine of ownership does not obtain. Nor does any of them present the fact of a purchase by the wife over the protest and objection of the husband.

The court gave to the jury the further instruction:

"Should you find from the evidence that the defendant M. V. Woodard did not execute the note set forth in plaintiff's complaint herein, it will be your duty to return a verdict in favor of both defendants herein."

Doubtless the court based the instruction upon the fact that the complaint declared upon a note, and gave the instruction upon the theory that a failure to prove the execution of the note was a failure of proof warranting a finding in favor of the wife as well as the husband. But we think the instruction erroneous nevertheless. The answer and reply broadened the issues made by the complaint, and warranted a recovery against the wife on the obligation assumed by the purchase even though it be true she did not knowingly execute the note. No fraud was perpetrated upon her. The most favorable view of the evidence is that she did realize, when executing the papers evidencing the purchase of the piano, that she

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was executing a note. But by her own admission she executed the contract of purchase fully understanding its purport. It is conceded that the obligation assumed has not been met. Plainly, therefore, the appellant was entitled to a judgment against the wife, and the jury should have been so instructed by the court, or, failing in that, the court should have granted a judgment against her notwithstanding the verdict.

The judgment is reversed as to the respondent M. V. Woodard, and the cause remanded with instruction to enter a judgment against her according to the terms of the contract of purchase, the judgment to be executed upon her separate property. In other respects, the judgment will stand affirmed.

Main, C. Jl, Mitchell, Tolman, and Parker, JJ.,

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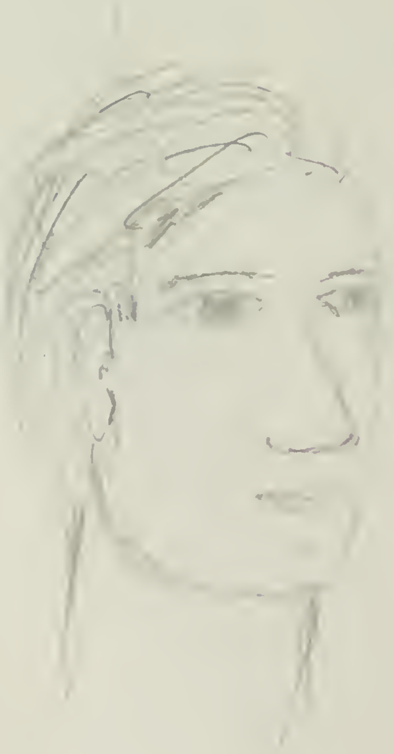

LEATHERWOOD and others v. ARNOLD and Wife.
(66 Tex. 414, S. W. Resp.173)

Supreme Court of Texas, June 11, 1886.

Appeal from district court, Johnson county.

Trespass to establish title to land, the respective parties claiming through successive execution sales of "community real estate." Judgment for plaintiffs, and appeal therefrom by defendants.

Robertson, J. It was decided at Tyler that a surviving wife, administering the community estate under the statute, was entitled to the allowances and exemptions accorded her in a regular administration. Nichols v. Oliver, 64 Tex. 647. The creditor may reach the bond by a preceeding under the statute, or he may pursue his remedy by judgment and execution. Carter v. Conner, 60 Tex. 52. The remedy prescribed for the distributees was held at Galveston to be accumulative only, and their right to investigate the trust, and have partition in the district court, was recognized. Huffman v. Smith. The survivor, without qualifying under the statute, may pay community debts with his own means, and reimburse himself by an appropriation of community property. Sanger v. Moody, 60 Tex. 96. This power is legalized when the survivor qualifies under the statute. Davis v. McCartney, 64 Tex. 584. The defendant in this case proposed to prove, in order to defeat the plaintiffs' title, that Mrs. Robinson, after qualifying as survivor, paid debts, which together with the allowances to which she was entitled, exceeded in amount the value of the unexempt community property; and it was insisted that she had thus extinguished the community right in the 20 acres of land in controversy before it was sold under execution, and bought by the plaintiffs. This evidence was rejected on two grounds: First, that it would not affect the plaintiffs' title if admitted; and, second, it was not admissible under the plea of not guilty.

The first of these questions involves in its decision a further exploration of the nature of the trust administered by the community survivor than has been made in any reported case. The survivor is a trustee of unique character. He is the owner in his own right of one-half the trust estate. By qualifying under the statute he acquires over the whole the same right of management, control, and disposition possessed by the managing partner during the life of the partnership. How the trust shall be administered the law has not attempted to direct. His duty, defined in the condition of his bond, is to pay debts, and distribute the remainder. Here arises the difference between him and other trustees. The object to be accomplished is fixed, but the means of accomplishment are as varied as the circumstances and discretions of men. He may sell all the property, pay all the debts, and distribute the remainder in money. He may sell only enough to pay the debts, and divide what is left in kind. He may force every creditor, or none, or any number of them, to resort to their legal remedies. He may use his own means in paying the debts, and reimburse himself by an appropriation, or by sale of the assets of the estate. It results necessarily, from his unbridled discretion and

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unlimited power, that he cannot be required to account for each item of the trust estate. But the responsibility of the survivor can only be fixed by aggregates. An ordinary trustee is guilty of a breach of his obligations if he makes a donation of an item of trust property. But the survivor may make a gift from the trust estate, without wrong or liability if he has extinguished, or afterwards extinguishes, the community interest in the subject of the gift. Inquiry into the details of his administration is inconsistent with the breadth of his poser and discretion. Whether he has done well or ill depends on no particular act, but on the general result. He is debited with the value of the estate, and its revenues, (Aiken v. Jefferson, Tyler term, 1885) and credited with the disbursements, and must account to creditors or distributees for the remainder. The surviving husband is personally liable for community debts If he has extinguished the community interest in a given item of community property, it is still subject to community debts, because the community debt is also his individual liability. Hence the precise question we are now considering cannot arise when the husband is the survivor, unless the creditor is seeking a remedy upon the bond. The surviving wife does not owe the community debts. When she lifts the community charge upon the property in her hands, the property is hers as unqualifiedly as if she had bought it with her separate means at an execution sale of it for the payment of a community debt. While she had no power over the community during her husband's life, and is not personally liable for the debts, yet when the wife survives, and qualifies under the statute, she is vested with the same power and discretion in execution of the trust assumed that the husband had during life to manage, control, and dispose of the common property as the head of the connubial firm.

If the creditor filed a bill against her, or required her to account with a view to a judgment on the bond; if it appeared that her allowances and exemptions exceeded the value of the property received by her,-the trust would be executed by her reception of the property; the property would all be absorbed by the first charge upon it, and nothing would be left for the creditor. Again, she is not required to make any pro rata distribution among creditors of the same class, but she has succeeded to the right of the deceased managing partner to make preferences among those of equal degree; and, when there is not enough to pay all, she may pay some in full, and nothing to others. The right of the creditors to judgment and execution excludes the idea of an equitable distribution.

If, then, the community property is sufficient to satisfy exemptions and the widow's allowances, and also pay a portion of the general debts, and she has paid upon these debts as much as is left to them after satisfying prior charges, she cannot be made liable to a creditor who has received nothing. She has performed the trust in appropriating the property to the allowances, and the excess to the debts she has preferred. In the payment of debts she is required to observe the classification of claims prescribed for regular administration. She cannot appropriate to fourth-class claims the trust estate, and leave unpaid those entitled under the law to prior satisfaction. This would be maladministration, against which the bond protects injured parties. Rev. St. art. 2175. If she uses her own credit or means in the payment of debts, she extinguishes, pro tanto, thecommunity interest in the property in her hands. When called upon to account, the aggregates alone will be dealt with.

Though she possesses every item of property originally belonging to the trust estate, the creditors can reach nothing, if what she has received did not exceed in value the disbursements or credits shown by her of equal or superior dignity to the claim asserted against her. When she qualifies as survivor the community property becomes hers, subject to a charge in favor of creditors, and theinterest of distributees in the remainder. The distributees have no interest if there is no residue, and the unpaid creditors have no right to be satisfied out of the property yet in her hands if she has extinguished the charge in favor of creditors by the payment of other equally meritorious debts. If the creditors under whose judgment the plaintiffs bought had proceeded in equity against Mrs. Robinson, or under the statute had required her to account, what the defendants proposed to prove would have prevented any decree against her. The 20 acres of land would not have been subjected to the payment of the demand for which it was sold. She had already paid more debts than she could have paid with the proceeds of all the property in her hands after satisfying her allowances. According to the proposed showing, it would have appeared that she had eliminated from the 20 acres of land all community right, and had thus become its sole owner. She had done this in the faithful administration of the trust assumed by her, and neither her land nor her bond was further liable to the beneficiaries of the trust.

The creditor need not proceed in equity or require an account, but may have his judgment and execution. But, whether he selects one or another remedy, his right is the same. That right is to have the fruits of his charge upon the trust estate. If that charge is extinquished by the payment of other debts, he can no more subject what has become absolutely her property to the payment of his demand by an execution, than by an account in probate or a bill in equity. In the latter proceedings the showing is made in advance, and the decree ends his case; in the former, the showing cannot be made,-he recovers his judgment, and has execution. In electing this remedy, in which the question whether the trust has not already been fully administered cannot be determined in advance, he does not cut off the inquiry, but, of necessity, postpones it until the title to the property he appropriates to the payment of his judgment comes in issue between the purchaser at his sale and the survivor or her assigns. If it is then ascertained that the community right in the property has been discharged by the assessment upon it of the widow's allowances, and the payment of community debts, the sale of it under execution was simply unauthorized and inoperative. The defense proposed by the rejected proof was simply that the property claimed by the plaintiff under an execution sale was not subject to be sold; that the plaintiffs acquired nothing by their purchase. We perceive no more difficulty in admitting the proof under the plea of "not guilty" than in admitting proof that the property was homestead.

One of the defendants claimed by a deed from Mrs. Robinson, made before the writ under which the plaintiffs claimed was levied upon the land. Her title is good against the plaintiffs if the facts she proposed to prove are true. We are of the opinion that she was entitled to introduce the evidence under the plea of not quilty. There was some eviden tending to show that Mrs. Robinson made the conveyance to her daughter in fraud of creditors. It could not have been made in fraud of the judgment debt under which the plaintiff claimed, if before her conveyance of

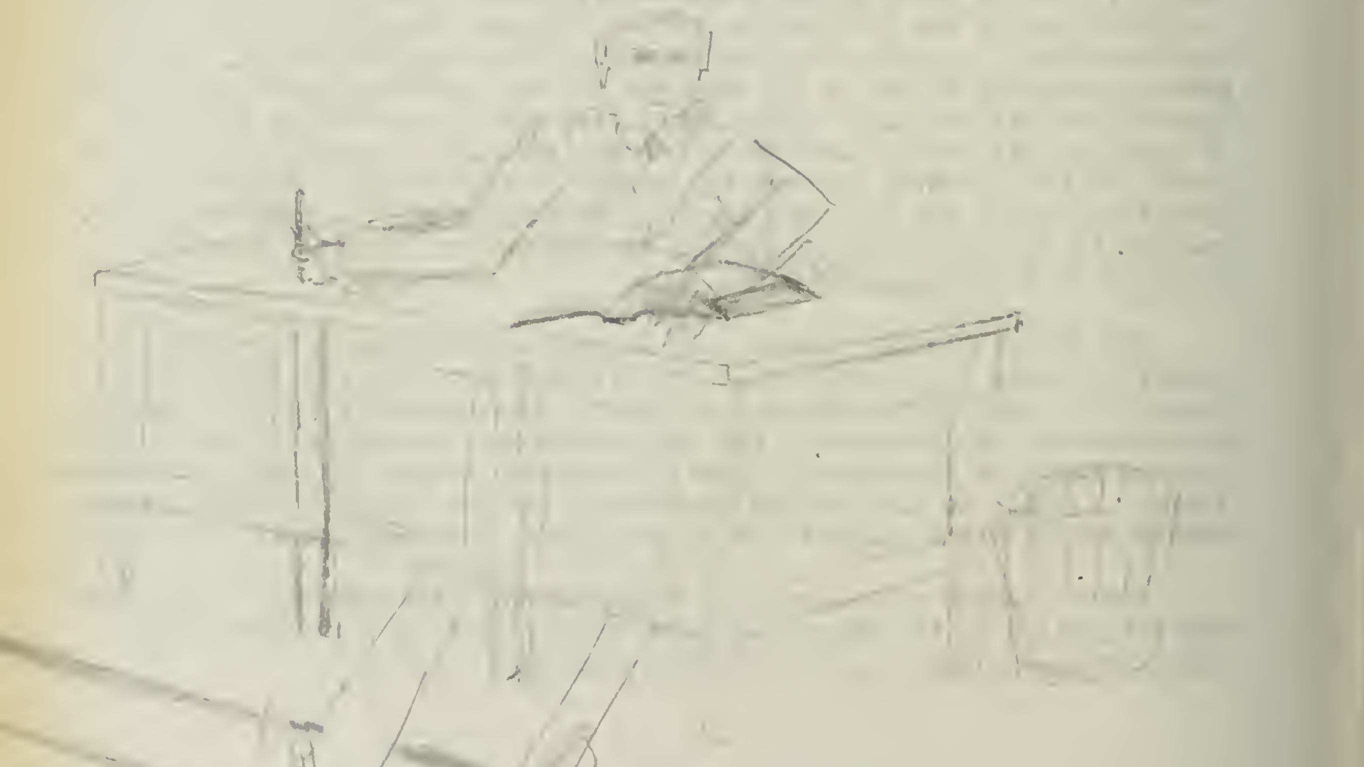
it she had divested it of its community character by the means indicated in this opinion.

There was no error in admitting in evidence the execution, return, and deed evidencing the first sale under which the plaintiffs purchased. The levy, return, sale, and deed were sufficient to pass the community interest in the land, according to the decision of this court in the case of Carter v. Conner, already cited. If it was error to admit the evidence of the second sale, as the plaintiffs had acquired by the first all the title they couod have obtained by both, the error did not prejudice the defendants.

One of the defendants claimed title under an execution sale of the land under a personal judgment against the survivor. This sale was made before either of those under which the plaintiffs asserted title. If the consideration of the debt merged in the judgment under which that defendant purchased was money borrowed by Mrs. Robinson, and used by her in paying community debts, or if that was not the consideration, whether defendant did not obtain a better title than the plaintiffs to the whole 20 acres by his prior purchase is a grave question presented in this record. If the survivor becomes the owner of the community property by qualifying under the statute, assuming upon her personal responsibility, secured by the bond, the obligation to discharge a personal trust, the property is subject to her debts.

The issues already passed upon in this opinion are the only ones likely to arise in another trial, or probably necessary to the final disposition of this case. Those arising from Leatherwood's purchase are more material in determining the rights between him and Mrs. West-between whom no issue is presented on this appeal-than between him and the plaintiffs. It will be time enough to decide them when their solution is necessary to the final disposition of the appeal and case involving them.

For the error considered, in rejecting the evidence offered to prove the extinction of the community right in the land in controversy, the judgment is reversed, and the cause remanded.



CHAPTER XV.

CITATIONS

What are the seperate liabilities?

Way v. Lyric Theatre Co. (1911)	79 Wash. 275.
Case Threshing Co. v. Weley (1916)	89 Wash. 301.
Shuey v. Adair (1901)	24 Wash. 378.
Allen v. Chambers. (1897)	18 Wash. 341.
Johns v. Clother. (1914)	78 Wash. 602.
Bird v. Steele. (1913)	74 Wash. 68.
Peter v. Hensen. (1915)	86 Wash. 413.
Williams v. Hitchcock. (1915)	86 Wash. 536.
Bramel v. Ratliff. (1809)	54 Wash. 581.

What are community liabilities?

Allen v. Chambers (1900)	22 Wash. 304.
Calhoun v. Leary (1893)	6 Wash. 17.
Reed v. Loney (1800)	22 Wash. 433.
O'Conner v. Jackson (1903)	33 Wash. 219.
Kuhn v. Groll (1920) #16741.	16 Dec. 199.
Bank of Montreal v. Buchanan (1903)	32 Wash. 480.
Anderson v. Harper (1902)	30 Wash. 378.
Bryant v. Stetson & Post Mill Co. (1896)	13 Wash. 692.
Goetzinger v. Rosenfield (1897)	16 Wash. 392.
Bimrose v. Mathews (1914)	78 Wash. 32.
Peacock v. Ratliff (1911)	62 Wash. 653.
Peterson v. Badgerstate Land Co. (1915)	86 Wash. 530.
Clough v. Monro (1915)	86 Wash. 507.
Mineah v. Duffy (1918)	103 Wash. 547.
Kanters v. Kotick (1918)	102 Wash. 523.
Tacoma Ass'n of Credit Men v. Lyons (1918)	102 Wash. 213.
Union Savings & Trust Co. v. Manney (1918)	101 Wash. 274.
Blankenship Bros. v. Knox. (1919)	105 Wash. 418.
Western Hardware & Metal Co. v. Norden (1920)	110 Wash. 150

when is comm. Prop. liable for Sep. debts

THE COLUMBIA NATIONAL BANK V. ALLEN EMBREE, Executor.

(2 Wash. 331, 1891)

Appeal from Superior court, Columbia County.

The facts are fully stated in the opinion.

The opinion of the court was delivered by

Scott, J.--The facts agreed upon are, in substance, that one William McGee died testate, his wife surviving him; that said parties owned community property in Columbia county at the time of his decease; that one Embree was appointed executor of his will; that said McGee owed the Columbia National Bank $440, being a suretyship debt; that he left a small amount of separate estate, but not sufficient to pay the claim; that the community debts were paid by the executor, and a surplus of money was left in his hands arising from a sale of the community property; that the claim was duly presented and allowed, the separate property of deceased exhausted, and a balance of said debt remained unsatisfied. The court decreed that said indebtedness was a separate debt of the deceased, and that it was not a charge upon the community estate, or upon the decedent's interest therein.

It is not contended that this particular debt is not a separate debt of the deceased, and the sole question presented to us is whether the unpaid balance should be paid out of decedent's interest in the community property, or whether said property should go to his devisees relieved from liability therefor. It is not claimed that his said interest in the community property is exempted from the payment of this debt on any other ground than that it is a separate debt, for which it is urged that no part of the community property is liable in any event. Under our law (Code 1881, Sec. 2411) the power to devise one half of the community property exists in each spouse without restriction. The persons interested in the community may be entirely excluded, and the property given at will to a stranger. Certainly the separate debts of the deceased should be paid therefrom when the community debts are paid, and there is not separate property to pay them, unless such payment is prohibited by the statute. Considering all the statutes thereon, we do not think there is any such prohibition, although the section cited only expressly makes such devise subject to community debts. It is true, as contended, that it was useless in such a case to mention this class-as the liability therefor would have existed without it-unless there was an intention to exclude all others; but it seems rather to have come from inadvertence or an excess of caution--the liability for separate debts is not expressly excluded. Section 2405 provides that either spouse shall not be liable for the separate debts of the other. This only protects the separate property of the spouse not having contracted them and his or her half of the community property, and by implication would leave the other half of the community property liable therefor. These laws were evidently passed at the same time, and it might be said with equal force that, in so far as separate debts contracted after marriage are concerned, in the light of

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is exhausted.

our other statutes relating thereto there was no reason for this particular statute, if Sec. 2411 (and 2412, where party dies intestate) prohibits the payment of separate debts from the community property, for the separate property of the other spouse or such spouse's interest in the community property would not have been liable therefor without Sec. 2405.

While the law relating to our probate practice is somewhat confused, yet it is apparent--as no other way is provided--that upon the death of a person his separate estate and his interest in the community property is administered upon in the same proceeding, even though there may be no express provision therefor, and although his interest in partnership property is particularly mentioned. See Sec. 1435 and following sections. This would clearly be so in the execution of a will, and it must necessarily be the case where a person dies intestate. Section 1419 provides that when, by reason of a suit concerning the proof of a will or from any other cause, there shall be a delay in granting letters testamentary or of administration, a special administrator shall be appointed to collect and preserve the effects of the deceased. Section 1444 gives every executor or administrator a right to the immediate possession of all the real as well as personal estate of the deceased, and Sec. 1445 requires him to make a true inventory thereof. By Sec. 1465 the executor or administrator is required to publish a notice to the creditors of the deceased requiring all persons having claims against the deceased to present them, etc. Section 1479 prohibits the issuance of an execution upon any judgment rendered against the testator or intestate. Section 1528 requires the executor or administrator to take into his possession all the estate of the deceased, and Sec. 1562 requires the debts of the estate to be paid in the order there specified; the fifth classification relates to judgments against the deceased. The word "estate" must be held to relate to the separate property of the deceased, and as well to his interest in the community property, and the debts referred to include separate debts as well as those against the community. There are other provisions of the same general purport, to which it is unnecessary to further allude. It is urged that these statutes were passed before the law relating to community property was adopted here, and that consequently they can have no bearing. But considering the fact that no other provision has been made for administering upon the estate, separate or community, and the practice that has obtained, it must be held that it was understood, when the community laws relating to husband and wife were passed, that they were enacted in view of the probate law as it then existed, and that it was sufficient for a general and complete administration, even if there was no other answer. His separate estate not otherwise exempt would be liable for the community debts, at any rate after the separate debts were paid and the community property exhausted. The only reason for exempting community property from the separate debts of either spouse is for the benefit of the community, and when this is dissolved the reason no longer exists. We do not decide that the interest in the community property of a contracting spouse may not be reached during the life-time of the community for a separate debt, although such exemption may necessarily follow. But when the community is dissolved by death, or in any other way, the interest in the property thereof of the party owing a separate debt, which interest is not required to pay the community debts, and not otherwise exempt, is held liable for such separate debt when the separate property is exhausted. Reversed and remand

Anders, C. J., and Dunbar, Stiles, and Hoyt, JJ., concur.

MARY C. ROSS, Resondent, v. HENRY HOWARD et al., Appellants.

(31 Wash 393, 1903)

Appeal from Superior Court, Spokane County.--Hon George W. Belt, Judge, Affirmed.

The opinion of the court was delivered by

Fullerton, C. J.--On June 6, 1898, the respondent and her husbnad, E. S. Ross, being then the owners of certain real property situate in Spokane county, executed and delivered to one F. E. R. Linfield an instrument in the form of a warranty deed, purporting to convey the property to her for the consideration of one dollar. On the 15th of June following, the appellant Howard recovered a judgment in the superior court of Spokane county against E. S. Ross, on which he caused a writ of execution to issue, and to be placed in the hands of the other appellant, who was then sheriff of Spokane county, for execution. The sheriff, under the direction of the judgment creditor, levied upon the real property above mentioned, and was proceeding regularly to sell the same when this action was brought to restrain him from so doing. The question of the respondent's right to maintain the action, and the question of the sufficiency of the complaint, were before this court and determined in a former appeal. 25 Wash. 1 (64 Pac. 794). After the remittitur went down on the determination of that appeal, issue was joined on the merits of the action, and a trial had, which resulted in a finding to the effect that the deed to the property mentioned was intended to be, and was in fact, a mortgage; that the property was the community property of the respondent and her husband; that the judgment recovered by the appellant Howard was the separate debt of E. S. Ross, and not a lien upon the real property of the community. A judgment restraining the sale of the property, and quieting the title thereto against the apparent lien of the judgment, was thereupon duly entered.

The appellants do not deny that the real property in question was, prior to the execution of the deed from the respondent and her husband to F. E. R. Linfield, the community real estate of the respondent and her husband. Nor do they deny that the debt on which the judgment of the appellant Howard was founded was the separate debt of E. S. Ross. But the contention is, as we understand it, that the statute makes a distinction between community real estate and community real property, protecting the former from sale under execution on a judgment for the separate debt of either spouse, but rendering the latter liable when the separate debt is the debt of the husband. The particular section of the statute which is thought to make this distinction is Sec. 4491 of Ballinger's Code, and reads in part as follows: "The husband has the management and control of the community real property, but shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing," etc., the instrument of conveyance. It is said that "chattels real, equitable interests in land, etc.," are meant by the term "community real property," while legal title in fee in either spouse constitutes "community real estate"; that as the husband has the management and control

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executors [illegible] rendered [illegible]
[illegible] debt [illegible] either spouse.

of the former, and is forbidden to incumber the latter only, it must follow, analogous to the ruling of this court to the effect that community personal property is subject to sale on execution issued on a judgment rendered on the husband's separate debt, that community real property is also subject to sale; and, further, that the deed from the respondent and her husband to Mrs. Linfield changed their estate in the lands from a legal to an equitable estate, or, as the appellants would have it, from real estate to real property, and thereby rendered it subject to sale to satisfy the husband's separate debt. Calhoun v. Leary, 6 Wash. 17 (32 Pac. 1070), is said to maintain this principle. But what we held in that case was that the community's equitable interest in real property could be sold on execution to satisfy a judgment for a community debt, not that it could be so sold to satisfy a judgment for the separate debt of either spouse. This is far from holding that there is a distinction between community real property and community real estate, or that an equitable interest of a community in real property can be sold to satisfy a separate debt of the husband. Treating the question, therefore, as one of first impression in this court, the distinction sought to be made is, in our opinion, entirely unfounded. Aside from the fact that the section of the statute relied on would in itself hardly be consistent if different meanings were to be given to these different terms, the several sections of the statute relating to the acquisition and disposition of real property, and the tenure by which the same is holden, where one or the other of these terms is used, do not leave the matter in doubt. While it would too unduly extend this opinion to set these sections out in detail, their perusal will plainly show that in the legislative mind the terms community real property and community real estate had the same meaning, and that it was the intent of the legislature that the equitable interests in land held by a husband and wife as community property, as well as the legal interests should not be subject to sale on an execution issued on a judgment rendered for the separate debt of either spouse.

The remaining errors assigned go to the right of the respondent to show that the deed from herself and husband to Mrs. Linfield was a mortgage, and the sufficiency of the evidence to justify the finding that it was a mortgage, if the right exists. These questions are material here only in so far as they affect the right of the respondent to maintain the action, and it may be that the court will not for that reason look so closely into the proofs as it would were the contest between a grantor and grantee. But, be this as it may, it is the settled rule of this court that an absolute deed of conveyance, whether in form of warranty or quitclaim, may be shown by parol evidence to be a mortgage. Wiss v. Stewart, 16 Wash. 376 (47 Pac. 736); Anderson v. Stadlmann, 17 Wash. 433 (49 Pac. 1070); Ross v. Howard, 25 Wash. 1 (64 Pac. 794). And the evidence here abundantly justifies the finding that the deed in question was intended as security for money loaned by the grantee to the grantors.

The judgment is affirmed. (For P)

Mount, Dunbar and Anders, JJ., concur.

ARTHUR SCHRAMM, JUNIOR, as Trustee, Appellant
v. JOHN STEELE et al., Respondents.

(97 Wash. 309, 1917)

Appeal from a judgment of the superior court for King county, Smith J., entered April 14, 1916, dismissing an action for equitable relief, upon sustaining a demurrer to the complaint. Affirmed.

Ellis, C. J.--Suit in equity in the nature of a creditor's bill to set aside as fraudulent a transfer of personal property made by defendant John Steele to his wife, Florence Steele, and for other equitable relief.

Plaintiff alleges, in substance, that on January 8, 1916, a judgment for $3,000 was entered in favor of Robert H. Wilson against John Steele in the superior court of King county, upon complaint of Wilson against Steele for alienating the affections of Wilson's wife; that, on January 11, 1916, the judgment was assigned by Wilson to Schramm, plaintiff in this action; that the cause of action upon which the Wilson judgment was based accrued long prior to February 10, 1915; and that defendants John Steele and Florence Steele are, and at all times material were, husband and wife; that, as a marital community, they are the owners of described personal property worth about $6,000; that, after February 9, 1915, John Steele, without consideration, secretly and for the purpose of evading payment of Wilson's claim, transferred to his wife his community interest in all of their community personal property; that no bill of sale or other instrument evidencing such conveyance was ever filed for record; that, on November 29, 1915, defendants Steele and wife, executed to defendant, E. M. Smithers, a chattel mortgage for $6,000, covering all of their personal property; that they were not indebted to Smithers in excess of the sum of $1,000; that the mortgage was given pursuant to a secret agreement between defendants to so incumber the community property as to make impossible the collection of any judgment which Wilson might obtain against Steele; that the title was thus so clouded and apparently incumbered as to make the property wholly unsalable on execution; that plaintiff has no remedy at law; and that defendant John Steele has no property except his interest in the community personal property.

The prayer is that defendants be required to make disclosure of their dealings with the community property; that Florence Steele give an accounting of all property and money received by her for and on account of the community; that all transfers made by Steele to his wife be declared null and void, and all personal property of defendants Steele decreed to be community property; that the amount owing to Smithers be ascertained and that he be required to satisfy his mortgage upon payment of such sum; and that a receiver be appointed to conserve the community property until subjected to levy under plaintiff's execution.

Defendants separately demurred to the complaint upon the ground that the facts stated are insufficient to constitute a cause of action. The demurrers were sustained. Plaintiff electing to abide by his pleading,

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judgment of dismissal was entered. He appeals.

But two questions are presented. (1) Is the community property of the marital community subject to execution for the payment of a judgment against the husband alone for a tort committed by him alone, not in connection with the community business nor in furtherance of the community interest? (2) Is the complaint fatally deficient through lack of an allegation that the transfer was made after appellant's judgment was obtained.

There are three lines of our own decisions all having a direct bearing upon the first question and creating an impasse which necessitates the overruling or modification of some one of the three.

In the following cases, this court has held that the community personal property can be sold on execution to satisfy a judgment against the husband for his separate debt: Powell v. Pugh, 13 Wash. 577, 43 Pac. 879; Gund v. Parke, 15 Wash. 393, 46 Pac. 408; Morse v. Estabrook, 19 Wash. 92, 52 Pac. 531, 67 Am. St. 723. These decisions have never been followed in any case, nor, so far as we have been able to find, have they even been cited on this point in any of our later decisions. The majority opinion in Powell v. Pugh, Judge Gordon dissenting, is based upon a decision of the territorial court (Andrews v. Andrews, 3 Wash. Terr. 286, 14 Pac. 68), in which the bare statement is made and based upon the statute defining community property (which so far as here concerned was the same then as now) without discussion. The other two decisions merely follow the Powell case.

In the following cases, this court has held that a person having a claim for damages sounding in tort is a creditor of the tort-feasor within the meaning of the statute of 13 Eliz. C. 5, which is the prototype of all statutes touching fraudulent conveyances, and is the common law of this state. That is to say, the tort-feasor is a debtor of the injured person within the meaning of the law of fraudulent conveyances. Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Sallacke v. Fletcher, 73 Wash. 593, 132 Pac. 648 Ann. Cas. 1914D 760, 47 L. R. A. (N.S.) 320; Allen v. Kane, 79 Wash. 248, 140 Pac. 534; Henry v. Nott, 88 Wash. 95, 152 Pac. 714 These cases involved fraudulent conveyances of real estate but, touching the question who is a creditor and who is a debtor, that circumstance is obviously immaterial.

The third line of decisions involves torts committed by the managing member of the community. In the following cases, this court has held that community real estate cannot be subjected to levy to satisfy a judgment for the husband's tort which was not committed in the management of the community business nor for the benefit of the community. Brotton v. Langert, 1 Wash. 73 25 Pac. 688; Day v. Henry, 81 Wash. 61, 142 Pac. 439; Wilson v. Stone, 90 Wash. 365, 156 Pac. 12. The opinion in Day v. Henry expressly and definitely places these decisions on the ground that, when the tortious act is wholly outside the scope of the husband's authority as manager of the community property, there is no room for the application of the doctrine of respondeat superior, and not upon the fact that the community property sought to be levied upon was realty. There is no intimation that a different rule would prevail in case of personalty. The argument in the Day case definitely precludes that view.

In the following cases, this court has held that a liability for the husband's tort which is committed in the management or prosecution of the community business can be enforced against the community property whether real or personal, but only because he is the agent acting for the community. These cases rest squarely upon the rule respondeat superior. Kangley v. Rogers, 85 Wash. 250, 147 Pac. 898; Woste v. Rugge, 68 Wash. 90, 122 Pac. 988; Milne v. Kane, 64 Wash. 254, 116 Pac. 659, Ann Cas. 1913 A 318, 36 L. R. A. (N. S.) 88; McGregor v. Johnson, 58 Wash 78, 107 Pac. 1049, 27 L. R. A. (N.S.) 1022.

In not a single case has this court held or intimated that community property, whether real or personal, can be subjected to levy to satisfy a judgment against the husband alone for a tort committed by him alone and not in connection with the community business nor for the benefit of the community. On the contrary, the decisions above cited involving torts committed by the husband, by necessary implication, limit the liability of the community property, whether real or personal, for such torts to ca where it can be said that the tort was committed in the management of the community property or for the benefit of the community. This court is thus definitely committed to the doctrine that, in such cases, the liabil of the community property of whatever kind rests solely upon the statutory agency of the husband and only exists where the rule respondeat superior can be soundly applied.

Involving the first two of these lines of decisions, appellant's argument, syllogistically stated, is this: Under the first line, the community personalty is liable for the separate debt of the husband. Unde the second line, a liability for damages for the tort of the husband is a debt of the husband within the meaning of the law of fraudulent conveyances. Therefore, the community personal property is subject to execution under a judgment for the husband's tort in whatever connection committed. It is plain that, if there is any liability of the community personal property for the husband's acts, whether contractual or tortious, not performed in connection with the community business nor for the common benefit, it must be rested upon the provision of the statute, Rem. 1915 Code, Sec. 5917, giving the husband the management, control and disposition of the community personalty, and it must be because that provision gives the husband the absolute proprietary right in such property and the wife no present right but only a contingent expectancy. Such is, in fact, the sole basis of the decision in Lowell v. Pugh, supra, and the two cases following it. Simple candor, therefore, compels the admission that, if that view be sound, the community personal property can be subjected to the payment of the husband's separate liability for tort just to the same extent that it can be subjected to payment of his separate contract debt. Either the husband has such an absolute proprietary interest in the community personalty, or no act of his, whether contractual or tortious, can bind such property except through his agency for the community. To rest a distinction in this respect upon the technical definition of a debt as distinguished from a liability for tort would be simply absurd. It follows that we are forced either to overrule the case of Lowell v. Pugh, supra, and the two decisions following it, or to hold that the community personal property is subject to execution for a judgment against the husband alone for a tort committed by him alone and in no manner connected with or redounding to the benefit of the community.

The latter course would obviously stultify the reasoning of every one of the third class of decisions hereinbefore cited, where community property generally was held liable for a tort committed by the husband. It would force a shifting of their ground from that of a statutory agency to that of a statutory propietary right in the husband. This impasse presented by our own decisions forces us to a reconsideration of the ground of decision in the Powell, Gund, and Morse cases. If that ground is sound, the judgment heremust be reversed. If it is not sound, the judgment here mustbbe affirmed.

