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Recent Cases

W. A. H.

the liabilities of the vendor, although he acquired all the latter's "right, title and interest"

If, as suggested, the vendor executes a deed to the purchaser and also one to the assignee, it may be argued that these deeds are, if executed and delivered at the same time, conflicting and nugatory; or that, if the deed to the assignee is executed and delivered later, the vendor has no title to pass. Where the deed to the purchaser is placed in escrow, however, the legal title still remains in the grantor[16] until the condition has been performed. The deed to the assignee conveys only the vendor's interest, expressly subject to the contract. Upon fulfillment of the contract, the right of the assignee, the holder of this interest, is at an end.

In *Bimrose v. Matthews, supra,* it was stated that the title passed directly from the vendor to the purchaser.[17] If the vendor had already conveyed all his interest to the assignee, it is difficult to see how this could be true. But whether the title passes directly or through the assignee, the purchaser, in the absence of special provisions in the contract, will have received all he is entitled to, the vendor will not have given a general warranty and, in the meantime, will have perfected his right to the purchase money by notifying the purchaser of the assignment and will have acquired the vendor's title as security by taking and recording the warranty deed from the vendor, subject to the contract.

Robert B. Porterfield.

RECENT CASES

COMMUNITY PROPERTY—SEPARATE PROPERTY OF THE WIFE—COMMUNITY AND SEPARATE FUNDS.—Plaintiff entered into negotiations for lot 5. The purchase price was $4,000. $1,000 came from the plaintiff's separate funds and the balance was raised by the execution of a mortgage of $2,500 and five notes of $100 each signed by the community. Payments were made upon this mortgage until about January, 1922, and with $1,600 still remaining unpaid a new mortgage was executed by the community upon the property for the sum of $3,000, part of which was used to pay community debts. *Held:* The character of property is to be determined as of the date of its acquisition, and unless such action is taken thereafter as destroys its character it remains the same. Hence lot 5 is one-fourth separate and three-fourths community. *Zintheo v. Goodrich Co.,* 36 Wash. Dec. 161, 239 Pac. 391 (1925).

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[16] In *May v. Emerson, 52* Ore. 262, 96 Pac. 454, 1065 (1908), it was held that pending full payment of the price the legal title remained in the vendor and was subject to the lien of a judgment against the vendor to the extent of his interest therein.

[17] The court also said, "This deed was undoubtedly for the purpose of conveying the property to Matthews in case of the failure of Bimrose and wife to comply with the contract and in case the contract should, for that reason, be forfeited."

The objection to this case is that property acquired after marriage and not by any of the methods required by Rem. Comp. State. §6892, namely, by gift, devise, or inheritance, can be part separate and part community property. The authorities in this state indicate that this case is an exception to a well established rule that all property acquired after marriage except by gift, devise or inheritance is presumptively community property. In *Yesler v. Hochstuber* 4 Wash. 349, 30 Pac. 398 (1892), the court said, "Under the statutes of this state, lands acquired after marriage by deed of purchase expressing a money consideration are presumed to be community property, and the presumption can be rebutted only by clear and convincing proof that the lands were acquired by gift or that the consideration was furnished out of the grantee's separate property." This rule was affirmed in *In re Brown's Estate,* 124 Wash. 273, 214 Pac. 10 (1923).

Through all the cases this presumption has prevailed with but one exception and that exception is a line of cases beginning with *Heintz v. Brown,* 46 Wash. 387, 90 Pac. 211 (1907), and coming down through a series of decisions of which the case in question is probably the latest. In *Heintz v. Brown* the court said, "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." The language of the court shows some doubt as to the correctness of the rule laid down. But the only reason given is that such a rule is established by the authorities. Uniformity among states is to be encouraged, but uniformity within the state is also very important. Especially should this be in Washington, where a strong community property system has been built up.

Our statute provides that all property acquired during marriage, except property acquired by gift, devise, or inheritance, shall be community property. Now in this case, the property was acquired after marriage and not by gift, devise or inheritance, nor wholly with separate funds. Also, there has been considerable commingling. The property has been mortgaged twice, the first mortgage was taken in the name of the community and community funds were used to pay it. The funds obtained by the second mortgage were used in community business. In other words the property has all the aspects of comunity property and yet it cannot be held for community obligations because a small sum of separate property was used in its acquisition.

In *Siverd v. Dumestre,* 143 La. 578, 78 So. 969 (1918), it was held that property purchased after marriage with part separate and part community funds, was community property and that the spouse who advanced the separate funds was to be considered as creditor of community for such funds as was actually advanced. By the rule in this case there would be less chance for fraud and less trouble in determining what was community property. If property were acquired during marriage and if any community funds or property went into its acquisition the presumption that it would be community property would apply. Then if either spouse had contributed to the acquisition of this property some separate funds or separate property which could readily be traced, such spouse would be entitled to reimbursement from the community

property of such separate funds expended. This rule, it is submitted, would be more within the spirit of the system which the community property laws are seeking to bring about. W A. H.

CONSTITUTIONAL LAW—EXEMPTIONS.—Respondent had a judgment against the appellants in the sum of $631.30 for work and labor performed. Execution was issued on the judgment, by virtue of which the sheriff seized certain personal community property and threatened sale thereof. Thereupon the appellants duly claimed the property as exempt. The property in question was household furniture and wearing apparel and would be exempt from seizure and sale towards the satisfaction of an ordinary money judgment, being within the classes of exempt personal property enumerated in Rem. Comp. Stat. § 563. Respondent contends that property is not exempt from execution because of Rem. Comp. Stat. § 564, which provides that no property shall be exempt from execution for clerk's, mechanic's or laborer's wages earned within the state.

