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Community Property—Improvements—Liens; Evidence—Hearsay—Self-Serving Declarations; Equity—Unfair Competition—Customer Lists

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RECENT CASES

COMMUNITY PROPERTY—IMPROVEMENTS—LIENS. Judgment in a wrongful death action ran against the community alone. A trustee in bankruptcy was appointed for the community. The husband owned separate real property which several years before had been substantially improved, and the cost of improvements paid out of community funds. The trustee in bankruptcy brought suit to have a lien impressed upon the property in the amount that community funds had been expended in making the improvements. *Held:* The trustee in bankruptcy of the community is entitled to a lien,*Conley v. Moe*, 107 Wash. Dec. 245, 110 P. (2d) 172 (1941).

The doctrine is well established that the status of property as separate or community becomes fixed as of the date of its acquisition. *Merritt v. Newkirk*, 155 Wash. 517, 285 Pac. 442 (1930); *Rawleigh Co. v. McLeod*, 151 Wash. 221, 275 Pac. 700 (1929); *In re Brown's Estate*, 124 Wash. 273, 214 Pac. 10 (1923) and cases collected therein. And improvements on land follow the title to the land. *Commissioner of Internal Revenue v. Burke*, 62 F. (2d) 7 (C. C. A. 9th, 1932); *Merritt v. Newkirk, supra; Rawleigh Co. v. McLead, supra;* MCKAY, LAW OF COMMUNITY PROPERTY (2d ed. 1925) §§ 342, 347; *cf. In re Carmack's Estate*, 133 Wash. 374, 233 Pac. 942 (1925). For this reason mainly, the problem of adjudicating the rights which arise when property of one class is substantially improved by the use of property of the other class has proved a difficult one. In the early case of *Legg. v. Legg*, 34 Wash. 132, 75 Pac. 130 (1904), it was said, by way of dictum, that the surviving wife was entitled "in equity and fairness," to a lien against the land which had been the separate property of her deceased husband, in the amount that community property had been used to improve it, but what was actually granted was reimbursement out of the proceeds of a partition sale. In *In re Deschamp's Estate*, 77 Wash. 514, 137 Pac. 1009 (1914) the community was held to have acquired no interest in the wife's separate real property by reason of improvements made by it, but the court indicated that there might be an equity in favor of the community, which it elected to disregard because the amount was insubstantial, and there was no indication that the parties had intended to create any such equity.

The problem next arose in *In re Carmack's Estate, supra*, where the large value of business property was due almost solely to a building which had been erected by the community on land owned separately by the wife. The court there held that the property *belonged to the community* in the proportion that the value of the improvement bore to the value of the bare land, and awarded the property to the administrator of the deceased husband for administration as part of the community estate. A somewhat similar situation was presented in *In re Hart's Estate*, 149 Wash. 600, 271 Pac. 886 (1928), but the community was held to have acquired no interest in the property because there was uncontroverted evidence that the improvements had been intended as a gift. In *Rawleigh Co. v. McLeod, supra*, a husband sought to prevent a separate creditor from levying upon what had been his separate real property, his theory being that, under the rule of the *Carmack* case it was mostly community property, since its chief value was in a house which had been erected upon it by the community. In holding that the property was wholly separate, the court explained that in the *Carmack* case it had referred to equities only, and

recognized the possibility in this case of an "equitable lien" in favor of the community. Again, in *Merritt v. Newkirk, supra,* the court held that the ownership of separate property is not changed by the expenditure of community funds in improvements "unless . . . the equities of the case require a different conclusion." On the authority of these cases, the Circuit Court of Appeals held that property which had been purchased by the husband before marriage for $1,250, and upon which the community had erected a building costing almost $400,000, was, for tax purposes, separate property, without any mention of the "equities of the case." *Commissioner of Internal Revenue v. Burke, supra.* The first request for a lien, as such, in favor of the community, came in *In re Woodburn's Estate,* 190 Wash. 141, 66 P. (2d) 1138 (1937), where the lien was denied upon a finding in effect, that the improvements had not been made with community funds. Then, in *Federal Land Bank of Spokane v. Schidleman,* 193 Wash. 435, 75 P. (2d) 1010 (1938), without denying the possibility of a lien, the court held that it could not be asserted as against a subsequent mortgagee without notice.

With the law in this condition, the court decided *Conley v. Moe.* The language used is reminiscent of that in the *Carmack* case, to the effect that the community, by reason of the improvements, acquires an interest in the land, but the holding is that the community is entitled to an equitable lien. This is the first time that a lien has actually been granted, and the first time that reimbursement in any form has been allowed other than after the death of one of the spouses. *Conley v. Moe,* holding that there is a lien, and that it is an asset available to creditors of the improver, is a landmark in the development of Washington community property law.