The same circumstances, all of them and no others, which make real estate community property make personalty community property. The two kinds of property are impressed with the community character by the same facts and by force of the same words in the same defining statute. All property, whether real or personal, "property and pecuniary rights" without exception, "acquired after marriage by either husband or wife, or both" otherwise than "by gift, bequest, devise or descent," is community property. Rem. Code, Sec. 5917, by reference to Sections 5915 and 5916. It follows that the one kind of property, when so held and acquired, is just as absolutely the property of the community as such as is the other, and that neither member of the community has any independent proprietary interest or right in either. It follows, further, that the management and control conferred by statute (Id., Sections 5917 and 5918) on the husband as to both species of property, though differing in its extent as to the two kinds, is a management and control for the community and in the community interest. This necessarily results from the fact that it is the statutory entity-the community as such--which owns the property. The provisio of the statute entrusting the husband with "the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof" (Rem. Code. Sec. 5917,), must be construed in the light of this dominant fact of ownership! The property referred to is "community" property, that is, property belonging to the community. The husband is made, by the statute, the manager, not the owner. His management and control include the power of absolute disposition, but only for th community. Else there is no such thing as a vested property right in the community as to any personal property, since the husband could give away all such property in any manner he pleased, except by will, at any time during the existence of the community. To hold that the whole substance of the term community property as applied to personalty consists in a mere contingent expectancy of the wife, would make of the term "community personal property" a palpable misnomor. It would take away every community element except the fact that the wife's labors and scarifices had helped to earn it. It would destroy that equality which it is the obvious purpose of our community property law to conserve.

These considerations make it plain that the statute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty intends no more than to make him the statutory agent of the community. Marston v Rue, 92 Wash. 129, 159 Pac. 111. The words of the statute are certainly no broader than those often employed in general powers of attorne for the management and disposition of personal property; but we have yet to learn of a case in which such a power, however broad, was held to destroy the estate of the donor of the power and subject the property to

the personal debts of the attorney in fact. There is no reason, either in the words or purpose of the statute, why the statutory agency created for the same purpose of management should destroy the estate, substitute for it a shadowy defeasable expectancy in the wife, and subject the property to the purely personal debts, whether arising in contract or tort, of the husband. The assertion found in the Powell decision that the husband may sell the community personalty "to staisfy his individual debt and pass a good title," even if sound, is only so because the voluntary act of sale if within the scope of the husband's apparent authority as agent. The argument is conclusively answered by the dissenting opinion of Judge Gordon He points out that the husband's power of disposition, whatever its extent. "is to be voluntarily exercised." The authority "presupposes the exercise of discretion and assent, and hence such a sale or disposition of the property is to be distinguished from an involuntary execution sale, wherein the consent of the debtor is wholly immaterial."

We are now clear that Judge Dunbar in the case of Brotton v. Langert, supra, stated the correct principle when, referring to Sec. 2409 of the Code of 1881, which is in substance the same as Sec. 5917 of Rem. Code, he said: "This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business." This necessity is fully met by holding that the husband is the statutory managing agent of the community with an absolute discretion in the voluntary disposition of the community personalty, and that the statutory agency is no broader than a general power of attorney conferring a like discretion which has never been held to destroy the donor's estate by subjecting it in invitum to the payment of the attorney's individual debts or to satisfactio of his liability for his individual independent torts.

The rule announced by a divided court in the Powell case does not affect titles to real property, nor does it create any vested property right in the husband's creditors as such to the community personalty. To overrule that decision and the two which follow it cannot affect rights which have become vested by antecedent sales of such property on execution for the husband's separate debts. Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Harris v. Jex. 55 N. Y. 421, 14 Am. Rep. 285; Kelley v. Rhoades, 7 Wyo. 237, 57 Pac. 593, 75 Am. St. 904, 39 L. R. A. 594; 7 R. C. L. p. 1010, Sec. 36. It can affect no rule of property, since the husband will still have every right of management, control, and voluntary disposition of the community personalty that he ever had, whatever those rights may be--a thing which it is unnecessary now to decide. It certainl cannot affect injuriously either the husband, the wife, the community which they compose, nor any vested property rights of third parties. On the othe hand, it will restore to our decisions a consonance with the plain policy of our community statute, which is to create and maintain an equality of the husband and wife in their joint earnings so far as the necessities of business management will permit. It will introduce a consistency into our own decisions which is now wholly wanting. These considerations make it plain that the doctrine of stare decisis cannot be soundly invoked to preserve the rule of the Powell case. The following often quoted language of the supreme court of Indiana seems peculiarly pertinent:

"Much as we respect the principle of stare decisis, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant [illegible] liability [illegible] comm. [illegible] torts [illegible] hus. rests [illegible] statutory agency [illegible] hus [illegible] exists [illegible] respondeat superior applies, [illegible] comm. personalty [illegible] liable [illegible] hus. [illegible] eliminating [illegible] exceptions [illegible] 9.

Neither hus. nor [illegible] proprietary [illegible] comm. [illegible] either real [illegible] personal, Rem. § 5917 [illegible] hus. [illegible] comm. personalty, [illegible] like [illegible] disposition [illegible] sep. [illegible] construed [illegible] comm. [illegible] merely vests [illegible] absolute discretion [illegible] voluntary disposition [illegible] comm. personalty, [illegible] subject [illegible] involuntary [illegible] satisfy [illegible] debts.

as we are to depart from former decisions we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none," Paul v. Davis 100 Ind. 422, 428.

See, also, Board of Com'rs of Jasper County v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; Truxton v. Fait & Slagle Co., 1 Penn. (Del.) 483, 42 Atl. 431, 73 Am. St. 81; Calhoun Gold Mine Co. v. Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 83 Am. St. 17, 50 L. R. A. 209; Oliver Co. v. Louisville Realty Co., 156 Ky. 628, 161 S. W. 570, Ann. Cas. 1915C 565, 51 L. R. A. (N.S.) 293; Rumsey v. New York & New E. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600, 15 L. R. A. 618.

The only possible ground of the Powell, Gund, and Morse decisions has been discredited by our decisions in the Day, Kangley, Woste, Milne, McGregor and Marston cases. We must overrule the former, or modify the latte in such a way as to necessitate the affirmance of the judgment here. We are clear that the Powell, Gund, and Morse decisions are unsound. They are hereby overruled.

Since our answer to the first question presented by this appeal must be in the negative, it is obvious that the question of pleading presented by the second is immaterial.

The judgment appealed from is affirmed. For Def

Holcomb, Morris, Mount, Main, Chadwick, and Parker, JJ., concur.

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LITTELL & SMYTHE MANUFACTURING COMPANY,
Respondent, v. P. B. M. MILLER,
Appellant.

(3 Wash. 480, 1892.)

Appeal from Superior Court, King County.

The facts are stated in the opinion.

The opinion of the court was delivered by

Scott, J.--This action was brought to foreclose a lien under chap. 138 of the Code of 1881, for materials furnished by the respondent which entered into the consideration of a building situated upon certain real estate, which the respondent alleged belonged to the appellant. The appellant answered, denying that he owned anything more than a community interest therein, and alleging that said property was the community property of the appellant and his wife, Eva J. Miller, setting up the necessary facts to show its community character. A demurrer thereto by the appellant, that said answer stated no facts to constitute a defense, was sustained by the court. Proof was taken as to other issues, and a judgment was entered directing a sale of the interest of the appellant in said real estate.

It is contended that, as the husband has no power to sell the community real estate, he cannot accomplish by indirection what the law will not permit him to do directly; that he has no power to create any charge or encumbrance under which community lands can be sold; that there can be no involuntary alienation where there is no power to convey voluntarily, and that in any event the wife was a necessary party to the action. It is necessary to first consider Sec. 2410 of our 1881 Code, which reads as follows;

"Sec. 2410. The husband has the management and control of the community real property, but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, That all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon."

If the provision in this section is to be given any force at all, it must mean that the husband may contract for the erection of a building up the community real estate, and thus subject it to the liens provided for in such cases. If the husband and wife both contract the debt, the property would clearly be liable therefor, and to the liens, without the provision. It is a rule of construction that effect should be given to every part of a statute when it can be done. The management and control of the

community real property is given to the husband, and the statute speaks as though he is the only member of the community who, acting alone, can create a charge against the same for improvements, and it plainly implies that he may do so, and also create debts against the community otherwise, independent of any action upon the part of the wife, by virtue of which a judgment lien may be obtained upon the community lands. It also provides that such lands may be sold on execution issued upon a judgment for a community debt, and, if it means anything, it must mean that such debts may be created by the husband independent of any specific appointment of him by the wife as her agent to represent her in community matters, and without any participation by her in the contract. To this extent the law appoints him the agent of the community; for where both members of the community contract, their community property would be liable therefor without the provision, as would also their separate property, so far as the creditor is concerned, although it might be as between each other they would under some circumstances be entitled to relief; and although the court might, upon request, require that either the separate property of one, or the community property, as the case might be, should be first exhausted. No such powers seem to be given to the wife generally in relation to the community matters. She is only spoken of in this section as in connection with the limitation upon the husband's power to sell or convey or to encumber otherwise than as is specified in the provision therein.

Doubtless the wife can create a charge against the community for necessary family expenses, and also such as may be necessary for the proper education of the children. Sec. 2407 authorizes this. Sec. 2403 can have effect as to the separate property, or as to conferring additional powers concerning the community property. Secs. 2396 and 2406 can only relate to separate property, and thus far there is no conflict. There is a conflict as to Sec. 2398, which is as follows:

"Sec. 2398. All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights, she shall have the same right to appeal, in her own individual name, to the courts of law or equity for redress and protection, that the husband has: Provided, always, That nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."

But this section has not been recognized as having the sweeping force the first part of it seems to carry. Certainly, the scope of its general language is limited by Sec. 2409 and 2410 on the ground that general provisions must yield to special ones, where there has been no repeal. These sections were substantially originally contained in separate enactments which, however, were both approved upon the same day, November 14, 1879. Sec. 2398 is found as Sec. 1 of an act to be found at page 151 of the Session Laws of 1879. It was carried forward into the code with a slight change referring to the chapter 183 of which it is a part. This section "abolished" all prior laws in conflict therewith. The part of Sec. 2409 referred to is found as Sec. 7 of an act to be found at page 77 of said Session Laws, and Sec. 2410 appears as Sec. 8 of said act. This act repealedaall acts in conflict therewith, or on the subject-matter thereof. The fact that the act containing what is now Sec. 2398 is found at a later

Amended § 2410 Code 188. [illegible]

[illegible] [illegible] comm. of real [illegible] providing [illegible] liens [illegible] mechanics [illegible] labor [illegible] furnished in erecting structures thereon, [illegible] empowered [illegible] erection [illegible] comm. of real estate [illegible] it a mechanic's lien

[illegible] suits [illegible] foreclose liens [illegible] comm. of real estate [illegible] [illegible] [illegible] § 1894 Code 188. [illegible] party owning lease [illegible] a fee simple [illegible] execution [illegible] apply.

place in the published laws of that year would not show that it was approved later in the day than the other act, even if parts of a day would be taken into consideration, for the order of the different acts as published in that volume have no reference to dates of approval, later acts preceding earlier ones in many instances. Even with regard to different days the ordinary rule is to consider all acts passed at the same session as having been passed at the same time, and that they should be so construed as that the whole may stand where practicable. The Code of 1881, Sec. 761, says:

"The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments."

However these acts stood with relation to each other in these particulars prior to the adoption of the code, they were carried forward, or substantially re-appear therein, in the same chapter, the order of their appearance being reversed therein in the arrangement of the various sections. Some changes are also made in each of them, the more important ones being in Sec. 2409 and 2410, especially in the last one relating to liens of judgments for community debts and to sales on executions issued thereon. Under all the circumstances, I also think these sections could be held in force on the ground that they have received later legislative consideration, or are later enactments.

Notwithstanding the fact, however, that the husband individually can incur the debt, in all suits to foreclose liens upon community real estate the wife is a necessary party defendant. She has at least as much right to contest the facts making the same a charge against the community as the husband has. There can be no sale of the husband's or wife's interest in the community property separately during the existence of the community. Sec. 1959 of the code, authorizing the interest of a party owning less than a fee simple to be sold, does not apply to such a case.

Reversed, and remanded.

Anders, C. J., and Hoyt, Dunbar and Stiles, JJ., concur.

NATHAN KATZ, Respondent, v. ANNA R. JUDD, Appellant, EDWARD JUDD, Defendant.

(108 Wash. 557, 1919.)

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 16, 1918, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Reversed.

Fullerton, J.--This is an action upon a promissory note. The defendant Anna R. Judd interposed a defense of want of consideration. Judgment went against her in the court below and she appeals.

In November, 1910, the appellant, then Anna Ragdale, was a stenographer in the law office of Edward Judd. She had theretofore taken title to certain real property which she held as trustee for him. On the day named, Judd borrowed of the respondent, Katz, the sum of $1,000 and gave a promissory note therefor signed by himself and the appellant. As security for the note, he caused the real property mentioned to be deeded to Katz, taking from him a writing, running to the appellant in her then maiden name, to the effect that he held title to the lands as security for the note. The appellant had no interest in the loan, and it was testified, over the objection of the respondent, that, when she signed the note, she inquired as to the liability she assumed thereby, and that Judd stated to her, in the presence of Katz, that she assumed no liability whatsoever. The note was not paid at maturity, nor was it finally taken up until February 15, 1917. In the meantime one parcel of the land conveyed as security had been lost through a mortgage foreclosure, another had been sold by Katz without the knowledge of Judd, and Judd had made certain payments on the note either in cash or by the performance of legal services. In the meantime, also, Judd and the appellant had intermarried. In the early part of the year 1917, the respondent began pressing Judd for the balance due on the note, and on the day in February named, a settlement of the accounts between the parties was had in which the amounts creditable on the notes were adjusted. The parties also agreed upon the value of the remaining land held by the respondent in trust, and this value was also credited on the note. There then remained due on the obligation the sum of $900, and for this amount Judd gave a new note payable in installments at future dates. When the settlement was finally reached, the respondent insisted that the appellant execute the new note, which she did at the request of her husband, he telling her, when asked for an explanation, that it "was the old Katz matter." It is to recover upon the last note that the present action is prosecuted.

The defendant Edward Judd at no time questioned his liability on the note. It is insisted on his behalf, however, that there was nothing more than a past consideration for the execution of the new promise. As to the appellant, it is insisted, if we have correctly gathered the meaning of her counsel, that she assumed no liability, not even that of an accommodation party, when she executed the original note, and as there was only a past consideration for the execution of the new note on the part of the

A note [illegible] hus. [illegible] obligation [illegible] marriage [illegible] sep. debt [illegible] hus., [illegible] future [illegible] accomodation surety [illegible] sep. debt [illegible] comm. debt, [illegible] its [illegible] new promise.

[illegible] hus. [illegible] part [illegible] general against [illegible] dfts' [illegible] not [illegible] comm.n principal obligor, there was no consideration at all as to her, since a past consideration moving not to her but to the principal on the note will not support a promise on her part to pay.

But whether the conclusion contended for would follow were the premise admitted, we have not found it necessary to inquire, as we cannot conclude that the new note was founded entirely upon a past consideration. The obligation evidenced by the original note was due at the time of the execution of the new note. Edward Judd, at least, was then presently obligated to pay it. The postponement of the obligation to a future date was a new consideration moving to him and operated as a present consideration for the execution of the new note. The new note was accepted only after the appellant had signed it. Conceding that she was not obligated on the original note, she became obligated on the new one by her act of signing as an accomodation party, notwithstanding she personally received no consideration for executing the note. Rem. Code, Sec. 3420; Northern Bank & Trust Co. v. Graves, 79 Wash. 411, 140 Pac. 328; Metzger v. Sigall, 83 Wash. 30, 145 Pac. 72; Skagit State Bank v. Moody, 86 Wash. 286, 150 Pac. 425, L. R. A. 1916A 1215; Knickerbocker Co. v. Hawkins, 102 Wash. 532, 173 Pac. 623.

The court, on the facts, not only entered a joint and several judgment against the defendants, but entered a judgment against the community composed of the defendants. While judgment in the first of these forms legally follows from the considerations stated, plainly judgment in the latter form does not. The obligation was not a community obligation of the defendants. In its inception it was the obligation of Edward Judd upon which the appellant was at most an accommodation party. The subsequent marriage of the makers did not change its character in this respect, nor was its character changed by reason of the new promise. The obligation is still the obligation of the defendant Edward Judd on which his wife is liable as an accomodation party. As such it is the separate obligation of each, not their community obligation, and the judgment entered is erroneous in so far as it makes the obligation a charge upon community property.

The judgment is reversed, and the cause remanded with instructions to modify it in accordance with this opinion.

Holcomb, C. J., Mount, and Parker, JJ., concur.

LEVY v. BROWN, United States Marshal, et al.

(Circuit Court, D. Washington, N. D.
December 24, 1892.) No. 223.

(Fed.Rep.,Vol.53, 568.)

At Law. Statutory proceedings by Eva Levy against Thomas R. Brown, United States marshal, and Ralph S. Hopkins, execution creditor, to establish her claim as owner of personal property levied upon to satisfy a judgment against her husband. Jury waived. Trial by the court. Findings and judgment for defendants.

Hanford, District Judge. The Code of this state contains a chapter relating to claims of third parties to property levied upon under an execution, authorizing a party other than the judgment debtor, who claims to be the owner, or entitled to have possession of property taken in execution, to retake the same from the officer, upon giving an affidavit alleging his title or right, and a bond conditioned that he will appear in the court from which the execution issued, and make good his title, return the property, or pay its value to the officer. 2 Hill's Code, Sec. 491 et seq. Under said chapter, after property has been claimed, the affidavit is deemed to be denied, and the question of title to the property is treated as an issue to be tried and determined in the court from which the execution issued. The plaintiff has by an affidavit and bond, attempted to defeat a levy by the marshal upon certain property, under an execution issued out of this court upon a judgment in favor of Ralph S. Hopkins against her husband, H. Emanuel Levy, in an action by said Hopkins against said Levy to recover damages for a tort. The property levied upon consists of certain houses built by Levy upon property leased by him for an indefinite period, and rent money collected by the marshal from persons occupying said houses as tenants of said Levy. Other money on deposit in a bank to the credit of Levy, and made subject to the execution by notice of garnishment thereof, is also claimed by the plaintiff, which money, I find from the evidence, was collected for rent of real property to which the plaintiff appears by the record to have the legal title. From the testimony I find the houses levied upon and moneys collected by the marshal to be the community property of the plaintiff and said H. Emanuel Levy. The real estate referred to was acquired by purchase while the plaintiff and her husband were living together as husband and wife, in this state, with money which they together borrowed for the purpose; and, in my opinion, it is their community property, although the evidence shows that the husband intended to bestow his interest therein as a gift upon his wife. The rent thereof is community personal property.

For the purpose of this decision, I assume that the debt for the collection of which the execution issued is not a community debt, and, under the decisions of the supreme court of this state, community real estate of the parties could not be subjected to this execution. But the decisions referred to interpret and give effect to the section of the Code which denies to a husband alone power to sell or incumber community real estate. Community personal property is not affected by said section of the Code,

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and by another section the husband is given the absolute power of disposition thereof. The decisions of the supreme court, as I understand the same, carefully observe a distinction between community personal property and community real property, corresponding to the distinction which the statute has made in the provisions thereof affecting the husband's power of disposition. It is my conclusion, therefore, that the plaintiff has failed to establish her claim of title, and judgment must be rendered for the defendants.

GEORGE MILNE, Appellant, v. M. FRANCIS KANE et al.,
Respondents.

(64 Wash. 254, 1911)

Appeal from an order of the superior court for King county, Tallman, J., entered September 30, 1910, granting a new trial as to one defendant, after the verdict of a jury rendered in favor of the plaintiff and against both defendants, in an action for personal injuries sustained by a passenger in an automobile through a collision with a street car. Reversed.

Mount, J.--The plaintiff brought this action to recover a judgment against the defendants on account of personal injuries received by him while being carried as a passenger for hire in an automobile. The automobile was operated for the benefit of the community consisting of Mr. Kane and his wife. It was being driven by the defendant M. Francis Kane at a high rate of speed, and ran against a street car and injured the plaintiff. The case was tried to the court and a jury. The jury found a verdict, in favor of the plaintiff and against both the defendants, for $900. The defendants moved for a new trial. This motion was denied as to Mr. Kane, and a judgment was thereupon entered against him, but was granted as to Mrs. Kane, upon the ground that the community was not liable. The plaintiff has appealed from the order granting a new trial as to Mrs. Kane.

The defendants rely upon the case of Brotton v. Langert, 1 Wash. 73, 23 Pac. 688, where it was held that, "community real estate is exempt from execution on a judgment rendered against the husband, who, as constable wrongfully sold mortgaged personal property, under execution." The logic of that case no doubt supports the contention of the defendants here, but we do not desire to extend that doctrine so that it will cover cases where the community as such is the wrongdoer, as well as to cases where an individual member is a wrongdoer, as was the case there. In the case of Floding v. Denholm, 40 Wash. 463, 82 Pac. 738, we held that community property was liable upon a surety obligation entered into by the husband alone for the benefit of the community. We there distinguished the Brotton case, by saying that the liability of the husband in that case arose on account of a transaction which was not for the benefit of the community. In that case we said:

> "The rule now is that community property is liable for a debt created by the husband for the benefit of the community. But such property is not liable for a debt created by a tort of either spouse, or one which is not for the benefit of the community."

See also, McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022.

In this case, if the negligence of the husband causing the injury may be held to be a tort, it was the tort of the community, because the husband was acting for the community. It is clear, we think, that, if

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the community consisting of the two defendants had employed a man to drive the automobile, and the negligence of this employee had caused the injury, the community would be liable. This would follow because the employee would be the agent of the community. and for his negligence in the line of his duty the community would be liable. The fact that Mr. Kane was himself the driver, and was negligent, does not change the liability. He was one of the community, acting in the line of the business for the benefit of the community, and was as much an agent for both as an employee doing that work would have been. If the community joined in the tort, the community was liable. We are satisfied, therefore, that the negligence here, though actually committed by the husband, was the negligence of both himself and wife, because it was committed by him as agent of the community, in the line of his duty, in a business in which the community was engaged.

The trial court, therefore, erred in not entering a judgment against both defendants. The case will be remanded for that purpose.

Dunbar, C. J., Parker, Fullerton, and Gose, Jj., concur.

The comm. [illegible] liable [illegible] passenger [illegible] tort [illegible] husb. [illegible] negligently driving an auto [illegible] [illegible]

CORDELIA MOSTE, Appellant, v. HENRY RUGGE et al.,
Respondents.

(68 Wash. 90, 1912)

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 10, 1911, dismissing an action to subject property to a judgment, upon sustaining a demurrer to the complaint. Reversed.

Parker, J.--The plaintiff commenced this action, seeking a decree subjecting certain property, which she alleges belongs to the community composed of Henry Rugge and Pauline Rugge, his wife, to the payment of a judgment theretofore rendered against Henry Rugge in her favor, which judgment she alleges to be the community obligation of Henry Rugge and wife. A demurrer to the complaint upon the ground that it does not state facts constituting a cause of action was sustained by the court. The plaintiff elected to stand upon her complaint and not plead further, and thereupon a judgment of dismissal was rendered against her. From this disposition of the cause, the plaintiff has appealed.

It is conceded that the facts alleged in the complaint show that the property sought to be reached is the community property of Henry Rugge and wife, legal title thereto being held in trust for them by others. The allegations of the complaint bearing upon the question of the judgment being a community obligation are as follows:

"That on or about the 7th day of October, 1909, the plaintiff suffered damages by reason of the acts of negligence of the defendant Henry Rugge and the community composed of Henry Rugge and Pauline Rugge his wife, and on Feb. 12, 1910, commenced an action in the superior court of Spokane county, against said Henry Rugge for the purpose of recovering judgment agaist said defendant and the said community for such damages so suffered, in which action said defendant appeared and such proceedings were thereafter had that on Sept. 26, 1910, judgment was regularly entered in favor of plaintiff and against said defendant Henry Rugge in in the sum of $1,050, with interest from June 18, 1910, at 6 per cent per annum and $52.80 costs. which judgment is a liability of said Henry Rugge and the community composed of Henry Rugge and Pauline Rugge, his wife, that the acts of negligence committed by said Henry Rugge and the community composed of Henry Rugge and Pauline Rugge, his wife, were the manner in which said defendants conducted a certain grocery store in which plaintiff was a customer and in which plaintiff sustained damages through the negligence of said defendants, in that said community consisting of Henry Rugge and Pauline Rugge, maintained in said store an open trap door in the floor thereof, partially concealed and so located that plaintiff, in transacting business in said store fell through same and sustained the injuries for which said judgment was entered."

Appellant contends that these facts show the judgment to be a community obligation, because it grew out of acts performed by Henry Rugge

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in the conduct of the community business; and that, while the wife was not a defendant in that action and the question of the obligation being against the community was not rendered conclusive against her by the judgment, that question can be determined in this action. If the judgment rested upon a contractual obligation, there would seem to be no room for argument against these contentions, in the light of our former decisions holding that a judgment rendered for a community debt against the husband in an action where the wife is not made a defendant in name, is enforcible out of the community property, though the question of the community character of the debt will remain open to the wife to be determined in some appropriate action or proceeding. Oregon Imp. Co. v. Sagmeister, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; Calhoun v. Leary, 6 Wash. 17, 32 Pac. 1070; Curry v. Catlin, 9 Wash. 495, 37 Pac. 687, 39 Pac. 101; Diamond v. Turner, 11 Wash. 189, 39 Pac. 379. The plaintiff may have the question determined in the original action by making the wife a defendant with the husband. McDonough v. Craig, 10 Wash. 239, 38 Pac. 1034; Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777. Or the wife may have the question determined by intervention in the original action. Gund v. Parke, 15 Wash. 393, 46 Pac. 408.

But it seems well settled by the decisions first above cited that the question need not be finally settled in the original case, and will not be regarded as determined therein unless brought into the case in some proper manner. In none of the cases above cited does it appear that the liability of the community rested upon negligence or other wrongful act of the husband committed in the conduct of the community business. But in the later cases of McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N.S.) 1022, and Milne v. Kane 64 Wash. 254, 116 Pac. 659, it was held that the community is liable upon contracts made by the husband for the community in the conduct of its business. In these cases, however, the wife was made a defendant in name; and it is now contended by counsel for respondent.

"That inasmuch as the former tort was brought against Henry Rugge only and judgment was taken only against him this action will not lie. . . That in order to enable the plaintiff to take the community property under such a judgment, it is necessary that the wife should have been joined as a party defendant in the tort action, and that failure so to have joined her as defendant precludes the maintenance of any such action as this."

Counsel for respondent concede that the community may become liable for negligent acts of the husband performed in the conduct of the community business, under the decisions last above cited; but their present contention rests upon the theory that this judgment could in no event bind the community property, because it is in form against the husband only, and was rendered in an action where the husband alone was named as a defendant. It is insisted that the rule that the wife need not be made a party to the original action, in order to make the judgment the basis for a community claim, is applicable only to judgments resting upon contractual obligations; and that, when it is sought to hold the community for judgments arising out of negligence or other wrongful act of the husband, that the wife must have been made a party with the husband in the original

action, before the judgment rendered therein can be of any force as a foundation for a claim against the community.

We are not able to agree with this contention. We think there is no sound reason for differentiating between cases involving these different classes of obligations, so far as the making of the wife a defendant is concerned. The only question she is interested in, to wit, that of the community character of the obligation, is equally open to her whether the obligation arises out of contract or negligence. So far as the merits of the claim is concerned, the husband defends, not only for himself, but for the community, even though the wife is not named as defendant. When the husband negligently maintained the trap door in the floor of the store belonging to and operated in the interest of the community, as alleged in this complaint, he was acting as agent for the community as completely as when he incurred a community debt by the purchase of goods to replenish the stock in the store. We are not able to see that one was the act of the community any more or less than the other.

We are of the opinion that the learned trial court erred in sustaining the demurrer to the complaint. The judgment is reversed with direction to overrule the demurrer and for such further proceedings as are not inconsistent with this opinion.

Dunbar, C. J., Crow, Gose, and Chadwick, JJ., concur.

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§ 5929 providing [illegible] all injuries

committed by married [illegible]

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[illegible] marriage did [illegible] exist.

U. KILLINGSWORTH, Respondent, v. F. W. KEEN, Appellant.
(89 Wash. 597, 1916)

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 7, 1915, in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Bausman, J.--Keen, sued by his chauffeur for wrongful discharge outside of the state, sets up as a counterclaim that the chauffeur's wife took another automobile of Keen's out of his garage and used it "for the benefit of the marital community of the plaintiff and herself" for a period of four hours, during which time she damaged it. The counterclaim was to recover the value of its use as well as the cost of the repair. Plaintiff demurred to this as an attempt to set off tort against contract. Error is assigned on the lower court's sustaining that demurrer.

As the answer does not show, and as it is not claimed in argument that the wife's taking the automobile was other than tortious, the husband and the community property are protected against liability in that respect by Rem & Bal. Code, Sec. 5929 (P.C.95 Sec. 13), as follows:

"For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in case where he would be jointly responsible with her if the marriage did not exist."

We have had occasion to remark, in a suit upon false representations by a wife, that we know of no statute making the community property liable for them. Strom v. Toklas, 78 Wash. 223, 138 Pac. 880.

Appellant argues that this is one of those torts which the injured party may waive in its tort aspect and sue upon as creating an implied promise to reimburse for value appropriated. Assuming, but not deciding, that, still it cannot be applied here. Keen might, indeed, be permitted to do this in an action between him and the wife, but here he is in litigation with a third person protected by statute. The wife's act was a tort to begin with. It cannot be made contractual against the husband unless he too waives the form of action.

The bare and general allegation "for the benefit of the marital community" does not oblige us to discuss under this statute the situations in which a husband by acquiescence, authorization, acceptance of profits, or otherwise may be estopped to question the community's or his own liability. The tort was presumptively not for the benefit of the community, and facts must be pleaded to disturb that presumption.

We have sustained conclusions against demurrer when facts, though defectively set out, accompanied those conclusions (Harris v. Halverson 23 Wash. 779, 63 Pac. 549), but to sustain them utterly without facts is contrary to the whole theory of code pleading. Freeman v. Centralia, 67 W. 142, 120 Pac 886, Ann Cas. 1913 D 786; Longfellow v. Seattle 76 W.509 136 Pac. 855; Martin v. Olympia, 69 Wash. 28, 124 Pac. 214.

Judgment affirmed.

Morris, C. J., Mount, Holcomb, and Parker, JJ., concur.

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C. A. BIRCH et al., Respondents, v. W. R. ABERCROMBIE
et al., Appellants.
(74 Wash 486, 1913)

Appeal from a judgment of the superior court for Spokane County, Sessions, J., entered March 14, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries. Reversed.

Ellis, J.--This is an action to recover damages for injuries sustaine by the plaintiff, Julia M. Birch, by being struck by an automobile owned by the defendants W. R. Abercromibie and wife, which was at the time being driven by their daughter, the defendant Frances Abercrombie. The trial resulted in a verdict and judgment infavor of the plaintiffs, and against all of the defendants, for $2,000 and costs. The evidence, so far as necessary, will be noticed in the discussion. At appropriate times, the defendant Frances Abercrombie moved for a directed verdict, for a new trial and for judgment notwithstanding the verdict. The defendants W. R. Abercrombie and wife moved for directed verdict and for judgment notwithstanding the verdict. All of these motions were overruled, and each of the defendants appealed.

(1) It is first contended, on behalf of all the appellants, that the evidence was insufficient to establish any negligence on the part of Frances Abercrombie, and that in any event the respondent Julia M. Birch was guilty of contributory negligence as a matter of law. We shall not attempt an exhaustive review of the evidence. The following will suffice: It is admitted that the appellant Frances Abercrombie was driving the automobile north on Jefferson street in the city of Spokane, and that, near the intersection of that street with First avenue, the machine struck the respondent Julia M. Birch, who was crossing Jefferson street diagonally from west to east; that Jefferson street is sixty feet wide, and that Mrs. Birch was struck at the point about twelve feet from the east curb of the street. It seems to be admitted, also, that Mrs. Birch's hearing was slightly impaired prior to the accident. She testified that, before leaving the curb, on the west side of the street, she looked south on Jefferson street and saw nothing, the street being perfectly clear for a distance of about a block; that she had no intimation of the approac of the automobile until the ringing of the bell the instant before she was struck. Another witness testified, in substance, that he heard the bell ring violently just at the time the woman was struck, but heard no other warning, and stated that, if the bell had been sounded before that time, he thought he would have remembered it, as he was coming down the street in the same direction as the automobile. Evidence was introduced on behalf of the appellants to the effect that the automobile was running slowly at the time of the accident, and that the bell was sounded several times before Mrs. Birch was struck. Upon this conflict of evidence, the question of Miss Abercombie's negligence in failing to sound the bell, and of Mrs. Birch's contributory negligence in failing to look south after leaving the west curb, were clearly for the jury. We have so held repeatedly on facts essentially parallel. Ludwigs v. Dumas, 30 Wash. Dec. 16, 129 Pac. 903; Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892; Lewis v. Seattle Taxicab co., 30 Wash. Dec. 202, 130 Pac. 341.

(2) It is contended on behalf of appellants W. R. Abercrombie and wife that, even conceding that a case was made as against the daughter, the evidende exonerates them from liability in that the automobile was at the time in use by the daughter for a purpose of her own, and not as their servant or agent. The jury in addition to the general verdict, found in answer to special interrogatories: (1) That Frances Abercrombie was at the time of the accident driving the machine for her own pleasure; (2) that she was not driving the machine without the knowledge or consent of her parents express or implied; (3) that her parents had not prior to the accident ordered or directed her not to drive the machine. The appellants contend that the last two findings are without support in the evidence. This contention ignores the admitted ownership of the automobile by the appellants W. R. Abercrombie and wife. It is well established that, in cases of this kind, where the vehicle doing the damage belonged to the defendants at the time of the injury, that fact establishes prima facie that the vehicle was then in the possession of the owner, and that whoever was driving it was doing so for the owner. We have repeatedly so held Knust v. Bullock, 59 Wash. 141, 109 Pac. 329; Kneff v. Sanford, 63 Wash. 503, 115 Pac. 1040; Burger v. Taxicab Motor Co., 66 Wash. 676, 120 Pac. 519. The burden was thus cast upon the appellants to overcome this presumption by competent evidence and it was for the jury to say upon such evidence whether the burden had been sustained. There was evidence that the automobile was purchased by the appellant W. R. Abercrombie for the use of his family. He testified that it was sent, in the morning of each day, from the garage where it was kept, to his home for that purpose and taken away in the evening. On June 5, 1912, both W. R. Abercrombie and his wife were away from home, and the daughter, the appellant Frances Abercrombie, entertained a number of friends at luncheon. She was taking them home in the automobile when the accident happened. Both W. R. Abercrombie and his wife testified that the daughter was not strong, and that running the machine was a tax on her nerves, and that, for that reason, sometime before the accident, they had advised her not to run the machine and told her that they would rather she would not run it. Mr. Abercrombie testified that this was "emphatic and positive in the shape of an order from parent to child." This last statement was obviously a conclusion, and hardly sustained by the words actually used as testified to by him. In rebuttal, the respondents introduced certain interrogatories propounded by them to the appellant W. R. Abercrombie, and his answers thereto. Two of his answers read as follows:

"Answering interrogatory Number 3, these defendants state that Frances Abercrombie was permitted to use the electric vehicle owned by them at different times."

