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EARLY WASHINGTON MARITAL PROPERTY STATUTES

CYRIL HILL*

Twenty years prior to statehood, the legislature of the Territory of Washington adopted the Community Property System. For nearly seventy years the courts have struggled with its provisions. Although the original act was copied largely from a statute adopted in California in 1850, such changes have been made, that the system in Washington may be regarded as unique.

The adoption of the system in its present form was not accomplished by one stroke of the pen. Rather, it has had a checkered career. The original statute passed in 1869¹ was followed by a marital partnership property act approved November 29, 1871,² which in turn was repealed effective November 5, 1873³. Nine days later, an act substantially the same as the statute of 1869,⁴ was approved. This was modified in 1879⁵. Slight amendments designed to clarify the system followed in later years.

For approximately seventeen years, and since the organization of the Territory in 1853 the common law had been followed in governing the property interests of married persons. Dower and courtesy were recognized from the first, even provided for as late as the statutes of 1869, and were not abolished until 1871.

The legislative struggle began with "An Act Defining the Rights of Husband and Wife" approved December 2, 1869. This statute, reenacted in 1873, was intended to govern the rights of husband and wife respecting all property subsequently acquired, unless a marriage contract executed prior to marriage and duly acknowledged and recorded provided otherwise. In the exercise of this option any provision in such a contract to alter the legal order of descent or derogate from the rights given by law to the husband over the persons of his wife and children, or which belonged to the husband as the head of the family, or to the surviving husband or wife as the guardian of the children, was invalid.

The "common" property, under the 1869 statute, included all property acquired by husband or wife except by gift, bequest, devise or descent, which together with property acquired prior to marriage, constituted separate property. The separate property of the wife included the rents and profits of her separate property.

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¹Laws of Washington Territory, 1869, p. 318.

²*Id.*, 1871, p. 67.

³*Id.*, 1873, p. 486.

⁴*Id.*, 1873, p. 450.

⁵*Id.*, 1879, p. 77.

To protect her property from seizure for the debts of her husband, inventories of all of her separate estate except money, were required to be recorded. Her separate property, but not the property of the husband could be held for the antenuptial debts of the wife. The husband was granted the management of all community and separate properties, except the rents and profits of property acquired by the wife upon a stipulation that the rents and profits thereof should be applied to her sole and separate use. In case the wife had just cause to apprehend that her husband had or might waste or mismanage her separate estate, the court might appoint a trustee for its management. The power of disposition of the community property was given to the husband. However, the wife was required to join in any sale or encumbrance of her separate property. The granting of powers of attorney by the wife for the conveyance or encumbrance of her separate property required the signature of the husband, but she could revoke such powers alone. The wife could effect a gift to the husband by making a sale of her separate property for his benefit.

The act of 1871 purported to establish a marital copartnership applicable to all married persons living in the Territory of Washington. The procedure to effect the desired results was detailed in the statutory provisions. The common or "partnership property" consisted of all property acquired during marriage by joint or individual efforts of the spouses. Likewise the rents, profits, interest or proceeds of the separate property of each accruing during marriage became common property, except that rents, profits, interest or proceeds of the separate property of the wife together with personal earnings, became her separate property when necessary for the support of herself or her children. All property received in exchange for separate property and all property acquired prior to marriage remained separate property. A one-half share in the common property belonged to the wife. The proportionate share of the wife might be increased when properly evidenced by the personal property inventory, which, together with deeds to realty, were required to distinguish the wife's separate property. A duly recorded inventory was required to evidence the separate property of the husband and any increase in his proportionate share in common property.

The separate property of the wife could not be held for the debts of the husband but it was liable, together with her share of the common property, for her antenuptial debts. Neither could his separate property be held for her debts, whether contracted prior or subsequent to marriage. However, indebtedness incurred

for the necessary comforts or welfare of the family became a charge against the separate property of each, in case there was not sufficient common property to satisfy it. And the common property became liable for indebtedness incurred by the wife for ordinary supplies and comforts of life, or to meet unavoidable emergencies. Gifts between the spouses were valid except as against existing creditors. But the wife could not convey realty to the husband without having received full and satisfactory equivalent in money or property. The notary before whom her deed was acknowledged was required to question her concerning this matter separate and apart from her husband.

Each spouse retained the management of his separate property. The management of the common property was awarded to the husband. After complaint by the wife against the husband for mismanagement of her share, the court might require bond or separate the property, or award her certain property belonging to the husband as might be just. The wife could appoint the husband her agent, trustee or attorney. The power of disposition and encumbrance of common property was held by the husband, except that sales of real estate required the wife to join. Each could dispose of, or encumber his separate property. However, it was necessary for the husband and wife to join in transactions involving the separate property of the wife received as a gift from the husband.