F. K. F.

EVIDENCE—HEARSAY—SELF-SERVING DECLARATIONS. *P* company alleged an agreement with *D,* whereby it was to receive a commission. Apparently the only evidence on this issue was a letter written to *D* by *P's* president (who died before the trial), setting out the terms allegedly agreed to. *D's* counsel made no objection. The trial court gave judgment notwithstanding the verdict, for *D. Held:* the letter was a self-serving declaration, and had insufficient probative value to support a judgment for *P.* No question of adoptive admission was present, *D* having promptly denied any such agreement. *W. W. Conner Company v. McCollister & Campbell,* 109 Wash. Dec. 434, 115 P. (2d) 370 (1941).

The court concedes the general rule that hearsay admitted without objection may have probative value sufficient to support a verdict. It has so held before. *Atkins v. Clein,* 3 Wn. (2d) 168, 100 P. (2d) 1 (1940); *Beebe v. Redward,* 35 Wash. 615, 77 Pac. 1052 (1904); *State* ex rel. *Race v. Cranney,* 30 Wash. 594, 71 Pac. 50 (1902). This accords with the concept of the hearsay rule as simply assuring the opponent "a right that the trier shall not be influenced by testimony which the adversary has had no opportunity to cross-examine," rather than as an exclusion based on the inherently inferior quality of the evidence. Morgan, *The Hearsay Rule* (1937) 12 WASH. L. REV. 1, 4. But the court draws a line. "Though self-serving declarations are sometimes characterized as hearsay, we think there is sound reason for limiting the application of the rule to what is generally understood and characterized as hearsay evidence." "The vice of according probative value to . . . [a self-serving statement] is not obviated nor diminished because it may have been admitted

without objection."

Our court has frequently looked upon evidence as opprobious because self-serving. *Stusser v. Gottstein*, 178 Wash. 360, 370, 35 P. (2d) 5, 9 (1934) (a hearsay letter rejected; "A party cannot offer in evidence his own declaration relative to the subject in controversy, nor may a witness corroborate himself by his own self-serving declaration."); *Dunn v. Buschmann*, 169 Wash. 395, 398, 13 P. (2d) 69, 70 (1932) (record of *D* rejected because the first statement was hearsay, the second "manifestly a self-serving statement"); *Eastman v. Northwestern Mut. Life Ins. Co.*, 169 Wash. 125, 132, 13 P. (2d) 488, 490 (1932) (hearsay excluded "was of a self-serving nature; hence it was not admissible"); *Dennis v. Trick*, 165 Wash. 403, 407, 5 P. (2d) 493, 494 (1931) ("At best, the diary was a self-serving memorandum and was properly rejected."); *Kirkpatrick v. Collins*, 95 Wash. 399, 163 Pac. 919 (1917) (a memorandum of *D's*, offered to corroborate her testimony, held to have the vices of both self-serving *and* hearsay evidence); *Munson v. Baldwin*, 93 Wash. 36, 37, 159 Pac. 1070, 1071 (1916) (in a case similar to the principal one: "It is an established rule of evidence, subject to few exceptions, that a party cannot offer in evidence his own declaration relative to the subject in controversy."); *Moritz v. Herskovitz*, 46 Wash. 192, 195, 89 Pac. 560, 561 (1907) (a letter excluded: "It was but a self-serving declaration . . .").

Is "self-serving declaration" more than an epithet? Most courts using the expression have been concerned with hearsay. But not all. In *Jacobs v. Jacobs*, 281 Mass. 198, 183 N. E. 147 (1932), *D*, sued for malicious alienation of her son's affection for his wife, offered *A's* testimony that *D* had asked him to attempt a reconciliation, as indicative of her beneficent state of mind. Said Rugg, C. J.: "It was a self-serving statement by the defendant, not made in the presence of the plaintiff, and falls within no one of the exceptions that might make such statements admissible in evidence." *Contra*, on this precise issue, is *Worth v. Worth*, 48 Wyo. 441, 49 P. (2d) 649 (1935); the case was remanded because the evidence had been excluded: ". . . there is no principle of evidence especially excluding self-serving statements . . . If they are inadmissable, it is because they are hearsay, or because of some other reason." Wigmore uses the same language. 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1765. This seems the better view. If a statement is to be rejected because it is favorable to the declarant, vestiges of an old disqualification—interest—are reappearing in the law of evidence. The debate on that ended long ago, in favor of admitting it for what it is worth; there are sufficient other safeguards against fabrication. The jury need not believe all it hears.

It is not necessarily true that self-favoring statements have no probative value. *Bardsley v. Truax*, 64 Wash. 400, 116 Pac. 1075 (1911), is illustrative (*D* established title to land by his own testimony to an otherwise unknowable event). Under exceptions to the hearsay rule admissions, spontaneous utterances and statements of mental condition and pain are acceptable though in the declarant's favor.

In the present case it would have been enough to say that, though some hearsay might have probative force, this letter did not. There seems no useful purpose in further segregating testimonial evidence into what subserves the declarant's interest, and what does not; this nascent rule against self-serving declarations offers little but confusion.