Held. That portion of Rem. Comp. Stat. § 564 providing that no property shall be exempt from execution for specified wages is unconstitutional as an impairment of the exemption rights under Const., Art. 19, § 1, and a violation of the equal privileges and immunities guaranty of Art. 1, § 12. *Vermo v. Hickey,* 35 Wash. Dec. 17, 237 Pac. 5 (1925).

Rem. Comp. Stat. § 563, exempting certain personal property from execution was in force in territorial days (Code of 1881, § 347, Laws of 1886, p. 96) and Art. 19, § 1, of the Constitution, providing that the Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families, was self executing, and while the Legislature can modify exemption laws as they existed at the time of the adoption of the constitution, it cannot destroy exemption rights or enact exemption laws which violate the equal privileges and immunities guaranty of the Constitution, and classify general debtors and general debts upon a basis of differing natures of the debts, so that all debtors shall not have equal exemptions as against all forced sales to satisfy their existing debts.

The question here presented was first passed upon, in substantially the same form, in the cast of *Tuttle v. Strout,* 7 Minn. 465, 82 Am. Dec. 108 (1882). Since that time there have been several other cases involving the same point in Minnesota. These are reviewed, discussed and affirmed in *Bofferding v. Mengelkoch,* 129 Minn. 184, 152 N. W 135 (1915), the Minnesota court taking the same view as the principal case. Similar legislative enactments have been held invalid in Michigan and South Dakota. See *Burrows v. Brooks,* 113 Mich. 307, 71 N. W 460 (1897), *O'Leary v. Croghan,* 42 S. D. 210, 173 N. W 844, 6 A. L. R. 1134 (1919).

The contrary view, holding that the Legislature is given power to make reasonable exemptions, and that what is a "reasonable exemption" may vary under the circumstances, is presented in a strong dissenting opinion of two judges in *O'Leary v. Croghan, supra.* See also *In re Vonhee,* 238 Fed. 422 (1916), *McBride v. Reitz,* 19 Kan. 123 (1877), *Hazlip v. Hazlip,* 240 Mo. 392, 144 S. W 851 (1916). The latter two cases can be distinguished, however, on the different wording of the clause of the Constitution that the court is interpreting.

As a result of the principal case it would seem that the remainder of Rem.

Comp. Stat. § 564, providing that there shall be no exemption if the judgment is for actual necessaries not exceeding $50.00 in value which have been furnished within sixty days preceding the bringing of the action, or if it is against an attorney or agent for money belonging to his principal, is also unconstitutional.

The case raises a doubt as to the constitutionality of that portion of Rem. Comp. Stat. § 703, which provides that if a garnishment be founded on a debt for actual necessaries, no exemption shall be allowed in excess of $10.00 per week, instead of the usual $100.00 exemption which prevails in the case of an ordinary judgment. The Supreme Court of Minnesota in *Bofferding v. Mengelkoch, supra,* holds unconstitutional the following proviso to a statute exempting wages not exceeding $35.00: "Provided, however, that if the action, in which such attachment, garnishment, or levy of execution is made, is brought to recover the purchase price of necessaries for the use of the debtor or his family dependent upon him, and any such debtor shall have been paid wages amounting to $35.00 or more earned during said thirty day period, then in any such case, such debtor shall not be entitled to any exemption under this subdivision in wages earned during said thirty day period, except the thirty-five dollars theretofore paid." If the Washington court is disposed to follow the holdings of the Minnesota cases, which it quotes with approval, and its own suggestion that classifying general debts upon a basis of the differing natures of the debts, is unconstitutional, then it is submitted that that portion of Rem. Comp. Stat. § 703 above mentioned, is unconstitutional. However, it must be remembered that the exemption, as far as garnishment is concerned, is not in compliance with an express command of the constitution. Ordinarily an act is not class legislation if the classification is reasonable in view of the subject matter and is uniform as to all classes. "Debtors owing money for necessaries" would seem to be a reasonable classification. O. H.

CRIMINAL LAW—ARREST—SEARCH AND SEIZURE—SUPPRESSION OF EVIDENCE. —Defendant was arrested by two deputy sheriffs, without a warrant, for failure to have proper lights and license plates on his car. His car was then searched and intoxicating liquor discovered in it. He was charged with unlawful possession of intoxicating liquor. Before trial, he moved for the suppression of the evidence on the ground that it had been unlawfully obtained. *Held.* (1) Defendant had been properly arrested. (2) His person or personal property in his control and possession could be searched for evidence tending to prove the crime for which he was arrested. (3) Evidence tending to prove any crime could be seized where the search was lawful and the evidence was proper to introduce at the trial. *State v. Deitz,* 36 Wash. Dec. 186, 239 Pac. 386 (1925).

The first two propositions of the court's decision are well established in this state and elsewhere. (1) An officer may, without a warrant, arrest for a misdemeanor committed in his presence, even though the misdemeanor does not amount to a breach of the peace. *State v. Llewellyn,* 119 Wash. 306, 205 Pac. 394 (1922). However, an officer can not arrest without a warrant when he merely suspects that a misdemeanor is being committed in his presence. *State v. Gibbons,* 118 Wash. 171, 203 Pac. 390 (1922), *Mitchell v. Hughes,* 104 Wash. 231, 176 Pac. 1 (1918).

