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RECENT CASES

COMMUNITY PROPERTY—LIABILITY FOR TORTS OF WIFE. Going to her dressmaker to have a sweater fitted, the wife of the defendant community negligently parked the borrowed car she was driving. While she was absent it rolled down the hill and injured the plaintiff. *Held:* The community is liable for the negligence of the wife, not on the family car doctrine, but solely on the theory that she was on a community errand as agent of the community in purchasing the sweater, the price of which would be an obligation of the community. *Werker v. Knox*, 97 Wash. Dec. 390, 85 P. (2d) 1041 (1938).

At common law the husband was liable for the torts of his wife. MCKAY, COMMUNITY PROPERTY (2d ed. 1925) § 811. This liability has been abrogated in Washington, as in many states, by statute. REM. REV. STAT. § 6904. This statute operates to relieve only the separate property of the husband for his wife's torts. *Werker v. Knox, supra.* But community property is also free from liability for individual torts of either spouse. *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688 (1890); *Killingsworth v. Keen*, 89 Wash. 597, 154 Pac. 1096 (1916). The result is that a plaintiff injured by an individual tort of a spouse will frequently be unable to gain actual redress for his injury, because, although there may be community property, very often neither spouse will have any separate property. But the community property is liable for community torts and, therefore, it is suggested that a liberal definition of community torts is to be favored. (1928) 3 WASH. L. REV. 153.

In the automobile injury cases, a plaintiff injured by negligence of a spouse operating the community auto should be able to reach the community property on the family car doctrine, where it is followed, regardless of the separate or community nature of the tort. In such cases liability follows the ownership of the car for injuries arising from the negligence of a member of the family using the car for a family purpose. Note (1936) 100 A. L. R. 1021. If the community owns the car the community is liable; *Lloyd v. Mowery*, 158 Wash. 341, 290 Pac. 710 (1930), if a spouse owns the car, then the spouse is individually liable; *Hart v. Hogan*, 173 Wash. 598, 24 P. (2d) 99 (1933). But in the *Werker* case, *supra*, the community purpose doctrine alone was sufficient to fasten liability on the community, and hence the ownership of the car under the family car doctrine was immaterial. Further, in distinguishing the community purpose and family car doctrines, the family purpose under the family car doctrine would seem to be broader than the community purpose involved in cases similar to the *Werker* case. Compare Note (1936) 100 A. L. R. 1021 with *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937). But in the *Werker* case, the court, in a dictum citing family car cases, indicated that a pleasure trip, clearly a family purpose in the family car doctrine, would be a community purpose—and hence the community would be liable for the negligence of a spouse on such a trip, regardless of the ownership of the car. Such a holding would extend the community purpose beyond the limits set by some of the cases. *Adams v. Golson, supra; Tuck v. Harmon*, 151 So. 803 (La. 1934). But the inability of plaintiffs to reach community property for separate torts of a spouse is questioned—MCKAY, COMMUNITY PROPERTY (2d ed. 1925) § 825—and a liberal definition of community torts seems desirable.

W. B. B.

CONSTITUTIONAL LAW—CLASSIFICATION—SPECIAL LAWS. REM. REV. STAT. (Supp.) § 10322-11, provides that all buildings of the state or its agencies must use fuel mined or produced within the state; exempting from the provisions those institutions of the state which at the time of the enactment were using fuel produced outside the state. Defendant, although not coming within the exception, entered into a contract for a supply of fuel not produced within the state. Action was brought to enjoin the carrying out of the contract. A permanent injunction was granted by the lower court. *Held:* The law was special and in violation of art. II, § 28, subdivision 15 of the Washington Constitution, providing that no special law be enacted for the management of common schools. *Nicholls v. Spokane Public School District No. 81*, 95 Wash. Dec. 258, 80 P. (2d) 833 (1938); *aff'd on rehearing*, 96 Wash. Dec. 278, 82 P. (2d) 857 (1938).

The statute seemingly would prohibit the future installation of oil burners in public buildings until Washington becomes an oil producing state. It is submitted therefore that the question is one of reasonable classification, since there is a discrimination in favor of those who, at the time of the legislation, had been acting in a certain way and against those not then so acting, but who may desire to so act in the future. This type of discrimination is usually challenged under the "equal protection" clause of the Federal or state Constitutions. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580 (1935); *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936).