M. B. C.

EQUITY—UNFAIR COMPETITION—CUSTOMER LISTS. *A* purchased the assets and goodwill of an insolvent corporation from its creditors and at the same time employed the sole shareholder of the corporation, *B*, as sales-manager. Later, due to a dispute over the terms of payment under the employment contract, *B* terminated it and entered the services of *C*, a competitor of *A*, as a salesman. While in such service *B* commenced to solicit customers with whom he had dealt while employed by *A*. *A* then sought to restrain *B* from such soliciting or from divulging any information that he had learned while in the confidential employ of *A*, and also to restrain *C* from participating in such solicitation. On appeal an injunction was granted on the alternative grounds that *B's* actions constituted an infringement of *A's* property rights in the trade secrets, and also because such conduct constituted unfair competition. *Cooper v. Anchor Securities Co.*, 109 Wash. Dec. 114, 113 P. (2d) 845 (1941).

The courts have taken two views in the problem involved here; either that the unauthorized use of the customer list invades a property right, or that such use constitutes unfair competition. The principal case is a departure from the earlier Washington view insofar as it considers customer lists a property right. In *Davis v. Miller*, 104 Wash. 444, 177 Pac. 323 (1918), it was held that a former employee who was soliciting plaintiff's customers could be enjoined, not on the ground that a property right was being violated, but that such action was unfair competition. In two subsequent decisions dealing with similar subject matter, the court discussed the problem on the unfair competition basis but held for the defendants, in both instances, on the ground that the information acquired lacked the secret or confidential character present in the *Miller* case. *City Ice Co. v. Kinnee*, 140 Wash. 381, 249 Pac. 782 (1926); *Ice Delivery Co. v. Davis*, 137 Wash. 649, 243 Pac. 842 (1926).

The question of whether the owner of customer lists is to be afforded protection under the unfair competition theory or under the property concept is more than mere academic pabulum. The difference is especially important in those cases where the defendant alleges that he is a bona fide user or purchaser without notice of the plaintiff's right. *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255 (1903); *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068 (1890). Both of the above cases rested on the property doctrine, but judgment was granted the defendants on their showing that they were bona fide users without notice. Many other cases state that honest acquisition is a defense, but in nearly all it is dictum inasmuch as the facts show that the purchaser had notice either of the employer's rights, or of the colorable conduct of the employee. *Warner v. Lilly*, 265 U. S. 526 (1924); *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911 (1912); *Elaterite Paint Co. v. Frost Co.*, 105 Minn. 239, 117 N. W. 388 (1908). It would seem that a totally innocent purchaser or user, under the property doctrine, should be afforded full protection because of his bona fide acquisition, especially since this is consistent with the fundamental property principle that the bona fide purchaser of a voidable title acquires fully valid title. The case of *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed. 401 (C. C. W. D. Mich. 1908), is often cited as holding contrary to the above rule, but in reality there was no property interest to protect because the knowledge of the employee was not of a secret nature Obviously where this confidential or secret element is lacking there can be no property interest.

But in those jurisdictions where protection is given on the unfair competition theory the bona fide nature of the defendant's acquisition of the secret should not be a defense, even though the Washington court in the *City Ice* case, *supra*, indicated that it might be. The manner of acquisition should make no difference because the issue is whether the *competition* is, in fact, unfair. The manner of the defendant's use of the secret—whether it is contrary to commonly accepted business practices—is the primary inquiry, and not *how* the secret was obtained. This question, admittedly difficult, is no more so than the other arbitrary tests in the law where the court is obliged to determine the reasonableness or unreasonableness of certain actions. Under the unfair competition theory a totally innocent purchaser, whose conduct is found unbusiness-like and unfair, could be enjoined; whereas, under the property doctrine his good faith acquisition would be a sufficient defense, regardless of the manner of use.

Aside from this practical difficulty in the property view, there is the additional objection made by both courts and writers, that such an intangible thing or interest as can be carried in the mind, like a customer list, is difficult to conceive as being within the traditional equitable meaning of *property*. WALSH, EQUITY (1930) § 45; *Haskins v. Evan*, 71 N. J. Eq. 575, 64 Atl. 436 (1906); MCCLINTOCK, EQUITY (1936) § 147.

Furthermore, the reluctance of the courts to follow the property view is evidenced by their tendency to grant relief on other grounds. In *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 130 Pac. 1180 (1913), relied on in the principal case, it was held that the disclosure of customer lists constituted a breach of an implied contract not to use any confidential information to the detriment or injury of the employer. Another ground, an outgrowth of the unfair competition theory, is that the employee or his assignee is deemed to hold the information in trust for the employer. *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339 (1907).

However, it is doubtful whether the principal case actually effects any serious change in Washington law because the property concept was an alternative ground for the injunction and the third party had knowledge of the employee's relation to his former employer.

W. A. A.