(2) After a proper arrest has been made, (even though without a warrant), the officer may search the person and personal property of the person arrested,

and in his control and possession at the time. *State v. Hughlett,* 124 Wash. 366, 214 Pac. 841 (1923), *Carroll v. United States,* 45 Sup. Ct. Rep. 280, 69 Adv. O. 347 (1925). Any evidence tending to prove the crime for which the arrest was made may be seized. *State v. Hughlett, supra; Carroll v. United States, supra.*

The third proposition is, however, a new and rather startling extension of the doctrine that the person arrested may be searched. It is, for all that, an extension that might have been expected.

The history of this whole phase of the law has been one of logical extension. Originally, the person arrested might be searched, and anything which might help him escape could be seized. Then, anything found on his person tending to prove the crime for which he was arrested could be seized.

The next step was to extend the right to search to suitcase, grips or other personalty which the arrested man might have, and again, anything tending to prove the crime might be seized.

In *State v. Hughlett, supra,* the court said that it was only logical that the automobile, driven by the arrested person might be searched. Now, *State v. Deitz,* gives us the final step: Person or personalty may be searched, and evidence tending to prove any crime may be seized.

C. J. P.

CRIMINAL LAW—SUSPENSION OF SENTENCE.—Relator was charged by information with the crime of grand larceny, alleged to have been committed on February 25, 1925. He pleaded guilty to the charge, and made a full confession of a series of offenses, beginning some two years prior thereto, through which he had obtained from various brokers the sum of ten thousand dollars. The relator was sentenced to a term of imprisonment and sentence was suspended pending good behavior.

Thereupon, relator was charged by information with a new and independent offense, (grand larceny), alleged to have been committed on January 26, 1925. To this charge a plea of guilty was entered, and motion made to suspend sentence. Motion was denied by trial court on authority of Rem. Comp. Stat. §2280. Relator filed application for a writ of prohibition to restrain imposition of sentence.

Held. Writ denied—that provision for suspended sentences on first conviction of lesser offense than those enumerated did not authorize suspension of second conviction of crime committed prior to that resulting in first conviction. *State ex rel Zbinden v. Superior Court,* 35 Wash. Dec. 314, 238 Pac. 9 (1925).

The statute in question provides that "whenever any person never before convicted of a felony or gross misdemeanor shall be convicted of any crime except murder or burglary in the first degree, robbery, arson in the first degree, carnal knowledge of female child under the age of ten years, or rape, the court may suspend sentence in its discretion, and direct that sentence be suspended until further order of court, etc."

By the weight of authority, apparently courts have no inherent power to suspend sentence. *State ex rel Lundin v. Superior Court,* 102 Wash. 600, 174 Pac. 473 (1918), *Ex parte United States,* 242 U. S. 27, 61 L. Ed. 129, 37 Sup.

Ct. Rep. 72, L. R. A. 1917E 1178 (1916) *People v. Morresette,* 20 How. Pr. 118 (1860) *People v. Brown,* 54 Mich. 15, 19 N. W 571 (1884) *People v. Kennedy,* 58 Mich. 372, 25 N. W 318 (1885) *State v. Voss,* 80 Iowa 467, 45 N. W 898 (1890), *In re Webb,* 89 Wis. 354, 62 N. W 177 (1895) *State v. Hockett,* 129 Mo. App. 689, 108 S. W 599 (1908). However, it seems the contrary view has been upheld in some courts: *Commonwealth v. Maloney,* 145 Mass. 205, 13 N. E. 482 (1887) *Dowdican's Bail,* 115 Mass. 133 (1874), *State v. Whitt,* 117 N. C. 804, 23 S. E. 452 (1895), *Weber v. State,* 58 Ohio St. 616, 51 N. E. 116 (1898) *State v. Buckley,* 75 N. H. 402, 74 Atl. 875 (1909).

It should be noticed that some of the cases cited as upholding the view that the court has power inherent in itself to suspend execution of sentence, related to delays in imposing sentence rather than suspension of execution.

Manifestly, in those jurisdictions holding that the courts have no inherent power to suspend execution of sentence, such power can only be exercised where the legislature has granted it—*Ex parte United States, supra* (page 52 of decision). In the absence of a statute granting the power, the only remedy of the person seeking to stay the execution of the sentence imposed is to seek executive clemency.

In the principal case, the crime charged in the second information occurred prior in time to the crime charged in the first information. However, the statute makes no provision for a situation like this, and, as the court points out, the statute being clear and unambiguous, and the legislative intent being manifested, there is no room for interpretation or construction. The statute being clear and unambiguous and the language plain, the court cannot give a different meaning to subserve public policy. LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, (3rd ed.) §367, page 705.

The statute relating to punishment of habitual criminals, where it must appear that the subsequent crime was committed after the date of the first conviction of accused, and this probably even where the statute is silent on the subject, (Underhill Criminal Evidence, 3rd ed., par. 772), has no application in the principal case as the statute in question does not call for exercise of punishment, but extends special leniency in cases coming within its provisions.