Typical of the statutes which discriminate against newcomers are those which require examination before entering a profession or trade, but exempt those who are already engaged therein. The following cases have upheld such classification: *Dent v. West Virginia*, 129 U. S. 114 (1889) (doctors who had practiced for ten years before passage of the act exempted from examination); *Watson v. Maryland*, 218 U. S. 173 (1909) (same, four years); *Fox v. Territory*, 2 Wash. Terr. 297, 5 Pac. 603 (1884) (similar); *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737 (1903) (similar; barbers). Zoning ordinances afford another example of discrimination which may be even more pronounced, newcomers being either under a greater burden or entirely prohibited. *Specter v. Building Inspector*, 250 Mass. 63, 145 N. E. 265 (1924) (exempting existing buildings from zoning law); *City of Aurora v. Burns*, 319 Ill. 84, 149 N. E. 784 (1925) (same). Cases in which classifications discriminating against newcomers have been held invalid are exemplified by *Mayflower Farms v. Ten Eyck*, 297 U. S. 266 (1935) (new entrants into the milk distributing business in New York denied favorable price differential accorded to existing distributors of brands not well advertised); *State v. Post*, 55 N. J. L. 264, 26 Atl. 683 (1893) (only those engaged in oyster cultivation could continue in such occupation); *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101 (1936) (only those having licenses for certain years entitled to new permits for commercial fishing). The last case was the principal case relied upon by the court in reaching its decision here.

From these cases it is seen that where the discrimination is against newcomers into skilled occupations or professions the courts are less likely to declare the discrimination invalid than in cases in which the occupation is of a general or common nature. As to the use of property the courts have been inclined to uphold the discrimination. The instant case seems somewhat inconsistent with this general attitude.

. The Washington Court,. previous to this case, had held that a special law within the meaning of the state constitution was one relating to particular persons or things. *Young Men's Christian Association v. Parish*, 89 Wash. 495, 154 Pac. 785 (1916) (statute exempting from tax, property of the Y. M. C. A. which was used for religious purposes held special); *State ex rel. Allen v. Schragg*, 159 Wash. 68, 292 Pac. 410 (1930) (statute classifying counties by population held not special). As the question in the instant case was one of classification rather than particularization it would more logically seem to fall under art. I, § 12 of the Washington Constitution which is the state analogue of the equal protection clause of the Fourteenth Amendment of the Federal Constitution. However, by its express language, art. I, § 12 imposes no restriction on the grant of special privileges or immunities to municipal corporations.

McCormacks, Inc. v. Tacoma, 170 Wash. 103, 15 P. (2d) 688 (1932) (statute granting special privileges to a municipal corporation held not in violation of art. I, § 12, whether given to the municipal corporation in its governmental or private capacity); *Washington National Investment Co. v. Grandview Irrigation District*, 175 Wash. 644, 28 P. (2d) 114 (1933) (irrigation districts held not within art. I, § 12). Hence in the instant case the court was precluded from resorting to this clause, which presumably explains the use of art. II, § 28 as the basis of decision.

H. A. B.

EVIDENCE—ADMISSIBILITY—PAST RECOLLECTION RECORDED. Action upon an accidental death policy. Defense was that the deceased had been intentionally shot by his son protecting his mother. The son testified at the trial that it was accidental. To impeach this testimony the defendant called the stenographer present when the son had made statements to the prosecutor, which were inconsistent with his present testimony. The stenographer testified that she had no present recollection and even after reference to her transcribed notes she had no independent memory. The trial court refused to allow the notes to be read. The stenographer testified that she did not take down everything that the son had said but only that which the prosecuting attorney indicated. The defendant did not attempt to introduce the notes as past recollection recorded. *Held:* The notes were properly excluded as no effort was made to qualify them as past recollection recorded. By way of dictum the court intimated that, had the defendant tried to introduce them, they might have been excluded because they were not complete. *Preston v. Metropolitan Life Ins. Co.*, 98 Wash. Dec. 141, 87 P. (2d) 475 (1939).