The Act of 1879, substantially following the Act of 1873, which brought back the scheme of the Act of 1869^a, governed the property rights of every husband and wife unless a marriage settlement or postnuptial agreement provided otherwise. In such settlement the parties were not permitted to alter the legal order of descent, nor derogate from the rights given by law to the husband as the head of the family. All property owned by either spouse prior to marriage and all property acquired by gift, bequest, devise or descent, together with the rents, issues and profits therefrom remained separate property. In addition, the wife was allowed as her separate property, her earnings and accumulations and those of her minor children in her care and custody while she was living separate from her husband. All other property acquired after marriage by either spouse became "community" property.

The Act of 1879 thus was the first to make mention of "community" property. The separate realty of the husband and the community realty were made liable for the debts of the husband, but only one-half of the community realty could be held for his

^a*Supra* p. 118.

antenuptial debts. The antenuptial debts of the wife were a charge only against her separate property. The debts of the husband were not a charge against the separate property of the wife, nor against her earnings. However, separate realty as well as the community realty was subject to liens for labor and material furnished for improvements on the respective properties. The management of all real estate, community or separate in character, was controlled by the husband. He could not, however, select a homestead from the separate property of the wife. In case of mismanagement of her separate estate the court might appoint a trustee or even authorize the wife to manage her separate property. The conveyance or encumbrance of any real property, whether community or separate in character, required both husband and wife to join in the transaction. Each had power to dispose of separate personalty. Each spouse had the power by will to dispose of one-half of the community property in addition to his separate property. The parties might agree concerning the disposition, effective at death, of the community property presently owned or afterwards to be acquired.

An Act of 1881⁷ again made the community property system compulsory, affecting the property rights of all married persons. Equal authority was given over the children. Each was allowed the management of his separate estate and the power to encumber or alienate the same.

It has been noted that the early statute of 1869 made the system compulsory where no marriage contract was entered into containing contrary stipulations. This contract could only be altered prior to the celebration of the marriage. The provisions of the partnership act of 1871 were compulsory. They governed the property rights of all married persons within the territorial jurisdiction. The Act of 1873, re-enacting the 1869 statute again made the system optional. A prenuptial agreement could reject it. The 1879 Act governed the property rights of every husband and wife unless a marriage settlement or postnuptial agreement provided otherwise. The Act of 1881 made the system compulsory. However, no prohibition was made against contracts relating to presently held property. Modification of the rights of the parties is therefore possible. But the community is dissolved in no case except by death or divorce.

The distinction between separate and community property is basic. Property owned prior to or at the time of marriage has been recognized as separate property from the earliest statutes to the present time. So also have been considered acquisitions by gift or

⁷See Code of 1881, §§ 2396-2418.

inheritance during marriage. In recognition of the rule that "to the owner belong the fruits, rents, issues and profits", the statutes beginning with 1879 provide that these follow the character of the property from which derived. The original statute of 1869, reenacted in 1873, protected only the increase from the wife's separate property in this way. The "partnership" statute of 1871 definitely provided that the rents, profits, interest and proceeds of separate property became common, except when the increase of the wife's separate property was necessary for the support of herself or children on account of the disability or failure of the husband to provide. A similar exception relating to her personal earnings is the first recognition in the statutes of this right. The repeal of the statute in 1873 eliminated this. The present rule, awarding to the wife her earnings and accumulations and those of her minor children with her, while she is living apart from her husband, found its way into the community property system of this state in the modification statute of 1879.

Under the partnership statute of 1871, one-half of the common or partnership property belonged to her and her heirs. The wife's share of the common property might be increased to more than one-half, and protection was afforded to her in this respect in case she filed in the county auditor's office an inventory setting forth the proportion the value her share bore to the entire value of the property mentioned. Since separate property acquired after marriage was regarded as an exception to the general statutory provisions that all property acquired after marriage was common property, the presumption was early developed that all property acquired after marriage was common⁸.

From the first statute in 1869 the wife was required to file notice of her title in the form of inventories of all her separate property (except money), and its increase, as the property was acquired, in order to exempt the same from liability for the debts of her husband. The partnership act of 1871 required the signature of the other spouse as witness on the inventory of separate property; and deeds to separate real property were required to be taken in the name of the spouse claiming the same as separate property. Otherwise the omitted property, except personal effects and money, was regarded as common property. The Act of 1879 eliminated the necessity for inventories of separate property.