A. R.

LIMITATIONS OF ACTIONS—ACTIONS FOR RELIEF UPON THE GROUND OF FRAUD.—One H, while president of the plaintiff corporation, the H Realty Company, executed deeds, in the company's name, but without authority, to the defendant, of certain property owned by the corporation. He made the deeds to her as a marriage settlement, no consideration whatever moving to the plaintiff. The deeds were made in October, 1915, and August, 1916, respectively. He died in July 1921. He and his wife, the defendant, who had been made a trustee of the corporation, had meanwhile been in complete control of the corporation's affairs. In March, 1923, the plaintiff began this action, seeking the recovery of the property and the removal of the clouds upon its title, the clouds being the conveyances to the defendant. It was contended by the defendant that the action is barred by the statute of limitations; specifically, by §159, Rem. Comp. Stat., (P C. §8166), subdiv. 4, prescribing three years for the commencement of "An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by

the aggrieved party of the facts constituting the fraud." *Held*. That this was not an action for relief upon the ground of fraud, within the meaning of the statute, and was not barred. *Hutchinson Realty Co. v. Hutchinson,* 36 Wash. Dec. 151, 239 Pac. 388 (1925).

This decision is based upon the rather nice distinction that although there may have been fraud present, (and the court does not admit that there was), yet fraud is not of the essence of the cause of action. It is rather only an incident thereto. The true cause is, rather, the existence of the cloud upon the plaintiff's title to the land, raised by the deeds in question, which are void for lack of consideration.

The opinion quotes from *Wagner v. Law,* 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784 (1892), wherein the rule of this case was first set forth in this state: "That section (the one under consideration) we think has reference to suits by parties to contracts who are asking to be relieved from contracts that they were fraudulently induced to make, as where a deed has been fraudulently obtained, and suits of that character where fraud is the substantive cause of the action."

Or, as stated in *Thomas v. Richter,* 88 Wash. 451, 153 Pac. 333 (1915), "To constitute an action for 'relief on the ground of fraud, the fraud must be the substantive cause of the action, the cause without which the action would not exist; the fraud must have been practiced upon the complaining party, causing him to assume some obligation or liability or suffer some loss which but for the fraud he would not have assumed or suffered."

In *Bradbury v. Nethercutt,* 5 Wash. 670, 164 Pac. 194 (1917), in an action to quiet title, it is said, "But the gravamen of this action is to quiet title and, even though fraud is practiced in creating the cloud, it is not subject to the three-year limitation in actions for relief on the ground of fraud."

The rule appears in a number of other Washington cases previous to the principal case. See *infra.* There are also cases in which the rule should have been applied, but was not. One of these is *Union Trust Co. v. Amery, infra,* of which the court in the present opinion says: " may be out of harmony with the early decision in *Wagner v. Law, supra,* but, as we shall presently see, the decision in *Wagner v. Law* has been adhered to in our later decisions." The *Richter* case, *supra,* arising out of facts very similar to the *Amery* case, both being upon unlawful diminutions of the capital stock of corporations, applies the rule, and holds fraud not to be the gravamen of such an action.

In *Carroll v. Hill Tract Improvement Co., infra,* in an action to quit title, the cloud upon which was created by a fraudulent sheriff's sale redemption certificate, it was squarely held that the action was barred by the statute in question. The decision is clearly contrary to the principle of *Wagner v. Law,* and to the very letter of the subsequent *Nethercutt* case, heretofore quoted. The *Improvement Company* case has never been cited in this connection by the Washington court.

As the court well says, "The problem of whether or not an action is for 'relief upon the ground of fraud' in any given case has been fruitful of much concern and some, at least seeming, conflict of views in the courts of this country." This is putting it most conservatively. An example of the concern evoked is furnished by the Oklahoma court, in the *Campbell v. Dick* opinions.

In the first one, 157 Pac. 1062 (May, 1916), the action was held to be one seeking "relief on the ground of fraud," and hence barred, reversing the trial court which had considered it as one for the recovery of real property, and subject only to their 15 year statute. But in April, 1918, the case coming before them again, the court turned a complete flip-flop, holding the action to be one for the recovery of realty. In doing so, they expressly disapproved the authorities upon which the first opinion had been founded, including their own case of *Webb v. Long,* 48 Okl. 354, 150 Pac. 116 (June, 1915). This second opinion is reported in 172 Pacific, at page 782. But the court, apparently still unsatisfied, wrote decision No. 3, 71 Okl. 186, 176 Pac. 520 (Nov., 1918), which is, however, essentially the same as No. 2. And although this was to supersede No. 2, we find the opinion in *Etenburn v. Neary,* 77 Okl. 69, 186 Pac. 457 (1919), quoting at length from the second of the trinity. But it quoted, at least, with approval. Meanwhile, *Franklin v. Ward,* 72 Okl. 282, 174 Pac. 244 (May, 1918), was decided, and accords with these cases. So the rule in that jurisdiction may now be said to be established. The timorous bird has lit. The Campbells have come. That the Justices were at all times striving for peace is indicated by the fact that in none of the Campbell triad was there a single dissenting opinion.

The rule appears to be as strictly, and harshly, defined in Washington as in any other jurisdiction. As for the country as a whole, it is probably impossible to bring any sort of order out of the chaotic multitude of cases. Here and there a likely-looking line of demarcation suggests itself, but invariably the next case examined proves the line to have been drawn in very pale ink. The distinction in the cases concerning fraudulent conveyances, may lie in the difference between void and viodable deeds. It sometimes appears, with a naive disconcern for logic, that fraud is held not to be the gravamen in cases where, if it were, the action would be barred; and held as the gravamen where the plaintiff needs must call upon the provision regarding discovery to toll the statute.