"Answering interrogatory Number 4, these defendants state that Frances Abercrombie had used the electric vehicle owned by them on some occasions prior to June 5, 1912."

In view of these answers to the written interrogatories, and in view of the fact that the automobile was being used for the very purpose for which it was purchased and kept, and in view of the presumption attending admitted ownership, we cannot say that the last two findings of the jury

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are not supported by competent evidence. The presumption attending ownership was not overcome, as a matter of law, by evidence of mere advice an expression of preference on the part of the parents some weeks befor that the daughter should not drive the machine, especially in view of th fact that antecedent knowledge and consent of the parents to her use of the machine were admitted by the answers to the interrogatories. There being competent evidence from which the jury might reasonably find as it did, we must assume that Frances Abercrombie had been permitted the use the machine and that she was at the time of the accident using it with th consent of her parents.

This reduces the consideration of the appellant's contention under this head to answering a single question: If Frances Abercombie was driving the automobile for her own pleasure, were the father and mother, notwithstanding that fact, liable for the injury to the respondent resulting from her negligence under the other evidence adduced?

It is conceded that an automobile is not an agency so dangerous as to render the owner liable for injuries to travelers on the highway inflicted thereby while being driven by another, irrespective of the relation of master and servant or agency as betweenthe driver and the owner, and we have so held. Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N.S) 216. This concession eliminates any necessity to review the following authorities, cited by the appellant, in which the driver was either not in any sense the agent or servant of the owner, or though a servant, was acting for himself and obviously outside of the scope of his employment and not in connection with the owner's business. These authorities are cited only to the point conceded. Jones v. Hoge supra; Robinson v. McNeill, 18 Wash. 163, 51 Pac. 355; Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133; Lotz v. Hanlon, 217 Pa. 339, 66 Atl. 525, 118 Am. St. 922, 10 L. R. A. (N.S.) 202; Huddy, Automobiles, p. 95.

It must also be conceded that a parent is not liable for the torts of his child solely on the ground of relationship. The liability, if any exists, must rest in the relation of agency or service. This eliminates any necessity for a review of the following authorities, cited by the appellant, only in support of that point. Mirick v. Suchy, 74 Kan. 715, 87 Pac. 1141;Chastain v. Johns, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325.

This leaves only two cases cited by thea ppellant under this head for our consideration. They are Reynolds v. Buck, 127 Iowa 601, 103 N. W. 946, and Doran v. Thomsen, 76 N. J. L. 754, 71 Atl. 296, 131 Am. St. 677, 19 L. R. A. (N.S.) 335. The case of Reynolds v. Buck is clearly distinguishable from the case in hand on the facts. In that case the defendant, a dealer in automobiles, decorated one for use in a paradd, and after the parade directed that the machine which stood in front of the store be taken inside, and he then left. His son, who was employed as a clerk and who had been given a holiday, coming upon the machine where it stood, invited a lady friend to ride. While he was driving, the plaintiff's horse took fright at the machine and the plaintiff was injured. It was held that the defendant was not liable, on the ground that the son was using the automobile for his own purpose without the knowledge or consent of the father and in a matter wholly disconnected with the father's business. In

the case before us the automobile was purchased and kept for the use of the family. It was customary for the members of the family to drive it at their pleasure. It was intended for another purpose. At the time of the accident, it was being so used, as the jury found on what we must hol. competent evidence, with the knowledge and consent of the appellants W. R. Abercombie and wife. The distinction from the Buck case is plain.

The case of Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228 cited in McNeal v. McKain, post, seems to have been decided on the same ground though the facts would hardly seem to justify it. The general rule of liability, however, as there stated, distinctly sustains a liability in the case here. The court said:

"Liability arises from the relationship of master and servant, and it must be determined by the inqhiry whether the driving at the time was within the authority of the master, in the exécution of his orders, or in the doing of his work."

The New Jersey case, Doran v. Thomsen, is not distinguishable on the facts from the case before us. The father owned the automobile, kept it on his premises, and the daughter used it with his knowledge and consent at her pleasure. While heartily subscribing to the view there expressed, "that the mere fact of the relationship of parent and child would not make the child the servant of the defendant," we think the opinion unsound in that it ignores the agency induced by the fact, independent of that relationship, that the daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in furtherance of the very purpose of his ownership and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. McNeal v. McKain, (Okl.) 126 Pac. 742. In running his vehicle, she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule respondeat superior. We think that the instruction which is criticized in the Doran case is, in itself, a complete answer to the opinion. It declared the use of the machine for the purpose for which it was owned, by the person authorized by the owner to so use it, a use in the owner's business. It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similtude to a lending of a machine to another for such other's use and purpose unconnected with the general purpose for which the machine was owned and kept.

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An examination of the authorities cited, and an independent search, induces the belief that the Doran case stands practically alone. Some courts have sought on slight circumstances to distinguish it. One has frankly criticized it. We have found none which followed it. In Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L.R.A. (N.S.) 224, the supreme court of Kentucky, holding a father liable on closely analogous facts, used the following language:

"In the first place, it may be said that a considerable part of the discussion of counsel is addressed to the idea that, even though the son was generally the agent or servant of the father in the operation of the car, the father is not liable under the facts stated here, because the son was engaged at the time in an enterprise of his own,--the seeking and giving of pleasure to himself, his sister, and their friends, upon an excursion of his own,--in which the father had no interest, and which was not in the line or scope of the son's employment. The question ordinarily is a vital one in cases of this character; but it is of no consequence here. For the only ground upon which the father can be held answerable for this act of his son excludes the idea of an independent venture, under the facts detailed. That ground is, as contended for by the appellee, that the machine was bought and operated for the pleasure of the family; that, at the time of the accident, the son was engaged in carrying out the general purpose for which the machine was bought and kept; and that, as he took it out at the time in pursuance of general authority from his father to take it when he pleased, for the pleasure of the family and himself as a member of it,--the purpose for which it had been bought,--he was engaged in the execution of his father's business, i.e., the supplying of recreation to the members of the father's family. . . . So, in the case at bar, the father had provided his family with this car as a means of recreation and amusement; and the son, in the use of the car for that purpose, was not performing an independent servise of his own, but was carrying out that within the spirit of the matter, was the business of the father."

Referring to the Doran case, the court says:

"It is true that there is authority of a most excellent character in direct conflict with the views which we have set out. Notable among the cases are those of Doran v. Thomsen, 76 N.J.L. 754, 71 Atl. 296, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, and Mahr v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228; but the conclusion reached by us is sustained both by the case of Lashbrook v. Patten, from this court, and by what we believe to be the sounder argument."

In Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351, another case analogous to that in hand, except in its reference to the minority of the offending child, which fact we deem immaterial, the court said:

"The evidence discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle and when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner?"

In Marshall v. Taylor (Mo. App.), 153 S.W. 527, the same court, referring to the Maxwell case, said:

where an auto [illegible], [illegible]
use of [illegible] family [illegible] drivers [illegible]
daughters [illegible] her [illegible] pleasure, [illegible]
presumption [illegible] used
[illegible] overcome [illegible]
admit [illegible] expression [illegible] preference
[illegible] drive it; especially
[illegible] written interrogatories
[illegible] permitted [illegible]
run it [illegible] occasions

"But further we held that the use of the car by the minor son for his own pleasure, and with the consent of his father, the owner, was one of the uses for which the vehicle was kept, and therefore was a part of the service for which the owner had authorized the boy to run the car as his servant. The only difference between that case and this is that here the young man had attained his majority, was sui juris, and his father owed him no duty of parentage, and, of course, was under no obligation to provide him with means of pleasure and recreation. We do not think this fact is determinative of the question of defendant's liability. The real question at issue is not that of the legal duty defendant owed his son, but is whether or not the son was the agent of his father in running the car. Frequently fathers continue not only to support their children after the latter have become sui juris, but to provide them, as members of the family, with the means of recreation and pleasure. This car was provided by defendant for the use of his immediate family. He contemplated and intended that his son should enjoy it in common with other members of the family. When in such case, it was as much in his service as it would have been had it been occupied by his wife, his daughter, his mother, or his guest. We conclude that the young man was not a mere servant using his master's vehicle for his own purpose, but was the agent of his father operating the car for one of the purposes of its intended use."

In McNeal v. McKain (Okl.), 126 Pac. 742, another case of the same character, the court said:

"Vehicles and motor cars may be used, not only for the business of the master for profit, but also in his business for pleasure. If Paul, the minor son of the plaintiff in error, had been driving his father's carriage (whilst he was a member of his family) in which were contained his sister and a guest of his father's house, the same being done by him with the express or implied consent of his father, the relation of master and servant would exist, and the father would be liable for the negligent acts of the minor son whilst engaged in the driving of the carriage, and the same rule is supported by authority as to motor cars."

See, also, Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L.R.A. (N.S.) 701; Moon v. Matthews, 227 Pa. 488, 76 Atl. 219, 136 Am. St. 902, 29 L. R.A. (N.S.) 856.

We think that, both on reason and authority, the daughter in the present instance should be held the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if he knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous. While we are loath in any case to order a new trial where the verdict of a jury is sustained by competent evidence, we are equally loath to refuse a new trial where, through respondents' fault, incompetent and essentially prejudicial matter was deliberately placed before the jury.

The judgment is reversed, and the cause is remanded for a new trial.

Main and Fullerton, JJ., concur.

Morris, J., concurs in the result.

GEORGE BICE et al., Appellants, v.
JAMES BROWN et al., Respondents.

(98 Wash. 416, 1917.)

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered April 27, 1916, upon the verdict of a jury rendered in favor of the defendants, in an action for damages for trespass to property. Reversed.

Ellis, C. J.--This is an action in trespass to recover damages for depositing upon plaintiffs' land a large quantity of logs, stumps, and debris and for the destruction of a bridge across California creek, in Whatcom county, which bridge gave access from one part of plaintiffs' land to another.

The facts are these: Plaintiffs are husband and wife and are the owners of eighty acres of land crossed by California creek, a stream varying in width from twenty-five to forty feet, which flows into the sea. In 1914, drainage improvement district No. 7 of Whatcom county was organized for the drainage of lands in the vicinity of this creek above plaintiffs' land. The scheme adopted contemplated the construction of ditches to drain the lands of the district, which ditches were to be discharged into the creek, the creek itself being used as the trunk ditch. Though the record does not make it entirely clear, it seems to be conceded that plaintiffs' land lies outside the district and between it and the mouth of the stream. The stream flows through timbered lands, and a large quantity of logs, fallen timber and snags had floated down and accumulated in its bed where it crosses plaintiffs' land. To carry out the drainage scheme it was necessary to clear this creek of obstruction in order to secure a free flow of the waters collected from the district. For that purpose the county, acting for the district, secured from plaintiffs, On December 31, 1914, a deed of easement which, so far as here material, is as follows:

"The grantors, George Bice and Oro Bice, his wife, for and in consideration of the sum of one dollar and other valuable consideration in hand paid, for lands both taken and damaged, and the receipt of which is hereby acknowledged, do hereby grant bargain sell and convey into Whatcom county, a municipal corporation and one of the legal sub-divisions of the state of Washington, for the use and benefit of that certain drainage district known as drainage improvement district No. seven of Whatcom county, Washington, the following described real estate situated in said Whatcom county, Washington, and within said drainage district as follows, to wit:

"The right to clear out, straighten, deepen and widen and to maintain as a drainage ditch California creek across the west half of the northwest quarter of section 27, township 40, north, range 1 east, W. M.

"This conveyance is made for the purpose of vesting in the grantee a certain right of way for the drainage ditch for said drainage improvement district No. seven, Whatcom county, Washington, and the right is hereby granted to go over and across any and all lands of the grantor into and upon the said right of way for the purpose of constructing, maintaining and operating said drainage ditch; but the right is hereby reserved to the grantors and to their executors, administrators and heirs-at-law to occupy and use and cultivate the land within said right of way in so far as the same shall not be occupied by said ditch, its banks, or embankments and in such manner only as will not interfere with the free flow of water through said ditch or weaken or impair said embankments.

"The rights of the grantee herein are confined to the space actually and necessarily used and occupied, with the right of ingress thereto and egress therefrom."

Defendants James Brown and Miles Parish, two of the supervisors of the drainage district, early in July, 1915, undertook the work of clearing out the creek across plaintiffs' land by day labor, employing a crew of five or six men and a donkey engine. The plan employed was to attach a lead block to a tree or stump and with a cable, by means of the engine, drag the logs, stumps and other debris up to the lead block, clearing the stream, both up and down from each such location, as far as the cable would reach. The engine was moved down stream from time to time and the operation repeated. The logs, stumps and debris were left in fan-shaped groups or piles on plaintiffs' land just as they were drawn up and released from the cable. Three large heaps were thus created on the north side and eight on the south side of the stream, all of them on plaintiffs' land and each, as the evidence shows, covering an area of approximately half an acre. These heaps extended from the banks to a distance of one hundred to one hundred and twenty-five feet on either side of the stream. At about the time the work was commenced, plaintiff George Bice notified Brown and Parish, the county engineer, and also the attorneys for the district, that he would not allow the heaps of logs and debris to be left upon his land, and demanded that they be removed or burned. Brown and Parish, after some temporizing, refused to remove the logs and debris, claiming the right under the deed to leave the piles on the land.

It is alleged in the complaint that defendants, as supervisors of the district, received compensation for their work to the benefit of their respective marriage communities; that their acts were tortious and were committed for the benefit of their respective community lands within the drainage district, and judgment was asked for damages in the sum of $800; $700 being for the estimated cost of removing the logs and debris, and $100 for the replacing of the bridge destroyed in the work. Defendants answered, denying the trespass and alleging, as affirmative defenses, (1) that they committed the acts complained of in their capacity as supervisors of the drainage district, hence where not liable personally, and (2) that the deed gave them authority as officers of the district to do the acts complained of. The reply denied that defendants were acting within the scope of their authority as supervisors or within the authority conferred by the deed. The jury returned a verdict for defendants. Motion for new trial was made and overruled. Judgment was entered in favor of defendants, and against plaintiffs for costs. Plaintiffs appeal.

The court, by instruction, took the first affirmative defense from the jury. So far as the record shows, no exception was taken to this instruction. In any event, we think it correct. If the acts complained of were not authorized by appellants' deed to the county they clearly constituted a trespass and were in excess of the authority of respondents as supervisors of the district. They constituted a personal tort of respondents for which they would be liable.

The dominant question is that presented by respondents' second affirmative defense. Did the deed give respondents authority as officers of the district to do the acts complained of? Upon this point appellants requested an instruction as follows:

"Upon the question of this second affirmative defense the court instructs you that the same is not a defense to this action; that said right of way deed gives said district and its officers the right to clear out the bed and banks of said creek and to remove therefrom logs, fallen timber, stumps and other debris which may obstruct the flow of water therein, and also gives the right to said district and its officers to use the banks of said creek to an extent which is necessary for the temporary purpose of clearing out said creek, and under and by virtue of said deed said defendants had the right to temporarily deposit such debris upon so much of the banks of said creek was was actually necessary for the purpose of carrying off, cutting up, burning or otherwise removing such debris, but said deed does not confer any right upon said drainage district or its officers or upon these defendants to haul out said debris beyond such narrow strip as was actually necessary for the purpose above stated, nor to leave the same upon any part of said land of plaintiffs or the banks of said creek except for such temporary purpose, and for such reasonable time as would have enabled said defendants to burn up or remove same. You will therefore not consider said deed, as in any manner exonerating defendants from liability in this action."

The refusal of the court so to instruct is assigned as error. The assignment is well taken. The second paragraph of the deed, above quoted, gives in general terms "the right to clear out, straighten, deepen and widen and maintain as a drainage ditch California creek" across the land. The third paragraph, after granting a right of access across any and all lands of grantors for the purpose of maintaining and operating the stream as a drainage ditch, expressly reserves the right to the grantors,

"To occupy and use and cultivate the land within said right of way in so far as the same shall not be occupied by said ditch, its banks, or embankments and in such manner only as will not interfere with the free flow of water through said ditch or weaken or impair said embankments."

This reservation is wholly inconsistent with any right in the drainage district to use appellants' land or any part of it as a permanent place of deposit for logs, brush, stumps and debris taken from the creek. It contemplates the use of no more of appellants' land than is necessary for proper embankments essential to the maintenance of the creek as a drainage ditch. This view is further emphasized by the last sentence of the deed, above quoted, as follows:

"The rights of the grantees herein are confined to the space actually and necessarily used and occupied with the right of ingress thereto and egress therefrom."

Appellants invoke the familiar rule that deeds are to be most strongly construed against the grantor. That rule, however, is merely a rule of construction, and where, as here, the deed contains an express reservation inconsistent with the right claimed, that rule of construction cannot be invoked to extend the general words of grant so as to destroy or render nugatory the express reservation.

The court, construing the deed as conferring the right permanently to deposit the logs and debris upon appellants' land if no more land was occupied than was necessary for the purpose, instructed upon the theory that the action was one for negligence, and to the effect that, if the jury found that the work was performed in a reasonably careful and prudent manner, there could be no recovery even though plaintiffs were damaged. The giving of this instruction is also assigned as error. This assignment presents in another form the same question as that just discussed. The issue was not as to a negligent exercise of rights conferred by the deed, but as to a wanton exercise of rights not conferred. We are clear that the deed must be construed as conferring no right to permanently use more of the land than was necessary for retaining embankments. It gave no right to permanently deposit logs and debris upon the land. The reservation negatives any such implication. Such an implication cannot be indulged unless not to indulge it would defeat the grant, which is not the case here. Such right was not essential to the full enjoyment of the easement. The evidence shows without contradiction not only that it was perfectly feasible to pile and burn the debris, but that that course was followed in clearing the upper reaches of the stream above appellants' land. In view of the reservation in the deed, the only use of appellants' land, other than that of access to the stream, reasonably implied in the grant was the right of temporary use for piling and burning or otherwise removing the logs, stumps and debris. The instruction complained of was erroneous.

There was some evidence that appellant George Bice, while the work was in progress, expressed to some of the workmen satisfaction with the manner in which it was being done. He denied this, but admitted that he authorized them to leave any cedar logs fit for shingle bolts upon the land. Touching this evidence the court instructed to the effect that if the timber removed and placed upon higher land became more valuable to appellants that fact should be considered in estimating the damage, if the jury found that they were damaged. This instruction was erroneous. There was no evidence that any of the logs, save a very few cedar logs, were of any value. As to the cedar logs, the mere fact that appellant gave permission to leave them upon his land should have been considered in mitigation of damages only to the extent of the damage resulting from leaving such cedar logs. Their value to appellant was wholly immaterial. There was no evidence of any agreement that the cedar logs should be taken in payment for a violation of the terms of the deed.

Touching this evidence the court further instructed to the effect that if the logs taken from the creek were deposited at places known to

where officers [illegible] drainage
district exceeded [illegible] committed
a tort [illegible] district
[illegible] act [illegible] personal act, [illegible]
liability [illegible] comm. [illegible]

appellants and appellants agreed thereto, they would not be entitled to damages as a result of the logs being so placed. Respondents, in their answer, did not plead an oral agreement that the logs and debris might be permanently deposited on the land, nor did they plead any such consent as an estoppel to claim damages. In the absence of such pleading it is obvious that this evidence and the instruction addressed thereto were outside the issues. But inasmuch as the reception of this evidence was not objected to upon that ground, we cannot say that the court erred in giving this instruction.

Appellants complain of an instruction to the effect that, if the jury found from the evidence that it was reasonably necessary to destroy the bridge in order to clear the creek of logs and debris, no damages could be awarded for its destruction. This was not error. The prime purpose of the deed of easement was to permit the clearing of the stream. If the destruction of the bridge was necessary to that purpose, its destruction was within the contemplation of the grant.

It is urged that the court erred in directing the jury to return a verdict in favor of respondents Belle Brown and Roxie Parish. This instruction was clearly correct. They had no part in the commission of the tort. Whether judgment against their husbands would bind the property of the two communities is a different question. Inasmuch as no judgment was entered against any of the respondents, a decision of this question is not now imperative. But since this case must be retried and the court's instructions seem to indicate the view that no judgment binding the communities could be rendered on the cause of action stated, we deem it expedient briefly to examine the question. Respondents were not contractors. They were officers of the district, elected to manage its affairs. They committed the tort complained of in connection with the business of the district, not the business of the communities. Since they exceeded their authority the tort was their personal tort. We are clear that the case falls within the rule announced in Brotton v. Langert, 1 Wash. 73, 23 Pac. 688, and followed in Day v. Henry, 81 Wash. 61, 142 Pac. 439, rather than that stated in Kangley v. Rogers, 85 Wash. 250, 147 Pac. 898. In the latter case, the distinguishing elements are clearly and sufficiently noted. Neither the facts pleaded nor those developed in evidence constitute a cause of action against the communities.

Judgment reversed, and cause remanded for a new trial.

Holcomb, Parker, Fullerton, and Mount, JJ., concur.

[illegible] vicious propensities
[illegible] dog [illegible] thereof [illegible] verdict
[illegible] two [illegible] common [illegible]
[illegible] injuries inflicted [illegible]
[illegible] bit [illegible]
[illegible] previously bitten two [illegible]
[illegible] teased [illegible]
owned [illegible] vicious propensities
[illegible] biting [illegible] child [illegible]
[illegible] point [illegible]

UMNA HALM, by His Guardian etc.,
Respondent, v. JOHN MADISON,
et al., Appellants.

(65 Wash. 588, 1911.)

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 4, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for personal injuries received from the bite of a dog. Affirmed.

Fullerton, J.--The respondent, a minor, brought this action against the appellants to recover for injuries received from the bite of a dog owned and kept by the appellants. He recovered in the court below, on a trial had before the court sitting without a jury, and this appeal followed.

The only error assigned is that the findings and judgment of the court are contrary to the weight of the evidence. It is contended that the evidence did not justify the findings of the court to the effect that the dog was vicious, and that the defendants knew of its vicious propensities. But as we read the record, the evidence clearly supports these findings. It is not questioned that the dog bit the respondent, and there was evidence tending to show that it had bitten another child shortly before that time, and had bitten a boy who came to one of the neighboring houses to deliver meat, and the appellants' daughter testified that he was cross when teased. As to the appellants' knowledge, it was shown that one of the appellants had been warned of the dog's vicious propensities, and had been told of its biting another child. It may be that she did not believe the statements; in fact, she testified that the dog was at another place when it was claimed it had bitten the first child, but this does not alter the legal aspects of the case. The notice was sufficient to put her upon inquiry, and notice to one joint owner is notice to all of the owners.

We think the evidence sustains the judgment, and it will therefore stand affirmed.

Dunbar, C. J., Mount, and Parker, JJ., concur.

Gose, J. (dissenting)--The husband and wife have not heretofore been regarded as joint owners of the community property in this state. I do not think that community property is held by such a tenure, nor do I think that the knowledge of the wife of the vicious propensities of a domestic animal can be imputed to the husband. She is in no sense his servant or agent. He is the manager and has the untrammeled right of disposal of the community personal property. I therefore think that the judgment against the husband was erroneous, and that it should be reversed as to him.

HENLEY v. WILSON et ux. (S.F. 2,083.)
(Supreme Court of California. Sept. 13, 1902.)

(70 Pac.Rep. 22.)
(137 Cal. 273)

Department 2. Appeal from superior court, city and county of San Francisco; George H. Bahrs. Judge.

Action by Bessie Henley against J. A. Wilson and wife. Judgment for plaintiff. Defendant J. A. Wilson appeals. Affirmed.

Temple, J.--Action for damages caused by a violent assault committed upon the plaintiff by the defendant Delphine Wilson, wife of the appellant, J. A. Wilson. It was admitted on the trial that the husband was not present at the time of the assault, and had no knowledge of the occurrence until some time afterwards. An instruction was asked by appellant to the effect "that the husband is not responsible for the wrongful acts of the wife committed out of his presence, and without his knowledge or consent." This was refused, and a verdict for plaintiff was returned, and judgment went against both defendants, from which the husband appeals. Whether this proposed instruction should have been given is the only question involved.

While there is a conflict in the authorities, appellant concedes at the outset that a majority of the cases still hold to the commonlaw rule which makes the husband liable absolutely for all torts committed by the wife. This statement is too broad. Pom. Rem. & Rem. Rights, Sec. 320, 321, states that as to all torts committed by the wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, the common-law rules remain unchanged. Since she is permitted to manage her separate estate as though she was a feme sole, it follows that in such management she must be responsible as a feme sole. The common-law rule must prevail unless it has been changed by statute. No express change has been made, but it is contended that, since the wife now retains as her own such property as she has at the time of the marriage, and such as she afterwards may acquire by gift, descent, or devise, and may manage her own separate estate, she should now be held solely responsible for her torts, on the principle that the reason for the common-law rule has ceased to exist, and therefore the rule should cease. But what all the reasons for the rule were originally is not now so easy to determine, and accordingly it was said by Mr. Justice Field, in Van Maren v. Johnson, 15 Cal. 312: "It matters not what was the origin of the common-law doctrine; its rule is settled and exists independently of the grounds on which it originally rested." These rules are quite ancient, and cannot be said to have been rested solely upon the fact that the husband may take all the wife's personal property and her earnings, and may control her person, or that she can have no estate from which a judgment against her could be satisfied, added to the supposed merger of her legal personality in his. It was said by the supreme court of Texas in Zeliff v. Jennings, 61 Tex. 458, that the doctrine "rests perhaps mainly upon the supposition that her acts are the result of the superior will and

influence of the husband. Owing to the intimate relation of husband and wife, and to the nature of the control given him by law and social usage over her conduct and actions, it would be difficult, if not impossible, for the courts to determine when she had acted at her own instance, and when she was guided by his dictation." And it may be added, in a case where the wife has no separate estate, if the husband cannot be held, the aggrieved person will have no redress, and upon the wife there will be no restraint of pecuniary responsibility. If so disposed, she could with impunity blast the lives of her neighbors by most grievous slanders. Nor is it true, in the absolute sense, that she has no interest in the estate of her husband. She is entitled to a support out of it, and to be maintained in a degree of comfort proportionate to his wealth. To make this fortune liable for her torts may directly affect her. It may diminish her comfort and style of living. As to the community property, if the coverture is ended in any mode during her life without her fault, one-half of it will be hers. Most wives consider themselves equally interested in accumulations, and properly so. At common law, even, they had morally an interest in the fortune made or inherited by the husband. In some circumstances they could secure a separate maintenance from it on a scale proportionate to its amount. We hear much of the power over the wife given to the husband by the common law, which is now thought to have been oppressive. But it had its other side. It was calculated to make a more complete and indissoluble union, in which the wife had rights that could be lost only by her violation of her marriage vow, and, I think, to make the common earnings liable for the torts of each tended in the same direction. Each became the other's "keeper." These earnings are held by the husband, but are liable for the support of the wife. Since the reason of the common-law rule cannot now be fully known, we are at liberty to suppose that it was founded upon these and many other considerations, as well as upon those usually stated. But many of the reasons upon which it is commonly supposed the common-law rule depended still subsist, and the express limitations upon the liability of the husband or of the community property for the debts of the wife imply that in other respects the common law still prevails. For instance, the husband is the head of the family, and may choose the residence. Civ. Code, Sec. 156. He is entitled to the custody and control and to the earnings of minor children as against the wife (Id. Sec. 197), unless during separation (Id. Sec. 198). The provisions of the Code giving the wife the power to make contracts with reference to property negative the idea that she has in other respects the power or the responsibility of a feme sole. So section 167 of the Civil Code expressly provides that the community property shall not be liable for the debts of the wife contracted before marriage, leaving it still liable for her debts contracted after marriage. See In re Burdick's Estate 112 Cal. 398, 44 Pac. 734, opinion of Mr. Justice Harrison; also Van Maren v. Johnson, 15 Cal. 308; Vlautin v. Bumpus, 35 Cal. 214. Van Maren v. Johnson was a suit against husband and wife for services rendered the wife before marriage. Judgment was against both, but in terms it provided that it could be satisfied from her separate property or from the community property. The husband appealed, and the only question was as to the liability of the community property. Upon this question Judge Field said: "The statute in terms provides that the separate property of the wife shall be liable for her debts contracted previous to the marriage, and at the same time that the separate property of the husband shall not be thus liable. It is silent as to the liability of the common property

as to such debts, and also as to the liability of that property for the previous debts of the husband." The learned judge then proceeds to show that the common law is the basis of our jurisprudence, and that the statute has modified that law, on this matter, only in two respects: "It renders the separate property of the wife liable and exempts the separate property of the husband. Beyond this exemption of his separate property his liability exists; that is tosay, he is liable to the extent of the common property." That is, the common law prevails except as it has been modified by statute. Furthermore, by the express provision of the statute, the wife cannot be sued without her husband for a tort which does not concern her separate estate. She can sue or be sued alone only when: (1) The action concerns her separate property or her claim to the homestead; (2) when the action is between herself and husband; (3) when she is living in separation by his desertion, or under an agreement in writing. Code Civ. Proc. Sec. 370. And it has been held that in an action for damages which accrue for the injury of the wife the husband must be joined; the recovery will be community property. McFadden v. Railroad Co., 87 Cal. 464, 25 Pac. 681, 11 L.R.A. 252; Neale v. Railroad Co., 94 Cal. 425, 29 Pac. 954. See, also, Sheldon v. The Uncle Sam, 18 Cal. 527, 79 Am. Dec. 193. I think there would be no profit in discussing the cases cited by appellant from other states. In some the statutes expressly provide against the liability of the husband for the torts of the wife. In others all the earnings of the wife during coverture, and all recoveries for personal injuries, are her separate property. In some cases the tort accrues in the management of her separate estate. But whatever the rule may be in other jurisdictions, the principles which are determinative of the case have been settled here, and are in accordance with the rule prevailing in a majority of the states. Some of the cases cited by the respondent are interesting, because they discuss the reason upon which the common-law rule was believed to be based. See Kowing v. Manly, 49 N. Y. 201, 10 Am. Rep. 346; Alexander v. Morgan, 31 Ohio St. 548; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366.

The judgment is affirmed.

I concur: Henshaw, J.

McFarland, J.--I concur in the judgment of affirmance. I also concur in the opinion of Mr. Justice Temple, with the exception of a few expressions therein which are not necessary to a determination of the case. I see no escape from the proposition that a husband's common-law liability for the torts of his wife has not been changed by the statutory law of California. If there be any injustice in the doctrine, the remedy is with the legislature.

Note: The comm. liable for debts
created by the hus., or by the comm.
Neither spouse liable nor the comm.
liable for tort of [illegible] — by the comm.
hus., not liable for ante-nuptial
torts of wife.

CHAPTER XVI

CITATIONS

When is community property liable for separate debts?

Andrews v. Andrews (1897)	3 W. T. 286.
Stockand v. Bartlett (1892)	4 Wash. 730
McDonough v. Craig (1894)	10 Wash. 239.
Dillon v. Dillon (1896)	13 Wash. 594.
McKee v. Whitworth (1896)	15 Wash. 536.
Shuey v. Holmes (1898)	20 Wash. 13.
Clark v. Eltinge (1902)	29 Wash. 215.
Deering v. Holmes (1901)	26 Wash. 588.
Anderson v. Kilker (1805)	38 Wash. 632.
Graham v. Smart (1906)	42 Wash. 205.
Crawford v. Morris (1916)	92 Wash. 288.

The liability of the community for torts

Strom v. Toklas (1914)	78 Wash. 223.
Switzer v. Sherwood (1914)	80 Wash. 19.
Prentiss v. Bogar (1915)	84 Wash. 481.
Hicks v. Baumgartner (1917)	96 Wash. 71.
Geissler v. Geissler (1917)	96 Wash. 150
Mogelberg v. Calhoun (1917)	94 Wash. 662.
Wilson v. Stone (1916)	90 Wash. 265.
Kies v. Wilkinson (1921)	114 Wash. 89.
Hendrickson v. Smith (1920)	111 Wash. 32.
Farmers Market v. Ida Austin (1922)#16621	18 Dec. 45

LUMBERMEN'S NATIONAL BANK, Appellant, v.
DAVID GROSS, Garnishee, Respondent.

(37 Wash. 13, 1905.)

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered July 29, 1904, upon findings in favor of a garnishee, after a trial on the merits before the court without a jury, discharging a writ of garnishment. Affirmed.

Rudkin, J.--The plaintiff brought this action against Johanna Gross and others to recover judgment on a promissory note. In such action a writ of garnishment was issued, and served on the garnishee respondent, David Gross, and the liability of the garnishee is the only question before the court on this appeal. Judgment was rendered in the court below discharging the writ.

The facts on which it is sought to hold the garnishee liable are these: In 1895 the firm of Gross Brothers, a partnership composed of the respondent, David Gross, Ellis H. Gross, husband of the defendant Johanna Gross, and Morris Gross and Abraham Gross, was indebted to the London & San Francisco Bank. For the purpose of securing this indebtedness, and further advances to be made to the firm by the bank, the respondent, David Gross, and Morris Gross, two members of said firm, mortgaged their individual property in the city of Tacoma to the bank. In 1896 this mortgage was foreclosed, and the individual property of the respondent and the said Morris Gross, covered by said mortgage, was sold on execution, and bid in by the bank, and by it accepted at a valuation of $18,000, which was applied on the firm indebtedness to the bank. On the 23d day of September, 1898, the defendant Johanna Gross and her husband, Ellis H. Gross, entered into a written agreement reciting, among other things, the payment of $18,000 of the firm indebtedness by the respondent and the said Morris Gross out of their individual property; the death of Abraham Gross, one of the members of said firm; that the defendant Johanna Gross and Ellis H. Gross, her husband, were liable for, and should pay one-third of, said sum of $18,000, or $6,000; and that $4,500 of said sum of $6,000 was due to respondent, David Gross, and $1,500 thereof to the said Morris Gross. This agreement closed as follows:

> "Now, therefore, in consideration of the premises, we, Ellis H. Gross and Johanna Gross, do hereby acknowledge ourselves jointly and severally indebted to David Gross, in the sum of $4,500, and to Morris Gross, in the sum of $4,500, and agree to pay them the said sums respectively on demand, after date hereof, without interest;"

and was signed by the said Ellis H. Gross and Johanna Gross. This agreement is taken from the findings of the court. The agreement to pay Morris Gross the sum of $4,500 is probably an error, and was intended for $1,500, but such error is not material for the purpose of this appeal.