The rights in either spouse to manage, encumber and alienate the separate or common property determines to a substantial degree

⁸Yesler v. Hochstetter, 4 Wash. 349, 30 Pac. 398 (1892). Dealing with the Acts of 1873 and 1881.

the question of fairness of the property system. Criticism has been leveled at these features of our laws. We must admit that equality of the spouses does not exist. However, if two ride a horse, one must ride in front.

The Act of 1869 gave to the husband the right to manage all personal and real property, whether common property or the separate property of either spouse. Mismanagement or waste by the husband were grounds for the wife to apply to the court for the appointment of a trustee to manage her property. However, in case the wife received property to devise, bequest or gift for her sole and separate use, the management of the rents and profits thereof was reserved to her. The husband had the power to encumber and sell without the consent of the wife all property except her separate property other than money in specie.

The inequalities of these provisions were modified in the partnership statute which superseded it. The wife was granted the management of her separate property. She alone was entitled to encumber or sell her property unless it was a gift from her husband. An encumbrance or sale of common real property required that the wife join; but not so in case of common personal property. The wife might also apply to the court for a trustee to manage the common property. In case of danger of waste or mismanagement of common property the wife might also apply to the court to require the husband to give proper security for his management, and in case of waste or mismanagement, an order of the court might divide the common property, or award to the wife separate property belonging to the husband.

The Act of 1879 extended the rights of the wife. Although the husband was given the management of all properties except the separate personal property of the wife, it was necessary for the husband and wife to join in the encumbrance or sale of all real property whether separate or common. In case of danger by his mismanagement of her separate property, the wife was authorized to apply to the court for the appointment of a trustee, or for her own management of the same. Labor and material lien rights were preserved against both separate and common realty. Each party retained all rights over his separate personal property. The community personalty was subject to disposition by the husband. However, each was entitled to the testamentary disposition of one-half of the community property and all of his separate property. To each spouse there was restored under the laws of 1881, the power to manage, encumber and sell all of his separate property.

A discussion of encumbrances upon property should not be considered apart from the subject of liability for debts. Radical changes occurred during the formative period of the community property legislation relative to the liability of the properties for the debts of the spouses.

The prenuptial debts of the wife were from the first made a charge against her separate property but not against the separate property of her husband. Her postnuptial debts were a charge against her separate property under the statutes of 1871 and 1879. Her share of the common property was also liable for both her pre- and postnuptial debts under the statute of 1871. However the laws of 1869, 1873 and 1879 were silent on this point. But the doctrine was early developed that all community property was exempt from seizure for separate debts⁹.

The separate debts of the husband were not made a charge against the separate property of the wife in the partnership act of 1871 nor under the statutes of 1879 and 1881. Under the statute of 1879 the wife's earnings could not be held for such debts. His separate property remained liable for his debts. Under the 1879 laws, one-half of the community real estate was subject to a judgment or decree against the husband. By joining in the creation of the obligations in writing or by written acknowledgment either spouse could subject his separate property to the debts of the other spouse under the laws of 1871. Although not specifically provided, it may be assumed, either spouse could exercise this power under the other statutes. Moreover it may be assumed also that both spouses could join in subjecting common property to any debts.

An exception to the limitations placed on holding certain property liable for specific debts is found where family expenses are involved. Under the partnership statute¹⁰ indebtedness incurred for the "necessary comforts or welfare of the family" whether contracted by either spouse was chargeable against the separate properties of both husband and wife in the absence of sufficient common property. The husband's share of the partnership property was also subject to debts of the wife contracted for "ordinary family supplies or comforts of life, or to meet unavoidable emergencies." Other obligations of the wife resulting in the sale upon execution of common property became a "debt against the wife's share of the common property", unless the husband by his will or by an "instrument in writing signed by two disinterested wit-

⁹*Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688 (1890); *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917); *Katz v. Judd*, 108 Wash. 557, 185 Pac. 613 (1919).

¹⁰Act of 1871, *supra* p. 118.

nesses" waived the same. The Code of 1881 made the "expenses of the family and the education of the children . . . chargeable upon the property of both husband and wife, or either of them." Such is the law today.

With a view of explaining the system or interpreting the community property laws, various theories have been advanced concerning the nature of the community and ownership of the property involved under the statutory provisions. In an effort to identify the community property laws with provisions of laws governing relationships other than marriage, strange conclusions are drawn. The community is not a legal entity separate and apart from its members as a corporation nor is it (disregarding the statute of 1871) a partnership. The rights of the members may be compared with rights recognized in one or the other of these institutions, but that is all. One may speculate in regard to the single, double, trust and agency theories of ownership of community property. But the real test of the nature of the community is found in the determination of the rights of the spouses and third parties in respect of the community and separate properties of the husband and wife.