Washington Law Review

Volume 17 | Number 1

1-1-1942

Contracts—Real Property—Judgment Liens; Practice and Procedure—Trial—Conduct of Judge; Release—Covenant Not to Sue—Joint Tort-Feasors

J. B. K.

W. A. A.

D. A. W.

RECENT CASES

CONTRACTS—REAL PROPERTY—JUDGMENT LIENS. An executory contract for the sale of land, duly recorded, was entered into by *A* and *B*. Several payments were made by *B*. *C*, creditor of *A*, obtained a judgment against him and, personally and by letter, notified *B* of such judgment, and warned him not to make any more payments on the contract. *B* made subsequent payments on the contract to *A*. Over three years after entry of the judgment, *C* levied on the property, and it was sold at a sheriff's sale. This was an action to quiet title. *Held:* The sale was valid, subject only to the right of redemption and the contract of sale between *A* and *B; B* should pay to *C* (buyer at sheriff's sale) the amount stipulated in the contract less the amount paid to *A prior to notice of judgment obtained by C against A. Heath v. Dodson,* 7 Wn. (2d) 667; 110 P. (2d) 845 (1941).

In this case the Washington court follows the general rule that a vendee in possession of land under an executory contract of sale, while not bound to investigate as to the existence of any judgment against the vendor, will not be entitled to the benefit of payments made upon the contract if, at the time of the making of such payments, he knew of the existence of such a judgment. The mere docketing of the judgment, however, is not notice to the vendee, but the judgment creditor must give such notice that the vendee actually knows of the judgment. 2 FREEMAN, JUDGMENTS (5th ed.), § 966; 34 C. J. 598; *Filley v. Duncan,* 1 Neb. 134 (1871); *Wehn v. Fall,* 55 Neb. 547, 76 N. W. 13 (1898); *Hampson v. Edelen,* 2 Harris & J. (Md.) 64 (1807); *Parks v. Jackson,* 11 Wend. (N. Y.) 442 (1833); *Moyer v. Hinman,* 13 N. Y. 180 (1855).

However wise the Washington court may be in adhering to the accepted rule in the instant case, this problem is a new one to this jurisdiction and the case may well have been decided the other way. A judgment is only a lien against the property of the debtor, and before it can be asserted against specific property of the debtor there must normally be some affirmative action on the part of the judgment creditor. It would indeed be strange to say that a judgment creditor can make another his own debtor merely by informing such person that his creditor owes money to such judgment creditor. The vendee is bound by contract to make his payments to the vendor, and until such time as another assumes the benefits and liabilities of the vendor under the contract, the vendee's obligation to continue making payments to the vendor remains. In the case of *May v. Emerson,* 52 Ore. 262, 96 Pac. 454, 1065 (1908), the Oregon Supreme Court held that the defendant vendee was not required to make the payments to the plaintiff, judgment creditor, until he acquired the vendor's rights. "The vendor cannot assume to determine for himself, and at his own risk, the controversy between the plaintiff and his debtor; and defendant need not go into equity to settle their differences. He may stand upon his contract, and when the plaintiff has acquired the vendor's right to the money *by perfecting title in himself* the defendant will be justified in making payment to him." *Accord, Moyer v. Hinman, supra.* Under the holding in the instant case, whichever way he elects to make his payments he is penalized. If he heeds the notice of the judgment

and stops making payments on the contract, he makes himself liable to the vendor, for a mere judgment against the vendor does not extinguish his interest in the contract; if he disregards the notice of the judgment he may be forced to pay twice those payments which came due between the date of the notice of judgment and that on which the judgment creditor obtained the vendor's interest in the contract.

REM. REV. STAT., § 445-1, provides: "The lien of judgments upon real estate of the judgment debtor shall commence . . . (a) . . . from the time of the entry thereof; . . ." And § 445 says, "Personal property of the debtor shall be held only from the time it is actually levied upon."

A contract of the type found in the instant case leaves the vendor with two interests which usually run together, but which may be separated. They are the interest in the real property, and the interest in the contract. Evidently the Washington court considered these as inseparable and both as interests in real property. Granted that under REM. REV. STAT. § 445-1 the lien upon real property commences from the time of entry of the judgment, it does not follow that the lien should likewise commence upon the vendor's interest in the contract. Such an interest should not be considered an interest in real property, but has more of the nature of personalty, and should be governed by § 445.