Again, some time prior to the 16th day of October, 1893, the firm of Gross Brothers became indebted to Brigham-Hopkins Company, for merchandise

sold to the firm. Suit was brought on this account, after the death of Abraham Gross, against the three surviving members of the firm. This suit was settled and compromised by the respondent, and in payment and satisfaction of the portion of the amount so paid, which should have been paid by the said Ellis H. Gross, the said Ellis H. Gross and Johanna Gross, on the 10th day of November, 1903, executed to the respondent their certain joint and several promissory note, for the sum of $600, payable on demand. On the 10th day of June, 1903, The Ellis H. Gross Company was indebted to Johanna Gross in the sum of $4,725, and on that day executed and delivered to Johanna Gross its certain promissory note for said amount, payable on demand. This note was the separate property of Johanna Gross. On the 10th day of January, 1904, Johanna Gross assigned and transferred said last mentioned promissory note to the respondent, David Gross, in payment of the amount due on the $600 note hereinbefore described, the balance to be applied on the agreement to pay to the respondent the sum of $4,500 hereinbefore described.

The garnishment in question was not issued until February 27, 1904. Prior to the service of the writ of garnishment, The Ellis H. Gross Company was adjudged insolvent, and a receiver appointed, and on the 3d day of March, 1904, the receiver of The Ellis H. Gross Company paid to the respondent the sum of $2,274.70, on account of the said promissory note, so assigned and transferred by Johanna Gross to the respondent. The Ellis H. Gross Company is insolvent, and no further sum will be paid for or on account of said note. At the time said note was so assigned by the said Johanna Gross to the respondent, Johanna Gross was insolvent, and had no other property subject to execution. Johanna Gross was never a member of the firm of Gross Brothers, and her separate property was in no manner liable for the firm debts.

Upon these facts the appellant contends that the $600 note, and the agreement to pay the sum of $4,500, mentioned in the foregoing statement of the case, were without consideration, so far as concerns the defendant, Johanna Gross, and that there was, therefore, no consideration for the assignment and transfer of her note of $4,725 to the respondent, David Gross, in payment and satisfaction of said note and agreement, and that the transfer so made was void as against the appellant.

It will be conceded that the separate property of Johanna Gross was not liable for the payment of any part of the firm indebtedness of Gross Brothers, and that no personal judgment could be recovered against her for any part of such indebtedness. This concession is made, of course, in the absence of any agreement on her part rendering herself, or her separate property, liable. We presume it will also be conceded that Ellis H. Gross was bound to repay to the respondent, David Gross, his pro rata share of the firm indebtedness which the respondent was compelled to pay out of his individual property, and that such obligation was a community obligation of the said Ellis H. Gross and his wife, Johanna Gross. That this pre-existing debt or obligation was a sufficient consideration for the agreement and note, in so far as Ellis H. Gross was concerned, cannot be questioned. 1 Daniel, Neg. Inst. (5th ed.), Sec. 184.

We are also satisfied that it was a sufficient consideration for

the agreement and note of the community consisting of husband and wife. A community debt or obligation, past or present, is a sufficient consideration for a joint note of the husband and wife. Upon such a note a personal judgment can be recovered against both husband and wife, and on such judgment the community property of the husband and wife, and the separate property of either, not otherwise by law exempt, can be taken in execution. It seems to us that any other rule would lead to the utmost uncertainty and confusion. Under the law of this state, a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose. Her signature to a contract imports the same obligation as the signature of any other person, viz.: that a judgment may be taken against her for failure to perform, and that her separate property may be taken in execution to satisfy the judgment. We are satisfied, therefore, that the note and agreement referred to were founded upon a sufficient consideration, as to both Ellis H. Gross and the defendant Johanna Gross, and that the transfer of the note of Johanna Gross, though her separate property, in satisfaction of such note and agreement, was not without consideration, and was not fraudulent or void as against the appellant bank.

The judgment of the court below was in accordance with these views, and the same is affirmed. [illegible]

Mount, C. J., Dunbar, Hadley, and Fullerton, JJ., concur.

Root and Crow, JJ., took no part.

The obligation [illegible] hus. [illegible] prin[illegible] pro rata share [illegible] indebtedness [illegible] comm. debt [illegible] consideration [illegible] joint note [illegible] hus. [illegible] sep. [illegible] hus's partner [illegible] debt [illegible] estate.

The joint note [illegible] hus. [illegible] binds [illegible] sep. [illegible] assignment [illegible] her sep. [illegible] fraudulent [illegible] consid.

[illegible]

[illegible]

[illegible]

[illegible]

NORTHERN BANK & TRUST COMPANY, Appellant v.
HELEN M. GRAVES et al., Respondents.

(79 Wash. 411, 1914.)

Appeal from a judgment of the superior court for King county, Gilliam, J., entered August 6, 1913, in favor of the defendants, upon agreed facts, in an action on contract. Reversed.

Ellis, J.--This is an action against the defendant wives on a promissory note which was signed by them and also by their hhsbands. The husbands were made parties defendant in compliance with the statutory requirements that husbands be joined in suits against married women. Rem. & Bal. Code, Sec. 181 (P.C. 81 Sec. 11).

The action was tried before the court without a jury upon a written statement of agreed facts, from which it appears that the husbands, for some time, had been engaged in business as partners, under the firm name of Federal Paint & Wallpaper Company; that, in the prosecution of this business, they had become indebted to the plaintiff for money borrowed and used in the business, in the sum of $2,900, evidenced by five demand notes, executed by all of the defendants in this action; that, on July 1, 1912, about seven months after the maturity of the last note, the note now in controversy for $2,900, due one day after date, was executed by the partnership and also by the individuals composing it, and, before delivery, was signed on the back by the individual partners and their wives. There is no controversy as to the execution of the note. The note contains the usual words "one day after date, without grace, I promise to pay," and waives presentment for payment, protest, and notice of protest for nonpayment by all the parties thereto. From the statement of agreed facts, it further appears that there was no consideration for the wives signing the note "other than such consideration as inured to the benefits of the matrimonial community existing between the said defendants E. L. Graves and Helen M. Graves, and said defendants G. E. LaBelle and Clara LaBelle." It is admitted that the husbands have gone into voluntary bankruptcy, and that the plaintiff filed its claim against the bankrupt estates on account of this note, and received a dividend of $152.01. It is further admitted that the plaintiff is the owner and holder of the note, and that no part of it has been paid, except interest to November 1, 1912, and this bankruptcy dividend. The trial court dismissed the action. The plaintiff appeals.

There is no claim of absence or failure of consideration as against the husbands, nor that the signatures of either the husbands or the wives to the note in question were obtained by fraud or through mistake. It is not claimed by the respondents that they signed as indorsers, their answer alleging and their argument being that they signed merely as members of their respective communities, and in order to bind the communities. This was, of course, unnecessary, since the signature of the husband alone to a note given for a community debt or in prosecution of a community enterprise is all that is necessary to bind the husband personally and the community, and to subject the community property to the

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judgment thereon. The signature of the wives for this purpose would be an idle thing and without effect. The wives, in signing this instrument, must have intended that act to have some effect rather than none. Toon v. McCaw, 74 Wash. 335, 133 Pac. 469. Such also must have been the intention of the appellant in requiring their signatures. The fact that the wives made themselves parties to the note by signing it raises a presumption, not rebuttable by parol evidence, that they intended to bind themselves personally. In Henrich v. Wist, 19 Wash. 516, 53 Pac. 710, the same defense was pleaded as that here invoked. The note was a joint and several note of the husband and wife. The husband died. The note was not presented to the administrator of the community estate within the time prescribed by statute. Action was thereafter brought against the wife upon the note. The answer alleged a parol understanding that she was not to be held personally liable thereon, and that she signed it only as a member of the community. This court, sustaining a demurrer to the answer, said:

"A defense of that kind should not be allowed to contradict the terms of the written instrument. No fraud was alleged as against the appellant in inducing her to sign the note, and we are of the opinion that her separate property became liable upon the contract."

In Lumbermen's Nat. Bank v. Gross, 37 Wash. 18, 79 Pac. 470, this court, holding that a community debt was sufficient consideration for a joint note of husband and wife, said:

"A community debt or obligation, past or present, is a sufficient consideration for a joint note of the husband and wife. Upon such a note a personal judgment can be recovered against both husband and wife, and on such judgment the community property of the husband and wife, and the separate property of either, not otherwise by law exempt, can be taken in execution. It seems to us that any other rule would lead to the utmost uncertainty and confusion. Under the law of this state, a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose. Her signature to a contract imports the same obligation as the signature of any other person, viz.: that a judgment may be taken against her for failure to perform, and that her separate property may be taken in execution to satisfy the judgment."

We are thus committed to the doctrine, which it would seem must, in any event, necessarily follow from the removal of the wife's common law disability to contract, that a wife's signature to a contract imports the same obligation as the signature of any other person, namely, that a judgment may be taken against her for her failure to perform, and that her separate property may be taken in execution to satisfy the judgment.

As we have said, there is no claim that the wives signed the note merely as indorsers, though the position of the names, in the absence of the tacit admission that they signed as makers, might, under the sixth clause of Sec. 17 of the negotiable instruments act. Rem. & Bal. Code, Sec. 3408 (P.C. 357 Sec. 33), warrant the holding that they signed as indorsers. Assuming, however, that they did sign as indorsers, that would not alter the case. They must still be held to have signed even in that

capacity to some purpose rather than none. Their liability, under the foregoing decisions, would be the same as that of other indorsers. As pointed out in Bradley Engineering & Mfg. Co., v. Heyburn, 56 Wash. 628, 106 Pac. 170, 134 Am. St. 1127, the main object of the negotiable instruments act was to make the law of negotiable instruments certain and to make such instruments speak the true intent of the parties. There is no good reason, either in law or morals, why this purpose should not prevail, even as between the original parties to a negotiable instrument, in the absence of fraud, mistake or failure of consideration. In any view of the case, the respondents must, under Sec. 29 of the negotiable instruments act be held as accomodation parties. That section declares:

"An accomodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accomodation party." Rem. & Bal. Code, Sec. 3420 (P. C. 357, Sec. 57).

As we have seen, if they were makers the community debt was a sufficient consideration for the joint note of husband and wife. If they be held indorsers, whether there was, in fact, an independent consideration for their indorsement is immaterial, since, without consideration, they, as accomodation parties, would be liable to the holder for value even with notice that they were only accomodation parties. This same rule prevails as in favor of an original payee. Gleeson v. Lichty, 62 Wash. 656, 114 Pac. 518.

It is true that this court, in the early case of Board of Trade of Seattle v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. 919, 16 L. R. A. 530, held that, notwithstanding the wife's right to enter into contracts and manage her separate property, she cannot make a contract of partnership with her husband, and that, in the later case of Elliott v. Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. 1016, referring to the Hayden case, we said:

"The rule discussed and decided in the case cited is for the protection of the wife's separate property, to prevent her from entering into such engagements with her husband that her separate property may be taken from her in satisfaction of his debts."

That, however, is a very different thing from saying, as we are asked to say here, that the removal of the wife's disabilities does not authorize her to enter into the same contract and incur the same obligations to third persons that any other person sui juris may enter into and incur. The contract here, whether the respondents be regarded as makers or as indorsers, is a contract not with their husbands, but with the appellant.

It is also true, as this court has often held, that a wife's separate property is not ordinarily liable for community debts, but that is a very different thing from holding that she cannot make it so liable by her own contract. That, also, is a rule for her protection from the act of her husband. It was never intended to reimpose her common law disabilities.

We have not discussed citations from other jurisdictions, since our own decisions are clearly controlling.

It cannot be doubted that a creditor has the right to proceed against a bankrupt debtor's codebtor, whether the codebtor be primarily or secondarily liable. Section 15 (a) Bankruptcy Act.

The judgment is reversed. For 121.

Crow, C. J., Main, Chadwick, and Gose, JJ., concur.

a prom. note executed by [illegible] [illegible], comm. debt binding comm. [illegible] sep. estate [illegible] [illegible] signed [illegible] [illegible] indorsers in view of removal [illegible] [illegible] disabilities, [illegible] binding [illegible] sep. estate.

Wives indorsing [illegible] [illegible] accomodation parties, [illegible] R & B. § 3420 defining an accomodation party [illegible] [illegible] signed [illegible] [illegible] drawer acceptor [illegible] indorser [illegible] [illegible] party liable thereon.

[illegible] rule [illegible] sep. estate [illegible] liable [illegible] comm. debts [illegible] present [illegible] assuming [illegible] liability [illegible] executing [illegible] [illegible]

D. G. RUSSEL, Appellant, v. JENNY GRAUMANN, Respondent.

(40 Wash. 667, 1905.)

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 25, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action against a wife for medical and hospital services to the husband. Reversed.

Hadley, J.--This is an action to recover for services rendered by the plaintiff as a physician, and also for hospital services, the latter claim having been assigned to the plaintiff. The services were rendered to one J. H. Graumann, during his last illness, at the Sacred Heart Hospital, in the city of Spokane. The defendant was the wife of the deceased at the time of the latter's death. The complaint avers that the deceased and the defendant were husband and wife, and that, at all times mentioned in the complaint, they maintained the status and relationship of a family, mutually contributing to each other's aid and support as such family. It is also alleged that an administrator of the estate of the deceased was duly appointed by the superior court of Spokane county, and that the claims here involved were duly presented to said administrator, and were allowed by him and by said court; that there are no assets of said estate within the possession of said administrator, or within the state of Washington. The answer admits that, at all times mentioned in the complaint until the death of the deceased, he and the defendant were husband and wife; but denies that during those times they maintained the status and relationship of a family, mutually contributing to each other's aid and support as such family. The cause was tried by the court without a jury, and resulted in a judgment for the defendant and for costs against the plaintiff. The plaintiff has appealed.

Respondent moves to dismiss the appeal on the alleged ground that appellant has not furnished an appeal bond as required by law. It is insisted that the bond purports to be both a supersedeas and cost bond; that it is insufficient in amount for a supersedeas bond; and that the court fixed no amount for such bond. The judgment rendered against appellant was that he should take nothing by his action, and that respondent should recover $17 costs. The only purpose the supersedeas bond can serve is to stay the issuance of execution for the $17. The judgment is a final one for the recovery of a definite sum of money. It was therefore unnecessary for the court to fix an amount for a supersedeas bond. The bond given is in the sum of $240. It therefore includes the $200 necessary for a cost bond and, in addition thereto, more than double the amount of the judgment. Respondent urges that a supplemental record which she has brought here shows that a writ of garnishment has issued in the action, which involves $305.30 of her funds, and that the bond is, for that reason, insufficient in amount. The amount of the appeal and supersedeas bond is determined by the judgment in the cause, and is not dependent upon the existence of the garnishment or upon the amount of funds to which it is directed. The motion to dismiss the appeal is denied

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The appellant seeks to maintain this action against the wife under the authority of Bal. Code, Sec. 4508, which reads as follows:

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

That ordinary medical aid and advice for the wife create family expenses has been repeatedly held. 15 Am. & Eng. Ency Law (2d ed.), 877, and cases cited. The husband is a part of the ordinary family, and under a statute providing in general terms for liability for "expenses of the family," as does our statutes quoted above, we see no reason why medical and hospital services rendered to a husband are not as fully comprehended in the statute as are those rendered to a wife. We do not understand that respondent seriously contends that such is not the law, but she urges that the necessary family status or relationship intended by the statute did not exist between her and her husband so as to render her liable. The record discloses that the trial court adopted that view, and held that recovery cannot be hand in this action for the reason that the husband and wife did not sustain the relation of a family within the meaning of the statute. We shall therefore confine our discussion to the relationship that is shown to have existed between the respondent and her deceased husband.

Appellant urges that the pleadings do not raise the issue that the family relationship had been severed, and that the testimony upon that subject is not relevant to any issue in the case. It is true the answer does not in terms aver the severance of such relation, and appellant argues that the denial of the averments of the complaint on the subject of the family relationship is couched in such involved language that it is insufficient as a denial. However, in view of the result we have determined should be reached in the case, we shall, without discussion, pass over appellant's contention as to the pleadings, shall treat them as including the issue that the family relationship was severed, and shall consider all evidence offered upon that subject.

The evidence discloses that for about three years the deceased had been residing in Spokane, where he pursued his occupation as a painter. During at least a part of that time the respondent was not in Spokane, but it is not established by the evidence, as we view it, that she was not at any time in Spokane with her husband. During his last illness, and at the time of his death, she was in the state of Pennsylvania. But, assuming that respondent may not at any time have been with her husband in the city of Spokane, it does not follow from that fact alone that the family relationship had in a legal sense been severed. It is not necessary that the husband and wife shall at all times reside together under the same roof, in order that the legal status of the family may be preserved. It is a matter of common knowledge that many husbands in their struggles for a livelihood are often required to be far from home, and for long periods of time, and that such enforced absences are in behalf of the family, in order that the comforts of life may be provided for them. Such absence may be a strong evidence of the affection and regard for the family, rather than otherwise. It will not do to say that in such cases the family status is destroyed by somewhat continued absence of the husband.

There is nothing in this record to show that the deceased husband of respondent did not establish his residence in this state for the purpose of providing for his family, or that respondent and her children did not intend at some time to join him here. There is no positive evidence in the case that any intention ever existed on the part of either husband or wife to sever the family relationship. Any conclusion of that kind is a mere inference from the fact that the husband was in Washington and respondent was in Pennsylvania. So far as the evidence discloses, an affectionate relationship continued to exist until the death of the husband. The two corresponded frequently while he sojourned at the hospital during his last illness. Letters of tender solicitude for her husband were written by respondent to the Sisters at the hospital, and frequent anxious inquiry was made concerning him. Respondent remitted to the hospital, on different occasions, amounts aggregating $72, to apply on the hospital expense, and promised to pay the remainder. Thus she at all times during his illness manifested the most sincere regard for his welfare and contributed to aid in his comfort. Moreover, after the death of the husband, the respondent petitioned the superior court of Spokane county to set aside to her the entire estate of her husband as being less than $1,000 in value. Her petition must have been based upon the existence of the family relation. She procured a decree awarding the estate to her for the support of herself and children. The statute which authorizes such award, Bal. Code, Sec. 6215, was intended as a provision for the family surviving the husband and father. Respondent cannot claim the estate of the husband in behalf of the surviving family, and at the same time repudiate his relationship to that family in legal contemplation. Under all the evidence, we think the court erred in holding that the family relation had been severed prior to the death of the husband.

In Jennison v. Hapgood, 10 Pick. 77, the husband was long absent from his family, and led a somewhat wandering life. The court said:

"The presumption is that he did not intend to abandon them, and this presumption is so strong, that it requires the most cogent proof to remove it."

In Hudson v. King Brothers, 23 Ill. App. 118, the liability of the wife for a family expense created by the husband was under consideration. It was contended that the wife was not liable for the reason, as she claimed, that she and her husband were living separate and apart. The husband was much away from his family. After reviewing the acts of the parties bearing upon this subject, the court said:

"If there had been an actual separation, neither of the parties would have done as the evidence shows they did. There is nothing in this point."

We think it may as well be said here that, if there had been an actual separation between respondent and her husband, they would not have done as they did.

Respondent relies much upon the authority of Gilman v. Matthews (Colo. App.), 77 Pac. 366. There it was sought to establish liability of a wife for the expense of clothing used by the husband alone. It was

held, under the issues and facts shown in evidence, that the wife was not liable. The court, however, stated in the opinion that there was no evidence showing that the family relation existed between the parties. While it may appear from the reasoning of that court that its views may not be altogether in harmony with what we have hereinbefore said concerning the nature of facts which may be sufficient to establish the legal existence of the family relation, yet the case cited was determined in favor of the wife, on the theory that the family relation was not shown to exist. Such is not true in the case at bar, under our views of the evidence, as already stated. It follows that appellant is entitled to recover.

The judgment is reversed, and the cause remanded with instructions to enter judgment for appellant.

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Mount, C. J., Fullerton, Rudkin, Crow, Dunbar, and Root, JJ., concur.

Under Bal. § 4508, providing [illegible] expenses [illegible] family [illegible] chargeable [illegible] liable [illegible] hospital charges [illegible] medical attendance [illegible] hus. [illegible] last illness, [illegible] residing [illegible] state [illegible] positive [illegible] family relation [illegible] severed [illegible] contrary [illegible] intimate communication [illegible] husband's [illegible] estate [illegible] competition [illegible] set aside [illegible] exempt [illegible] support [illegible] herself [illegible]

Note [illegible] wife's separate prop. [illegible] liable [illegible] hospital bills [illegible] husband [illegible] necessaries

E. R. BUTTERWORTH & SONS, Respondent, v.
SARAH C. TEALE, Appellant.

(54 Wash 14, 1909)

Appeal from a judgment of the superior court for King county, Griffin J., entered October 1, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Morris, J.--This action was brought to recover for services as undertaker in the burial of appellant's husband. The complaint avers the services to have been performed "at the instance and request of defendant," and that they "were of the reasonable and agreed value of $561." The answer denied liability, and alleged the services to have been rendered at the request and upon the credit of a fraternal organization of which deceased was a member at the time of his death; which was denied. Upon these issues trial was had before the court without a jury, and the court found there was no express contract for the rendition of the services, but that they were rendered with the knowledge and consent of defendant, and were of the reasonable value of $150, in which sum judgment was entered, and defendant appeals.

Appellant contends that error lies in that respondent sued upon an express contract and recovered upon a quantum meruit. The language of the complaint is, "at the instance and request of defendant," the finding justified by the proof is "with the knowledge and consent of defendant." There is no such fatal variance as would necessitate a finding of error.

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

"Whenever it shall be alleged that a party has been so misled that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just."

Bal. Code, Sec. 4949 (P.C. Sec. 420).

If there was a variance between the pleading and proof, it availed appellant nothing, without a showing of resulting injury, in which case the powers of the lower court were ample to grant the proper relief. This section has been construed so often by this court that we do not now care to enlarge upon it. The following cases are decisive of the point, contrary to appellant's contention. Olson v. Snake River Valley R. R. Co., 22 Wash. 139, 60 Pac. 156; Wheeler v. Buck & Co., 23 Wash. 679, 63 Pac. 566; Ernst v. Fox, 26 Wash. 526, 67 Pac. 258.

Finding no error, the judgment is affirmed.

Rudkin, C. J., and Dose, J., concur.

Fullerton, J., (concurring)--I concur in the conclusion reached on the question discussed and decided in the foregoing opinion, and, also, in the disposition made of the entire case. The appellant, however, in addition to the contention determined in the opinion, made the further contention that a wife is not, either at common law or in virtue of the statute, personally liable for the burial expenses of her husband, where she has not contracted to pay them and he leaves her no estate. This question has seemed to me of sufficient interest and importance to be worthy of notice, and since it is presented by the record and thus necessarily decided, I shall briefly express my views upon it.

The cases with substantial uniformity agree that at common law a husband was personally liable for the funeral expenses of his wife, whether or not she left an estate of inheritance, or whether or not he had expressly contracted to pay them. In re Weringer's Estate, 100 Cal. 345, 34 Pac. 825; Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168; Brand's Ex'r. v. Brand. 109 Ky. 721, 60 S. W. 704; Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124, Staples's Appeal, 52 Conn. 425; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Jenkins v. Tucker, 1 H. Bl., 90. And this although the wife at the time of her death was living separate and apart from the husband. Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670.

But while the courts agree substantially on the rule, they are not so unanimous as to the reasons for the rule, or as to the grounds upon which it rests. In the Georgia case cited, it was held that the duty of the husband to defray the funeral expenses of the wife grew out of the obligation of the husband to furnish the wife with the necessaries of life, while in others it is based on the ground of duty arising from the relation of the parties. Subject to the laws passed in relation to the public health, the husband has the right of possession of the body of his deceased spouse between death and burial; he has the right to direct the place and manner of burial, and may change the place of sepulture at any time; he may recover in damages against any one who unlawfully mutilates the dead body, or otherwise wrongfully interferes with it; and neither the court in probate, nor the personal representative of the deceased, if such representative is other than the surviving husband, has any right to interfere with such possession. From these rights arise the corresponding duty of bearing the expenses of the interment.

Whether the common law imposed the duty upon the wife to bury the husband the authorities are not so clear. It is stated as the general rule in 12 Cyc. 1449, that the wife is not bound to use her separate property for the payment of the husband's funeral expenses. But one case is cited to support the text (Robinson v. Foust, 31 Ind. App. 384, 68 N. E. 182, 99 Am. St. 269), and that one seems not in point. The question before the court was whether a wife who supported her husband during his last illness out of her separate property on the promise of the husband's grandfather to make a provision for her in his will, could enforce the contract against the grandfather's estate. The court held the contract enforcible, but did not discuss the question here involved, and clearly it was not before them. Mr. Schouler, on the other hand, seems inclined to the opposite view; saying, however, that the obligation rested on a weaker foundation than the corresponding obligation of the husband. See Schouler's Domestic Relations (5th ed.), Sec. 211.

The [illegible] liable [illegible]
funeral expenses [illegible]
[illegible] services [illegible]
rendered [illegible] consent

In the case of Chapple v. Cooper, 13 M. & W. 252, cited by both of these authorities, the court took the view that the obligation of the husband and wife were alike in these respects, although the question before the court was whether an infant wife could bind herself by contract to answer for the funeral expenses of her deceased husband, the court deciding that she could. I am unable to find any common law case where the question was squarely decided. It would seem, however, that the question is determined by the selection of the ground on which the liability rests. If the funeral expenses are to be treated as necessaries, then clearly the wife is not responsible, as her separate estate is not liable for her husband's or her families' necessaries at the common law. But if the obligation rests on the ground of duty arising from the marriage relation, then it seems to me just as clear that the wife may be charged personally with the expenses of burial. This latter view is, to my mind, the correct one, as the right of the wife to the body of her deceased husband is the same as the right of the husband to that of his wife. Foley v. Phelps, 37 N. Y. Supp. 471, 1 App. Div. 551; O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; Hackett v. Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. 762, 19 L. R. A. 558; Hadsell v. Hadsell, 7 Ohio C. C. 196; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. 370, 14 L. R. A. 85n; Burell v. Hayward, 9 Gray (Mass.) 248, 69 Am. Dec. 284; Chapple v. Cooper supra.

See alsi, Pierce v. Proprietors Swan Point etc., 10 R. I. 227, 14 Am. St. 667; Snyder v. Snyder, 60 How. Pr. (N.Y.) 368; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. 249, 9 L. R. A. 514.

There is no direct provision of the statute making the wife liable for the funeral expenses of her deceased husband, nor is there much that indirectly supports such a rule, outside of the fact that the statute grants the wife greater property rights than she had under the common law, and imposes upon her a corresponding increase of liability. A woman now does not surrender her personal estate to her husband on entering into the marriage relation, nor does the husband have the profits from her separate real property. But her earnings during the relation are community property of which the husband has the management and control, and are as directly liable for the support of the family, as are his own earnings. So also the expenses of the family and the education of the children are made by statute chargeabel alike upon the separate estate of both spouses. Bal. Code, Sec. 4508 (P.C. Sec. 3874). Under this provision of the statute we have held the wife personally liable for medical and hospital services rendered the husband during his last illness basing the decision on the ground that such services were for the benefit of the family, and the expense created thereby a family expense within the meaning of the statute. Russell v. Graumann, 40 Wash. 667, 82 Pac. 998. It may be that the expense of burying the husband could be recovered upon the same principle, but I prefer to rest my conclusion on the ground that it is a common law liability.

The judgment appealed from is therefor without error, and the order of affirmance proper.

Chadwick, J., concurs with Fullerton, J.

ELLA GUIGNON, Respondent, v. ANNA S. L. CAMPBELL
et al., Appellants.

(80 Wash. 543, 1914)

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 23, 1913, upon the verdict of a jury rendered in favor of the plaintiff for $9,250, for personal injuries sustained by a pedestrian struck by an automobile. Reversed, unless $4,250 is remitted.

Parker, J.--The plaintiff seeks recovery of damages for personal injuries which she claims resulted to her from the negligent operation of an automobile by the defendant Archie Campbell, the son and agent of the defendant Anna S. L. Campbell. The trial resulted in verdict and judgment in favor of the plaintiff against both of the defendants in the sum of $9,250, from which they have appealed.

Appellant Anna S. L. Campbell is a member of a community consisting of herself and husband, maintaining their home in Seattle. Appellant Archie Campbell is a son of Mrs. Campbell, and a member of her family. Mrs. Campbell owns an automobile, it being her separate property. The automobile, by Mrs. Campbell's consent, is used for, and by, the family in the usual manner of family conveyance. It is driven by different members of the family, including Archie Campbell. On April 5, 1913, Mrs. Campbell was absent from her home in Seattle; but, with her approval, given before her departure, her daughter, a member of the family, gave to some friends, at their home, a luncheon. To assist in the work of the luncheon, an extra servant was procured for the day, and during the evening it became necessary to convey this servant to a street car that she might return to her home,; Archie Campbell, at the request of the daughter, his sister, then proceeded with the servant to the street car in his mother's automobile. Mrs. Campbell, being absent at the time, knew nothing of this particular use of the automobile, but that it was such use of her automobile as she contemplated might be made seems quite plain. The automobile had been put to general family use at her instance before her departure, and she says in her testimony, "While I was gone, the machine was just left with the family to be used, with no specific instructions as to what it was to be used for, . . . I left the machine there to be used for the family purposes as the occasion might arise." While appellant Archie Campbell was driving the servant to the street car, the automobile ran over respondent, because of his negligent driving, as is now claimed, inflicting serious injury upon respondent for which she seeks recovery in this action.

Contention is made that the cause should have been disposed of in favor of appellants, as a matter of law, by the trial court upon their motions for directed verdict. In so far as these motions involve the questions of the negligence of Archie Campbell and the contributory negligence of respondent, we deem it sufficient to say that a reading of the evidence convinces us that neither could have been decided as a matter of law, and were clearly questions of fact to be determined by the jury. We do not feel called upon to review the evidence in detail here.

The principal contention made by counsel in behalf of appellant Anna S. L. Campbell is that she is not liable to a judgment for damages against her separately, as is the effect of the verdict and judgment here rendered, and that the court should have so decided as a matter of law. We have seen that Mrs. Campbell was the owner of the automobile as her separate property; that she authorized its used by her children for family purposes; and that this particular use was clearly within that contemplated by Mrs. Campbell. The question of the liability of a father, flowing from the negligent use of his automobile while being used for family purposes, was so thoroughly reviewed by Judge Ellis, speaking for the court in Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, that we think little need be said here. The conclusion there reached by the court, which we think is equally applicable here, is tersely expressed at page 493, as follows:

"A father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent."

It is true, in the case before us, the automobile was the separate property of the wife, but we are unable to see that the principle announced in the Abercrombie case is not equally applicable to her and her separate liability. This use of the automobile by her children was not like the use of it by a stranger to whom she might have loaned it. Of course, she was not obliged to furnish an automobile or its use to her children or her family from the proceeds of her separate property; but having voluntarily done so, it became, in effect, a use by her. She permitted such use manifestly as a part of her parental duty, and made the furnishing of the automobile "her affair, that is, her business," paraphrasing the expression used in the Abercrombie case relative to the father in that case. We are of the opinion that the learned trial court ruled correctly in declining to absolve Mrs. Campbell from liability upon the ground here urged.

It is contended in behalf of both appellants that the verdict is excessive to the extent that it shows passion and prejudice on the part of the jury. We are constrained to agree with this contention, and regard the verdict as clearly more than compensatory. That respondent was seriously injured, there is ample evidence to show, but it is manifest that she was by no means entirely incapacitated and deprived of her earning power. At the time of her injury, she was earning $30 per month, with continuous employment as a nurse, though the evidence tended to show that she was capable of earning as a nurse from $15 to $25 per week, though when employed by the week, she would not have continuous employment. At the time of her injury, she was approximately forty-eight years old, and had an expectancy of approximately twenty-two years. It is highly probable that her earning power would tend to decrease rather than increase, in view of her age. Her actual loss in the way of injury to clothing and doctors' bills did not exceed $300. The award of $9,250 made by the jury would yield, at legal rate of interest, in all probability, somewhat more than her earning power, measured by her past experience, without any diminution of the principal. We feel constrained to hold that we would not be warranted, in view of all the circumstances, in allowing

a verdict and judgment in excess of $5,000 to stand against appellants in this case.

Other claims of error, we think, are without merit, especially in so far as their prejudicial effect is concerned. We do not see any useful purpose to serve by discussing them.

We conclude that if respondent will consent to a reduction of the judgment in her favor to $5,000 by remission of $4,250 therefrom, we will not interfere therewith. Otherwise the judgment must be reversed and a new trial granted to appellants. If respondent remits from the judgment as now entered the sum of $4,250, within thirty days from the filing of the remittitur in the superior court, the judgment will stand affirmed. Otherwise, appellants may have a new trial and the present judgment be regarded as reversed. Appellants will recover their costs upon this appeal.

For PL

Crow, C. J., Mount, Morris, and Fullerton, JJ., concur.

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[illegible] reason [illegible] her [illegible]
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KING v. VOOS and others.
(14 Ore. 91, 1886)

Supreme Court of Oregon. November 9, 1886.

Lord, C. J. This suit is a creditors' bill seeking to subject certain real property described in the complaint, owned by the defendants Fordice Bros., to the payment of certain judgments recovered against Q. Voos, the husband of Fredericka Voss. The defendant Fredericka claims that the property referred to was bought with her own money, earned and accumulated from her restaurant business; that it was owned, conducted, and carried on by her in her own name, and for her own benefit; that she contracted all bills in her own name, and was individually responsible for all debts; and that her husband only assisted her with his services in the management of the business. The judgments which it is sought to satisfy out of this property were recovered against the defendant Q. Voos several years prior to Fredericka's engagement in the restaurant business. The evidence shows that in the spring of 1875 the defendant Q. Voos went to California, where, shortly after, his wife joined him, and that from that time until the fall of 1876, when he returned to Portland, he had engaged in various kinds of business, at different places in that state, all of which proved to be failures in a business point of view. Returning again to Portland, although without means, with the assistance of friends, during the next three years, he made several other business adventures, all of which were attended with a like result. At this juncture in their affairs, when the husband was without money, or credit, or business, the wife recognized that something must be done, and presently, to provide a support for their family, which consisted of eitht children, besides the defendants. An opportunity offering, in the fall of 1879, she leased the restaurant and dining rooms of the Occidental Hotel, and began in her own behalf, and on her own individual responsibility, the restaurant business. The arrangement entered into at that time was regarded as a desirable one, and which required no particular outlay of money; and all the facts and circumstances show that this transaction, from its inception, and all other matters subsequently connected with it, was bona fide; that she was the party trusted and responsible for all the obligations it imposed, and all other engagements incidental to the management and prosecution of the business. Without entering into detail, it is sufficient to say that during the intervening years, she was the responsible head of the business, contracting and paying all its obligations of whatever kind, and managing and directing its affairs with such prudence, economy, and foresight as avoided disaster, and secured financial success. The profits of the business, when accruing, she prudently husbanded, and, as the result has since proven, invested them wisely and successfully. The property in question, which is now sought to be subjected to the payment of the judgments against the husband, was bought by her direction, and for her, with her money thus acquired, and the deed was executed to her, and in her name, and is so recorded.

