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Equity Exceeding Homestead Exemption Value Subject to Execution

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ceivably have a deleterious effect upon a smoothly functioning government.[34]

If the discretionary limitation on governmental liability is to be retained, as appears likely, some form of test must be established by which to apply the limitation. In curbing the statutory right of an individual to redress for governmental torts, equity and justice demand adoption of a rigid test. Indeed, by posing a set of four questions to be asked in cases involving the discretionary limitation, the court in the principal case did set forth a test which, if properly applied in each case, would insure just application of the limitation.[35] However, the test is cumbersome and, as the holding in the principal case indicates, easily misapplied. It would seem, therefore, that a simpler but equally confining test should be substituted for the "four-question test" in future cases.

Such a test is set forth by Professor Cornelius J. Peck in an article concerning the discretionary limitation as applied to the Federal Tort Claims Act.[36] Professor Peck suggests that the burden should be on the state to show affirmatively that the risk to which plaintiff was subjected was "*knowingly, deliberately* or *necessarily* encountered by one authorized to do so, . . . *in order to achieve* the objectives or purposes" as laid down in the constitution, statute or regulation.[37] By adopting this test, the court would preserve necessary governmental autonomy, free from unpredictable interference by juries. At the same time, however, the individual claimant would not arbitrarily be denied recovery because the state would rebuttably be presumed liable.

EQUITY EXCEEDING HOMESTEAD EXEMPTION VALUE SUBJECT TO EXECUTION

An action was brought by the plaintiff widow to permanently enjoin a judgment creditor from satisfying a judgment on a community debt from the surplus equity in the homesteaded realty over the homestead exemption. Plaintiff and her husband, in 1956, filed a valid declaration of homestead on their residence in Washington, which was held as

[34] See Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).
[35] See the questions set forth in note 14 *supra*.
[36] Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). Professor Peck exhaustively treats the discretionary limitation as applied to the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-78, 2680 (1964). See also Note, 41 WASH. L. REV. 166 (1966).
[37] Peck, *supra* note 36, at 225-26.

community property. In 1958, defendants were granted judgment against the plaintiff and her husband as a marital community. Plaintiff's husband died in 1961, and one of the defendants was appointed administratrix of his estate in Washington. A writ of execution was issued on defendant's judgment, and the sheriff levied on the homestead property in 1962. The superior court subsequently entered a probate order adjudging that the title of the residence on which the homestead was filed had vested in the plaintiff as her separate property immediately upon the death of her husband. The property was stricken from the inventory of his estate, and the sheriff was permanently enjoined from selling the property. On appeal, the court reversed and remanded.[1] *Held*: Equity exceeding the homestead exemption in homesteaded realty transferred to a surviving spouse is subject to execution for judgment on a community debt, despite the absence of a judgment lien and execution prior to the first spouse's death, if the judgment is properly presented as a claim against decedent's estate. *Aronson v. Murk,* 67 Wash. Dec. 2d 1, 406 P.2d 607 (1965).

The homestead exemption statutes are bases on article XIX, section 1 of the Washington State Constitution. When a declaration of homestead is filed for record,[2] the premises described constitute a homestead.[3] If the selection was made by a married person from community property, the land, on the death of either spouse, vests by virtue of statute

[1] The principal case was remanded to the trial court for determination of whether the judgment creditor's claim had been presented in the probate proceeding during the statutory six month period, or whether it was barred for failure to so present the claim. WASH. REV. CODE § 11.40.010 (1956). The court remanded the case because it concluded that the principal case was not an instance where the burden of proof required only one party to prove the status of the claim, rather the status of the claim was equally a part of the case of both parties. Previously the Washington court has held that the required claim presentation is mandatory and cannot be waived. See WASH. REV. CODE § 11.40.080 (1956); Walters v. Christensen, 191 Wash. 602, 71 P.2d 664 (1937). And the court has stated that presentation of a claim is a condition precedent to action on a claim. Empson v. Fortune, 102 Wash. 16, 172 Pac. 873 (1918). From these statutes and cases it appears that the party asserting the claim has the burden of proof. In light of this conclusion, a question is raised as to the meaning of the court's language in the principal case. It is possible that the court is stating that there is a "mutual" burden of proof; however, it seems unlikely that such a major change would be presented in this fashion. A more plausible explanation is that because of the special circumstances, where the "defendant" was both a judgment creditor and the administratrix, the status of the claim was essential to both parties. The judgment creditor was required to prove her claim presentation before recovery. And the plaintiff, who was seeking to have the administratrix prevented from paying the claim, would have to prove that the claim was improper.

[2] The manner of selection and declaration of homestead are provided in WASH. REV. CODE § 6.12.040 (1956).