The solution of this dilemma is to adopt a rule similar to that of *May v. Emerson, supra,* which would require the judgment creditor to exert his lien against the judgment debtor's interest in the contract by some affirmative action, either by enjoining the vendor from collecting further payments, by garnishment of the payments as they fall due, or by attaching the vendor's interest in the contract. Such a rule would undoubtedly remove the hardship placed upon the vendee under the present holding, and enable him more easily and with less risk to himself to make his payments.

J. B. K.

PRACTICE AND PROCEDURE—TRIAL—CONDUCT OF JUDGE. In a prosecution against a former county commissioner for misappropriations of public funds and related misdeeds, defendant's counsel, while cross-examining a principal witness, was held in contempt and fined by the trial judge, in the presence of the jury, for repeatedly referring to alleged enmities existing between the witness and the defendant. Counsel tendered his personal check in payment of the fine but the court emphatically refused it and demanded cash. Upon cash payment the jury was instructed to disregard any of the events occurring between the court and counsel. *Held:* That the conduct of the court in refusing to accept counsel's check constituted reversible error. *State v. Levy,* 109 Wash. Dec. 1, 113 P. (2d) 306 (1941).

The power to warn, rebuke, or hold a party in contempt is an inherent right of a court, but it must be exercised, especially in criminal proceedings, with due regard to the constitutional rights of the defendant. WASH. CONST. Art. IV, § 16 forbids a judge from commenting on the evidence or facts, while the right to a fair and impartial hearing is guaranteed by the due process clause. Thus to discredit counsel for the defense, or to impair his influence or destroy his usefulness, violates these rights and constitutes reversible error. *State v. Moneymaker,* 100 Wash. 463, 171 Pac. 253 (1918); *State v. Phillips,* 59 Wash. 252, 109 Pac. 1047 (1910).

Obviously this does not mean that the court can never warn or rebuke

counsel, even in the presence of the jury, when he invites it. *State v. Elder*, 130 Wash. 612, 228 Pac. 1016 (1924). If, however, the rebuke is uninvited and without just cause or reason it is error. *State v. White*, 10 Wash. 611, 39 Pac. 160 (1895).

So, when it is determined that the warning or rebuke was invited, it becomes a question of ascertaining whether or not the court acted in such a manner as to deprive the defendant of his above-mentioned constitutional rights. It may be assumed that in the principal case the conduct and attitude of counsel was contemptuous and that the trial court committed no error in holding him in contempt and levying a fine. That much was invited, but the refusal to accept the personal check of counsel was uninvited and thus falls within those cases where the action of the court is without just cause or reason and therefore constitutes error. And because the inferences which followed from the statement of the court were prejudicial in that they tended to create the impression that defendant's counsel was not to be trusted, and from this that the defendant himself was not to be trusted, the court found them to be sufficient to raise a presumption of prejudice. *Cf. Mansfield v. United States*, 76 F. (2d) 224 (C. C. A. 8th, 1935); 24 C. J. S. 849. This is to be distinguished from remarks or conduct of the trial judge which are not reasonably calculated to influence the judgment of the jury and are not presumed to be prejudicial. *Cf. State v. Birch*, 183 Wash. 670, 49 P. (2d) 921 (1935).

W. A. A.

RELEASE—COVENANT NOT TO SUE—JOINT TORT-FEASORS. While an action for personal injuries and property damage sustained in an automobile collision was pending, plaintiff executed a "covenant not to sue" in favor of one joint tort-feasor, with the reservation that "this instrument is not intended as a release or discharge of . . . any person whatsoever, but only as a covenant not to sue." *Held:* The instrument is a release, rather than a covenant not to sue, and operates to release the other joint tort-feasors also. *Haney v. Cheatham*, 8 Wn. (2d) 250, 111 P. (2d) 1003 (1941).

At common law a covenant not to sue is universally held not to discharge a joint tort-feasor. *Berry v. Pullman Co.*, 249 Fed. 816, L. R. A. 1918F 358 (1918); *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140 (1839). It does not extinguish a cause of action against a wrongdoer, but only entitles him to damages in case the covenant is violated; hence, it technically discharges no one.