As to these general facts there can be no dispute, although it was intimated that the arrangement to carry on the business was fictitious, and [illegible] comme [illegible]

[illegible] ecord [illegible]

[illegible] defendant Fredrick [illegible]

[illegible] for own money, errors and [illegible] designed as a cover of fraud. The main contention, however, arises out of the circumstance that her husband, whose services were valuable, assisted her in conducting the business, without compensation, and that it would be a fraud in law to allow her to retain the benefit of them, at least in excess of what is required to support the family. Let it be understood that the evidence satisfies us that the business was her own, and honestly carried on by her, separately from her husband. In such case, it is clear that the relation of employe and employer, and principal and agent, may exist between the husband and wife, without subjecting her interest in the business, or the acquisitions arising out of it, to the debts of the husband. The mere fact that the defendant employs her husband does not make the business in which she embarks or carries on his business, nor is it preceived why, if she needs an agent or servant to assist her in the conduct of her business, she may not employ her husband as well as a stranger. These relations may exist in the law, and are not inconsistent with good faith and fair dealing.

But can the husband give his services to the wife, in her separate business, without committing a fraud upon his creditors, or rendering her interest in the business liable? It is said by Mr. Bump that "an arrangement by which the husband acts as his wife's agent, without any compensation, or for a compensation that is insufficient, is, in effect, an attempt to make a voluntary conveyance of the products of his skill and labor in her favor, and is void as against creditors." Bump, Fraud. Conv. 270. But this proposition, as thus stated, is thought not to be accurate, nor sustained by the decisions cited in the note. See opinion of Buskirk, J., in Cooper v. Ham, 49 Ind. 393; and also Miller v. Peck, 18 W. Va. 81. It is freely admitted, on account of the opportunity that the marriage relation affords the husband and wife to conduct a scheme to defraud creditors, that the transaction ought to be vigilantly scrutinized, particularly when fraud is charged. Any device designed to cover the property or acquisitions of the husband debtor, or to conduct his business in the name of the wife, or some member of the family, to defraud creditors, is a sham and a fraud, which, when discovered, the law will not tolerate, but brand with the mark of its condemnation. But the mere fact that the husband gives his services to the wife in the conduct of her separate business is not, of itself, sufficient to vitiate it with fraud, or to make her interest in the business, or the profits arising out of it, chargeable with his debts.

In Abbey v. Deyo, 44 N. Y. 343, it was held that a husband may work for his wife in the management of her separate business or property, without any compensation, and that his creditors will not thereby acquire any rights against the wife, or her property. Hunt, J., said: "In arguing this point the appellant's counsel insists that the services, the time, and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. The one, he says, is as much their property as the other. The argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is to support his family. The instinctive

impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rightly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of the debtor for the satisfaction of his debts." And Earl, J., said: "The creditors of an insolvent have no claim upon his services. They cannot compel him to work and earn wages for their benefit, and hence he does not defraud them, if he chooses to give away his services by working gratuitously for another. The husband may, therefore, in the management of his wife's separate business or property, work for her, as any person might, without any compensation, and his creditors would not thereby gain any right against the wife, or her property, and would have no legal right to complain." See, also, 2 Bish. Law Mar. Wom. Sections 450-466.

The law gives the creditor no poser over the volition of his debtor, so that he may direct or control his future labors, or his contracts relating to the future. Whether the debtor shall exercise his volition, by laboring in his own behalf or for another, is a matter of his own free choice, which the creditor cannot coerce, control, or prevent. If he choose to work for himself, the acquisitions of his labors belong to him and the creditor, and the creditor may lay hold, and apply them to the payment of his debt. On the other hand, if he choose to give his services to his wife in the management of her separate property or business, the fruit of such labor is not his, but another's, and, on principle, the creditor cannot seize and appropriate it to the payment of his debt. So that, if a husband choose to give his wife his services in the conduct of her separate business, the creditor, having no power over his volition or to compel him to work for his benefit, is not defrauded; nor is the fact of such service any ground for subjecting her interest in such business, or the profits arising out of it, to the payment of her husband's debts.

There does not appear by the record to have been any contract of employment between the husband and wife. He seems to have rendered his services gratuitously, although they were valuable, and from the part he took was, as to theother employes, so to speak, "foreman of the gang." The responsibility of providing for the family the wife undertook out of her separate business, and if she derived any assistance from him it arose out of the circumstances detailed. Under the act of 1880 the wife was released of all "civil disabilities" not imposed upon the husband, except the right to vote, (Sess. Laws 1880, p. 6;) and her property is equally liable for the expenses of the family, (Sess. Laws 1878.) Her right to acquire property, to enjoy the fruits of her labor, or to hold and invest the profits arising from the seccessful management of her own trade or business, can no longer be disputed; and when, by her industry, prudence, economy, and business foresight, she acquires property in the management of her separate business, it is her property, and not his, and cannot be liable for his debts.

The case was very thoroughly examined by the learned referee, and subsequently confirmed, after full argument and thoughtful consideration, by the court, and the result reached is in accordance with our views, and the decree must be affirmed.

NOTE

The relation of employer and employed, or principal and agent, may exist between wife and husband, without subjecting the wife's property to liability for debts of the husband Kutcher v. Williams, (N. J.) 3 Atl. Rep. 257; Shuster v. Kaiser, (Pa.) 2 Atl. Rep. 110; Broadwater v. Jacoby, (Neb.) 24 N. W. Rep. 639; Second Nat. Bank v. Gaylord, (Iowa,) 24 N. W. Rep. 56; Ladd v. Newell, (Minnl) 24 N. W. Rep. 366; Edgerly v. Gregory, (Neb.) 22 N. W. Rep. 776; Dayton v. Walsh, (Wis.) 2 N. W. Rep. 65; but it is a propert subject of judicial inquiry whether or not such agency is fraudulent, and intended to cover the substantial ownership of the husband in the product resulting from his services, Ladd v. Newell, (Minn.) 24 N. W. Rep. 364.

In contests with the creditors of her husband, the burden is on the wife of proving that the property purchased during coverture was paid for with funds not furnished by the husband, Simms v. Morse, 2 Fed. Rep. 325; Kingsbury v. Davidson, (Pa.) 4 Atl. Rep. 33; Smith v. Bailey, (Tex.) 1 S. W. Rep. 627; but in Minnesota such questions are to be determined on the fair preponderance of the evidence, Laib v. Brandenburg, 25 N. W. Rep. 803.

As to what constitutes the separate property of a married woman and how far it is exempt from liability to her husband's creditors, see Harris v. Harris, (Cal.) ante, 274.

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FLANNERY v. CHIDGEY.

(Court of Civil Appeals of Texas.
Dec. 2, 1903.)
(77 S.W. Rep. 1034)
(33 Tex. Civ. App. 638.)

Appeal from Bexar County Court; Robt. B. Green, Judge.

Suit by Henry Chidgey against J. B. Flannery, executor of the estate of Elmira V. Ewalt, deceased. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fly, J.--This is a suit instituted by appellee, in the justice's court for $175 alleged to be due by the estate of Mrs. Elmira V. Ewalt for services as nurse rendered W. D. Ewalt, the husband of Elmira V. Ewalt, in his last sickness, amounting to $160, and services rendered in same capacity to Mrs. Ewalt in her last sickness, amounting to $15. The suit is based on allegations of an express contract of Mrs. Ewalt to pay for the services rendered her husband, made before and after his death. Appellee recovered judgment for amount sued for in justice's court, and for a like sum on appeal to the county court.

It appears that, W. D. Ewalt being sick in 1900, Mrs. Chidgey was engaged as a nurse at divers times between March and December of that year. W. D. Ewalt died on January 1, 1901, and Mrs. Elmira V. Ewalt, his widow, on January 3,1901, filed an application for probate of the will of her husband and for letters testamentary. On January 22, 1901, the will was probated, and Mrs. Ewalt was appointed executrix of the will, without bond, as provided therein. In that will practically everything possessed by the testator was bequeathed to his wife. No account for the services performed by Mrs. Chidgey was presented to the independent executrix. On January 7, 1902, Mrs. Elmira V. Ewalt died, leaving a will in which J. B. Flannery was appointed executor. Although it does not appear in the statement of facts, it appears from the petition and from an exhibit attached thereto that the account was presented to the executor, and by him rejected. There is some testimony which tends to show that W. D. Ewalt had some community property at his death.

The theory upon which the pleadings were prepared and on which the case was tried was that the property in the hands of the executor had been the separate estate of Mrs. Ewalt, and that she had before and after her husband's death expressly agreed to pay the debt due Mrs. Chidgey. The evidence is very weak and unsatisfactory as to Mrs. Ewalt attempting to contract for the services of Mrs. Chidgey, but the question will be discussed as though it was fully proved, because the principles that are hereinafter stated apply as fully to an explicit written contract as well as one of any other character. Under the common law the existence of the wife was merged in her husband, and she had no power to make contracts except through his authority, or for necessaries for herself and children. That principle of the common law has not been wholly abandoned in Texas, and in no instance, save in those expressly prescribed by statute, is the

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married woman given the power to make contracts. The only statutory authority given to a married woman to enter into contracts is embodied in article 2970, Rev. St. 1895, as follows: "The wife may contract debts for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property." The authority so granted is strictly construed, and no appeal to the equitable powers of a court can be made to bind the wife by her contracts not executed under the provisions of the statute. Magee v. White, 23 Tex. 180; Haynes v. Stovall, 23 Tex. 625. The necessaries named in the statute are those for the married woman and her children, and not for her husband.

In the case of Magee v. White, above cited, this matter was thoroughly discussed, and, after citing and quoting from several chancery cases, the court concluded: "So we think that if, in this state, the wife's property is to be held liable for articles furnished to the husband because they are necessaries, it will be in the husband's power to squander the proceeds of the property as it comes into his hands, out of which he should support himself and his family, and charge his expenses for necessaries upon his wife's separate estate, thus subjecting it to a burden which the law never intended it to bear."

Again, in elucidation of the Magee-White opinion, it was said in Haynes v. Stovall, above cited: "It was held that the separate estate could be held liable, according to the provisions of the statute, for debts contracted by the wife herself, or by her authority, for necessaries furnished herself or children, or for expenses incurred by the wife for the benefit of her separate property, and where such expenses are reasonable and proper. It was held that the wife was under no legal obligation to maintain the husband out of her separate estate; that the rules applied by courts of chancery in England to estates limited to the sole and separate use of married women were not applicable to the wife's statutory separate estate in this state; and that the expressions to be found in the opinions of this court, in the cases of Christmas v. Smith (10 Tex. 123), Brown v. Ector (19 Tex. 346), and McFaddin v. Crumpler (20 Tex.374), to the effect that the wife's separate estate is liable in equity, independent of the statute for necessaries for the husband, or for his children by a former marriage, were dicta, and were not to be regarded as authoritative decisions of this court."

In the case of Hutchinson v. Underwood, 27 Tex. 255, it was said: "Under the view of the law taken by the court below, it will be perceived that the wife's separate property may be charged on an account made, or a promissory note executed by her, for necessaries for her husband, or other members of the family than himself and children. Whatever difference of opinion there may formerly have been upon this question, the law upon it must now be regarded as settled by this court against the rule laid down in the instructions given to the jury in this case."

Again, in the case of Harris v. Williams, 44 Tex. 124, it was said: "The wife is under no legal obligation to maintain the husband out of her separate estate. It is the duty of the husband to support his wife and children. Hence the wife's estate cannot be charged with necessaries for the husband, or with debts contracted by him for the support of the family when not acting as her agent."

It is claimed, however, that Mrs. Ewalt, after the death of her husband, promised to pay for the services of Mrs. Chidgey. Only one witness, Mrs. Martin, testified as to this, and she said: "I heard Mrs. Ewalt say she intended to pay Mrs. Chidgey for her services. That was after Mr. Ewalt's death. * * * She said if she did not pay it in her lifetime she would pay it in her will; she had no ready money." The statements made by Mrs. Ewalt were not communicated to Mrs. Chidgey. There was no consideration for the promise, if the language could be so styled. The promise to pay, if the language proved can be construed to be a promise, was one that comes clearly within the purview of the statute of frauds. It is obnoxious to the provisions of both sections 1 and 2 of article 2543 of the Revised Statutes of 1895.

While the evidence does not disclose a state of case by which the separate property of Mrs. Ewalt would be liable for the debt declared on, still the labor was performed, and W. D. Ewalt received the benefit of it, and his estate was liable under an implied promise to pay for the services received by his; and if any of his separate estate, or any community property of himself and wife, not exempt under the laws of Texas, came into the hands of his wife after his deth, she would be liable to the extent of the value of such property for the debts of her husband or the community.

Although an express contract upon the part of Mrs. Ewalt to pay the debt is alleged in the petition, and that contract would not bind her, the facts alleged also show that the community estate of the ewalts was liable on an implied contract for the services performed for Mr. Ewalt, and are sufficient to form the basis for a judgment against the community property. The lands conveyed to Mrs. Ewalt before her marriage, and that conveyed to her by her husband, were her separate estate, and not liable for the debt sued for; but the record shows that one parcel of land was conveyed to Mrs. Elmira V. Ewalt, during the life of her husband, by Johanna Toepperwein, and it does not appear that it recited in the deed that it was the separate estate of Mrs. Ewalt. The presumption of law is that it was community property.

The judgment will be affirmed, the only restriction on it being that the estate of Mrs. Ewalt shall be liable for $160 of the debt to the extent of the value of the community estate that existed at the time of the death of her husband, as well as any separate estate left by him, her whole estate being liable for the services, valued at $15, rendered for Mrs. Ewalt. The judgment is affirmed.

[illegible] [illegible] [illegible] [illegible] liable [illegible] debts
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] common

CHAPTER XVII.

CITATIONS

When is separate property liable for community debts or torts?

Kemp v. Folsom (1896)	14 Wash. 16.
Clark v. Eltinge (1905)	38 Wash. 376.
Exchange National Bank (1895)	11 Wash. 108.
Cattell v. Ferguson (1892)	3 Wash. 541.
Conrad v. Mertz (1906)	44 Wash. 470.
Sweet Dempster & Co. v. Dillon (1896)	13 Wash. 521.
Curry v. Catlin (1894)	9 Wash. 495.
First National Bank v. Cunningham (1913)	72 Wash. 532.
Anderson v. Burgoyne (1910)	60 Wash. 511.
Butterworth v. Bredemeyer (1913)	74 Wash. 524.
Davies v. Cary (1913)	72 Wash. 537.
Churchill v. Miller (1916)	90 Wash. 694.
Smith v. Fisher (1917)	99 Wash. 102.
Turner v. Eddy (1920)	112 Wash. 652.
Knickerbocker Co. v. Hawkins (1918)	102 Wash. 582.
Shannon v. Prall (1921)	15 Dec. 100.

Homesteads

In the Matter of the Estate of Hattie Feas, Deceased.

30 Wn 51

Appeal from Superior Court, King County.--Hon. George Meade Emory, Judge. Reversed.

The opinion of the court was delivered by

Hadley, J.--In this cause the administrator filed a petition asking an order for the sale of real estate to pay debts and expenses of administration. Objections to the making of such order as to 150 acres of the land described in the petition were interposed. The particular land involved under the objections is described as 150 acres of the northeast quarter of section 29, township 24 north, range 2 east, situate in Kitsap county, Washington. The grounds of objection to the order of sale, substantially stated, are as follows, viz.: That Hattie Feas died in August, 1892; that said property was acquired from the United States by Abraham S. Feas, while he was the husband of the deceased, Hattie Feas, and was until the time of the death of said Abraham S. Feas. which occurred March 21, 1899, in his actual possession as a homestead for himself and minor children, and that the same has at all times been exempt from all debts and liabilities of said estate; that said Abraham s. Feas, in March 1895, after the death of his said wife, and while residing upon said land with his monor children, filed with the auditor of Kitsap county a declaration of homestead upon the land; that prior to his death the said Abraham S. Feas executed and delivered to his children, being seven in number, deeds of conveyance to all of the quarter section above named; that the objector, Carrie M. Feas, is a daughter of said deceased, Hattie Feas, and Abraham S. Feas, and has never parted with her interest in said estate; that she is also the successor in interest to all of the other children and heirs at law of the said Hattie and Abraham S. Feas, excepting William W. Feas, he being the owner of a certain 10-acre tract in said quarter section, the remaining children and heirs having conveyed to the objector by good and sufficient deed all their interest in said property. The objector asks that said land shall not be sold, and that the court shall make an order finding that at all times after the acquirement of the land by Abraham S. Feas it was the homestead for himself and minor children, and was never subject to any indebtedness of the deceased. The objections were overruled by the court, and the land was ordered sold. From such order the objector has appealed.

The court found that the land did not exceed in value the sum of $1,000, at the time of the death of Said Hattie Feas, and that said Abraham S. Feas continuously resided upon the land, and made it his home, from 1883 until his death in 1899, and had at all times living with him minor children of himself and said Hattie Feas. This property was the community property of Abraham S. Fease and his wife. It was occupied as a homestead at the time of the wife's death. The community estate passed into administration after the death of the wife, and it is under that administration that this order of sale was made. It is urged by respondent

that the declaration of homestead filed by the surviving husband in March, 1895, was of no effect because the law of 1895 providing for filing such declaration was not yet in force. Prior to the law of 1895 there was no provision for such formal declaration, and it was held in Philbrick v. Andrews, 8 Wash. 7 (35 Pac. 358), that mere occupancy of property as a home under the law then existing amounted to a selection of a homestead. To the same effect is Asher v. Sekofsky, 10 Wash. 379 (38 Pac. 1133). Under the above decisions mere occupancy of land as a home, and any assertion of claim to it as a homestead, before sale, was sufficient. In Wiss v. Stewart, 16 Wash. 376 (47Pac.736), it was contended that the law of 1895, which provides the manner of selecting a homestead, repealed Sec. 481, 2 Hill's Code, which simply provides that a selection may be made at any time before sale. The court held against the contention and said:

"The latter act in no way affects the provision in relation to the time of making the selection, but simply undertakes to direct the manner of such selection, and the provision that such homestead may be selected at any time before sale is still in effect."

Thus, under the law existing in March, 1895, the surviving husband being in occupancy of the land as a home with his minor children, thereby asserted claim to it as a homestead, and the written declaration which he filed became positive and confirmatory evidence of such fact, although no law then required him to make and file such formal declaration. If, then, the surviving husband could claim a homestead, it was sufficiently done.

It is urged that a surviving husband claim a homestead in the community interest of his wife after her death. It is undoubtedly the intention of the present law to authorize either the husband or the wife to make such claim while both are living. Sec. 5244, subd. 1, Bal. Code. When selected from the community property, the homestead vests in the survivor upon the death of either spouse. Sec. 5246, Bal. Code. The purpose of all homestead provisions is to protect the family, including minor children. For that reason a homestead selected by either spouse during coverture vests in the surviving husband, in order that the family composed of himself and minor children may have the benefit of a home. It would seem inconsistent and unreasonable that the law should authorize the parents, during the lifetime of both, to anticipate the welfare of the children by thus selecting a homestead that will vest in the father, and yet at the same time prevent the father from making such selection after the mother's death, if it was neglected before that time. Such a construction would take from a father the power to provide a home for his children, which the law intends he may do. It is argued by respondent that under Sections 6215, 6219 and 6220, Bal. Code, there is no authority in probate proceedings to set aside a homestead except to a widow or to the minor children of a deceased husband. In re Murphy's estate, ante, p. 9 (70 Pac. 109), we had occasion to pass upon a similar contention in reference to allowance for the use of the family pending settlement of an estate. It was contended in that case that such an allowance cannot be made when the community estate is under administration on account of the death of the wife, and can only be made in the event of the husband's death. It was held, however, that since the welfare of

under [illegible] statute permitting [illegible]
[illegible] hus. [illegible] homestead
[illegible] comm. [illegible]
existing [illegible] survivors [illegible]
either [illegible] spirit [illegible] intention
[illegible] hus. [illegible]
[illegible] select [illegible] homestead [illegible] comm.
[illegible] family.

Where a homestead [illegible] comm. [illegible]
[illegible] lawfully [illegible]
homestead even [illegible] attained
[illegible] majority [illegible] left [illegible] parental roof.

The fact [illegible] hus. [illegible]
homestead [illegible] comm. [illegible] belonging [illegible]
[illegible] deceased [illegible] conveyance
thereof [illegible] constitute [illegible]
abandonment [illegible] homestead, so [illegible]
[illegible] debts [illegible]
deceased [illegible] comm. [illegible]

minor children is one of the main purposes of the statute, it would defeat that purpose to hold with the above contention. The law was passed in 1854, long before the existence of our community property laws, and when, by the system of separate ownership, a surviving husband controlled his estate, and could use it for the benefit of his minor children. Now, however, the community estate passes into administration, leaving the surviving husband without means to care for the family of minor children, if no allowance can be made from the estate. We held that the earlier law must be construed in connection with the later community law so as to effect the real purpose intended in the way of providing for minor children. The same reasoning applies to the homestead which is under consideration in the case at bar. We think it is the manifest spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family.

It is contended in support of the order of sale in this case that at the time it was sought to subject this property to sale there were no minor children, and that the property had been abandoned as a family residence. We do not think, however, that such facts constituted an abandonment of the homestead. There were a number of minor children when the homestead was claimed as such, and there was never any abandonment thereof by the father. It is true he conveyed it to his children, but that was not an abandonment. Our law provides for a conveyance of the homestead and to make such conveyance effectual the grantor must have the privelege of leaving it and establishing his residence elsewhere after it has been so conveyed. Moreover, under the law of 1895 a homestead can be abandoned only by a declaration to that effect, duly executed and acknowledged. Sec. 5220, Bal. Code. While Abraham S. Feas held this land as a homestead free from debts of the community estate, he conveyed it to his children, who in turn have conveyed it to their sister, the objector here. The grantees of Mr. Feas took the land as he held it free from obligations of the estate. Carrie M. Feas, their grantee, holds it likewise, and it is not, therefore, subject to sale for debts of the estate.

For these reasons we think the order of sale was erroneously made. The judgment is, therefore, reversed, and the cause remanded, with instructions to the lower court to dismiss the petition to sell in so far as it relates to property included in the objections.

Reavis, C. J., and Fullerton, Mount, Anders, Dunbar and White, JJ., concur.

THE OREGON MORTGAGE COMPANY, Appellant, v. JOSEPH HERSNER et al., Respondents.
(14 Wash. 515, 1896)

Appeal from Superior Court, Spokane County.--Hon. James Z. Moore, Judge. Reversed.

The opinion of the court was delivered by

Dunbar, J.--The controlling question in this case is whether a husband, under a general power of attorney from his wife, authorizing him to mortgage all their real estate can make a valid mortgage of their homestead, which is community property, without being joined by the wife; and, as a corollary to that proposition, whether a bona fide purchaser, before maturity, of a promissory note made by the husband and wife, and of a mortgage given by the husband to secure the same on community real estate, occupied by the makers of the note as a homestead, under authority of a power of attorney from the wife, takes the same free from any claims of the wife, either under the community property laws or the homestead exemption laws. The trial court in this case held that the mortgage was void, which holding is alleged as error by the appellant.

It was held by the supreme court of Texas, in Patton v. King, 26 Tex. 685, that a married woman could, jointly with her husband, make a valid conveyance of lands, her separate property, by an attorney in fact, duly authorized, by power of attorney executed and acknowledged in the manner prescribed by law for the execution and acknowledgment of deeds of conveyance, and that the attorney was competent to make the legal acknowledgment of his deed as such attorney for registration. Substantially the same proposition was held in Warren v. Jones, 69 Tex. 462 (6 S. W. 775), and Jones v. Robbins, 74 Tex. 615 (12 S. W. 824). It is claimed by the appellant that the case of Patton v. King, supra, is not exactly in point, for the reason that that case was an action in trespass; but the case itself shows that the action was brought for the express purpose of trying the title which had been obtained under the power of attorney. It is also claimed that the subsequent cases, mentioned above, which were Texas cases, laid down the same rule, for the reason that they considered the case of Patton v. King as stare decisis; but from an investigation of those cases we are satisfied that they fully accord with the doctrine previously announced.

In opposition to this rule respondents cite Gagliardo v. Dumont, 54 Cal. 496, where it was held that, under the homestead act, the alienation of the homestead could only be by the personal act of the husband and wife, and a deed for that purpose could not be executed by attorney. This decision is based squarely upon the statute of California then in existence, which was to the effect that the wife could not convey even her separate property unless her husband joined in the conveyance, and the court bases the opinion squarely upon that statute, for it says:

"Under the restraints imposed by the homestead law, neither the husband nor the wife had power to transfer the homestead by a separate con-

veyance, nor could either incumber it to the prejudice of the other or of both, or the destruction of the homestead itself. The obligation between them, in respect to its preservation, was reciprocal. Neither could, without the consent and concurrence of the other, alienate or transfer it. . . . As, therefore, a conveyance of the homestead by either spouse would be invalid, whether made directly or indirectly, voluntarily or by forced sale, it would seem to follow that a power of attorney made by the husband to convey it would be also invalid; for, as the husband himself cannot dispose of it, he cannot empower another to do for him what the law forbids him to do. Having no capacity to convey it independently of his wife, he cannot delegate to another a power which he himself does not possess. Besides, the law is imperative that the alienation of the homestead must be by the personal act of the husband and wife."

This objection is not tenable, however, in this state, for our code (Gen. Stat., Sec. 1446) especially provides that a husband may make and execute a letter of attorney to the wife, or the wife may make and execute a letter of attorney to the husband, authorizing the sale or other disposition of his or her community interest or estate in the community property, and as such attorney in fact to sign the name of such husband or wife to any deed, conveyance, mortgage, lease, or other incumbrance, or to any instrument necessary to be executed, by which the property conveyed shall be released from any claim as community property. This in addition to the provision that such power of attorney may be made by either husband or wife to a third party, to alienate either interest in community property or the separate property of either spouse. And the rest of the California cases cited simply sustain the doctrine announced by the court which grew out of the peculiar statutes of that state. The case of Wallace v. Insurance Co., 54 Kan. 442 (38 Pac. 489), is claimed to be a parallel case with the one at bar, by the respondents; and so it is, so far as the facts in the case are concerned. But that case was decided, even by a divided court, on the express provisions of the constitution of Kansas, which requires the joint consent of husband and wife to any alienation of the homestead; and the court held that the joint consent clearly implied the concurrent action and mental accord of husband and wife, and that the provision was not incorporated in the fundamental law for the benefit of either husband or wife alone, or for both of them together, but for the children as well, as a social unit. If such construction as this should be placed upon our statute, it would render meaningless the law empowering the wife to give a letter of attorney to her husband to alienate her estate, and we have no constitutional provision like that of Kansas. And so with all the other cases cited.

While expressions concerning the policy of the law have been made by the courts tending to sustain the theory contended for by the respondents, the decisions themselves have been based either upon special provisions of the statutes or constitutions of the states wherein the decisions were rendered, or there has been an absence of such enactments as our statutes furnish on the subject of conveyance. But, even if there were a conflict of authority, we should be inclined to hold that, where a wife had given a husband a general power of attorney to mortgage all the real estate of the community, such power would carry with it the authority to mortgage the homestead as well as other lands. Especially ought this to be true where no record notice is given of the intention to hold the property [illegible] hus. [illegible] atty [illegible] [illegible] real estate [illegible], [illegible] homestead, [illegible] common [illegible] her joining in it.

[illegible] art. 190 [illegible] const., providing [illegible] legislature [illegible] 6 [illegible] protect [illegible] homestead [illegible] forced [illegible] apply [illegible] homestead [illegible] voluntarily incumbered.

mortgaged as a homestead. In this instance the mortgage was given in 1890, and the declaration of intention was not filed until several years afterwards, and until after the commencement of this action. Certainly, if the wife has the power, which, under the statute, she must be conceded to have, to delegate the power to her husband to execute a mortgage, and the husband does execute it in accordance with the power conferred, it would seem that, in good conscience, she ought to be estopped from denying the validity of her own deliberate act. Under all authority, the act of her attorney, within the scope of the authority conferred upon him, is her act. Especially should this rule obtain in this state where the wife's civil disabilities are removed by statute, the law providing that she shall have the same right and liberty to dispose of every species of property and to sue and be sued as if she were unmarried. All laws which imposed or recognized civil disabilities upon a wife which were not imposed upon the husband are abolished. The law especially provides that she may make contracts and incur liabilities, and that the same may be enforced by or against her in the same manner and to the same extent as if she were unmarried. With such a status, under the law, the decisions relied upon by the respondents could not have been logically rendered.

It is not contended that the power of attorney was not properly executed and acknowledged. That being taken for granted, it must be presumed that, if the wife had intended to relieve the homestead from the effects of the letter of attorney, it would have been so stipulated. The power given is a general power, and we see no reason, under the law or as a matter of right, particularly when the rights of innocent purchasers without notice are involved, why a homestead should be exempted from the operations of the power of attorney. It is contended by the respondents that such construction would be in violation of article 19 of the constitution, which provides that the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families. But we think this proposition is hardly worthy of discussion. The fundamental law had no reference to protection of homesteads under the exemption law, where the homestead had been voluntarily alienated or incumbered. With this view of the law, it is immaterial whether actual possession as a residence of the mortgaged property was a sufficient claim to the property as a homestead or not.

The judgment will be reversed, and the cause remanded, with instructions to enter judgment for the appellant in accordance with the prayer of the complaint.

Hoyt, C. J., and Gordon, J., concur.

In the Matter of the Estate of Lewis H.
Eyres, deceased: JENNIE M. EYRES,
Respondent, v. MARY M. BAKER
et al., Appellants.

(7 Wash. 291, 1893.)

Appeal from Superior Court, Lewis County.

The opinion of the court was delivered by

Hoyt, J.---This was a proceeding in the superior court by which the respondent sought to have set aside for her use certain real estate which had belonged to her deceased husband, and which was, at the time of his death, occupied by him. It is conceded that the real estate sought to be so set aside was the separate property of said husband, and that the same had never been by him in any manner selected as a homestead. It is also conceded, or made plainly to appear by the record, that the husband had, in his lifetime, duly devised such property to the appellant Mary M. Baker. Various questions are raised by the appellants as to the regularity of the proceedings in the court below, but the real merits of the controversy depend upon a single proposition, and that is, as to whether or not, under our statute, a widow is entitled, as against the will of her deceased husband, to have his separate real estate set aside by the court for her use as a homestead. Respondent earnestly contends that, under the provisions of Sec. 972 of the Code of Procedure, the court must be held to have such power, and she cites numerous decisions from the State of California to show that such has there been the construction of a somewhat similar statute. If this section stood alone, we should be of the opinion that the construction contended for is the correct one, not only from the fact that such has been the holding of the California courts, but also for the reason that such would seem to be the reasonable construction of the language used; but it is the duty of a court, in coming to a conclusion as to the proper construction of any provision of the statute law, to examine the same in the light of all the other provisions upon the same or relative subject matter; and when we so examine the provisions of this section, it will be found that our law relating to the rights of husband and wife, when taken as a whole, is so different from that of the State of California that but little aid can be gathered from the decisions of its courts; and when we further examine them in the light of the statute relating to the exemption of property from forced sale on execution, a still further dissimilarity will appear.

It follows that we must construe the provisions of our statute in relation to this subject matter with but little, if any, aid from decisions elsewhere. Such being our duty, we must look at the entire legislation relating to the property rights of husband and wife, and construe these provisions, as to the setting aside of a homestead after the death of the husband, in the light thereof. In title 16, ch. 2, Gen. Stat., the legislature has, at some length, sought to clearly define these rights. The first section of said chapter, being Sec. 1397, provides as follows:

[illegible] councils [illegible] legislation, [illegible]
relating [illegible] laws. [illegible] a
[illegible] constitutional [illegible]
[illegible] deceased laws, [illegible]
[illegible]

"Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such management, alienation or encumbrance, as fully and to the same effect as though he were unmarried."

And the next section gives to the wife practically the same rights as to her separate property as are given to the husband by the section above set out as to his. In addition to these express provisions, which seem to empower each of the spouses with the right to absolutely control and dispose of their separate estate, there are many other provisions contained in said chapter, all of which can only be harmonized with the intent on the part of the legislature therein to provide that the status of the separate property of each of the spouses should be entirely uninfluenced by the marriage relation existing between the two spouses. Such legislation having created an entity composed of the two spouses, sought to clothe it with all the property rights incident to, or growing out of, the marriage relation, and to leave property which would not, under the provisions of the statute, belong to this entity absolutely subject to the control and disposal of the spouse to whom it belonged as though he or she were unmarried. Such being the whole tenor of the legislation upon this subject, we feel compelled to hold that, under the provisions of Sec. 1397 above set out, the husband had the right, as against the wife, to devise his separate estate by will to whomsoever he saw fit, and that no act of the wife, either before or after the death of her husband, could in any manner prevent the taking effect of such devise.

The question is not now before us as to what would be the rights of a widow to have a homestead set off to her out of the separate real estate of her deceased husband where he had not devised the same by will, and we express no opinion thereon. It may be that this construction of said Sec. 1397 will not best subserve the public interest, as it may follow therefrom that a husband having a large amount of separate property might devise the same, and upon his death leave his widow without any provision whatever for her support. Such cases, however, will be so rare that no great public injury can flow therefrom, but even if it should, the intent of the legislature as expressed in said section is so clear that we cannot interpret it otherwise than as we have, and the remedy, if any, must come from the legislature.

The order appealed from will be set aside, and the cause remanded with instructions to deny the petition of the respondent.

Dunbar, C. J., and Anders, J., concur.

Stiles and Scott, JJ., concur in the result.

HALLIE STEWART et al., Appellants, v. OMAR FITZSIMMONS et al., Respondents.

(86 Wash. 55, 1915.)

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered February 13, 1914, upon findings in favor of the defendants, in an action for partition and an accounting tried to the court. Affirmed.

