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RIGHTS AND POWERS OF MARRIED WOMEN,

IN PROPERTY HELD BY THEM SEPARATELY FROM THEIR HUSBANDS, UNDER STATUTES, TRUST DEEDS, OR OTHERWISE.

This question recently came before the Supreme Court of Rhode Island,[1] in a case not yet reported, under the following circumstances:

The Rhode Island statute[2] on this subject, provides that "the chattels real, &c., which are the property of any woman before marriage, or may become the property of any woman after marriage, shall be, and are hereby, so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death; and upon the death of

[1] The question is one of general interest, inasmuch as many States have the like legislation.

[2] Public Laws of 1844, p. 270, secs. 1 and 2.

the husband, in the lifetime of the wife, shall be and remain her sole and separate property." * *

"The receipt or discharge of the husband" for the rents and profits of such property, shall be a sufficient receipt and discharge therefor, unless previous notice, in writing, shall be given by the wife to the lessee, debtor, or incorporated company, from whom such rents or profits are payable; in which case the sole and separate receipt of the wife shall alone be a sufficient "receipt and discharge therefor." * * And the act further provides that such property "shall not be sold, leased or conveyed by the husband, unless by deed, in which the wife shall join as grantor."

The wife held, under this statute, a leasehold estate, as tenant in common, with another party, and wanted to have it partitioned, but the proportions which each held were undefined by any deed or other document. She applied to a chancery solicitor for this purpose, and he advised a bill in equity, for the double purpose of ascertaining her title and of setting off her share, in severalty, which was held by the Supreme Court of New York[1] to be not only a proper, but the only mode of obtaining these objects. She retained the solicitor for this purpose, and herself promised to pay him, but did pay him only a small part of his bill for services in the long and laborious litigation which followed, the result of which was a decree defining her title, and partitioning the estate between the tenants. For the recovery of compensation for his services, he filed a bill in equity against her, together with her husband, seeking to establish a lien on her share of the property which had been the subject of litigation, stating the retainer, the services, and the importance of them to her interest in the estate, by which it was greatly increased in value, that she had repeatedly promised to pay for the services, by means of her share in the estate, and that, as he had no other remedy, *it* was chargeable with the payment of the amount, and praying a decree for a lien accordingly.

The defendants demurred to the bill, and it was heard in January, 1855, upon the bill and the demurrer, admitting the above statements to be true.

The plaintiff contended for the general proposition that, where a

[1] Green *vs.* Putnam, 1 Barb. S. C. 508.

service has been rendered, or expenditures have been made, at the request of a married woman, upon, or in reference to her separate estate, which were beneficial to said estate, that estate is chargeable with compensation for them,—and cited the following authorities:

Murray vs. *Barlee*, 4 Sim. R. 82, before the Vice Chancellor, who held that where a married woman, having separate property, and living apart from her husband, employed the plaintiffs as her solicitors, and promised them by letter, that she would pay their bills, but did not refer to her separate property, that that property was liable to pay the bills. This decision was confirmed on appeal to the Lord Chancellor, 3 M. & K. 209, who said, "Nothing could more effectually defeat the purposes of marriage settlements, than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions, from all oppression and circumvention, and to be made independent of her husband, as well as all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can engage a solicitor, while she can only obtain such help by executing a mortgage, or by granting bonds or notes, she is not on the same footing with them," &c.

So, in *North American Coal Company* vs. *Dyott*, 7 Paige, 14, Chancellor Walworth held, The feme covert is, as to her separate estate, considered as a feme sole, and may, in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the separate estate. And even the assent or concurrence of the trustee is not necessary, where no restriction upon her power is contained in the deed or instrument under which such separate estate is held, citing *Dowling* vs. *Maguire*, 1 Floyd & Gould's Rep. Temp. Plunkett, 19; *Cater* vs. *Eveleigh*, 4 Dessau. 19; *Montgomery* vs. *Eveleigh*, 1 McCord's Ch. Rep. 267; *N. A. Coal Co.* vs. *Dyott*, 7 Paige R. 9, 14, which was affirmed by the Court of Errors, in 20 Wendell, 570. And the same Chancellor reiterated the same doctrine in *Gardner vs. Gardner*, 7 Paige, 112.

The Vice Chancellor, in 1 Sandf. Ch. 25, held the same doctrine as prevailing before the revised statutes. Also, in the important case of *Curtis* vs. *Engell*, 2 Sandf. Ch. 287–8, the same doctrine was held. And again in *Noyes* vs. *Blakeman*, 3 Sanf. S. C., 531, it was held by the Superior Court that the solicitor and counsel who defended suits brought to charge the separate estate of a married woman with her insolvent husband's debts, was held entitled to recover such expenses against the estate which he had defended, on the retainer and agreement of the trustee to compensate him out of the rents and profits.

The plaintiff's counsel next cited *Jacques* vs. *Methodist Episcopal Church*, 17 Johns. 548, in which Ch. J. Spencer held, that the decisions fully established that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property with the consent or concurrence of her trustee, unless she is specifically restrained by the instrument under which she acquires her separate estate; and that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, a court of equity will apply it to the satisfaction of such an engagement.