A release, on the other hand, is the surrender of a cause of action. *Miller v. Beck*, 108 Iowa 575, 79 N. W. 344 (1899); *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830 (1880). In the early common law, as to those persons acting in concert, each was subject to the entire debt. Therefore, a release by the creditor of any one of them from his entire liability was held to be a satisfaction of the claim, and to bar further action against the joint debtors. This rule was later extended to include those wrongdoers who acted concurrently in causing injury to the plaintiff. *Tanana Trading Co. v. North Am. Trading Co.*, 220 Fed. 783 (C. C. A. 9th, 1915); *Hawber v. Raley*, 92 Cal. App. 701, 268 Pac. 943 (1928). The rationale that a person is entitled to but one satisfaction arises from the confused identification of release and satisfaction.

Under this common law doctrine, a reservation of rights against the remaining tort-feasors would be repugnant to the legal effect of release and therefore would be void. *Bea v. Cooper*, 217 Cal. 96, 17 P. (2d) 740

(1932); *Walsh v. N. Y. Cent. & H. R. Co.*, 204 N. Y. 58, 87 N. E. 408, 37 L. R. A. (N. S.) 1137 (1912).

The Washington court, in a long line of decisions, has adopted the orthodox common law rule as to the effect to be given to a release of one joint tort-feasor. *Rust v. Schlaitzer*, 175 Wash. 331, 27 P. (2d) 571 (1933); *J. E. Pinkham Lbr. Co. v. Woodland State Bank*, 156 Wash. 117, 286 Pac. 95 (1930), and cases cited therein. And in the *Pinkham* case the court found no occasion for a different result though the amount of recovery was unliquidated and the release only partial; the decision was said to be dictated by *stare decisis*.

Moreover, the position taken by our court seems to preclude the possibility of an injured party by any means receiving payment from one joint tort-feasor and still retaining his right of action against the others. The court, expressing its desire to prevent a double recovery, has been extremely reluctant to interpret a writing as a covenant not to sue, rather than a release. *Rust v. Schlaitzer, supra; J. E. Pinkham Lbr. Co. v. Woodland State Bank, supra; Sunset Copper Co. v. Black*, 125 Wash. 365, 217 Pac. 5 (1924). It has not made use of the legal fiction of finding a release with a reservation of rights to be in effect a covenant not to sue. See *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133 (1903). And *Stusser v. Mutual Union Ins. Co.*, 127 Wash. 449, 221 Pac. 331 (1923), in which the partial release of a judgment debt was said to be satisfaction *pro tanto* only, has not been persuasive in subsequent decisions.

While the application of the strict common law rules has some justification, it imposes an unreasonable hardship on the plaintiff, in that he must either forego any opportunity to obtain what he can get without suit, or he must give up his entire claim without full compensation. PROSSER, TORTS (1941) § 109. The reversal of a settled course of decisions in this matter cannot work an injustice to anyone, since the older rule always works to defeat the intention of the parties. RESTATEMENT, TORTS (Proposed Final Draft No. 9) § 11.

Modern authority favors disregarding the technical distinctions of the old common law. Williston proposes that if the rights are expressly reserved, no distinction should be taken between a covenant not to sue and a release, except that if it appears that the sum received was paid in full redress or is so large that any further award would be excessive. then no further action should be allowed. 2 WILLISTON, CONTRACTS (1936 ed.) § 338C. The danger of double recovery may also be avoided by crediting the amount paid for the release or covenant to the other tort-feasors as satisfaction *pro tanto*. *Miller v. Beck, supra; Ellis v. Esson, supra.* There is a considerable body of authority which holds that the discharge will not bar a claim against other tort-feasors if the parties so agreed orally. *Steenhuis v. Holland*, 217 Ala. 105, 115 So. 2 (1927); *Schmidt v. Austin*, 159 N. E. 850 (Ohio App., 1927).

The Washington court, in *Johnson v. Stewart*, 1 Wn. (2d) 439, 96 P. (2d) 473 (1939), found the strict common law rule applicable to joint contract obligors too harsh, and modified it to allow the court more easily to effectuate the intentions of the parties. Note, 15 WASH. L. REV. 187 (1940). An even greater reformation in regard to the effect of a release in the case of joint tort-feasors seems equally desirable. If judicial reformation is no longer feasible, then perhaps statutory change will bring a more satisfactory solution to the problem. D. A. W.