As a general principle any writing may be used to stimulate and revive a recollection. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 758. The failure to distinguish between the rules governing past recollection recorded and those governing present recollection revived has led to much confusion. It was held reversible error for a witness to use a copy to refresh his recollection when the original record was procurable in *Clausen v. Jones*, 191 Wash. 334, 71 P. (2d) 362 (1937). It is submitted that this ruling is erroneous.

The stenographer's testimony indicating that her memory was not and could not be refreshed, it is clear that the notes could not be read unless qualified as the record of a past recollection. The question presented by the dictum is whether they could have come in as such. This

type of record must be an exception to the hearsay rule. Morgan, *Hearsay and Preserved Memory* (1927) 40 HARV. L. REV. 712. The memorandum, as far as it went, undoubtedly met the requirements laid down by the textwriters. 2 WIGMORE, EVIDENCE (2d ed. 1923) §§ 734-755.

The stenographer here did not take down all that the boy had said, but only that which the prosecutor told her to. Thus, the record was obviously incomplete, and if completeness is a requisite it did not measure up. No treatment of this point has been found in any texts. In a similar situation, but with no discussion, the Illinois court excluded a similar record. *People v. Parker*, 284 Ill. 272, 120 N. E. 14 (1918).

At common law in the use of reported testimony, the reporting witness was required to repeat substantially everything testified to by the now unavailable witness at the first trial, both on direct and cross-examination. *Scribner v. Palmer*, 90 Wash. 595, 156 Pac. 531 (1916); 1 GREENLEAF, EVIDENCE (16th ed. 1899) § 165. By analogy to this it would seem that the memorandum, to be admissible, should contain substantially all the facts previously known to the witness which bear upon or are connected with the subject matter of the memorandum. Such a requirement seems to be a reasonable one, dealing as we are with an out-of-court statement not subjct to any effective cross-examination. This requirement then should be added to the other prerequisites commonly stated as essential for the admission of the record of a past recollection.

H. A. B.

MORTGAGES—JUNIOR MORTGAGEE'S LIEN FOR TAX PAYMENTS—PRIORITY AS AGAINST SENIOR MORTGAGEE. Appellant junior mortgagee purchased title at tax sale and unsuccessfully attempted to assert such title when the senior mortgagee foreclosed. Affirming, the court said, ". . . as against the senior mortgagee the junior mortgagee holding a tax deed does not have a title, but merely a lien, enforcible under his mortgage. His tax deed puts him in no better position than would a tax receipt." *Oregon Mortgage Co. v. Leavenworth Securities Corp.*, 97 Wash. Dec. 376, 86 P. (2d) 206 (1938).

In the instant case the second mortgagee purchased at the tax sale. Such purchase is held equivalent to payment of taxes. Cooley, J., in *Connecticut Mutual Life Ins. Co. v. Bulte*, 45 Mich. 113, 7 N. W. 707, 710 (1881) stated: "It is . . . just . . . here . . . to hold that the purchase is only payment of the tax." As to whether this gives the payer the superior lien [REM. REV. STAT. (1933) § 11260, § 11263, (Supp. 1933) § 11263-1, § 11264; P. C. (1933) § 6882-99, § 6882-102, § 6882-102a, § 6882-103] of the taxing power there is a division of authority.

About half of the jurisdictions in which the question has been raised hold a junior mortgagee's lien for payment of taxes is superior to that of the first mortgage because of the equitable right to be subrogated to the lien of the taxing power. *Connecticut Mutual Life Ins. Co. v. Bulte, supra; Norton v. Metropolitan Life Ins. Co.*, 74 Minn. 484, 77 N. W. 298 (1898); Note (1933) 84 A. L. R. 1366, 1375, 1393; 41 C. J. 641; Note (1934) 1 U. OF CHI. L. REV. 813; Note (1933) 42 YALE L. J. 971. The second mortgagee's right to reimbursement is also recognized elsewhere. *Chrisman v. Hough*, 146 Mo. 102, 47 S. W. 941 (1898); 2 JONES, MORTGAGES (8th ed. 1928) § 883; Note (1929) 61 A. L. R. 587; Note (1928) 38 YALE L. J. 263. As a possible member of the group taking the contrary view (Note (1933) 84 A. L. R.