Chadwick, J.--This action was brought by the appellants to secure the partition of certain property, alleged to be the community property of Peter A. Peterson and Jane H. Peterson, his wife. Peter A. Peterson filed on a government homestead in July, 1861. He married Jane H. Smelcer in September, 1831. The family settled on the land in October, 1881, a cabin having been erected and some fencing built previous to that time. Jane H. Peterson died in June, 1903. Her estate was administered by her surviving husband. Peter A. Peterson died in August, 1910. N. O. Baldwin is the executor of his last will and testament.

It is the contention of appellants, first, that the land is community property; second, that if it is not, Peter A. Peterson and those claiming under him are estopped because of the fact that Peter A. Peterson, when acting as administrator of the estate of his deceased wife, listed the land as community property and administered upon it as such. The contentions of appellants are met by respondents by the claim that the property was the separate property of Peter A. Peterson; that there is no estoppel, and, furthermore, that the land was claimed as a homestead by Peter A. Peterson after the death of his wife, and became his separate property in virtue of the statutory declaration of homestead. No declaration of homestead had been made in the lifetime of Mrs. Peterson. The property claimed in the declaration of homestead consisted of 160 acres entered as a government homestead, and forty acres which the Petersons had acquired as a preemption from the government. The trial judge found the 160 acres to be the separate property of Peter A. Peterson; that the forty acres, being a part of their preemption, was community property and subject to the claim of homestead. He accordingly denied the prayer of appellants' complaint and rendered a decree quieting title in the respondents who are devisees of Peter A. Peterson, subject to the administration proceedings not pending.

The judges are not in entire harmony with reference to the holding of the trial judge that the 160 acres government homestead was the separate property of Peter A. Peterson. We will not, therefore, review the facts which lead up to this holding, but content ourself with discussing the claim of a statutory homestead, which, in the opinion of all the judges participating in this case, is decisive. We shall treat the property as community property, as contended by appellants.

Jane H. Peterson died in June, 1903. Appellants take the position that, no claim of homestead having been filed in the lifetime of Mrs. Peterson, the property became subject to the orders of the court having

jurisdiction of the estates of decedents, and that a homestead could not be set off by order of the court after notice and hearing. Rem. & Bal. Code, Sec. 1465 is relied on.

"If the head of a family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled, on such compliance, to a homestead as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children."

It is further contended that, unless the claim of homestead is supported by such an order after due proceedings and notice, it would result in depriving the heirs of property without due process of law, under Rem. & Bal. Code, Sec. 1366, which vests title in the heir immediately upon the death of the ancestor. The statute is as follows:

When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another. his title shall vest immediately in his heirs or devisees. subject to his debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent." (L. '95, p. 197, Sec. 1.)

Section 1465 was a part of the old probate practice act passed in 1854. The purpose was to give a widow and minor children the benefit of a homestead when none had been claimed by "the head of a family in his life time." That statute may well be called a widow's homestead. It required a compliance with the homestead law and a "setting aside" by the court for "the use of the widow, child or children." It is not in harmony with the spirit of the community property laws. It implies a title in the "head of the family" at the time of his death, and a title in the widow and child or children after it is set aside; whereas, a homestead is most often taken out of community property, in which the widow has the same interest as the head of a family and to which she has a right absolute as against her child or children. The unfitness of this statute and the situations possible under it no doubt led the legislature to meet the demand for a more certain and equitable law.

In 1895, the legislature passes a new and complete act, making the act of declaring a homestead a matter entirely independent of any proceeding in court, either before or after declaration.

"In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." (L. '95, p. 113, Sec. 30.) Rem. & Bal. Code, Sec. 5581

It was the purpose of the act of 1895 to fix title in the community and, on the death of either spouse, in the survivor. This statute was

construed in In re Feas's Estate, 30 Wash. 51, 70 Pac. 270. After adverting to the spirit and history of the law, the court, speaking through Judge Hadley, said:

"We think it is the manifest spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family."

In Stwein v. Thrift, 30 Wash. 36, 70 Pac. 116, we held that all that part of Rem. & Bal. Code, Sec. 1468 which vested any title in a child or children, was superseded by the act of 1895; that the tenure depended upon the character of the property from which the homestead was selected

"If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property; if it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to the family of the decedent."

If that part of the old law was superseded, and a survivor can claim a homestead under the act of 1895 after the death of his spouse and title depends upon the character of the property and the act of 1895 alone, it follows that all parts of Sec. 1465 which require a setting aside" are superseded, and appellants' rights, if any, depend solely upon an answer to thequestions, (a) whether the property was the separate property of Jane A. Peterson, (b) what was the value of the property at the time of the declaration, and (c) does a declaration of homestead by the survivor of a homestead work a deprivation of property without due process of law?

Inasmuch as appellants assert, and we have assumed, that the property was community property, we shall pass the first proposition without discussion.

The testimony as to value was conflicting. There is evidence to sustain the finding of the trial judge that it did not exceed the sum of $2,000 at the time the declaration was made. The land is not what is known as first-class or quality land in the county, where is it situated. Out of the 80 acres, less than seventy acres is classed as farm land, the balance being pasture land. It is true that present values are shown to be largely in excess of the value found by the trial judge, but there is testimony to show that there had been a strong depression in prices of land, followed by a sharp raise in values, between the years 1903 and 1909. We are not prepared to say that the finding of the court in this respect is not sustained by a preponderance of the evidence.

Nor do we think that appellants have been deprived of property without due process of law. The right to declare a homestead is not an absolute right in the sense that a declaration shuts off propor judicial inquiry. In Fairfax v. Walters, 66 Wash. 583, 120 Pac. 81, we held the question of vlaue to be open to inquiry, whatever the antecedent proceedings may have been. In its broad sense, due process means an opportunity to be heard in a court of competent jurisdiction upon any question

affecting the personal or property rights of a citizen. A trial according to the "course, mode and usages of the common law." Hoke v. Henderson, 4 Dev. L. (15 N. C.) 1, 25 Am, St. 677. Stated in the alternative, a denial of due process means a denial of a right to be heard upon an issue of fact or law. If an opportunity to be heard remains, there is no lack of due process.

The state, in the exercise of its sovereign power, may define homesteads and provide the method of asserting the right of homestead. It is immaterial upon which particular ground the exercise of power is made to rest. It has the right, or as it is generally referred to, the duty, to allow a citizen the privelege of claiming a homestead against which the claims of creditors will not run. Having that power it is necessary within the power of the state to fix the character of the title under which the property shall be held. It is not necessary that the state should provide for the exercise of this right by way of judicial proceeding. It is enough that all who have an adverse interest shall have an opportunity to be heard. Opportunity in this connection means that the doors of the courts are open. If they are, there can be no complaint because the legislature has seen fit to define a procedure which is not dependent upon a court proceeding.

The right of Peter A. Peterson to claim a homestead being referable to the sovereign power of the state, the case falls within the principle announced by this court in holding that the state or any of its instrumentalities having power to exercise the right of eminent domain would not be ousted as for trespass after taking property and before ascertaining the damages to be paid; this upon the theory that a right to take is a sovereign right and that the remedy in damages was open to the aggrieved party under the forms, modes and usages of the common law. Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; Cassasa v. Seattle, 75 Wash. 367, 134 Pac. 1080.

In Crosier v. Cudihee, 43 Wash. Dec. 81, 147 Pac. 1146, it was contended that there had been a denial of due process. We said:

"The fact that appellant is in court seeking the validity of his lien against that of respondents is a sufficient answer to his contention that he has been deprived of his property without due process of law."

In Weber v. Doust, 81 Wash. 668, 143 Pac. 148, we quoted from McGehee on Due Process of Law, p. 52, holding that a judicial proceeding in a forman court is not essential to due process; that a hearing subsequent to the exercise of summary process is sufficient.

It is further contended that the title was vested in appellants as heirs upon the death of the ancestor, in virtue of Sec. 1366 of the code. This section of the code was passed at the 1895 session of the legislatur Laws of 1895, p. 187, a few days after the homestead law, Laws of 1895, p 109, was passed. The two acts may be sustained without violating the provisions of either. When construed in pari materia, it seems clear that the legislature intended to vest title in the heirs, subject to existing laws and the right of the surviving spouse to assert a homestead our of the property. Laws fixing the descent of property are usually general in their terms. Property descends subject to existing laws and the right of

The act of 1895 [illegible] providing for selection of homestead [illegible] [illegible] [illegible] [illegible] filed [illegible] [illegible] 9 [illegible] [illegible] supersedes the part of R. c 13, §1 to 5, requiring a "setting aside" of a homestead by the probate ct., [illegible] "the head of family [illegible] lifetime".

the state to charge it with the debts of the deceased person and with the support of his family or a part of his family. The fact that the state has seen fit to fix the title in a general way at the time of the death of an ancestor instead of by decree of distribution creates no greater right or interest in the heir than he had before the act was passed. He takes the property under the statute relied on, cum onere. All legal charges and encumbrances, whether resting in contract or in statute, are paramount to his claim of title. The legislature must have had the claim of homestead in mind when passing the act, for title is made subject to "debts, family allowance, expenses of administration, and any other charge for which such real estate is liable under existing laws."

Counsel finally contend that Sec. 561 of the code, being section 33 of the act of 1895, is unconstitutional in that the title of the act is not sufficiently comprehensive to sustain it. After quoting the title, "An act defining a homestead, and providing for the manner of the selection of the same," they say:

"Section 561 does something quite different than provide for the manner of the selection of a homestead. It determines the method of descent of community real property, a subject not at all germane to the defining of a homestead and the selection of the same."

We nevertheless are constrained to believe that the questioned section refers to matters that are germane to the title. The words "providing for the manner of the selection of the same" might be omitted so far as the question raised by counsel is concerned. The words "an act defining a homestead" are sufficiently comprehensive to sustain the section of the act defining the title under which a homestead is to be held. The legislature could not well define a homestead without providing for the manner of its selection and the tenure under which it is held. The object of all homestead laws is to make provision for the head of a family, and an act fixing and defining the character of the title does no violence to any of the statutes of descent.

Finding no error, the judgment of the lower court is affirmed.

Morris, C. J., Parker, Mount, and Holcomb, JJ., concur.

HAZEL MOYSES, Respondent, v. PETER NYBOE et al., Appellants.

(90 Wash. 257, 1916.)

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 3, 1915, in favor of the plaintiff, in an action to quiet title, tried to the court. Reversed.

Chadwick, J.--This action was brought to quiet title to lots three and four, block eighteen, Squire's Addition to Seattle. The lots in question were originally acquired as community property by Isaac A. Moyses and Ella Moyses. Ella Moyses died intestate October 13, 1907, leaving, as her heirs, her husband, Isaac A. Moyses, and Hazel Moyses, a minor child. A declaration of homestead was filed by the husband, and a decree, setting aside the property as a homestead, was granted April 3, 1908. The property was deeded by Isaac A. Moyses to Emma E. VanHook, who, in turn, deeded it to appellants. The respondent claims a one-half interest in the property as heir of Ella Moyses.

The case presents but one question: May a husband declare a homestead in community property after the death of his wife, and hold it in his own right, or, as in this case, sell the property and convey, by his own deed, the full fee simple title thereto. The question has been answered in the affirmative by this court. Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116; In re Feas's Estate, 30 Wash. 51, 70 Pac. 270. The subject was reviewed in detail in Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659.

The judgment is reversed, and the cause remanded with instructions to dismiss.

For Def.

Morris, C. J., Mount, Ellis, and Fullerton, JJ., concur.

A hus. [illegible] homestead [illegible] convey [illegible] deed [illegible] fee simple title.

In the Matter of the Estate of CHRISTINA BORROW. FREDERICK BORROW, Appellant, v. LILLIE MILLER et al., Respondents.

(92 Wash. 143, 1916.)

Appeal from a judgment of the superior court for Kittitas county, Grady, J., entered December 31, 1914, in favor of the defendants, in an action to establish a homestead right in property of an estate, tried to the court. Affirmed.

Fullerton, J.--On June 22, 1902, Frederick Borrow, and his then wife, Christina Borrow, acquired by purchase two certain lots situated in the city of Ellensburg, on which there had been theretofore constructed a dwelling house and certain other buildings. The parties immediately took up their residence in the dwelling house, and resided therein continuously until the death of Christina Borrow, which occurred on July 5, 1912. The family of the parties consisted of five daughters, all of whom had reached the age of majority, and none of whom were dependent upon their parents for support, at the time of the death of Mrs. Borrow.

On August 7, 1912, Frederick Borrow applied for letters of administration on his deceased wife's estate, which letters were granted him. Later on he filed a homestead claim on the premises mentioned, averring in his written declaration that he was the head of a family, that he was residing on the property with his family, and that he estimated the value of the property at $7,000, and claimed a homestead therein to the extent of $2,000.

The present action was begun on September 6, 1913, by Borrow against his daughters to establish his claim of homestead to the property and to procure a recognition thereof in the final distribution of the estate of his deceased wife. Issue was taken on the complaint by the defendants and at the trial it developed that no homestead had been selected or claimed on the premises prior to the death of Mrs. Borrow; that, since her death, the plaintiff had continued to occupy the premises, but that he had then no person living with him who was dependent upon him for support, or whom he supported; and that his daughters resided separate and apart from him. On these facts, the court held that the plaintiff was not the head of a family within the meaning of the homestead statutes, and hence not entitled to select or claim a homestead in the premises as against the interest of his daughters, and entered a decree setting aside and cancelling the claim of homestead filed, as a cloud upon their title. From this decree, the plaintiff appeals.

The provisions of the statutes prescribing the manner in which the homestead may be acquired in real property in this state and the tenure by which it is held are found in Rem. & Bal. Code at Sections 528 to 561 inclusive. Those pertinent to the present inquiry are the following:

"Sec. 528. The homestead consists of the dwelling-house, in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided."

"Sec. 552. Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes."

"Sec. 553. The phrase 'head of the family,' as used in this chapter, includes within its meaning,--

"(1) The husband or wife, when the claimant is a married person;

"(2) Every person who was residing on the premises with him or her, and under his or her care and maintenance, either,--

"(1) His or her minor child or the minor child of his or her deceased wife or husband;

"(2) A minor brother or sister or the minor child of a deceased brother or sister;

"(3) A father, mother, grandmother or grandfather;

"(4) The father, mother, grandfather or grandmother of deceased husband or wife;

"(5) An unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves."

"Sec. 558. In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record."

"Sec. 559. The declaration of homestead must contain,--

"(1) A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit:

"(2) A statement that the person making it is residing on the premisee or has purchased the same for a homestead and intends to reside thereon and claime them as a homostead;

'(3) A description of the premises;

"(4) An estimate of their actual cash value."

" "Sec. 561. From and after the time the declaration is filed for record the premises therein described constitute a homestead."

If these statutes are to be construed according to their natural and obvious purport, there would seem to be no question as to the correctness of the trial court's ruling. A homestead is defined as consisting of the dwelling house in which the claimant resides, and the land on which the same is situated, "selected as in this chapter provided." The mode of selection is prescribed, the classes of persons who are entitled to make the selection and file the declaration are defined, and finally, it is declared that "from and after the time the declaration is filed for record the premises therein described constitute a homestead." While residence on the property or a purchase with the intent to establish a residence thereon, is necessary as a prerequisite to the selection of a homestead, it is manifest that residence on the property, no matter how long continued, does not of itself create a homestead nor create the right to perfect it, as against intermediate contravening causes. In other words, the qualifications necessary under the statute to enable a person to select a homestead must exist in the person making the declaration at the time the declaration is filed, it cannot rest on any prior or preexisting right.

In so far as we have had occasion heretofore to notice the question, our holdings have been in accord with these principles. In Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046, we used this language:

"We agree with counsel that the later statute so far superseded the earlier one that no new homestead right can now be acquired under it, or could have been so acquired since the passage of the later statute, and that it is now necessary in order to impress real property with a homestead right, to execute, acknowledge, and file with the county auditor a declaration of homestead as provided in the later statute."

In Donaldson v. Winningham, 48 Wash. 374, 93 Pac. 534, 125 Am. St. 937, we held that, under the present homestead laws, there is no homestead right in property until a declaration of homestead is executed and filed for record as therein prescribed.

In Olson v. Goodsell, 56 Wash. 251, 105 Pac. 463, it was said:

"The trial court erroneously held that such a declaration of homestead destroyed appellant's lien and prevented its foreclosure. The lien having attached before the declaration of homestead was made, appellant was entitled to a foreclosure decree. In Hookway v. Thompson, ante p. 57, 105 Pac 153, this court recently held that a mortgage executed by a husband upon his separate property constituted a valid and enforceable lien, as against a subsequent declaration of homestead made by his wife. In other words, it was held that the mortgage lien created prior to the declaration of homestead could be foreclosed after and notwithstanding the making and recording of such declaration. Appellant's lien for work and labor had, under his recorded notice, attached to the property before the respondent Joseph Hall filed his declaration of homestead. It was not thereby destroyed, and appellant was entitled to a decree of foreclosure."

Under R. & B. §§ 528 to 561 defining homesteads [illegible] "head of a family" entitled [illegible] providing [illegible] selection [illegible] filing a declaration [illegible] premises constitutes a homestead qualification [illegible] statute [illegible] exist [illegible] filed; hence [illegible] widower [illegible] "head of family" as defined by statute [illegible] homestead.

In Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, we quoted certain of the sections from the homestead act, and made this comment:

"The language of these sections renders it plain that there is no homestead right in any specific property until it is selected, and such selection evidenced in writing and recorded as therein provided. The views of this court expressed in Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046, and Donaldson v. Winningham, 48 Wash. 374, 93, Pac. 534, 135 Am. St. 937, are in harmony with this view."

Tested by these principles, it seems plain that the appellant, at the time he made the declaration of homestead in question, did not have the statutory qualifications necessary to enable him to make a declaration of homestead. He was not then the head of a family, he was not a husband, nor did he have any one residing with him on the premises for whose support and maintenance he was responsible.

The appellant, to support his claim of homestead, cites and relies principally on the case of In re Feas' Estate, 30 Wash. 51, 70 Pac. 270. The facts of that case are too involved to be restated here at length, but a perusal of the case will show that it has no bearing on the question here presented. The homestead claim there made was rested upon a prior statute, and the question was whether it survived the death of the wife so as to exempt the property from sale in the course of the administration of the wife's estate for debts properly provable therein.

The cases cited from other jurisdictions we shall not review. In most of them, in so far as they rest upon statutes at all similar to our own, present the question whether a homestead estate once acquired is lost to the surviving spouse on the death of the other, or on the arrival of their children to a condition of independence. But the question here, as we have shown, is not one of the survival of an existing homestead, but one of the right to create a homestead.

The judgment is affirmed.

Morris, C. J., Mount, and Ellis, JJ., concur.

In the Matter of the Estate of Samuel Lavenberg.
(104 Wash.515, 1918.)

Appeal from an order of the superior court for King county, Jurey, J., entered May 20, 1918, directing the payment of the residue of an estate for the use and support of a widow and minor children, after a hearing before the court. Affirmed.

Chadwick, J.--There are two questions in this case.

1. Is a nonresident wife, surviving a husband who lived and did business in this state, entitled to an award of property under Sections 103 and 104, Laws of 1917, page 671, when the husband has never maintained a home or dwelling-house, and consequently no homestead has been claimed in the lifetime of the deceased, and there is no property subject to be claimed as a homestead.

Samuel Lavenberg, in his lifetime, operated a small tailoring business in Seattle. His wife and family lived in New York. The husband and wife were not separated in any legal sense. The estate consists of the proceeds of shop tools and equipment and of a small stock of goods, purchased from the now complaining creditors a short time before Lavenberg's death, and not exceeding in value the sum of $1,300. After the payment of preferred claims, there will remain less than $1,000, which the court ordered set aside to the use of the widow.

Appellants contend that the award of the whole of a small estate can only be made where one of two conditions occur: (a) Where no homestead has been claimed in the manner provided by law, and (b) Where the homestead, if claimed, is less in value than the sum of $3,000, in which event an award may be made which, including the home and household goods, shall not exceed in value the sum of $3,000.

It is further contended that homestead laws being primarily intended for the benefit of residents of the state in which they are enacted (21 Cyc. 470), and the property of nonresidents not being exempt from execution or attachment (Rem. Code, Sec. 571), it follows that the property of the estate is subject to the claims of creditors, and cannot be claimed as a homestead or in lieu of a homestead.

But the confusion of appellants' argument lies in the fact that the laws under which the award is made are not, strictly speaking, homestead and exemption laws. Although construed as analogous statutes, they in no sense pertain to the rights of debtor and creditor. Like the general laws exempting homesteads and certain personal property, they rest in a sound public policy and are calculated to prevent dependency, but they sound deeper in the policies upon which homestead and exemption laws are made to rest.

"Statutes of this character are founded on charity, they are remedial and partake of the nature of, but are not strictly, exemption laws." In re Heilbron's Estate, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

A non-resident widow is entitled to the allowance of $3000 under Laws 1917, providing the home, homestead [illegible] not exceeding $3000 shall be set aside to widow; since [illegible] strictly a homestead [illegible] exemption [illegible] charity to prevent dependency [illegible] liberally construed [illegible] widow [illegible] a contending party [illegible] creditors.

"It is the duty of the father to provide for his family during his lifetime, and to provide for them at all hazards, even as against the righ of creditors, and the law, during the administration of the father's estat simply steps into his shoes and insists upon making the same provision for the family." Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17.

If the widow were claiming a homestead, or property in lieu of a homestead, under the general law, she must have been a resident of the state at the time to take the benefit of the statute, but to the setting aside of the homestead or property in lieu thereof where the estate does not exceed in value a certain sum, the widow is in no sense a contending party and the court is given no discretion. A judicial duty imposed by the legislature compels the setting apart of the property, and against the order of the court nothing will avail unless it be the voluntary renunciation of the widow. It is the policy of our probate,law, now evidenced by Sections 103-104, Laws of 1917, p. 670, that compels rejection of the general rule that homesteads and lieu exemptions cannot be claimed by nonresidents. For, as against an imperative duty, no qualification of residence being imposed, the courts will look only to the relationship and not to the place of residence. "It is an absolute right that the statute gives unqualified by collateral conditions." Griesemer v. Boyer, supra.

In the case just cited, although not necessary to a decision upon the facts as found by the court, the right of a widow, although a nonresident, to take property under the probate exemption was advanced as a sound theor

2. But if these things be so, appellant insists that, inasmuch as the statute under which the award was made was passed after the greater part of the debts were incurred, the award will operate to impair the obligation of the several contracts, and must therefore fail pro tanto.

In re Heilbron's Estate, supra, with its succeeding line are relied o We do not feel called upon to discuss these cases, for in any event appellants take on distribution and not by execution, and so taking, they can have no advantage other than that given by the law existing at the time the debts were contracted. Under the old law, the sales were made subject to a widow's exemption of property in a sum not exceeding the sum of $1,000. Rem. Code, Sec. 1464.

While this section seems to have been repealed with out saving existing contract rights or pending cases, Laws of 1917, p. 707, Sec. 223, we think Sec. 219 warrants us in treating Sections 104 and 104 (pp. 670, 671) as a rewriting or amendment of the then existing law, and when so considered we have no hesitation in holding that appellants can claim nothing, it being certain that the residue of the estate, after paying preferred claims, is less than $1,000.

Affirmed.

Main, C. J., Mackintosh, Mitchell, and Tolman, JJ., concur.

In the Matter of the Estate of J. T. Bloor.
ISABELLA K. BLOOR, Appellant, v. LOREN C.
BLOOR et al., Respondents.

(109 Wash. 554, 1920)

Appeal from a judgment of the superior court for San Juan county, Hardin, J., entered June 27, 1919, dismissing a petition to establish a homestead right in the community property of an estate. Affirmed.

Parker, J.--Isabella K. Bloor seeks to have set aside to her from the community real property of herself and deceased husband, J. T. Bloor, a certain described tract of land as her homestead. The question of her right to such homestead was presented to the superior court for San Juan county, by her petition filed in the probate proceedings in the administration of the estate of J. T. Bloor, deceased, pending in that court. The matter was disposed of on the allegations of the petition and the objections thereto in the nature of a demurrer, filed by Loren C. Bloor, Libbie Bloor Jones, and Clifford H. Bloor, children of deceased by a former marriage, all of whom are of full age. The superior court having decided that the petition failed to state a cause for the granting of the relief prayed for, and the petitioner electing to stand upon her petition and not plead further, final judgment was rendered against her dismissing her petition, from which she has appealed to this court.

The controlling facts may be summarized from the allegations of the petition, as follows; Appellant is the widow of J. T. Bloor, who died in San Juan county in September, 1916. The land here in controversy, which appellant seeks to have set aside as her homestead, is situated in San Juan county, and was their community property for a period of about eighteen years prior to his death, during the whole of which period they resided thereon, and since his death she has resided thereon. No claim or declaration of homestead was ever made by J. T. Bloor in his lifetime, and no claim or declaration of homestead was ever made by appellant until the spring of 1919, the exact date of which does not appear in the record, when she filed a declaration under our general homestead law, Sections 528-561, Rem. Code, claiming as a homestead the land here in controversy, and thereafter filed her petition in this proceeding, seeking a judicial establishing of the land so claimed to be her homestead, to the end that absolute title thereto vest in her under Sections 561 and 1468, Rem. Code, and Sec. 103 of the new probate code, Laws of 1917, p. 670. There is no minor child of the deceased and appellant, or of either of them. There are no allegations of the petition touching the question of appellant being the head of a family within the meaning of Sec. 553, Rem. Code, of our general homestead law. We must assume, therefore, as counsel on both sides of this controversy seem to, that her claim of homestead can have no support upon the theory of her being the head of a family. More than a year has expired since the publishing of notice to creditors, no claims have been filed against the estate, the funeral expenses and expenses of the last sickness of the deceased have been paid, and we assume that the property of the estate is now ready for distribution to the appellant as the surviving widow, and to the heirs of the deceased.

Since J. T. Bloor died in the year 1916, and the new probate code was enacted by the legislature of 1917, enlarging the homestead right of a surviving spouse; and the homestead declaration and claim of appellant here involved was filed in 1919; and the enlarged right of homestead under the new probate code of 1917, if given retroactive effect in favor of appellant as against the inheritance rights of the heirs of the deceased, which occurred immediately upon his death in 1916 under Rem. Code, Sec. 1366, would, as we shall presently see, impair those accrued inheritance rights; it becomes necessary to determine whether appellant would be entitled to any homestead under the law as it existed at the time of the death of the deceased, prior to the act of 1917.

It had become the settled law of this state, prior to the act of 1917, that since the enactment of our general homestead law in 1895, Rem. Code, Sections 528-561, no right of homestead existed in any specific property until it was selected and such selection evidenced in writing and recorded as therein provided. Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E 739; In re Borrow's Estate, 92 Wash. 143, 158 Pac. 735. It is therefore plain that the residence of appellant and her deceased husband upon the land in controversy, prior to the filing of her declaration of homestead and her petition in this proceeding, lends no legal support to her claim of homestead rights therein.

Counsel for appellant rely upon the provisions of Sections 1465 and 1468, Rem. Code. These sections, as we noticed in our decision in Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659, were enacted as a part of the original probate law of 1854, which was before the enactment of our community property law, and imply a title in the deceased head of a family; and while that law contemplated the vesting of title to the homestead in the widow and minor children following the death of the husband, it was, in the latter respect, in effect repealed by the homestead law of 1895. Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116; Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659. Our decisions in Fairfax v. Walters, 66 Wash. 583, 120 Pac. 81, and Clark v. Baker, 76 Wash. 110, 135 Pac. 1025, do seem to hold that that law remained in force in so far as it gave to the widow alone a homestead right for a limited time in separate property of her deceased husband; that, however, is not the homestead right here in question, as we understand the claim of appellant. This proceeding we construe to be an effort on the part of appellant to claim a homestead in the community property of herself and the deceased husband such as will cause an absolute title to the land so claimed to vest in her as against the claims of the heirs of the deceased. This, we think, she could not successfully do prior to the passing of the probate code of 1917, since she was not qualified to make such a claim by reason of the fact that she was not, at the time of filing her homestead declaration and her petition in this proceeding, the "head of a family."

In In re Borrow's Estate, 92 Wash. 143, 158 Pac. 735, there was involved the claim of a homestead in community property made by the surviving husband, by the filing of his declaration of homestead after the death of his wife, there being no minor child or other person under his care and maintenance, and hence he not being the "head of a family" within the meaning of the homestead law of 1895, Rem. Code, Sec. 553. In that case it was squarely held that such surviving husband could not success-

fully claim a homestead in the community property because of his disqualification, in that he was not the head of a family when he made his claim therefor, after the death of his wife. A reading of the homestead law of 1895, Rem. Code, Sections 528-561, we think, renders it plain that the filing of a homestead declaration by a surviving wife stands upon no different footing, and confers no different rights upon her than the filing of a homestead declaration by a surviving husband confers upon him. In order for a surviving wife to acquire a homestead right such as appellant is here seeking, it is as necessary that she be qualified by being the head of a family as it is that a surviving husband be so qualified before he can acquire such homestead rights. The decision rendered by this court in In re Murphy's Estate, 46 Wash. 574, 90 Pac. 916, read superficially may seem out of harmony with our conclusion here reached, since that was a case where a surviving wife's homestead claim was protected by the court, though she was entirely alone in the world without any minor child or other person dependent on her, that is, she was not the head of a family. The homestead right there involved had become perfected in community property by occupancy as a home by both spouses long before the enactment of the homestead law of 1085, at a time when occupancy as a home was all that was necessary to perfect such right. Philbrick v. Andrews, 8 Wash. 7 35 Pac. 358; Anderson v. Stadlmann, 17 Wash. 433, 49 Pac. 1070; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046. Manifestly, that surviving wife need do nothing other than to continue to occupy the home in order to perfect her homestead right. We conclude that appellant could not, after the death of her husband, successfully claim a homestead right in the community property such as she here seeks to acquire, prior to the passage of the new probate code of 1917.

Nor do we think she can acquire such homestead right under the new probate code of 1917. It is true that Sec. 103 of that code, Laws of 1917, page 670, seems to materially enlarge the homestead right of each spouse when claimed after the death of the other. And it may be conceded that, if that law be controlling in our present inquiry, it would support the claim here made in appellant's behalf. It is to be remembered, however, that the rights of the heirs of J. T. Bloor, deceased, in this property acrued immediately upon the occurring of his death in 1916, and it would therefore seem to follow as a matter of course that the awarding to appellant of a homestead in this community property would be, in effect, awarding her a homestead in property the title to an undivided portion of which has already vested in the heirs of the deceased, and to that extent impair their vested rights. Rem. Code, Sec. 1366; Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765; Bickford v. Stewart, 55 Wash. 278, 104 Pac. 263, 34 L. R. A. (N. S.) 623; Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659.

It is true that, in the last cited case, at page 62, it is recognized that the heirs take immediately upon the death of the deceased, "subject to existing laws and the right of the surviving spouse to assert a homestead out of the property." This, we think, however, can avail appellant nothing, for, as we have seen, she possessed no homestead right of the nature she now claims in this property, under the law existing at the time of her husband's death, since no declaration of homestead had been made by either of them prior to his death and she was not thereafter the head of a family. It would seem, therefore, that the inheritance rights of the heirs were not, at the time title vested in them, immediately upon

Under R. §§ 528-561 [illegible] homestead existed [illegible] specific [illegible] until [illegible] selected [illegible] selection recorded [illegible] prior [illegible] residence [illegible] support [illegible] homestead [illegible]

The probate code, Laws 1917 enlarging [illegible] homestead [illegible] each separate [illegible] entitled [illegible] surviving [illegible] homestead [illegible] undivided [illegible] common [illegible] selected [illegible] homestead [illegible] husband's lifetime [illegible] vesting [illegible] heirs [illegible] decedent prior [illegible] Oct. 1917; since [illegible] impair vesting [illegible] the death of the deceased, impaired, or subject to impairment, by any possible homestead right in appellant. Certainly it never was the intention of the legislature, in passing the probate act of 1917, to impair such vested rights by conferring a homestead right upon one who did not possess such right under existing laws in property the title to which had already vested in heirs by descent. It seems quite clear to us that the probate code of 1917 was not intended by the legislature to be retroactive in this respect; and if such legislative intent were evidenced by the terms of that act, it would indeed be difficult to escape the conclusion that it was other than unconstitutional.

In so far as there existed a homestead right in a surviving spouse under existing law prior to the passage of the probate law of 1917, it may be that the enactment of that law, expanding the homestead right of a surviving spouse, was merely a rewriting of such previously existing law looking to the preservation of such existing rights. This would seem to be in harmony with observations made by Judge Chadwick, speaking for the court in In re Lavenberg's Estate, 104 Wash. 515, 177 Pac. 328. But that is quite a different thing from materially expanding the right of homestead in a surviving spouse, as the probate code of 1917 does, and giving it such retroactive effect as to impair inheritance rights which became fully vested in heirs before its passage.

It will be understood, of course, that our decision on the question here presented does not in the least impair whatever right, apart from her claim of homestead right, appellant may have as the widow of deceased or as his heir, in this and other community property possessed by them at the time of his death. We are quite convinced that the judgment of the trial court must be affirmed.

It is so ordered.

Holcomb, C. J., Mitchell, Mackintosh, and Main, JJ., concur.

SECURITY NATIONAL BANK, Appellant, v.
A. H. MASON et al., Respondents.
(#16325, Sept. 1921,)
(17 Dec. 63)

(117 Wn. 95)

Appeal from a judgment of the superior court for Douglas county, Hill, J., entered October 23, 1920, upon findings in favor of the defendants, in an action of ejectment, tried to the court. Affirmed.

Holcomb, J.--This action is in ejectment to determine the title to the northeast quarter of section 32, township 29, north, range 26, E. W. M., in Douglas county, Washington. On November 23, 1915, and for some time prior thereto, Mason and wife were owners in fee of the real estate and in occupancy thereof. On October 23, 1914, defendant A. H. Mason, acting for the community, executed and delivered to appellant bank a promissory note for $2,000, and thereafter, on November 23, 1915, the bank commenced an action in the superior court for Spokane county against Mason and wife upon the note. Personal service was had upon both defendants. At the commencement of the action, the bank caused a writ of attachment to be legally sued out, directed to the sheriff of Douglas county, Washington, which, on November 26, 1915, was duly levied upon the real estate in question. The bank also, on November 26, 1915, caused a lis pendens to be filed in the auditor's office of Douglas county. Washington. A. H. Mason defaulted, and his wife, Annie E. Mason, filed an answer in the case in Spokane county, but did not appear to contest the action. On February 10, 1916, the Spokane court made findings of fact, conclusions of law and judgment in favor of appellant for the full amount demanded. Appellant was granted judgment against both the Masons and the writ of attachment was in all respects declared to be valid and lawfully sued out, and the real estate theretofore attached directed to be sold by the sheriff of Douglas county, under the writ of execution issued under the Spokane county judgment, as provided by law. Pursuant to that judgment, an execution was duly issued, directed to the sheriff of Douglas county, who, acting thereon, on April 22, 1916, sold the real estate involved, in the manner provided by law, and issued a certificate of sale therefor to appellant. Thereafter the sale was duly confirmed, and on May 6, 1917, no redemption having been made, the sheriff of Douglas county issued a deed to appellant.