Among the cases where the question of the principal case has arisen, and the substantive cause of action held to be other than that of fraud, are:

Wagner v. Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784 (1892) *Evert v. Tower* 51 Wash. 514, 99 Pac. 580 (1909) *Cornell v. Edsen,* 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279 (1914) *Thomas v. Richter* 88 Wash. 451, 153 Pac. 333 (1915) *Golden Eagle Mining Co. v. Imperator-Quilp Co.,* 93 Wash. 692, 161 Pac. 848 (1916) *Bradbury v. Nethercutt,* 95 Wash. 670, 164 Pac. 194 (1917) *Myers v. Exchange National Bank,* 96 Wash. 244, 164 Pac. 951 (1917) *Shaw v. Rogers & Rogers,* 117 Wash. 161, 200 Pac. 1090 (1921).

Sandoval v. Randolph, 11 Ariz. 371, 95 Pac. 119 (1908) *Oakland v. Carpentier* 13 Cal. 552 (1859) *Clausen v. Meister* 93 Cal. 555, 29 Pac. 232 (1892) *Goodnow v. Parker* 112 Cal. 437, 44 Pac. 738 (1896) *People v. Kings County Development Co.,* 177 Cal. 529, 171 Pac. 102 (1918) *New Albany National Bank v. Brown,* 63 Ind. App. 391, 114 N. E. 486 (1916) *Holmes v. Culver* 89 Kan. 698, 133 Pac. 164 (1913) *Liter v. Ford,* 201 Ky. 686, 258 S. W 110 (1924) *Ross v. Saylor* 39 Mont. 559, 104 Pac. 864 (1909) *Miller v. Walser,* 42 Nev. 497 181 Pac. 439 (1919) *Logan v. Brown,* 20 Okl. 334, 95 Pac. 441 (1908) *Campbell v. Dick,* 172 Pac. 782, 71 Okl. 186, 176 Pac. 520 (1918), and

see remarks *supra* concerning this case; and *Model Bldg. & Loan Ass'n, v. Reeves;* 236 N. Y. 331, 140 N. E. 715 (1923). The New York case is somewhat similar to, and supports, the Washington case of *Cornell v. Edsen, supra,* one of the most extreme of our cases.

And where the fraud itself was held to be the cause of action: *Morgan v. Morgan,* 10 Wash. 99, 38 Pac. 1054 (1894) *Carroll v. Hill Tract Improvement Co.,* 44 Wash. 569, 87 Pac. 835 (1906) and *Union Trust Co. v. Amery,* 67 Wash. 1, 120 Pac. 539 (1912), see remarks *supra* regarding these two cases; *Feenstra v. Feenstra,* 124 Wash. 135, 213 Pac. 466 (1923) *Kiener v. Hood,* 126 Wash. 431, 218 Pac. 1 (1923).

Boyd v. Blankman, 29 Cal. 30, 87 Am. Dec. 146 (1865) *Duff v. Duff* 71 Cal. 513, 12 Pac. 570 (1886), *Lightner Mining Co. v. Lane,* 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C 1093 (1911) *James v. James,* 75 Colo. 156, 225 Pac. 208 (1924), *Hillock v. Idaho Title & Trust Co.,* 22 Id. 440, 126 Pac. 612 (1912), *Wiegand v. Shepard,* 105 Kan. 405, 184 Pac. 722 (1919), *Foy v. Greenwade,* 111 Kan. 111, 206 Pac. 332 (1922) *Combs v. Grigsby,* 200 Ky. 31, 252 S. W 111 (1923), *Delmoe v. Long,* 35 Mont. 38, 88 Pac. 778 (1907), *Tuttle v. Tuttle,* 146 N. C. 484, 59 S. E. 1008 (1907), and *Lone Star Life Ins. Co. v. Pierce,* 200 S. W 1104 (Tex., 1918).

H. S.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—PRIORITY OF LIENS.—At a sale of certain property for general taxes, King County secured an amount in excess of the taxes due and costs of the sale, which it paid over to the City of Seattle, under Rem. Comp. Stat. § 9393, to discharge all local assessment liens against the said property. The sum so paid over did not equal in amount the total of the outstanding assessments, and the city officials announced their intention to pro-rate the amount received among the holders of the various liens. This action is brought by the holder of a local improvement bond, secured under the fifth of the six outstanding assessments, to enjoin the city from carrying into effect its plan of *pro rata* distribution. *Held.* Injunction refused, the city to proceed with distribution according to its pronounced intention. Dissenting opinion: The distribution should take place on a basis of priority, the earlier liens to have preference. *Hollenbeck v. City of Seattle,* 36 Wash. Dec. 407, 240 Pac. 916 (1925), overruling *Seattle v. Everett,* 125 Wash. 39, 215 Pac. 337 (1923) insofar as the holdings of the two cases are inconsistent.

It is the rule in this state and elsewhere that special assessments for local improvements are levied under the general taxing power of the sovereign authority. *Seattle v. Hill,* 14 Wash. 487, 45 Pac. 17, 35 L. R. A. 372 (1896) *Carstens & Earles v. Seattle,* 84 Wash. 88, 146 Pac. 381, *Everett v. Adamson,* 106 Wash. 355, 180 Pac. 144 (1919) and *dicta* in *State ex rel Case v. Howell,* 85 Wash. 281, 147 Pac. 1162 (1915) *Malette v. Spokane,* 77 Wash. 205, 139 Pac. 596 (1913). In general, see 1 COOLEY, TAXATION (4 ED.), § 31, p. 107, and notes. Also 5 MCQUILLIN, MUNICIPAL CORPORATIONS, § 2017, p.4326 *et seq.* Special assessments differ from general taxes in fundamental respects, and Cooley, cited above, takes notice of the distinction to such an extent that he does not discuss special assessments at all in his new edition, referring the reader to McQuillin for a discussion of the principles. Footnotes 81-84,

1 COOLEY, TAXATION, 107. See also 1 ABBOTT, MUNICIPAL CORPORATIONS, § 337, p. 774 *et seq.*

Thus special assessments, while levied under the general taxing power of the state, are not charges for the support of the government. They are justified solely on the basis that they charge the property benefited by the improvements with the value of the improvements. 28 Cyc. 1102; 1 COOLEY, TAXATION, 105; 1 ABBOTT, MUNICIPAL CORPORATIONS, *supra,* and cases cited.