1366) the state of Illinois has been suggested. Comment (1935) 1 JOHN MARSHALL L. Q. 50.

Previous Washington decisions favor the superiority of the junior mortgagee's lien for tax payment. *Farrell v. Gustin*, 18 Wash. 239, 51 Pac. 372 (1897); *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742 (1901). Accord: *Childs v. Smith*, 51 Wash. 457, 99 Pac. 304 (1909), *aff'd on rehearing* 58 Wash. 148, 107 Pac. 1053 (1910); *Catlin v. Mills*, 140 Wash. 1, 247 Pac. 1013, 47 A. L. R. 545 (1926). The instant case, apparently foreclosing all rights of the second mortgagee, seems to deny the position taken in the earlier cases.

There is a possibility that a recent Washington statute [REM. REV. STAT. (Supp. 1933) § 11263-1; P. C. (1933) § 6882-102a; Wash. Laws 1933, c. 171 § 1] might explain the seeming change in the court's attitude. The statute provides that a person who has a lien by mortgage may pay taxes and the amount so paid shall "be collectible with, or as a part of, and in the same manner as the amount secured by the original lien" provided recording procedure is followed, or if it is not followed "the lien created by any such payments shall be subordinate to the liens of all mortgages or encumbrances upon such real property which are senior to the mortgage or other lien of the person so making such payment."

There is nothing in the instant case, however, to indicate that the court had the statute in mind except the mere statement, "His tax deed puts him in no better position than would a tax receipt." The point is not raised in the appellate briefs.

It is submitted that it is not a necessary construction of the statute that it as such creates a superior lien in favor of the second mortgagee paying taxes. The court can construe it as recognizing the equitable right of subrogation with the provision of the second clause as limiting that right unless the recording procedure, necessary for enforcement, is followed. The change from the previous statute (REM. REV. STAT. (Supp. 1933) § 11264; Wash. Laws 1925, Ex. Sess., c. 130 § 103) by inserting the recording provision lends weight to this suggestion.

Until the question is directly presented to the court it seems probable that neither this statute nor the instant case can be considered as changing the principle adopted in the earlier Washington cases.

H. M. C.

NEGLIGENCE PER SE—INVOLUNTARY VIOLATION OF STATUTE. In a collision at an intersection, without fault on defendant's part, the motor bus of the defendant corporation knocked down a stop sign. The driver of the bus was not aware of its destruction. The stop sign was not replaced, and two days later the plaintiff's decedent was killed in an accident resulting from a third person's failure to stop at the intersection, which failure was due to the absence of the stop sign. The plaintiff relied, in part, on statutes which made the destruction of a warning sign a misdemeanor (REM. REV. STAT. §§ 2716, 6308, 6310) and contended that the defendant violated such statutes and was therefor negligent *per se*. After a verdict for the plaintiff the trial court ordered a new trial because a negligence *per se* instruction was not justified. *Held:* Order affirmed. The defendant was not negligent *per se* since the violation of the statute was a technical one only, and excusable. *Baldwin v. Washington Motor Coach Co.*, 96 Wash. Dec. 65, 82 P. (2d) 131 (1938).

The court relied mainly on an Indiana decision holding that driving on the left side of the street contrary to an ordinance was not negligence *per se* when the right side of the street was blocked. *Condor v. Griffith*, 61 Ind. App. 218, 111 N. E. 816 (1916). The rule of the *Condor* case, that violation in emergencies of traffic regulations is not negligence *per se*, is well established. 63 A. L. R. 277 (1929). The rule is followed in this state. *Noyes v. Katsuno*, 111 Wash. 529, 191 Pac. 419 (1919); *Luther v. Pacific Fruit & Produce Co.*, 143 Wash. 308, 255 Pac. 365 (1927). Such cases have usually involved violation of traffic statutes or ordinances, and the violations have been volitional, the driver choosing, in an emergency, a course of action contrary to the statute.