After the commencement of the Spokane county action, and the issuance and levy of the writ of attachment, and the filing of the lis pendens, in the auditor's office of Douglas county, to wit, on December 2, 1915, the defendants, Mason and wife, executed and delivered to C. D. Martin and E. E. Garberg a warranty deed in the usual form for the real estate involved, which deed was duly recorded in the auditor's office of Douglas county. Afterwards, on February 17, 1916, Mason and wife took a reconveyance of the property by way of a quitclaim deed from Martin and Garberg and their wives, which was duly recorded. Appellant calls this transaction a repurchase by Mason and wife from Martin and Garberg of the real estate. Having repurchased the real estate subject to the attachment lien of plaintiff, as appellant claims, on March, 4, 1916, Mason executed, acknowledged and filed in the auditor's office of

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Douglas county, Washington, a declaration of homestead, and no declaration of abandonment has ever been made. It will be noted that this declaration of homestead was made after judgment in the case in Spokane county but before sale under execution. Mason and wife claiming title, and having possession, appellant brought this suit.

On the issue of fact of whether or not theconveyance by Mason and wife to Martin and Garberg was if fact an absolute conveyance or a mortgage, the trial court found that the deed was intended to be, and was, in fact, an absolute deed of conveyance of the real estate, and vested title thereto in Martin and Garberg, subject to the attachment of plaintiff. The trial judge, however, decided that the conveyance by Mason and wife to Martin and Garberg, and the reconveyance by Martin and Garberg to Mason and wife, did not cut off the statutory right of homestead, and that is the sole question to be determined on this appeal.

No statement of facts or bill of exceptions was brought up, and the question has to be determined solely upon the findings of fact and conclusions of law.

Appellant urges two propositions to justify a reversal: First, defendants could not by purchasing the real estate, already burdened with the lien of plaintiff's attachment, obtain a better title or greater rights than their grantors had therein; and second, the judgment of the superior court for Spokane county in which the attachment was issued, and the final judgment rendered directing the sale of the real estate involved, is res judicata between the parties.

It is first contended that the attachment in the Spokane county suit created a specific lien in rem against the real estate here involved and that when the judgment was granted expressly preserving the attachment lien, that the execution preserved the specific lien against the property under the judgment. Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759, and Van De Vanter v. Davis, 23 Wash. 693, 63 Pac. 555, are cited as sustaining the above contention.

We have uniformly held, since the earliest days of statehood, that homestead and exemption laws are to be liberally construed, because of the interest that the public has in the maintenance and protection of the home of the individual citizen. Such laws were commanded to be enacted by art. 19, Sec. 1, of our constitution. Prior to statehood, the territorial legislature had provided that:

"There shall be also exempt from execution and attachment to every householder being the head of a family, a homestead, etc. . . . Such homestead may be selected at any time before sale." Code of 1881, Sec. 342, p. 76.

We held in Wiss v. Stewart, 16 Wash. 376, 47 Pac. 736; Anderson v. Stadlmann, 17 Wash. 433, 49 Pac. 1070; Ross v. Howard, 25 Wash. 1, 64 Pac. 794; In re Feas' Estate, 30 Wash. 51, 70 Pac. 270, and State ex rel. Jakubowski v. Superior Court, 84 Wash 665, 147 Pac. 408, that the last sentence of that section, "that such homestead may be selected at any time before sale," was not superseded by the Laws of 1895, ch 64, p. 109,

relating to the manner of selection and the value of a homestead, but that that chapter merely superseded all other laws relating to the method of selecting or declaring a homestead, and the value thereof. The same reasoning leaves in force the first portion of Sec. 302 of the act of 1881, as follows: "There shall also exempt from execution and attachment to every householder being the head of a family, a homestead." There is no other declaration outside of the constitutional requirement, which we have held is not self-executing, "that there shall be exempt," etc., "a homestead." We held, also, in Snelling v. Butler, 66 Wash. 165, 119 Pac. 3, and in Kenyon v. Erskine, 69 Wash. 110, 124 Pac. 392, that a judgment becomes a lien upon property, subject to the right of the owners of the property to defeat execution sale by the filing of a homestead declaration. When the declaration is filed the property becomes a homestead, and as such it is exempt from execution and forced sale.

We also held in the Jakubowski case, supra, that in order to preserve the homestead right as against a purchaser on execution, it is necessary that the declaration of homestead be filed prior to the date of the sale. Such was the fact in this case. Appellant argues, however, that these holdings do not mean that the judgment debtors may purchase the property burdened with a lien and thereby avoid such lien, which might have been enforced against their grantors except for the conveyance. That is not the case here. Appellant could not have enforced their judgment against the property passing to Martin and Garberg unless the property went to them burdened with a specific lien by attachment; but in the hands of the Masons, the owners, it was as much subject to homestead exemption against the attachment as against the execution, for they could declare the homestead in the premises at any time before sale, and appellant could not have prevented it.

Under the authorities generally, had the homestead declaration been made before the writ of attachment was sued out, the writ of attachment would not have created even the appearance of a lien against the real estate; and since our statute provides that the declaration of homestead may be made "at any time before sale," one cannot acquire a prior lien, defeating a right of homestead, by a writ of attachment. The trial judge observed:

"The transfer by the Masons of the title to the property burdened with the judgment lien did not constitute such lien a thing that inhered in or attached to the property independently of the personal obligation of the defendants evidenced by the judgment. Such lien, for its enforcement, must depend on an execution under said judgment, and a sale under such execution would be a forced sale to compel the payment of the personal obligation of the defendants. The defendants having impressed the land in question with the character of a homestead prior to the execution sale thereof under which plaintiff claims title thereto, said sale was such as the law prohibits and was therefore void."

We believe the above observations are correct.

It is further claimed by appellant that the judgment of the superior court for Spokane county, in which the attachment was issued and final judgment entered, and in which the Masons were personally served and the wife

Homestead [illegible] liberally construed.

The first [illegible] Rem. § 529 [illegible] homestead [illegible] head [illegible] family exempt [illegible] execution [illegible] attachment [illegible] still [illegible] force; [illegible] words [illegible] last sentence, providing [illegible] homestead [illegible] selected [illegible] creditor acquiring [illegible] priority [illegible] lien [illegible] filing a writ [illegible] attachment [illegible] debtor [illegible] declaration [illegible] homestead.

[illegible] execution [illegible] a homestead [illegible] filed [illegible].

Failure [illegible] debtor [illegible] and [illegible] homestead [illegible] attachment [illegible] but [illegible] execution [illegible] precludes [illegible] pleading [illegible] execution [illegible] title [illegible] exemption [illegible] homestead.

appeared and defended, is res judicata. It is asserted that the right of a homestead, if any had been claimed or intended to be claimed, should have been asserted by the judgment debtors. The case of Brandon v. Leavenworth, 99 Wash. 339, 169 Pac. 867, is cited as conclusive. In that case judgment was recovered and execution issued and returned nulla bona. Afterwards an action in the nature of a creditors' bill was instituted, demanding that the deed from Brandon to his wife be set aside on the ground that it was made for the purpose of defrauding respondents, and that the judgment in the former suit be decreed a specific lien upon the property, and that it be sold to satisfy the judgment. Four or five days before answering, appellants filed their claim of homestead in the office of the auditor of the propertcounty. A trial was had and decree entered declaring the deed fraudulent and the judgment a lien, and ordering the property sold on execution. The decree was not appealed from. Thereafter the property was sold and bought in by respondents for the amount of their judgment, and the sale duly confirmed. It was held that, although appellants had filed a declaration of homestead at the time they answered in the suit to subject their property to the lien of the judgment, they did not plead it in bar of that action. The same rule was stated in Traders Nat. Bank of Spokane v. Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. 17, in an action in the nature of a creditor's bill.

It will be observed that both of these actions were creditors' actions brought to set aside specified fraudulent conveyances and subject the debtors real estate to the prior judgment lien. This court simply held in both adtions that the judgment debtors were put upon their defenses to show any superior right or title they had which would prevent the enforcement of the judgment lien set up in the creditors' bill. The last cited case simply followed the first case cited, to the effect that it was the duty of the debtor to plead that the land was exempt for homestead, they having prior thereto filed their declaration of homestead in the suit brought to subject the land to the lien of the judgment. And that its exactly what respondents have done in this case. They have pleaded that the land was exempt as a homestead, and set up their declaration of homestead.

We conclude that the judgment of the trial court was correct.

Affirmed.

Parker, C. J., Fullerton, Bridges, and Mackintosh, JJ., concur.

CHAPTER XVIII.

CITATIONS

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CITATIONS

In Re Estate of Eric Hamilton (1919)	108 Wash. 326.
Philbrick v. Andrews (1894)	8 Wash. 7.
Stewin v. Thrift (1902)	30 Wash. 36.
Re Lloyd's Estate (1904)	34 Wash. 84.
Fairfax v. Walters (1912)	66 Wash. 583.
Foss v. Howard (1901)	25 Wash. 1.

Miscellaneous

ELEANOR HERRICK et al., Appellants, v. EVA J. MILLER
et al., Respondents.
(69 Wash 456, 1912)

Appeal from a judgment of the superior court for King county, Myers, J., entered January 2, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to obtain the construction of a will and settlement of property rights thereunder. Affirmed.

Parker, J.--The parties to this action are the children and widow of Dr. P. B. M. Miller, deceased, late of Seattle. The purpose of the action is to obtain a construction of his will and a settlement of all of the property rights of the parties under the will. Dr. Miller died on December 3, 1904, leaving the will here involved, which he had made a few months previous. The only provisions of the will which we need notice in our present inquiry are the following:

"(3) I bequeath to my son, Hubert Lixingston Miller, my gold watch and chain, all my medical library, surgical instruments and general surgical equiptment of every nature whatsoever.

"(4) I bequeath all the residue of my personal property and effects of every nature whatever, including my separate personal property and my interest in community personal property wheresoever situated, after the payment of my debts, funeral and testamentary expenses as hereinbefore provided, unto my wife, Eva J. Miller, absolutely.

"(5) I give and devise all my real estate of every tenure whatsoever and wheresoever situated, and all interests therein, community and otherwise, of which I shall at my death be seized or entitled to, or of which I shall at my death have power to dispose of by will, unto my wife, Eva J. Miller, and my son George E. Miller, my executors hereinagter named, and to the survivor of them, and their successors, in trust, to be held by them for the purposes and subject to the provisions hereinafter declared.

"(6) I declare it to be my earnest request and recommendation that, under no circumstances, shall any part of my realproperty be sold during the lifetime of my said wife, provided, she shall so long continue my widow; but that said property shall be rented and leased as may seem best to by executors and trustees and their successors; and I direct that the ne income therefrom shall be paid to my said wife during her widow hood and be come her absolute property and she shall not be liable to account for any income so paid to or received by her.

"(7) I direct that, after the death or future marriage of my said wife, her successor in the trust and the said George E. Miller or his successor in the trust shall, as soon as practicable thereafter, sell all of my real estate and interests therein hereinbefore devised in trust and convert the same into money, and shall for the purposes aforesaid execute

and deliver all such deeds and conveyances as may be necessary to pass the proper title thereto:-and I direct that the money so received from such sale or sales, together with the income received from said real property from and after the death or re-marriage of my said wife, shall be distributed equally, share and share alike, among my children, . . ."

The will appoints Eva J. Miller and George E. Miller, widow and son of the testator, executrix and executor without bonds, and directs the settlement and management of the estate without the intervention of the court, except to admit the will to probate and file an inventory as required by law. Accordingly, in Janyary, 1905, the will was admitted to probate, and an inventory filed by the executor and executrix. All of the property left by Dr. Miller was his interest in the community property of himself and wife, Eva J. Miller. That the community property consisted of lot 1 and the north 15 feet of lot 4 in block 48, Terry's addition to Seattle, which was appraised at $35,000, and personal property consisting of surgical instruments, medical library, office furniture, and household furniture which was appraised at $850. The community real property above described, at the time of the death of Dr. Miller, consisted of a tract of land fronting 75 feet upon the east side of Sixth avenue and 120 feet upon the south side of Marion street, being at the southeast corner of the intersection of that avenue and street in Seattle, together with a hotel building situated upon the westerly portion of the tract, and also a foundation situated upon the easterly protion of the tract upon which they were then contemplating the erection of another building. This property is referred to as the "Ross-shire," that being the name they gave to the hotel building thereon. The management of this property appears to have been left largely if not wholly to Mrs. Miller after the death of Dr. Miller. She had separate funds of her own with which she thereafter erected upon the foundation on the easterly portion of the tract a building at a cost of approximately $12,000. This building and the other one upon the westerly portion of the tract were rented together as a hotel. In May, 1911, in a condemnation proceeding prosecuted by the city of Seattle to acquire the right to damage the Ross-shire property by changing the grade of Sixth avenue, there was awarded to the owners of that property the sum of $12,000 damages, which was accordingly paid into court by the city. The claim of Mrs. Miller to one-half of this money as belonging to her absolutely, and that only one-half thereof belonged to the trust estate, gave rise to this controversy, and resulted in the bringing of this action in June, 1911, by certain of the residuary devisees to settle the property rights of all parties under the will.

The substance of the prayer of plaintiffs' complaint is that the will be so construed as to give to Mrs. Miller only the net income from the Ross-shire property and the $12,000 awarded as damages to that property in the condemnation case, reserving the whole thereof to go to the residuary devisees upon the death or remarriage of Mrs. Miller. The theory of this claim of the plaintiffs is that Dr. Miller devised the whole of the Ross-shire property as if it were his separate property; that Mrs. Miller was thereby required to elect between her right to her community interest in that property and her right to the income from the whole thereof under the will, and that she has elected to take under the will and thereby waived her right to assert her community interest. The plaintiffs also

prayed in the alternative that in the event the court should decree that they are not entitled to the construction of the will claimed by them, the respective interests of Mrs. Miller and the residuary devisees be finally determined, and that the community interest of Mrs. Miller, if she be decreed to have any such interest, be set apart to her.

The trial court decredd, in substance, that the plaintiffs were not entitled to the construction of the will claimed by them; that Mrs. Miller was not required to elect between her community interest and her rights un the terms of the will; that she is the absolute owner, by virtue of her community right, of an undivided one-half interest in the Ross-shire property, exclusive of the building she erected thereon with her separate funds and that she is the owner of that building. The court also partitioned the Ross-shire property, with the aid of commissioners appointed for that purpose, between Mrs. Miller and the trust estate, awarding to her the easterly seventy feet on which her building is situated, and to the trust estat the westerly fifty feet together with the building thereon. The court also awarded the $12,000, one-half to Mrs. Miller and on-half to the trust estat providing, however, that there should be first paid therefrom a mortgage upon the Ross-shire property for $3,600, which had been given to raise fund to pay a community debt incurred by Dr. Miller in his lifetime. From this determination of the rights of the parties, the plaintiffs have appealed.

The controlling question in this case is, Was Mrs. Miller required to elect between her community interest in the Ross-shire property and her right to the net income from the whole thereof, which it is claimed by counsel for appellants was devised to her by the terms of the will? In other words is the devise made to her by the will so inconsistent with her claim of community interest in the property that equity will not permit her to assert both claims? Learned counsel for appellants contend that such rights of Mrs. Miller are so inconsistent that she cannot succes fully maintain both, but must choose which one she will exercise and abandon the other. This contention is rested upon the general rule that when the owner of an estate, in an instrument of donation, either will or deed, uses language with reference to the property of another, which, if t property were his own, would amount to an effectual disposition of it to a third person, and by the same instrument gives a portion of his own estate to that same owner whose rights of ownership he had thus assumed to transfer, such owner and donee is put to an election between his claim of title to the property so assumed to be disposed of by the donor, and hi right as donee under the instrument.

Before looking to the particular language of the will let us notice some of the rules of law applicable to the construction of such instruments when a question of election is involved. In 1 Pomeroy's Eq. Jur. (3d ed.), at Sec. 472, that learned author says:

"The first and fundamental rule, of which all the others are little more than corrollaries, is: In order to create the necessity for an election, there must appear upon the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention, on the part of the testator or other donor, to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor's power of disposition, must appear ..

from language of the instrument which is unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary."

A strong presumption, necessary to overcome in order to require an election on the part of the donee under such circumstances, is that the testator is presumed to intend only to dispose of property over which he has testamentary power of disposition. The authorities hereafter noticed dhow that this presumption will always prevail unless the testator's intention is clearly expressed or necessarily implied to the contrary by the terms of the will itself. We think there is no dissent from this rule. We will also find as we proceed that such an intention on the part of the testator must be evidenced by designating with certainty the specific property he so assumes to dispose of, in order to put his donee to an election. The simplest case requiring an election is where a testator assumes to dispose of property of his devisee and designates the property he so assumes to dispose of by description such as would be sufficient in an ordinary conveyance. In such a case it is easy to see that the devisee is put to an election, because there is then no uncertainty as to the testator's intention to dispose of property belonging to his devisee. In this case, however, we have no such specific designation of the property of the devisee which it is claimed the testator assumed to dispose of as his own, and besides we are dealing with property which belonged equally to both the testator and the devisee. Such cases give rise to more difficulty in the determination of a question of election. The Ross-shire property being the community property of Dr. and Mrs. Miller, under our laws he had no power of disposition of that property by conveyance during his lifetime, except by deed joined in by Mrs. Miller; Rem. & Bal. Code, Sec. 5918; nor did he possess any testamentary power of disposition thereof except as to his community interest therein alone, that being only an undivided one-half interest. Rem.& Bal. Code, Sec. 1342. If we assume that this is simply a case of two persons owning undivided interests in property, apart from the analogy sometimes sought to be drawn by the courts between dower and community property rights of a wife, we find the following observations of Professor Pomeroy applicable here:

"If a testator owning an undivided share uses language of description and donation which may apply to and include the whole property, and by the same will gives benefits to his co-owner, the question arises whether such co-owner, is bound to elect between the benefits conferred by the will and his own share of the property. Prima facie a testator is presumed to have intended to bequeath that alone which he owned,--that only over which his power of disposal extended. Wherever, therefore, the testator does not give the whole property specifically, but employs general words of description and donation, such as 'all my lands,' and the like, it is well settled that no case for an election arised, because there is an interest belonging to the testator to which the disposing language can apply, and the prima facie presumption as to his intent will control. On the other hand, if the testator devises the property specifically by language in

dicating a specific gift of the property, an election becomes necessary." 1 Pomeroy, Equity Jurisprudence (3d ed.), Sec. 489.

If we assume that dower and community property rights of a wife are analogous rights, then it would seem that there must be an equally clear expression of an intention on the part of the husband in his will to put her to an election, because a gift to a wife by will, in jurisdictions where dower rights exist, in the absence of statute prescribing a differen rule, is presumed to be intended as a provision in addition to her dower right, unless the language of the will clearly expresses or necessarily implies that such gift to her is in lieu of dower. 1 Pomeroy, Equity Jurisprudence (3d ed.), Sec. 493. At Sec. 505, referring to the question of election by a wife between community rights and her rights under the will of her husband, the author further observed:

"Whenever a husband has made some testamentary provision for his wife, and has also assumed to dispose of more than his own half of the community property, in order that she shall be put to her election, the testamentary provision in her behalf must either be declared in express terms to be given to her in lieu of her own proprietary right and interest in the community property, or else an intention on his part that it shall be in lieu of such proprietary right must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to her share of the community property would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. An intent of the husband to dispose of his wife's share of the community property by his will, and thus to put her to an election, will not be readily inferred, and will never be inferred where the words of the gift may have their fair and natural import by applying them only to the onehalf of the community property which he has the power to dispose of by will."

Having in mind these rules of construction, what does the language of this will tell us as to the intention of Dr. Miller to dispose of his wife's interest in their community property?

The only language of the will which can possibly be construed as expressing an intention on the part of Dr. Miller to dispose of Mrs Miller's community interest in the Ross-shire property is the following: "I give and devise all my real estate of every tenure whatsoever and wheresoever situated, and all interest therein, community and otherwise, of which I shall at my death be seized or entitled to, or to which I shall at my death have power to dispose of by will, unto my wife Eva J. Miller and my son George E. Miller . . . in trust," etc.; Mrs. Miller being the sole beneficiary of that trust during her life or until she again marries. No specific property is designated or described in any manner, and the language apparently expressly limits his testamentary disposition to property which he shall at the time of his death "be seized or entitled to" or"have power to dispose of by will." In view of the fact that he is not seized of or entitled to the wife's community property, has no power of disposition thereof during her lifetime, nor any power of testamentary disposition thereof, it seems to us that there is but little room for arguing that this language is even ambiguous as to whose property he assumed to dispose of. Standing alone and applying thereto the rules of construction we have noticed, it seems to us that the language does not express an

intention on the part of Dr. Miller to dispose of his wife's community interest. In any event such an intent is not expressed with such clearness as the law requires in order to put her to an election. In the case of Estate of Gilmore, 81 Cal. 240, 22 Pac. 655, dealing with the provisions of the will disposing of property in language no more specific than this, the court said:

It will be observed that the will does not specifically describe any property. but simply gives to the wife 'one-half of all my property, both real and personal, of which I shall be possessed at the time of my death.'

"Conceding that the will is susceptible of two possible constructions, one, that the testator intended to devise all property of which he should b possessed at the last moment of life, including the whole of the community property over which he had the power of disposition during life; and the other, that he intended to devise only his property then in his possession over which alone he had the power of testamentary disposition,--still, well-settled rules of construction and presumptions of law require the adoption of the latter construction, which accords with the decree of the lower court.

"(1) The testator must be presumed to have known the law applicable to the disposition of property by will, and therefore to have known that he had no power to dispose, by will, of his wife's interest in the community property, but only of his onw interest therein. (Civ. Code, Secs. 172, 1331, 1402; Morrison v. Bowman, 29 Cal. 347; Estate of Frey, 52 Cal. 660.)

"(2) He must also be presumed not to have intended to devise any property over which he had no power of testamentary disposition, and therefore the will should be read as applying only to his property within such power. (King v. Lagrange, 50 Cal, 332; Estate of Silvey, 42 Cal.212.) In the latter case it was said: 'The devise must be read as applying only to that moiety which was within his testamentary power. A purpose to attempt the disposition, by will, of property which by statute would be pass to the wife, as survivor of the matrimonial community upon his death, is not to be readily inferred especially where, as here, the words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition.'

"The devise in this case is, 'of all my property of which I may die possessed,' and not of any specific property. The devise to the wife is no inconsistent with the other devises to the daughter and grandshiclren. All the words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition'; and there is nothing in thecircumstances under which the will was made substantially tending to rebut the presumptions above stated. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome those presumptions that the wife canbe put to her election either to take under the will, or to take what she is entitled to by law. (Morrison v. Bowman, 29 Cal. 347; Noe v. Splivalo, 54 Cal 207; Estate of Stewart, 74 Cal. 98.) But where there is no such manifest intent, the wife may claim and take

both what the law gives her in the community property, and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition. (Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Payne v. Payne, 18 Cal. 301; Estate of Silvey, 44 Cal 210; King v. Lagrange, 50 Cal. 331; Estate of Frey, 52 Cal. 658.)"

In the case of In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437, the court held that a similar provision of a husband's will did not require the wife to elect between her community rights and her rights under the will, and further that, notwithstanding she there exressly elected, by a signed written instrument under the belief that she was required to elect, the written instrument of election not being intended as a conveyance to the other legatees, such election amounted to nothing as affecting her rights, and that she thereafter could claim both under the will and her half of the community property. These California cases are of special interest and force in this case, in view of the fact that, under the laws of California, the husband has the absolute power of disposition of the community property by deed without the wife joining therein, during his lifetime. We have seen that he has no such power under the laws of the state of Washington. In the earlier California case of Estate of Stewart, 74 Cal. 98, 15 Pac. 445, the court was evidently largely influenced by the fact that the husband had power to dispose of the whole of the community property during his lifetime, as indicated by its remarks at page 103 as follows:

"When read together, the provisions of the will are the best expression short of a direct statement to that effect--that he was dealing with the whole of the community property under the phrase 'all my estate.' Every clause in the will bears a clear and indisputable badge of that intention. He dealt with the property just as he had been accustomed to deal with it through a long, active, and successful business life; just as he had in accumulating and disposing of th property during his lifetime,--without consulting his wife, or asking her to join with him in any conveyance. He uses the phrase 'my estate' in the sense that he had been accustomed to use it all his life, It was his estate. He could dispose of it absolutely without the consent of his wife during his life, and he thought undoubtedly that he could do so, and that he was doing so, by his will."

The result of that case seems to be not in entire harmony with the later California cases we have above noticed; but it is worthy of note that the case was decided by a majority of one only, three of the judges dissenting, We are of the opinion that Mrs. Miller was not required to elect between her community rights and her right to take under the provisions of the will. This view finds support in Moss v. Helsley, 60 Tex. 426; Pratt v. Douglas, 38 N. J. Eq. 516; In re Gwin's estate, 77 Cal. 313, 19 Pac. 527.

So far we have dealt with the language of the will as though it contained nothing but the language of the device made to the executor and executrix in trust for Mrs. Miller's benefit. There are other provisions in the will relating to the management of the property devised in trust, as will be noticed by reference to the provisions of the will above quoted, which may seem to indicate an intention that all of the Ross-shire property should be kept and managed together. Those provisions, however, even if

construed as mandatory, go only to the question of the management of the property, and do not affect the question of where the title thereto shall ultimately rest. Manifestly no one is interested in this question except Mrs. Miller and the residuary devisees. It is true that all of the Ross-shire property will not necessarily be managed together if Mrs. Miller's portion be partitioned to her, though it may be so managed if she and her co-executor so desires, since she in any event is entitled to the entire net income therefrom. But these appellants are not in position to complain of a separation of these interests. They have in effect asked that very thing by the alternative prayer of their complaint. Whether or not Mrs. Miller would have the right to have the property partitioned and her interest set apart against the objections of the residuary devisees and thus give her the power to prevent the joint management, which it may be argued the will contemplates, is now of but little consequence in view of the manner in which the several rights of the parties are sought by appellants to be settled in this action. This is only a question of whether or not partition shall take place now between Mrs. Miller and the trust estate, or shall take place at her death or marriage. Appellants seeking this partition cannot complain that it seems in a measure to defeat the management of the trust estate as contemplated by the will.

Some contention is made upon the claimed necessity of Mrs. Miller accounting for rents and profits of the property during her management of the trust estate. This becomes of no consequence in view of the fact that in any event she is entitled to all of the net income, not only of her own community interest, but also of the trust estate during her life or until she marries. She has not wasted the property nor caused its depreciation in value in the least. Manifestly she has nothing to account for.

The partition of the property as made is apparently eminently just and fair, and the fact that it could be, and was, so partitioned as to give to her her own building without impairing the rights of the residuary legatees in the least, renders the question of their rights in that building, by reason of it having been built upon the common property by her, of no consequence. Had the building been placed there by her in such manner that a partition of the property could not have been fairly had by regarding the building as her separate property, Mrs. Miller might have been required to forego her claim of absolute ownership to the building.

We are of the opinion that the learned trial court has properly disposed of the rights of the parties, and that the judgment should be affirmed. It is so ordered.

Dunbar, C. J., Gose, and Crow, JJ., concur.

Chadwick, J. (dissenting)--It is said in the majority opinion that, standing alone and applying thereto the rules of construction theretofore noticed, the language of the will does not express an intention on the part of Dr. Miller to dispose of his wife's community interest; or, if so, it is not expressed with such clearness as the law requires in order to put her to an election. It seems to me that the intent is sufficiently

A will devising [illegible] testator's
real estate and [illegible] therein, comm.
[illegible] seized [illegible]
[illegible] disposition [illegible] in trust
[illegible] net income [illegible]
[illegible] widowhood [illegible] share any interest
[illegible] comm. [illegible]
[illegible] election [illegible]
[illegible] comm. [illegible] provision [illegible]
[illegible] in [illegible] will [illegible]
[illegible] necessity [illegible] election [illegible]
[illegible] face [illegible] will [illegible] presumption
[illegible] testator intended [illegible] dispose [illegible]
[illegible] in [illegible] absence [illegible] designation
[illegible] specific [illegible]

expressed. It is true, as asserted, that the husband cannot, as against the will of his spouse, devise more than his half, but he may so draw his will as to compel an election. There are many things about this will that make his intent sufficiently clear and certain to satisfy the tests of the law. He assumed and undertook to provide that the whole property should be kept intact during the widowhood or pending the death of his wife. It is evidence from the whole instrument that he intended that the whole property should eventually go to his children, and that in lieu of her present interest in one-half of the property, his wife would take the income of the whole. When a testator gives property to one whom he would not be bound to recognize as a beneficiary, and the bequest depends upon a beneficial condition, an election must necessarily follow. Mrs. Miller was entitled to her half of the community property; or in lieu thereof, she might take the income of the whole. The effect of the majority holding is that she is entitled to her own and the whole income pending the determination of this litigation. The will states that the property is given in trust to the executors. The trust would be wholly ineffectual unless Mrs. Miller permitted her undivided share to rest in the trust and contented herself with the income of the whole property. While the case of Prince v. Prince, 64 Wash. 552, 117 Pac. 255, was based upon the principl of law governing mutual will, yet it seems to me that the same principle would govern here, inasmuch as Mrs. Miller accepted the terms of the will and acted upon it for a sufficient time to bind her to an election.

For these reasons, I dissent from the majority opinion.

In the Matter of the Estate of JOHN F. CURTIS.
(#16471, July 1921, 16 Dec. 186)
(116 Wn. 237)

Appeal by legatees from a judgment of the superior court for King county, Jurey, J., entered December 16, 1920, decreeing a settlement and distribution of an estate, after a hearing upon exceptions to the final account of the administrator. Modified.

Holcomb, J.--John F. Curtis died in King county, Washington, in 1893 He left a will which was thereafter duly probated in, and by, the superior court of King county, disposing of his estate. After certain usual and customary provisions, the provisions of the will in controversy and most material in this matter, were these:

"Third: I give and bequeath to my beloved wife Ellenor the rents and use of all my personal estate of every description whatever, money I m have on hand at the time of my death and all securietes for money, indebtedness, chances (choses) in action, subject only to the payment of my debts and funeral expenses.

"Fourth: I give the use of the building and rents to receive on lot number three, block twenty-six in the town of Sprague, now recorded in Lincln county, state of Washington-

"Fifth: I give the use of lots one and two, block ninety-eight, David D. T. Dennys fifth addition to Seattle, King county, state of Washington--also the use and collection of rents on 3 houses on John street and two on lots No. 2 running on said lot to alley.

"Sixth: I give the use of lots No. 1 and 2, block sixteen, and the use and collection of rent on the house built on lot 1, corner Adams and 12th street extension to Fairhaven, situated in Fairhaven, Whatcom county, state of Washington.

"Seventh: All my money received from rents or lease of lots to be received by my wife Ellenor or her agents and to take out fifty dollars from said rentals for her maintenance and support and the balance left in the bank drawing interest and not to be drawn out except for repairs of houses and taxes and street grades and in case one of the houses burn down, and to make out a yearly report to my son Leonard Harvey John Curtis, giving detail and receipts of all work done yearly. I make these provisions and stipulations so as to give a correct account so it will enable my son Leonard as to the wants of all buildings and taxes and repairs and all other items.--should there be not money enough coming in from rents my son Leonard must make up the amount for the support of my wife Ellenor maintenance and the four heirs will have to pay equal share-no lots nor any of the houses to be sold if possible.

"Eighth: At the death of my wife Ellenor all the property of every description and all moneys in banks coming from the receiving of the rents to be given over to the rightful heirs begotten by me and the lawful heirs are Mary Eliza Facer, now in Colorado, Matilda Sarah Winterburn Fairweather,

of Spokane, Leonard Harvey John Curtis of this state of Wash., Anson Erastus Jeptha Curtis, of Albina, Oregon, at the death of my wife Ellenor this property herein described must be divided equally as the four heirs may decide on--this to be done as soon as my wife Ellenor his burried, all funeral expenses to come out of the estate.

"Eighteenth: To my wife Ellenor until her death to live in the house on corner of John and Bissmark street if she wishes or she can live in any of the house- she chooses untill her death and if is apparent to the executor that she becomes demented or sichness overrakes her and her reason leaves her for the excutor to thae hold of it and do the business for her. All the furniture I die possessed with, and bedding and clothes for her own and to be given to whom she likes, I would prefer Lizzie Cox to have them."

By other paragraphs of his will, he left small bequests of personal articles to certain of his own children, and also children of the surviving wife. He nominated his son Leonard Harvey John Curtis as executor and provided that he should not be obliged to give security before obtaining letters testamentary. Leonard Harvey John Curtis, upon the admission of the will to probate, was granted letters testamentary, without bond. The executor died in 1911, without having closed and procured distributioh of the estate and without, in fact, having given notice to creditors, although an order so to do had been made by the superior court for King county upon the admission of the will to probate, and his appointment as executor.

The widow, Ellenor Curtis, was a second wife of the testator, and had no children by him, but had three children by a previous marriage. Elizabeth Curtis, the first wife of decedent, died in The Dalles, Oregon, in February, 1881, leaving four children, who were the four children and representatives of deceased children involved in this proceeding. The testator and his first wife had lived in the state of Washington from about the year 1870 to about the year 1879, and had acquired property in what was then Fairhaven (now Bellingham), Whatcom county, Washington, and a tract of land near Silver Lake and Castle Rock, Cowlitz county, Washington, and real esrate in The Dalles, Oregon, after their removal there, which they used for a home, and a small house which was rented to their son, Anson. After the death of the first wife in 1881, the surviving husband visited his old home in England, and on his return trip in December, 1881, he married Ellenor Curtis at La Porte, Indiana. He immediately came west after his marriage and took a position with the Northern Pacific Railway Company as master mechanic, at Pasco, Washington, removing in about three months to Sprague, Washington, where his duties had been transferred. His wife came west to join him at Sprague in the summer of 1882. In his capacity as railroad master mechanic, Curtis earned between $200 and $250 per month, and retained the position until the spring of 1883, or a little over one year. He then went to Seattle. While living at Sprague he built a residence, probable costing, according to the testimony, in the neighborhood of $3,000. On April 6, 1883, he sold and conveyed the property at The Dalles, Oregon, for $2,500. On June 11, 1883, or a little over two months thereafter, he acquired the Seattle property, which is now in dispute, for a consideration of $1,000, which was paid in cash, and the conveyance immediately made by deed. This property was later improved with

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

five small frame houses, the first one of which to be built was occupied as a home by Curtis and wife, and the other four were rented.