Under the Washington statutes, funds derived from special assessments are not to be commingled with the general tax funds of the state or counties, but are to be kept apart according to the assessment districts of the various improvements. So a "trust fund" is created, administered by the proper municipal authorities, for the discharge of the obligations incurred when the work was performed. Rem. Comp. Stat. §§ 9380, 9383 and 9384.

Because of the fact that special assessments and the resultant liens arising therefrom are wholly creatures of statutory creation, the general rule prevails that the Legislature may by statute give these liens any rank or priority that it deems expedient. *Seattle v. Hill, supra; Woodill & Hulse Electric Co.,* 180 Cal. 667, 182 Pac. 422 (1919) *Gould v. City of St. Paul,* 120 Minn. 172, 139 N. W 293 (1913) 5 MCQUILLIN, MUNICIPAL CORPORATIONS, § 2110, p. 4494; 1 ABBOTT, MUNICIPAL CORPORATIONS, § 389, pp. 948-9. For examples of types of legislative enactments creating priorities, see Cahill, Consolidated Laws of New York, 1923, Ch. 65, § 113; Idaho Compiled Statutes of 1917, § 4007 Rem. Comp. Stat., § 9372. Not creating priorities, but creating liens: Throckmorton's General Code of Ohio, 1921, § 3897 General Laws of Massachusetts, 1921, Vol. 1, p. 759, Ch. 80, § 12. Whether statutes giving priority to local assessment liens refer to such liens as a class or to the individual liens depends on the interpretations of the particular statutes. In Washington the liens arising out of local assessments are superior to the ordinary liens arising out of contract, and inferior to the liens of general taxes. Rem. Comp. Stat., § 9372, "Such lien shall be paramount and superior to any other lien or encumbrance whatsoever, theretofore, or thereafter created except a lien for assessments for general taxes." *Maryland Realty Co. v. Tacoma,* 121 Wash. 230, 209 Pac. 1 (1922) *Seattle v. Algar* 122 Wash. 367, 210 Pac. 664 (1922) *Everett v. Adamson,* 106 Wash. 255, 180 Pac. 144 (1919). However, this section is held not to apply in favor of the holder of certificates of delinquency for general taxes as against a lien for subsequent local improvements held by a city. *Seattle v. Everett,* 125 Wash. 39, 215 Pac. 337 (1923).

Where the question of priority is among local assessment liens of the same class, as in the instant case, there are three theories of priority, *i. e.*.

I. The general tax rule of inverse priority· "Last in time, first in right." In support of this rule, it is argued that since special assessments are levied under the general taxing power of the state they should follow the general tax rule of inverse priority. The Supreme Court of Washington approved this rule and reasoning in a *dictum* in *Seattle v. Everett, supra,* and to this extent that opinion is overruled by the case under discussion. It is replied to this argument that it does not take into account the fundamental distinction between general taxes and special assessments, the former being levied to secure revenue for the support of the government, and the latter to place the charges for local improvements on the property benefited thereby. It is fur-

ther contended in support of this rule that the later improvements enhance the value of the property (which is the security of the prior liens), and that therefore, having the advantage of this increased security, the prior liens should be subservient to the later ones. Of course, the obvious answer to this contention is that the improvements for which the prior assessments were levied likewise increase the value of the security of the later liens. A further argument in favor of this theory based on an interpretation of Rem. Comp. Stat., § 9372, is that since each lien at its creation is made superior to *all* other liens, such latter lien should naturally prevail. This does not account for the presence of the word "thereafter" in the statute. For cases supporting this theory see *Seattle v. Everett, supra; Woodill & Hulse Electric Co. v. Young, supra; Burke v. Lukens,* 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539 (1895), *Jaicks v. Oppenheimer,* 264 Mo. 693, 175 S. W 972 (1915), *Gould v. City of St. Paul, supra.*

II. The ordinary lien rule of chronological priority. The exponents of this rule claim that in the absence of statutory disposition, the ordinary lien rule should prevail. To this it may be said that since this lien is solely of statutory creation, its status must be determined as far as possible from the intent of the Legislature that created it, as evidenced by the creative act. Thus the instant case turns largely upon the interpretation of the local improvement act of 1911. Laws of 1911, Ch. 98, p. 441 *et seq*; Rem. Comp. Stat. §§ 9352-9425 *passim.* It is further contended that since the later lienholders secure their interests subsequent in time to the interests of the earlier lienholders, they are charged with knowledge of the existing rights of their predecessors, and consequently should take subject to these rights. Also, the adoption of any other rule than that of chronological priority, it is said, would render of doubtful value the security of the holder of local improvement bonds, since no person purchasing such bonds would be able to ascertain what might be levied against the property in the future. *Contra,* it is propounded that the holder of the security should be in no better position than the owner of the fee, who must hold at all times subject to the future right of the sovereign or municipality to tax or assess. In support of this general rule see: *Des Moines Brick Co. v. Smith,* 108 Ia. 307, 79 N. W 77 (1899), *Scott-McClure Land Co. v. City of Portland,* 62 Ore. 462, 125 Pac. 276 (1912), *Bell v. City of New York,* 66 App. Div. 578, 73 N. Y. S. 298 (1901), *Philadelphia v. Meager* 67 Pa. St. 345 (1871), *Parker-Washington Co. v. Corcoran,* 150 Mo. App. 188, 129 S. W 1031 (1910) (discussed but not followed by the Missouri Supreme Court in *Jaicks v. Oppenheimer, supra*).