It is suggested that the above rule does not properly apply to the *Baldwin* case, *supra*. In the *Baldwin* case the statute punishing the destruction of warning signs was not violated, technically or otherwise, because the basic element of a crime, the criminal act, was absent. Volition is essential to an "act". *Duncan v. Landis*, 106 Fed. 839 (1901); RESTATEMENT, TORTS (1934) § 2. In the original collision the defendant's bus was apparently out of control when it knocked down the sign, and the destruction of the sign was not volitional on the part of the bus driver. Two cases have been found which seem to bear this theory out, holding regulatory statutes not to apply to vericles out of control. (Speeding statute inapplicable to runaway car on steep grade) *McCormick v. Merritt*, 232 App. Div. 619, 250 N. Y. Supp. 443 (1931); (Keep to right rule inapplicable where steering mechanism broken) *Giancarlo v. Karabanowski*, 124 Conn. 223, 198 Atl. 752 (1938). The result in the *Baldwin* case could have been reached by holding that the destruction of the sign was without volition on the bus driver's part and that consequently there was no violation of the statute.

W. B. B.

TAXATION—LIEN AND PRIORITY—PRIORITY OF GENERAL TAX LIEN OVER LIEN FOR INHERITANCE TAXES—STATUTORY PROVISIONS. The plaintiff brought action to quiet title to a city lot purchased from the county. The county had acquired title to the lot through foreclosure of its lien for delinquent general taxes. The state claimed a lien for delinquent inheritance taxes which arose prior to the taxes under which the county foreclosed. *Held:* The general property tax has priority over the inheritance tax lien and the purchaser from the county takes title free of such lien. *City of Walla Walla v. State*, 97 Wash. Dec. 309, 85 P. (2d) 676 (1938).

The state relied on the inheritance tax statute re-enacted in 1937 which provides in part: "The inheritance tax shall be and remain a lien on such estate from the death of the decedent until paid." REM. REV. STAT. (Supp. 1937) § 11201. The plaintiff relied on the statute relating to liens for general taxes which provides in part: "The said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, responsibility to or with which said real estate may become charged or liable." REM. REV. STAT. § 11260.

Inheritance taxes are payable to the state. REM. REV. STAT. § 11210. The county administers the general property tax. REM. REV. STAT. § 11244. But the county, when it acquires land at a general tax foreclosure sale for want of other purchasers, takes and holds the land in trust for the

state to the extent of the state's interest. *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194 (1914). The question here did not involve priority between the state and a local taxing authority, but was simply a determination of the priority of two state liens.

The state has an undoubted power to create priority of tax liens over other claims in aiding its taxing power. *Carstens & Earles, Inc. v. Seattle*, 84 Wash. 88, 146 Pac. 381 (1915). It logically follows that the state can determine, by statute, what priority the various tax liens shall have. There is, however, a distinction between establishing a tax lien so that it takes priority over other claims and establishing priority of one tax lien over another.

In giving a tax lien priority over other liens or claims, the general rule is that priority must be given by positive statute; it will not be sustained by resort to construction. *Scandinavian-American Bank v. King County*, 92 Wash. 650, 159 Pac. 786 (1916). However, such words as "the lien shall be continued until taxes are fully paid and discharged" have been held to give priority. *Eaton's Appeal*, 83 Pa. St. 152 (1876). This result was repudiated in a case which arose in a Federal Court in New York where the words of the statute were similar. *Central Trust Co. of New York v. Third Ave. R. Co., et al.*, 186 Fed. 291 (1911).

It is not settled whether the inheritance tax which is declared to be a lien until paid would have priority over other claims, but giving it priority would seem to be the best construction. Such a lien following the land until paid would of necessity reduce the value of the land by the amount of the tax because, if it remained until paid, no title free of it could be gained. The instant case cannot be said to be authority for the view that the inheritance tax lien has priority over other claims, or that it does not have priority. It decides that, as between the two tax liens, the general property tax lien shall have priority by virtue of the express provision of the statute. The inheritance tax lien by construction will not supersede it.

Ordinarily, when the county purchases property at a foreclosure proceeding, and subsequently sells it to a third party, a new title is thereby initiated and the purchaser takes title free of all prior liens. *Maryland Realty Co. v. Tacoma*, 121 Wash. 230, 209 Pac. 1 (1922). The decision in the instant case leaves that proposition unimpaired.

E. K. N.