[3] What constitutes a homestead is set out in WASH. REV. CODE § 6.12.010 (1956). The value of the homestead is limited to six thousand dollars by § 6.12.050.

in the survivor "subject to no other liability than such as exists or has been created under the provisions of this chapter."[4] By statute, the homestead is subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mechanic's, laborer's, materialmen's, or vendor's liens on the premises, and on debts secured by mortgages on the homesteaded premises if executed and acknowledged by both husband and wife.[5] When, for the enforcement of a judgment obtained in a situation other than those enumerated above, execution is levied upon the homestead, the judgment creditor may apply to the superior court of the county in which the homestead is situated for an appraisal.[6] If it appears to the court from the appraisal that the land claimed can be divided without material injury, the court must order the appraisers to set off so much of the land as will equal in value the homestead exemption, and execution may be enforced against the remainder.[7] If the land claimed as homestead exceeds in value the amount of the homestead exemption, and the land cannot be divided, the court must order its sale under the execution.[8] In deciding homestead questions, the Washington Supreme Court has held that the homestead statutes are favored in the law and should be liberally construed.[9] It has further stated that the statutes do not protect the rights of creditors; rather, they are in derogation of such rights.[10]

The question in the principal case was whether the declared homestead was subject only to those liabilities specifically enumerated in Washington Revised Code section 6.12.100, or whether it was also subject to the appraisal procedure of section 6.12.140. The question arose because of the ambiguous use of the word "homestead" in the statutes, both to refer to the exemption value in the former section and to the parcel of land in the latter section. The court determined that the homestead property received by the surviving spouse was subject to claims made under both sections 6.12.100 and 6.12.140. The court reasoned that the appraisal procedure referred to the levying of execution against the surplus equity over and above the exemption value in the recorded property, and that the enumerated liens referred to the claims which, because of their nature, may be made against the exemption value itself. The court concluded that the legislature did not

[4] WASH. REV. CODE § 6.12.080 (1956).
[5] WASH. REV. CODE § 6.12.100 (1956).
[6] WASH. REV. CODE § 6.12.140 (1956).
[7] WASH. REV. CODE § 6.12.220 (1956).
[8] WASH. REV. CODE § 6.12.230 (1956).
[9] Lien v. Hoffman, 49 Wn. 2d 642, 649, 306 P.2d 240, 244 (1957).
[10] First National Bank v. Tiffany, 40 Wn. 2d 193, 202, 242 P.2d 169, 173 (1952).

intend to give the surviving spouse a homestead subject only to claims under section 6.12.100, because this would remove all exemption limits from community property homesteads, no matter how great the value of the homestead, following the death of one spouse.

The court decided that it was immaterial that the judgment in the principal case did not become a lien against either the homestead exemption or the surplus value over and above the exemption.[11] The court concluded that the excess value could be reached if the property had remained in the hands of the judgment debtor.[12] Consequently, the court reasoned that, when the property remained in the hands of persons protected by the homestead exemption statute, the rule should be the same as that applied to execution against the judgment debtor himself, because the mutual rights which were received under Washington Revised Code section 6.12.080 were intended by the legislature to be subject to the mutual claims. Thus, the court stated that a lien was necessary for execution under section 6.12.140 only when there was no personal liability.[13]

The court reasoned that it was also immaterial that the homesteaded property was not part of the deceased husband's probate estate. The court concluded that the probate decree was not determinative of whether the surplus value above the homestead exemption was subject to execution for a community debt under Washington Revised Code section 6.12.140. Rather, the probate decree determined only that

[11] Ordinarily, a money judgment becomes a lien upon real property of a judgment debtor from the day judgment is rendered. WASH. REV. CODE § 4.56.190.—.200 (1956). However, the Washington court in Lien v. Hoffman, 49 Wn. 2d 642, 306 P.2d 240 (1957), stated that, when the homestead exemption is established prior to judgment, as in the principal case, the judgment does not become a lien upon the homesteaded property except in those situations specified in WASH. REV. CODE § 6.12.100 (1956). See Barouh v. Israel, 46 Wn. 2d 327, 281 P.2d 238 (1955); Trader's Nat'l Bank v. Schorr, 20 Wash. 1, 54 Pac. 543 (1898). When judgment is rendered prior to the filing of a homestead declaration, the judgment immediately becomes a lien upon the real property of the judgment debtor. WASH. REV. CODE § 4.56.190 (1956). The Washington court, however, has enjoined the sale of homesteads under the general execution statutes when a declaration of homestead was filed before the sale. Security Nat'l Bank v. Mason, 117 Wash. 95, 200 Pac. 1097 (1921); Kenyon v. Erskine, 69 Wash. 110, 124 Pac. 392 (1912); Snelling v. Butler, 66 Wash. 165, 119 Pac. 3 (1911). See Locke v. Collins, 42 Wn. 2d 532, 256 P.2d 832 (1953).

[12] While the property was in the judgment debtor's hands, the excess value could have been reached through the process set out in WASH. REV. CODE § 6.12.140 (1956), even though no judgment lien had attached. The court in the principal case distinguished Trader's Nat'l Bank v. Schorr, 20 Wash. 1, 54 Pac. 543 (1898), in which the judgment creditor was not allowed to execute on the surplus value, because, in that case, the property had passed to a bona fide purchaser.