III. The rule of strict parity and equality. In Minnesota a double situation arises. The statute made assessment liens of equal rank with general tax liens, and under this statute the general tax rule of inverse priority prevails. However, as between liens arising in a single year, no priority will be allowed and the liens of that year are made of equal rank. *Gould v. City of St. Paul, supra.* In the instant case, the majority opinion maintains that there appears in the Washington statutes an active intent to make successive local assessment liens of equal merit; that although the wording of the creative section (*i. e.,* § 9372) is ambiguous when applied to liens of the same class, succeeding sections indicate such an intent. See Rem. Comp. Stat., §§ 9384-9388, incl. These sections relate to the enforcement of tax and assessment liens by sale or foreclosure. They provide in substance that the purchaser must pay or assume

all taxes or assessments against the property at the time of purchase, and also that the property cannot be sold for less than enough to pay all such taxes and assessments.

Apart from the interpretation of statutes, the principal argument in support is that it works substantial justice as between the parties, although the usual argument against *pro rata* distribution can be mentioned, *viz.*, that no one gets all of that to which he is entitled. For a further case in support of this theory of distribution see *Brownell Improvement Co. v. Nixon, et al,* 48 Ind. App. 195, 92 N. E. 693 (1910). W S .T.

PRIVATE CORPORATIONS—THE "TRUST FUND" DOCTRINE.—*Hoppe, Trustee, v. First National Bank,* 37 Wash. Dec. 61, 241 Pac. 662 (1925), is one of the first cases on the return flight of the "trust fund" doctrine from its apogee. (See "The Trust Fund Theory· A Study in Psychology," 1 WASH. L. REV., p. 81). The case was taken up, and affirmed, on Superior Judge Paul's elaborate findings of fact, a study of which reveals the following as salient facts: Two separate transactions were involved; (1) payments in July and December of 1922 on a preexisting debt and (2) repayment in March, 1923, of a debt incurred March 1, 1923, to engage in a specific business deal. October, 1923, a receiver was appointed because of insolvency December, 1923, the corporation was adjudged bankrupt. The findings indicate that the corporation was actually "insolvent" during all this time, but that it transacted its business in the ordinary course with all appearances of solvency. The key finding was that although the defendant bank had ample means of knowing the exact financial condition of the corporation and should have known it, yet it was fully justified in believing that the concern would pull out.

Under these findings it was *held* that the "trust fund" doctrine did not apply. Implicit in the decision, although inarticulate, is the thought that the courts should not interfere with a *bona fide* transaction in which the creditor is liquidating his debt without reasonable cause to believe the corporation doomed to dissolution: an illustration of the modern process of business law being molded by business exigencies, the merely logical being justly superseded by the presently practical. H. Zettler.

TORTS—DECEIT—MISREPRESENTATION AS TO INTENTION.—In the recent case of *Kritzer v. Moffat,* 36 Wash. Dec. 327, 240 Pac. 355 (1925), some land of the plaintiff was sold at an execution sale and during the year of redemption the plaintiff went to the defendant, who was in charge of her affairs, and told him that she had the money to redeem the land and that she wished him to take the necessary steps toward its redemption. The defendant made the promise to see that the land was redeemed before the period was up, but in fact he did not intend to redeem the property, but allowed it to be sold to himself, he having previously bid it in at the sheriff's sale, and took the title to the land at the expiration of the redemption period; thereby securing a profit to himself. The court held that the action of decit would lie, since the defendant made the promise never intending to keep it.

This case is following the doctrine outlined in the old case of *Swift v. Rounds,* 19 R. I. 527, 35 Atl. 45 (1896), where it was held that when a man bought goods promising to pay for them at a future date, but having the present intention never to pay for them, that an action for deceit would lie.

The question of present intent is always important in this class of cases,

and is clearly a question for the jury to decide; but since the case of *Edgington v. Fitzmaurice,* 29 Ch. Div. 459 (1885), when it was announced that "The state of a man's mind is as much a fact as the state of his digestion," the weight of authority has held that when a present intent never to pay is shown, an action for deceit will lie. *Stewart v. Emerson,* 52 N. H. 301 (1872) *Seymour v. Wilson,* 14 N. Y. 567 (1856), *Goodwin v. Horne,* 60 N. H. 485 (1881) *Hill v. Gettys,* 135 N. C. 373, 47 S. E. 449 (1904), *Hewett v. Dole,* 69 Wash. 163, 124 Pac. 374 (1912), and *Rozell v. Vansyckle,* 11 Wash. 79, 39 Pac. 270 (1895).