Leonard Curtis, as executor of the last will of John F. Curtis, filed two meager reports after his appointment, but did nothing further up to his death in 1911.

In the year 1919, the present administrator was appointed administrator with the will annexed de bonis non on the application of Ellenor Curtis, the surviving widow. No notice of the application for the appointment of the present administrator was given, the court making an order tha no notice was necessary. The present administrator, with the will annexed de bonis non, caused an inventory to be prepared, had appraisers appointed and had the property appraised. The property was appraised as community property of the value of $15,000. He published notice to creditors as directed by the order entered in 1893, and after the expiration of the time for serving and filing claims against the estate he prepared and filed his final account and petition for distribution, and gave the customary notice of hearing thereon. Prior to the hearing, objections were filed to the necessity for an administrator with the will annexed, and also objections to the manner of distribution proposed by the administrator

The attorneys for appellants originally appeared for Anson Curtis and also all the other legatees who would join with him. Thereafter, during the proceedings, the attorneys named as objectors all of the surviving heirs and descendants of John F. Curtis, save and except the widow, as those for whom they appeared. A motion was made by respondents to dismiss the attempted appeal fo John Facer, Frederick Facer, Cora A. Facer Pauley, and Eunice Facer Struthers, for the reason that they neither served nor filed nor made any objections to the final account and petition for distribution before the entry of the decree of settlement and distribution.

We will deny the motion to dismiss the appeal as to the foregoing named persons, presuming that the attorneys were authorized to, and did, appear for all the aforenamed persons, which authority is supported by affidavits filed by attorneys Martin and McCoy.

Appellants next complain of the findings of the coubt that the real estate involved in this appeal is community property of John F. Curtis deceased, and Ellenor Curtis, his surviving wife, and in decreeing distribution to the appellants of the remainder of one-half of the property in controversy instead of the entire property after the termination of the life estate of respondent widow.

After diligently reading the entire record, including a full statement of facts, we are unable to say that the evidence is sufficiently strong and convincing to overthrow the presumption of the community status of the property arising from the fact that the property was acquired during coverture of the testator and his surviving widow. There is no strong and convincing evidence controverting the fact that at the time of the acquisition of the property in question, the testator had considerable earning capacity, at a time when the purchasing power of a dollar was considerably greater than now; that Ellenor Curtis also had some little property, and that at most separate property of each, and

The presumption [illegible] comm. [illegible] [illegible] acquired [illegible] coverture [illegible] overcome [illegible]. showing [illegible] sep. cy [illegible] comm. ~~earnings~~ earnings [illegible] spouses [illegible] commingled [illegible] acquisition [illegible], [illegible] comm. cy.

community earnings were commingled in the acquisition of this property. In re Slocum's Estate, 83 Wash. 158, 145 Pac. 204.

Appellants then contend that if we find that the property involved was community property, then, under the terms of the will, the widow was required to elect and take either under the will or against it; and they contend that she has conclusively elected to take under the will, and therefore confined to her life estate in the property, and the distribution made by the court is incorrect.

Conceding that the testator by his will made provision for his widow which he was under no legal obligation to make, and that he dealt with the entire estate as if it were his separate property, devising to her a life use of specifically described real estate, and that she was therefore required, under our decisions in Herrick v. Miller, 69 Wash. 456, 134 Pac. 189, and Prince v. Prince, 64 Wash. 552, 117 Pac. 255, to elect whether she would take under the will or under her own right as community owner, we are of the opinion nevertheless that she was not required to make such election, where her right had not been disputed, until distribution. This she has done. She petitioned for distribution and declared that the property was community property. In re Smith's Estate, 108 Cal. 115, 40 Pac. 1037.

Nor are appellants in any position to assert estoppel and laches on th part of the widow when they themselves did not comply with the provisions o the will during the eight years of the executorship of Leonard Curtis, and ten years since the death of the executor, Leonard Curtis, to contribute sufficient to assure the widow a net income of fifty dollars per month, and maintain the status of the real estate as separate estate, the remainder of which would be distributed to the residuary devisees upon the termination o the life tenure.

The distribution made by the dourt will be affirmed.

The decree will be modified as hereinbefore specified fixing the administrator's commissions at $250, and the appellants will recover costs of appeal.

Parker, C. J., Tolman, Main, and Mitchell, JJ., concur.

CARL WASMUND, in his Individual Capacity,
Claimant Appellant, v. MAX WASMUND, Adverse
Claimant Respondent.

CARL WASMUND, as Administrator, Claimant
Appellant, v. MAX WASMUND, Adverse Claimant
Respondent.

(90 Wash. 274, 1916)

Cross-appeals from a judgment of the superior court for Pierce county, Clifford, J., entered August 5, 1915, upon findings in favor of the petitioner, adjudging a right of inheritance in the community estate of a deceased person. Reversed.

Chadwick, J.--Theresa, the wife of Carl Wasmund, died intestate leaving a community estate. The court found, and we shall accept its findings, that Max Wasmund was born out of wedlock, prior to the time of the marriage of his mother to Carl Wasmund; and further, that Max was the sole heir of Theresa and entitled to the whole of one-half of the community property, subject to some qualifications not material to this discussion. The controlling question presented upon this appeal is whether an illegitimate child can inherit the community property of a deceased parent to the exclusion of the surviving spouse.

That the state may define the character of property and the tenure by which it is holden, will not be denied. It may also fix rules of descent. The rule of the common law was that an illegitimate child could not take as their heir, either of the putative father or of the mother,. . . . for he can inherit nothing, being looked upon as the son of nobody." "The incapacity of a bastard consists principally in this, that he cannot be the heir to any one, etc." 4 Black. Com. 459.

So it is held in modern times that no man has an inheritable interest in an estate to which he is a stranger in blood, unless he inherit in virtue of some statute, or as Sir William Blackstone put it, following the text just quoted, " . . . by the transcendent power of an act of parliament and not otherwise, as was done in the case of John of Guant's bastard children by a statute of Richard the Second." The harshness of the common law rule, which was to some extent, if not entirely, "vicarious" in that it punished the child for the sin of the parent, has not met with general approval by legislative bodies in this country, and it is now the common thing to find statutes defining the status and fixing the interest of illegitimate children in the property of the admitted or acknowledged parent. We are not referred to any case where the courts have, in the absence of statute, questioned the rule of the common law or undertaken, by rule or construction, to enlarge the terms of such statutes if plain and certain in terms. Nor could they do so without violating one of the first principle of statutory construction, that is, that a right that is created, as distinguished from a natural or existing right which is defined by statute, shall not be extended beyond its terms or beyond its necessary implications.

And while it is true, as we said in In re Gorkow's Estate, 20 Wash. 563, 56 Pac. 365, that such statutes are "remedial," they are not remedial in the sense that they are intended to furnish a remedy for some natural or inherent right, but only in the sense that the beneficiary is given a status in law that he may take advantage of existing remedies. Whereas to an illegitimate, being denied all social and civil rights at common law, the statute undertakes to give all that it can give, that is, the civil right to inherit under the laws of descent. Respondent's rights depend, then, upon the statutes of this state. If he falls within the laws of descent, he is an heir of his mother; if not, he takes no interest.

As preliminary to a discussion of the statutes, it may be admitted that respondent is an heir of his mother, Theresa Wasmund, and would be entitled to share in a distribution of her separate property. With that question we have no concern; the whole of the estate is community property The community property system was adopted in this state in 1869.

"All property acquired after the marriage by either husband and wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." Laws of 1869, p. 319.

The act of 1869 was rewritten and extended in 1871. Laws of 1871, p. 67. The definition of common property was retained. No rule of descent for community property was fixed by either the act of 1869 or 1871. In 1875, the legislature enacted a rule of descent for community property. It also noticed the incapacity of an illegitimate child, and fixed its status as an heir.

"Sec. 2. Upon the death of husband or wife, the whole of the community property, subject to the community debts, shall go to the survivor, but nothing herein contained shall be construed to conflict with laws exempting property from attachment and execution, and specially the provision securing the homestead to the survivor, and all property except as an allowance for support of the family." Laws of 1875, p. 55.

"Sec. 4. Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledge himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and all the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate, and he theirs as heretofore provided in like manner, as if all the children had been legitimate, saving to the father and mother respectively their rights in the estates of all the said children, as provided heretofore in like manner as if all had been legitimate." Laws of 1875, p. 55.

In 1879, the rule governing the descent of community property was

qualified. It was provided:

"Sec. 13. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivors, subject to the community debts, and to the exclusion of collateral heirs, the family allowance, and the charges and expenses of administration." Laws of 1879, p. 79.

See, also, Rem. & Bal. Code, Sec. 1342.

The word "issue" had been theretofore defined in Sec. 13 of the act of 1875 as "all lawful lineal descendants of the ancestor." The act of 1879 does not refer to the rights of an illegitimate child.

It was within the power of the legislature to place the whole of the community estate in the survivor, as it did in the act of 1875, or in the "legitimate issue," if any, of the deceased spouse, as it did in the act of 1879. Considering the history of the law, we have no doubt of its intention to exclude illegitimate issue. We are invited to consider the injustice of the common law rule and hold, inasmuch as an illegitimate is always and "shall in all cases be considered as heir to the mother," that it was the intention of the legislature to raise an illegitimate to the rank of a legitimate inheritor. We may grant the injustice of the common law, but the statute is plain. We have no power to extend it beyond its terms. In the act of 1875, the rule of descent is fixed absolutely in the surviving spouse. In the act of 1879, the half of the estate is made subject to testamentary disposition; if no disposition is made by will and there be no legitimate issue, it goes to the survivor. If this were all, the contention of counsel might invite some remote doubt, but when it is remembered that in, and as a part of, the same act the legislature defined the right of an illegitimate to inherit at all in general terms, without qualifying the section referring to the descent of community property, we must assume that it had no intention to give to an illegitimate child any property other than the separate property of the parent.

While it may seem an unjust thing for the legislature to provide that an illegitimate cannot inherit the whole estate -- the community property as well as the separate property -- it is not entirely so, for, but for the statute, it could not inherit at all. And there are sound reasons to sustain the legislative intent as we find it to be. Our construction gives effect to every word of every act. We write nothing out of the law. Moreover, it is most likely that the legislature considered, having in mind that the community was a legal entity, the property being held by the whole as well as by the half and surviving to a spouse from the community rather than from the person of the deceased, that it would not be consistent with wise policy to distribute or destroy the entity by a grant to one who had no blood interest with the survivor; one who may be, and often is, an absolute stranger to the family, a "community" as it existed during the time the property was in process of building. It may have considered also that it was within the power of a parent to provide, under the statute of wills, for an illegitimate.

upon [illegible] her illegitimate child [illegible] inherit ½ [illegible] commun. [illegible] writing [illegible] act of 1875 providing [illegible] illegitimate child "shall [illegible] cases be considered an heir [illegible] mother" [illegible] shall inherit [illegible] estate [illegible] manner [illegible] born in lawful wedlock; in view of § 2 of [illegible] act [illegible] provides [illegible] spouse [illegible] commun. [illegible] vest [illegible] survivor [illegible] later enactment, Laws 1897 which provides [illegible] descent [illegible] ½ [illegible] commun. [illegible] equal shares [illegible] "legitimate issue" [illegible] deceased [illegible] "shall all [illegible] survivor"; since [illegible] history [illegible] act shows [illegible] intent [illegible] exclude illegitimate issue [illegible] sharing [illegible] commun. [illegible] except by testamentary disposition or acknowledgment or adoption [illegible] child, [illegible] parent to provide.

Taking the case at bar and fitting it to the entire law, we must assume that deceased was mindful of the statute and its terms. Instead of making a will, she relied upon the statute, as we must presume, which, in the absence of "legitimate issue," puts the estate in the hands of her surviving husband.

Counsel reply upon several decisions. In In re Gorkow's Estate, Supra, the estate was the separate property of the deceased, and the questions confronting us were in no way involved. Neither does In re Rohrer, 22 Wash. 151, 60 Pac. 122, 50 L.R.A. 350, touch, in any way, the statutes of descent. Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765, and Warburton v. White, 176 U. S. 484, are not in point. Children by a "former marriage" are legitimate issue and are clearly entitled to inherit the common property. Counsel also rely with much assurance upon cases from other states. In all of them the courts very properly followed a rule of liberal interpretation, the statutes being subject to interpretation. In the instant case, the statute being in no way doubtful, but plain and certain in its terms, we are not put to the necessity of interpretation or construction. We have only to declare the law as we find it.

Reversed and remanded with instructions to proceed with the administration of the estate without further interference on the part of the respondent.

Morris, C. J., Mount, Fullerton, and Ellis, JJ., concur.

NETTIE MORGAN et al., Appellants, v.
H. E. CUNNINGHAM et al., Respondents.

(109 Wash. 105, 1919.)

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered April 17, 1919, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court, Affirmed.

Bridges, J.--The appellant claims a homestead in a small tract of farm land in Thurston county, Washington, on the ground that she has living with her, and under her care and maintenance, a minor son. On the other hand, the respondent contends that the minor is not maintained by the appellant, and that, therefore, the appellant does not bring herself within the purview of the homestead laws of the state. The trial court held that appellant was not entitled to claim a homestead.

Section 553, Rem. Code, with reference to homesteads, defines "head of the family" as follows:

"The phrase 'head of the family' as used in this chapter includes within its meaning, . . .

"(2) Every person who has residing on the premises with him or her, and under his or her care and maintenance, either,--

"(1) His or her minor child or the minor child of his or her deceased wife or husband."

It will be noted that, in order that one may be the head of a family because of a minor child, that child must not only be residing with and under his care, but must be maintained by him. Maintenance is one of the necessary conditions.

The facts are substantially as follows: The appellant owns, as her separate property, the small tract of land above mentioned. She and her husband and their family lived on these premises for a number of years prior to the death of her husband, which was on May 3, 1917. She continued thereafter to reside at the same place. Charles W. Morgan is a minor son of the appellant and lived with her and his father prior to the latter's death, and with her most of the time since his father's death and until his marriage. On July 3, 1917, with the consent of his mother, he was married, and thereafter most of the time he and his wife lived at the home of and with the appellant. On October 27, 1917, appellant filed her claim of homestead. A short time previous thereto the respondent Cunningham had obtained a personal judgment against the appellant. He sought to enforce this judgment, and levied upon and threatened to sell the property claimed as a homestead. Both before and after Mr. Morgan's death, his minor son, Charles, was in the habit of going out to work. He was employed at one place for several weeks, and at another place for several months, and at still a third place for a considerable length of time.

When working for wages, as he did most of the time, when away from home, he received the usual wages paid to his coworkers. After his father's death, he secured his own employment, made his own terms, generally without consulting his mother, and collected his own wages. When he was not at work elsewhere he worked about the home premises. Whether working on his mother's land or elsewhere, he considered his mother's home as his own and that of his wife, but generally, when working away from home, he lived temporarily at the place he was working. When working away from home, he took provisions from his mother's place for the use of himself and his wife. At the time this suit was tried, a child had been born to them. He and his mother kept what they termed a "family pocketbook," and whatever he earned over and above his incidental expenses was generally put into this family pocketbook. They all lived as one family and, as one family, paid the bills, combining their efforts and income to that end.

The courts have almost unanimously held that, where a minor son is married with the consent of his parents, he thereby becomes emancipated. Thereafter he is the head of a family and controls his own time and affairs, and his parents have no right to require his services or to demand any of his earnings. In the case of Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 34 Am. St. 255, 16 L.R.A. 578, the court said:

"It seems to be settled that the marriage of a minor son with the consent of his father, works an emancipation. . . . It has been said: 'The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, labor, earnings and conduct.' . . . The meaning of emancipation is not that all of the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings."

The the same effect, see the following cases: Cochran v. Cochran, 196 N. Y. 86, 89 N. E. 470, 24 L.R.A. (N.S.) 160; State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N. W. 877, 79 Am. St. 358; Jackson v. Banister, 47 Tex. Civ. App. 317, 105 S. W. 66; Holland v. Beard, 67 Miss. 161, 42 Am. Rep. 360.

Sections 8732 and 8744, Rem. Code, provide that a male shall arrive at lawful age at twenty-one years, and a female at eighteen years, but the marriage of a female under eighteen years to one who is of full age has the effect of making such female of full and lawful age. The statute does not, however, make a male minor of lawful age because of marriage. We therefore agree with the appellants' contention that the marriage of Charles Morgan did not make him of lawful age, nor did it remove the civil disabilities imposed upon him as a minor. See cases cited above. But such marriage did have the effect of emancipating him and making him the head of a family. He thereafter became his own man. He was bound to use his income and wages, not for the support of his mother, but for the support of his own family. It is conceded by counsel on both sides of this case that there are very few decisions which lend much light to this case, because the homestead statutes of the various states are very different from our own. As a rule, the statutes of the other states entitle one who is merely the head of a family, or who has a family liv-

[illegible] a widow [illegible] entitled [illegible] a homestead [illegible] residing [illegible] her a minor son [illegible] her care [illegible] maintenance". [illegible] R. § 553 [illegible] son [illegible] emancipated [illegible] marriage [illegible] head [illegible] a family [illegible] contributing [illegible] support [illegible] combined family [illegible] mother.

ing with him, to claim a homestead, and those statutes as a rule do not define, as does our statute, who shall be considered the head of the family. Nor, under most of the state statutes, is it necessary that any person be dependent upon or maintained by the head of the family, as is required by our statute. For these reasons, most of the cases cited by the appellant are not in point. In the case of Tyson v. Reynolds, 52 Iowa 431, 3 N. W. 469, the facts were that the widower, who was claiming the homestead, had living with him his son and his son's wife, and the court held that he was the head of a family and entitled to claim a homestead. The court said:

"A family is 'the collective body of persons who live in one house, under one head or manager.' The relation existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. There need not, of necessity, be dependence or obligation growing out of the relation."

It will be noticed that, under the Iowa statute, it was not necessary that the son and his wife should be dependent upon, or maintained by, the homestead claimant.

Homestead statutes, because of their nature and purpose and the result sought to be obtained, should be liberally construed. Consequently, when the statute requires that the minor shall be maintained by the head of the family, it does not mean a complete dependence of the minor; it is sufficient if the child is materially or substantially maintained. But in instances where the child is emancipated and supports its parent more than it is by the parent supported, it cannot be said the parent maintains the child within the purview of our homestead act. So in this case, when all of the facts are taken into consideration, we are forced to the conclusion that Charles Morgan, the minor child, was not maintained by the appellant, but, on the contrary, he voluntarily contributed to her support; that she was maintained by him, rather than he by her. Besides, it would seem to be inconsistent to hold that a minor son, who is himself the head of a family, may legally be so under the care and maintenance of his mother as thereby to make her the head of a family, as contemplated by our homestead statutes.

We think the judgment should be affirmed. It is so ordered.

Holcomb, C. J., Tolman, Mount, and Fullerton, JJ., concur.

MARIA McKNIGHT et al., Appellants, v. E. A. McDONALD et al., Respondents.

(34 Wash. 98, 1904.)

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 18, 1902, upon an agreed statement of facts, dismissing an action to recover an interest in real property. Affirmed.

Mount, J.--On the 30th day of December, 1886, James Burke and Eliza Burke, husband and wife, were the owners of the north forty feet of lot 9, in block 28, of Bell & Denny's First Addition to Seattle. This lot was unimproved community property. On that day the said James Burke and wife entered into the following agreement:

"This agreement made and entered into this 30th day of December, A. D., 1886, by and between James Burke and Eliza Burke, husband and wife, residing at the city of Seattle, in King county, Washington Territory, Witnesseth:

"That whereas said James Burke and Eliza Burke are owners of certain real property described as follows, to-wit: forty (4) feet front by one hundred and twenty (120) feet deep, on the north line of lot nine (9) in block twenty-eight (28), Bell & Denny's First Addition to Seattle, in King county, W. T., the same being the north two-thirds of said lot, and fronting on Front street in said city, the same being now held in the name of said James Burke, and being desirous that said property shall pass without delay or expense in case of the death of either of said parties, to the survivor;

"Now, therefore, in consideration of the love and affection that each of said parties has for the other, it is hereby agreed that in case of the death of said James Burke while said Eliza Burke survives, the whole of said property hereinbefore described, together with any other property by them hereafter acquired, shall at once vest in said Eliza Burke in fee simple, and in the event of the death of said Eliza Burke leaving the said James Burke surviving her, the whole of said property hereinbefore described, together with all property by them subsequently acquired, shall at once vest in the said James Burke in fee simple.

"In witness whereof the said James Burke and Eliza Burke have hereunto set their hands and seals this 30th day of December, A. D. 1886.

"Signed sealed and delivered in presence of: G. H. Hill, Henry Sprague.

"Eliza Burke, (Seal)
"James Burke, (Seal)"

This contract was duly acknowledged by the parties in the form and in the manner required for the acknowledgment of deeds. On the next day,

viz., December 31, James Burke died, leaving surviving him his widow, Eliza Burke, and the plaintiffs, who were then minor children. On January 15, 1887, the above contract was filed for record, and recorded in King county. On January 31, 1888, Eliza Burke sold, and, by warranty deed, conveyed, the said property, and delivered possession thereof to one H. E. Kelsey. Thereafter, and by mesne conveyances, intervenor, Lucy R. Lyon, became the owner thereof, and is now in possession by the other named defendants, who are her tenants. This action was brought by the plaintiffs, who are the surviving heirs of James and Eliza Burke, to recover an undivided one-half interest in the property described. The case was tried by the lower court upon an agreed statement of facts, and a judgment was entered dismissing the action. Plaintiffs appeal.

Under the view we have taken, we deem it unnecessary to state any of the other agreed facts. The facts as above stated are sufficient for a determination of the case. It is argued by appellants that the contract above set out passed no present interest to either spouse in the property described, and therefore was no more than a will, and a number of authorities from other states are cited to that effect. It is then argued that, since the agreement was never probated, and since it did not conform to the statutory requirements for a will, and mentioned none of the heirs, therefore, when Eliza Burke sold the property, she conveyed away only her undivided one-half interest. Whether or not this argument would be sound under common law rules is not necessary for us now to decide because we have a statute which expressly provides for agreements of this kind. Section 4492, Bal. Code (Pierce's Code, Sec. 3883) reads as follows:

"Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: Provided, however, That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party."

The agreement in this case was executed under this section in the form and manner required, and was placed of record in the county where the lands were situated. No question is raised here as to the formality of the agreement, or the good faith thereof, and it is apparently conceded that, if this is a valid statute, the agreement vested the title of the property in dispute in Eliza Burke, upon the death of her husband.

But appellants argue that this section of the statute is invalid because, (1) it is not germane to the title of the act under which it was passed, and (2) it in effect repealed Sec. 11 of the act of 1854, The act entitled "an act relating [illegible] defining [illegible] hus. [illegible] is [illegible] support [illegible] provisions of § 4492 Pol. Code, [illegible] hus. [illegible] title [illegible] comm. realty [illegible] survivor [illegible] either spouse [illegible] an under [illegible] act, [illegible] provision is germane thereto, defining the jurisdiction and practice in the probate courts, which section is as follows:

> "If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." Bal. Code, Sec. 4601.

The title of the act of 1879, under which the section of the code relating to agreements was first passed, is as follows: "An act relating to and defining the property rights of husband and wife." We think this title was sufficient to support the provision for agreements between husband and wife and defining the effect thereof as to their community property. It has been frequently said by this court that the title of an act need not be an index thereof, but it is sufficient if it points out the general purpose and scope of the act. Marston v. Humes, 3 Wash. 267, 28 Pac. 520; Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376; Seattle v. Barto, 31 Wash. 141, 71 Pac. 735; State v. Sharpless, 31 Wash. 191, 71 Pac. 737; State ex rel. Zenner v. Graham, ante, p. 81, 74 Pac. 1058.

The purpose of this act was to define the property rights of husband and wife. It is commonly known as the community property law. Under this title, one would naturally expect to find the definition of what is, and what is not, community and separate property of husband and wife, and all the different conditions under which such property may be acquired, held, or disposed of; and it is provided by the act that property acquired in a certain way shall be common property of both spouses, and property acquired in a certain other way shall be separate property of each spouse. And the section in question then provides for the status of the common property, by the agreement of the parties, to take effect after the death of either, the effect of which section is to give the parties power to make community property, during life, the separate property of the survivor, after the death of either. This is clearly within the scope and general purpose of the title of the act.

There is no merit in the argument that this section repeals Sec. 11 of the act of 1854, which is now Sec. 4601, Bal. Code. This section refers to the construction of wills. This contract is not a will, and is not governed by the laws relating to wills. It is a special contract provided for by statute. But even if it were held to be a will, the objection made is not tenable because, if it is a will at all, it must be such under the special provisions of this act. The rule is well settled that general provisions of a statute must yield to subsequent special ones. Corbett v. Territory, 1 Wash. Ter. 461; Littell & Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Meade v. French, 4 Wash. 11, 29 Pac. 833.

The judgment of the lower court was right and is affirmed.

Fullerton, C. J., and Hadley, Anders, and Dunbar, JJ., concur.

For Dex

In the Matter of the Estate of Jennie F. Cannon, Deceased, and in the Matter of the Estate of A. M. Cannon, Deceased.

(18 Wash. 101, 1897.)

Appeal from Superior Court, Spokane County.--Hon. W. E. Richardson, Judge. Reversed.

The opinion of the court was delivered by

Scott, C. J.--The appeal herein was taken by H. D. Houghton, executor of said estates. Pending such appeal, upon the suggestion of the death of said Houghton, W. H. Ridpath was substituted.

It appears that on the 8th day of September, 1893, and for a long time prior thereto, A. M. Cannon and Jennie F. Cannon were husband and wife, residing in this state. They became possessed of a large amount of community property and incurred a large community indebtedness. Each of them had been married prior to their intermarriage, and each had children by such prior marriages, at the time of their respective deaths. Jennie F. Cannon died testate on said 8th day of September, and by her will she appointed said Houghton and J. W. Binkley as executors thereof. On the 23d day of February, 1894, the resignation of Binkley, as executor of said estate, was accepted, and Houghton proceeded to administer said trust. He had prior to this time taken into his possession all of the community property by virtue of his appointment as executor. After the death of Jennie F. Cannon, and after said executor had entered into the possession of the community estate, A. M. Cannon was married to the petitioner herein, Eleanor D. Cannon. On the 6th day of April 1895, A. M. Cannon died testate in the state of New York. In his last will, which was probated in the superior court of Spokane county, said Houghton and said Binkley were likewise named as executors of his estate. Binkley filed his resignation of the trust and Houghton was appointed executor of the estate of A. M. Cannon on May 24, 1895. On May 13, 1895, Eleanor D. Cannon presented to the superior court of Spokane county a petition, setting forth that said A. M. Cannon had left certain moneys which were his separate estate, and some wearing apparel and personal jewelry, which was in her possession in Spokane county, Washington, but that he had left no homestead, and no property from which a homestead could be selected by her except a community interest in the estate of himself and Jennie F. Cannon, then in course of administration in said court, and that he had left no household furniture or other articles specified by law as exempt from execution. She selected and claimed $500 of the sum of money in lieu of the articles and property which would be exempt from execution, and asked for the wearing apparel, jewelry, etc., of the said A. M. Cannon, and also prayed for an allowance of $200 per month for her support, pending the administration of the estate, for the reason that the property selected by her as aforesaid would be insufficient to maintain her during such administration. This petition was in all things granted by the court, and the sum of $200 per month allowed her during the pendency of

the administration was ordered to be paid by the appellant, with the condition that nine of the amounts provided for should be payable from the community estate of Jennie F. and A. M. Cannon until further order of the court. These several sums were paid over to her, and one month's allowance, to-wit: the sum of $200 was paid from the separate property of A. M. Cannon; this exhausted the assets of his said separate estate, and no further sums were paid. Another petition was filed by Eleanor D. Cannon praying for an order directing the payment of her allowance out of the other property, and a citation was issued thereon to appellant. Upon a motion by him this proceeding was quashed on January 28, 1897. But thereafter, on February 23d, the court made an ex parte order, in terms subjecting all of the property, both separate and community, of A. M. and Jennie F. Cannon to the payment of such allowance. It not being complied with, a citation was issued to appellant on April 10 to show cause, and the parties appeared and a trial was had, whereupon the court made findings of fact substantially in accordance with the foregoing statement. After stating conclusions of law thereon the court made another order directing that the allowance should be paid out of the interest of A. M. Cannon in the community property of himself and Jennie F. Cannon, and should have preference over the community debts of Jennie F. Cannon and A. M. Cannon, and the debts of the separate estate of A. M. Cannon, and this appeal was taken therefrom.

The respondent Eleanor D. Cannon moves to dismiss on the grounds that the order is not an appealable one, and because the appellant is not a party aggrieved. In support of the first ground it is contended that an appeal from the last order must be fruitless because no appeal was taken from either of the prior orders relating to such allowance. But the first order was only made against the separate estate of A. M. Cannon, and there was apparently no desire to resist that. The appellant contends that the second order made on February 23, 1897, was in effect superseded by the third order from which the appeal was taken, and contends further that it was void because it was made without any notice having been served upon him. As we agree with him upon the first ground it will not be necessary to examine the second. While in the last order the court recited the order of February 23d and referred to it as being in force, yet the last order materially modified it by making the allowance a charge only upon the interest of A. M. Cannon in the community estate aforesaid and in the terms it did not purport to affect the interest of Jennie F. Cannon therein. If any further support of the proposition that the second order was superseded by the last one is necessary, it may be found in the following order contained in the record as made on April 24, 1897, the date of the last order, viz.:

"By consent of all parties the order made in this matter with respect to the payment of allowance to Eleanor D. Cannon is hereby set aside and superseded by the findings of fact and conclusions of law and order this day signed, and the clerk is hereby directed to enter the same."

That the order thereby set aside was the second order is apparent from the fact that the first order with reference to paying the allowance from the separate estate of A. M. Cannon had been complied with. The respondent, in contending that the order of February 23d is yet in force, must have overlooked the order above quoted. In fact no attention seems to be directed thereto by either party in the briefs, nor, as we

recall, was it done upon the oral argument of the cause. We are of the opinion that the order of April 24th relating to the payment of the allowance was clearly appealable and that the appeal therefrom brings up effectually the matter of directing the payment of the allowance from the interest of A. M. Cannon in said community estate and making it a preferred claim.

We also are of the opinion that the executor could take the appeal, even though any of the parties interested in the proceeds of the estate could have prosecuted one. The case is essentially different from that of a contest between claimants to the estate as heirs or devisees, when it is ready for distribution. There the administrator or executor may not take sides, for if so he might resist the rightful claimant at the expense of the estate to which he might ultimately be found entitled. Such claims do not impair the estate, but relate only as to who is entitled to the same. But here was a claim that would materially diminish the estate, and it was resisted on the ground that it could not be made to any extent a lawful charge upon the community estate of A. M. and Jennie F. Cannon; and that is the only question we have to consider in this connection It being the duty of the executor to protect and preserve the estate pending its settlement, in discharging such duty he must have the right to appeal from an order like the one here in question, and, without discussing the various authorities cited by the parties, it is sufficient to say that such a right is generally sustained. He acts in a representative capacity and the question of whether he is a party aggrieved, in the sense of being personally injured, cannot be made the test in determining his right to appeal. In re Heydenfeldt's Estate, 117 Cal. 551 (49 Pac. 713). The motion to dismiss is denied.

As to the merits, the question presented is, can the survivor of the community of husband and wife, after the dissolution of the community by death, create a charge against the community estate which would be superior to the claims of the creditors of the community, and also to the rights of the deceased spouse's heirs or devisees to a one-half interest in the community property.

It would seem clear that the allowance to the second wife could not be made a charge upon the interest of the deceased wife in the community estate, but by indirection the order before us would have just that effect. If the interest of the husband in the community estate could be subjected to the payment of this allowance as a prior claim, the interest of the husband in the community estate could be subjected to the payment of this allowance as a prior claim, the interest of the deceased wife in the community property would be subjected to the payment of the community debts to the extent of the depletion of the husband's interest therein. But it could make no difference with the principle involved whether the entire community estate would be required for the payment of community debts, or only a portion of it, the rule would be the same whether the proceeds would go the creditors or devisees.

In Ryan v. Fergusson, 3 Wash. 356 (28 Pac. 910), this court, in speaking of sections 2411 and 2412 of the Code of 1881, which, with section 3303 of said Code are similar to section 1481, 1 Hill's Code (Bal. Code, Sec. 4621), held that, upon the dissolution of the community by [illegible] upon [illegible] dissolution [illegible] comm., [illegible] remarriage [illegible] hus. [illegible] create [illegible] charge [illegible] second [illegible] comm. [illegible] superior either [illegible] comm. [illegible] creditors [illegible] heirs [illegible] devisees [illegible] point [illegible] ½ [illegible] the death of one member, no part of the property could vest in the survivor except subject to the community debts.

There has been no change in this rule by the subsequent decisions of this court, nor, so far as we are aware, by any statute. An act approved March 20, 1895, relating to the descent of real property (Laws 1895, p. 197, Bal. Code, Sec. 4640-4645), has been cited, which provides that upon the death of either husband or wife title to all the community real property shall vest immediately in the person or persons to whom the same should go, subject to the payment of the debts, allowances, etc.; but if that act were retroactive and applied to a case like this, it is evident that there is no intention there to change former laws. The family allowance spoken of in section 1 of said act evidently means the family as it existed at the time of the death of the deceased spouse, and section 974, 2 Hill's Code (Bal. Code, Sec. 6221), which was section 1462 of the 1881 Code, relating to the allowance to the widow and minor children, and making it a preference to all other charges, has reference to the widow having an interest in the community property as far as that estate is concerned, in case the husband died first, and the minor children living at the time of the dissolution of such community--not a subsequent widow, should the husband survive the first wife and remarry. The status of the property with reference to the creditors, heirs and devisees becomes fixed at the time of the death of one member of the community. The surviving member could not create a charge thereon by mortgaging it, to the exclusion of those other parties. Why should he be permitted to do so by marrying again? Even in those states where the husband had the absolute control of the community property real and personal, during the existence of the community, and can convey all of it without the wife's consent, he could not after her death incur any separate debt or liability which would be a charge thereon to the prejudice of the creditors of the community. Johnston v. San Francisco Sav. Union, 75 Cal. 134 (7 Am. St. Rep. 129; 16 Pac. 753); Healey v. Ashbey, 47 La. An. 636 (17 South, 195); Newman v. Cooper, 48 La. An. 1206 (20 South, 722). And there would be much more reason for adopting a like rule here, where he had no such powers with reference to the real estate during the existence of the community, were the statutes susceptible of any other construction.

Reversed.

Dunbar, Reavis, Anders and Gordon, JJ., concur.

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