[13] The court in the principal case distinguished Locke v. Collins, 42 Wn. 2d 532, 256 P.2d 832 (1953), in which a lien was required for execution, because there was a discharge in bankruptcy in that case, and, therefore, execution could not have been made under WASH. REV. CODE § 6.12.140 (1956) due to the absence of personal liability.

the community property in the probate estate did not include the homesteaded real estate. Noting that there was no showing that the marital community had been discharged from the debt, and since no judgment lien and no execution was issued prior to the husband's death, the court stated that the judgment creditor was required by Washington Revised Code section 11.40.130 to file his judgment against the estate of the deceased like any other claim.[14] If the claim was timely, the judgment creditor could execute on the surplus; if not, the action was barred.[15]

The decision reached by the court in the principal case is both intrinsically sound and in accord with apparent legislative intent. Taken literally, however, the court's language would produce a strange result. The court stated that, because of the probate decree, the homesteaded real estate was not part of the husband's probate estate. The court concluded, however, that, before recovery was possible, the judgment creditor must file a timely claim against decedent's estate. A logical explanation for this seeming inconsistency is that property of a value equal to the homestead exemption should be excluded from the probate estate. This "property" passes under the statute to the surviving spouse, subject only to the claims enumerated in Washington Revised Code section 6.12.100. The surplus value of the homesteaded real estate over the exemption amount should be treated as being included in the probate estate, and subject to claims under section 6.12.140. This analysis would produce the result achieved by the court in the principal case, and, hopefully, would clarify the inconsistent language.[16]

Had the principal case been brought after July 1, 1967, it would have been possible for the plaintiff to seek an additional exemption amount.[17] The 1965 Probate Code had increased the value of the

[14] Usually, a judgment creditor does not have to bring a claim against the estate; he can go against the real property upon which he has a lien, which can be sold independently of administration of the estate. See *In re* Hacketts' Estates, 120 Wash. 236, 207 Pac. 11 (1922). In the principal case, however, it was determined that the judgment creditor did not have a lien on the real property; consequently, the judgment creditor was required to bring his claim against the estate.

[15] See note 1 *supra.*

[16] Under this analysis it would be necessary for the judgment creditor to invoke the appraisal procedure of WASH. REV. CODE § 6.12.140 (1956). Failure to bring such proceeding would conclusively establish the value of the land as declared. See John Hancock Mut. Life Ins. Co. v. Wagner, 174 Wash. 185, 24 P.2d 420, 27 P.2d 1118 (1933). In addition, the judgment creditor would have to file his claim against the estate within six months or be barred by WASH. REV. CODE § 11.40.010 (1956).

[17] WASH. REV. CODE § 11.99.010 (1965) provides that the title will become effective July 1, 1967. *But see* WASH. REV. CODE § 11.99.010, .020 (1965).

award in lieu of homestead to ten thousand dollars.[18] Although the value of the homestead exemption has not, as yet, been changed, and remains six thousand dollars,[19] there is a provision in the new probate code that, if the value of the homestead is less than ten thousand dollars, the court shall award additional property so that the total shall equal ten thousand dollars.[20] Thus, in situations similar to the principal case, the fact that the homestead value is lower than the award *in lieu of* homestead would not be significant because of the award *in addition to* homestead. There is, however, no reason for the variance, and the legislature should act to equalize the values.

EFFECT OF CONFLICTING "OTHER INSURANCE" CLAUSES

Plaintiff was seriously injured when an automobile in which she was a passenger collided with another vehicle driven by an uninsured operator. Plaintiff's automobile insurance policy, issued by defendant, included coverage for bodily injury caused by uninsured motorists. Excluded from this coverage, however, was injury sustained in an automobile not owned by plaintiff, if the owner had "similar insurance" which was available to plaintiff.[1] The owner of the automobile in which plaintiff was injured also carried insurance containing uninsured motorist coverage. His policy, written by another company, contained a pro rata clause restricting coverage to a proportionate share of the loss if the insured had other similar insurance available.[2] Being an "insured" by definition, plaintiff received the maximum payment under the latter policy, but defendant denied liability because of its policy's

[18] WASH. REV. CODE § 11.52.010 (1965).
[19] WASH. REV. CODE § 6.12.050 (1956).
[20] WASH. REV. CODE § 11.52.022 (1965).

[1] The exclusionary, or "escape" clause, read as follows, 66 Wash. Dec. 2d at 858, 405 P.2d at 713:

> This Section of the Policy does not apply: 1. to bodily injury of an insured sustained while in or upon, entering into or alighting from, any automobile, if the owner has insurance similar to that afforded by this Section and such insurance is available to the insured....

[2] This pro rata clause read as follows, 66 Wash. Dec. 2d at 858-59, 405 P.2d at 713:

> Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Company shall not be liable for a greater proportion of any loss to which this Uninsured Motorists Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.