In fine, it is said in 1 White & Tudor's Leading Cases in Equity, 370, 65 Law Library, 374, relying upon the above cited New York cases that the rule laid down in the Court of Chancery has been, that the wife's *separate estate is liable in equity for any debts, contracted by herself or her agent, for the benefit of that estate, or for her own benefit upon the credit of her separate estate.* Other important cases are quoted in 1 White & Tudor, 370 to 376, and were cited by both parties in this case. The last *case* cited by plaintiff was a passage from *Reid* vs. *Zamae*, 1 Strobb. at p. 40, which approves the decision in *Murray* vs. *Barlee*, above cited. He also referred to Adams' Eq. 159, 2 Stor. Eq. Jur. § 1397, and note 2, § 1400, and note 1, and § 1401.

The defendant's counsel insisted that a married woman cannot bind her separate property at all, in any case, nor can her creditors reach it, under her contracts or otherwise, except according to the

express provisions of the trust deed, statute or other instrument under which the property is held.

He cited *Jaques* vs. *Methodist Episcopal Church*, from 3 Johns. Ch. J. 77, which was overruled by the Court of Errors, per Spencer, Ch. J., as above. Also, *Reid* vs. *Zamae*, 1 Strobb, 27, which shows that the South Carolina doctrine is strong in his favor, and 1 White & Tudor, 361, 370, *et seq.* But his chief reliance was upon the R. I. statute above quoted, and the case of *Metcalf* vs. *Fook*, 2 Rhode Island Reports, 355, which held that where property is put in trust for the separate use of a married woman, she has no power to charge or dispose of the same except as expressly provided in the instrument creating the trust.

Judge Hale, who gave the opinion of the court in that case, said: The rights, liabilities, power and control of married women over their separate property are well established and defined in this State by positive statute and by the rules of the common law. And a *feme covert* here, is not deemed in relation to her contracts, as in some cases in England, a *feme sole*. But her right and power to bind herself or her separate property must depend in each case upon our statutes, the rules of the common law, or upon some legal instrument creating such right and power.

The court sustained the demurrer, and in concisely giving their opinion, (not written out,) said they considered the above case, decided by themselves, as substantially sustaining the defendant's ground; and furthermore, that under the R. I. statute, the husband has full control of the rents of the wife's separate property, until prohibited by the notice pointed out by it, which has not been given in this case, and, of course, the husband's power to receive the rents still remains, nor had the wife, in this case, made any appropriation of the rents nor conveyance of the property to pay for the plaintiff's services, which they acknowledged were meritorious, and they were strongly inclined to aid him, if they had the power, which they considered was denied them by the statute, under which the property was held.

NOTE.—A strong case on this subject was very recently decided by the Supreme Court of Massachusetts, sitting in Equity, Hayes *vs.* Perkins, et al, briefly reported, *infra.*

The late James Perkins, of Boston, bequeathed to his widow the clear sum of $6,000 annually, payable quarter-yearly. She afterwards married the Rev. Dr. Doane, now Episcopal Bishop of New Jersey. This gentleman having failed in business, and being much embarrassed, a contract was made between himself, Mrs. Doane and Michael Hayes of New Jersey, by which it was agreed that Hayes should take up certain notes to a large amount, which he had endorsed for the Bishop's accommodation, and that Mrs. Doane should give him an order on her trustees in Boston to pay him $1,000 annually for a certain number of years, until he should receive one-half of what he had advanced. Hayes proceeded to take up and pay the notes, and Mrs. Doane gave him the order requesting the trustees to pay him $1,000 a year, as had been agreed.

The first yearly payment was made by Bishop Doane. When the second became due, Hayes demanded it of the trustees, (Thos. H. Perkins and others,) who had doubts whether they ought to pay it; and as E. N. Perkins, son of Mrs. Doane, presented an order of a subsequent date for the quarterly payment, $1,500 then due, (which order was in favor of Bishop Doane and by him endorsed,) the trustees filed a bill in equity, asking the instructions of the court. The case was argued by C. G. Ripley for the trustees, J. L. English for E. N. Perkins, and P. W. Chandler and S. G. Wheeler for Hayes. Judge Thomas delivered the opinion of the court holding that the legacy to Mrs. Doane was intended for her support, and was to be payable quarter-yearly, and that she had no right to make such a contract as she did make with Hayes, although with the consent and for the benefit of her husband, and that the same was void in law. The order in favor of E. N. Perkins, being a quarterly payment then due, was a valid one.

The judge said (we quote from the report of the *Daily Advertiser*):

"The Court have not found it necessary to examine the question how far a *feme covert* has the power of a *feme sole* over her separate estate, because we think the contract defeats the will. It is clear that the yearly legacy of $6,000 was devised to the devisee for the use of herself and her children during the minority; and that it was payable to her own order, subject to limitations which might arise in certain contingencies. Power to alienate by anticipation is not given by the terms of the will: and though powers may sometimes be implied for the purpose of promoting the intention of the testator, they will never be implied for defeating it. Opinion of the Court adverse to the validity of the contract."