G. De G.

TRUSTS—MANAGEMENT OF TRUST ESTATES—SALES BY TRUSTEES—COMPLIANCE WITH TRUST—DILIGENCE—EVIDENCE—SUFFICIENCY.—H, the sole beneficiary of her parents' estates, obtained the appointment of a trust company as trustee for the disposition of the property. The order of appointment provided that the property was to be reduced to cash within six months from the date of the decree or after that period sold to the highest and best bidder as provided by law. No sale of the property was made within the six months and the beneficiary signed a letter prepared by the trust company in which she said that it was her judgment that the property should not be sold at that time. Subequently offers were received for various portions of the property but were rejected as inadequate. Meanwhile the trustee was paying taxes and assessments on the property out of its own funds and advancing money to the beneficiary, there being no money in the estate. A later agreement to sell a part of the property, resulted in a lawsuit between the purchaser and the trust company in which judgment went against the company. Finally, thirteen years after the appointment, the trust company filed its final accounting, to which the beneficiary objected. *Held.* That the neglect to sell within the first six months of the trusteeship did not amount to mismanagement of the trust.

The court after remarking that it was true that if the property had been sold within the first six months of the trusteeship, even at a sacrifice sale, it would have brought more than it eventually did, states that the officers of the trust company "are not endowed with any greater ability to foresee the final outcome of such matters than are the general run of individuals." "The trustee should be chargeable only with the final result of the handling of the estate, where there has been bad faith or negligence on its part, but when it acts with that care and caution that like trustees display and defers to the wishes of the beneficiary, whom it represents, it should not be penalized therefore." *Hancock v. Muldoon,* 36 Wash. Dec. 197, 239 Pac. 546 (1925).

As a general rule 'the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate." *Campbell v. Miller* 38 Ga. 304, 95 Am. Dec. 389; *Litchfield v. White,* 7 N. Y. 438, 51 Am. Dec. 534; *Fesmire's Estate,* 134 Pa. St. 67, 19 Atl. 502, 19 Am. St. Rep. 676 (1890) *Phila. Trust Co.'s Appeal,* 144 Pa. St. 79, 22 Atl. 831, 14 L. R. A. 103 (1891), *In re Adams,* 221 Pa. St. 77, 70 Atl. 436, 128 Am. St. Rep. 727, 15 Ann. Cas. 318 (1908).

Hutchinson v. Lord, 1 Wis. 286, 60 Am. Dec. 381 (1853), *Weltner v. Thurmond,* 17 Wyo. 268, 98 Pac. 590, 129 Am. St. Rep. 1113 (1908). Supine negligence or wilful default will render trustees liable, but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking such a trust. *Ellig v. Naglee,* 9 Cal. 684 (1858).

Mere inadequacy of price is no ground for charging the trustee with lack of ordinary care, or setting aside the sale, providing the transaction is otherwise properly conducted. *Franklin v. Osgood,* 14 Johns. 52 (1817), *Singleton v. Scott,* 11 Iowa 589 (1859) *Glenn v. Augusta Perpetual Bldg. & L. Co.,* 99 Va. 695, 40 S. E. 25 (1901).

The principal case holds that the court order for the sale to be made within six months is "directory and not mandatory," and that the omission to sell within the time of the decree is not *per se* mismanagement, citing *In re Abram's Estate,* 114 Wash. 51, 194 Pac. 787 (1921).

L. S.

BOOK REVIEWS

FAMOUS JURY SPEECHES. By Frederick C. Hicks. St. Paul: West Publishing Co., 1925. pp. 1180.

Mr. Hicks has published a timely book in this collection of 24 arguments of noted American advocates ranging in period from 1884 to 1924, and in style from Choate to Darrow. His title, however, conveys only a half truth, for 12 of the arguments reported were delivered before Courts without juries in Admiralty Equity, Probate, etc.

Your reviewer chooses to take the author at his word in attaching special significance to the type of tribunal addressed, and to emphasize the method and manner of presentation rather than the analysis of the law involved.

After all, the chief interest of the book lies in its reflected illumination of the jury system, and all the light we can get on that subject should be welcomed by those interested in legal reform. For the Trial Jury is itself definitely on trial in this 20th century, the 7th of its institutional existence among us of Anglo-Saxon tradition. Its precurser and long time companion device for securing the liberty of the individual, the jury of Presentment, has already, for practical purposes, lapsed into a state of inocuous desuetude, though still formally employed (of necessity by the Federal government) to register the decisions of the official prosecuting agency. Its original *raison d'être* becomes less and less cogent with the growth of urban communities. Likewise we find the trial jury becoming the victim of another aspect of the same circumstances. Complex industrial and business relationships determine the character of a greater and greater portion of our litigation both civil and criminal, and this matter of "taking the lay mind" of the community on the facts in dispute taxes to the breaking point the capacity of both the advocate and the judge who conscientiously attempt to unravel the technical evidence introduced for the benefit of the jurymen.

In view of these facts it is encouraging to read the text edited by Mr. Hicks, for it is only fair to say that the speeches selected are, most of them, remarkably temperate in tone, keen in analysis, and well ordered. No man's judgment on the jury system is more to be relied upon than that of the practitioner, and the real nature of that judgment is best indicated by the character of the appeal made to the twelve men in the box.

Public interest in the operation of the jury centers upon its application to criminal procedure both because of the more spectacular character of the trial, and the immediate vital human interests involved. Mr. Hicks has incorporated five speeches delivered by counsel in such cases. It is interesting to note that more attention in the selection has been given to the presentation of the case for the State than for the defense. Having in mind both the inherent disadvantages of the prosecution due to Constitutional safeguards, as well as the almost invariable lack of experience on the part of those charged with the prosecuting function, we are warranted in feeling some solicitude for the effectiveness of this particular part of the administration of justice. Francis