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Criminal Law—Former Jeopardy—Right of State to Appeal from Directed Verdict; Divorce—Estoppel of Procuring Party—Foreign Divorces—Estoppel to Attack—Change in Position; Depositions—Persons Authorized to Take Depositions Outside the State; Negligent Injury—Community Liability—Conflict of Laws

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RECENT CASES

CRIMINAL LAW—FORMER JEOPARDY—RIGHT OF STATE TO APPEAL FROM DIRECTED VERDICT D was granted a directed verdict at the close of the state s case on a charge of grand larceny The state appealed under REM REV STAT § 2183-1(5), which gives the state the right to appeal for error based on "any order which in effect abates or determines the action, or discontinues the same otherwise than by an acquittal of the defendant by a jury: Provided That in no case shall the state have a right to an appeal where the defendant has been acquitted by a jury" D moved to dismiss the appeal *Held:* Motion denied and case remanded Though the jury returned a verdict of not guilty, it did so at the direction of the court; therefore, D was not acquitted by a jury within the meaning of the statute as it had performed a mere ministerial act *State v Portee,* 125 Wash Dec 235, 170 P (2d) 326 (1946)

The above statute was held to be constitutional in *State v Brunn,* 22 Wn (2d) 120 154 P (2d) 826, 157 A L R 1049 (1945) That case is one of the most significant in criminal proceedings ever decided in this jurisdiction In it, the state appealed from an erroneous order of the trial court granting the respondent's motion to dismiss for insufficiency of the evidence In an excellent opinion the court held that the statute allowing the appeal did not violate the double jeopardy clause of Art I, § 9 of the Constitution of the state of Washington The court set down the following criterion for jeopardy in Washington: There has been no jeopardy until there has been one correct trial free from error unless the jury returns a verdict for the defendant The court recognized that the state as well as the defendant had a right to a trial free from error, that the legislature has the right to fix the rules of criminal procedure, and that the rule fixed by this statute did not violate the double jeopardy section The legislature did not provide for appeal by the state after acquittal by jury Whether they could is an open question in Washington

The rule of the instant case filled the loophole left by *State v Brunn, supra* A directed verdict is not an acquittal by jury The state can appeal from a directed verdict as well as from a dismissal, thus eliminating 'one-man" acquittals

The Washington position on double jeopardy is in the minority, but is an advanced position and one that is clearly in accord with the trend *State v Lee,* 65 Conn 265, 30 Atl 1110 27 L R A 498 48 Am St Rep 202 (1894); Holmes' dissent in *Kepner v U S* 195 U S 100 49 L ed 114 (1904); *State v Felch,* 92 Vt 477, 105 Atl 23 (1918); *Palko v Connecticut,* 302 U S 319, 82 L ed 288 (1937); *State v Witte,* 243 Wis 423, 10 N W (2d) 117 (1943) The former Washington rule and the rule in the majority of jurisdictions is that constitutional peril has attached when the jury has been impaneled and sworn and no new trial is allowed if the jury is discharged without the accused's consent, or any sufficient reason 1 BISHOP, NEW CRIMINAL LAW (9th ed 1923) § 1012 *et seq; State v Kinghorn,* 56 Wash 131, 105 Pac 234 27 L R A (N S) 136 (1909) This rule has developed many exceptions (15 AM JUR. 75, Criminal Law §§ 406-433) and is slowly breaking down into the present Washington position The American Law Institute has adopted a position allowing appeal by the state whenever material error has occurred at the trial A L I ADMINISTRATION OF THE CRIMINAL LAW *Official Draft* (August 15 1935) p 13 §§ 13-14 Should the Washington legislature adopt a position

allowing state appeal whenever there is error in the trial, even after acquittal by jury, it will be interesting to note whether the Washington Supreme Court will hold it constitutional S W P

DIVORCE—ESTOPPEL OF PROCURING PARTY—FOREIGN DIVORCES—ESTOPPEL TO ATTACK—CHANGE IN POSITION In an action for divorce on grounds of cruelty, it appeared that *P* wife, under the influence of *D*, had already obtained a divorce in Idaho, and *D* had thereafter remarried *P* maintained this prior divorce was invalid, that the Idaho court had no jurisdiction because *P* had never established a bona fide domicile in Idaho The trial court upheld *D's* contention that *P*, the procuring party, was estopped from collaterally attacking the validity of the Idaho divorce, and dismissed the action *Held*, reversing the trial court: Estoppel does not lie here In a divorce action the procuring party may collaterally impeach a decree of divorce granted in the courts of another state by proving neither party had a bona fide domicile within that other state—even when the record purports to show such domicile *Wampler v Wampler*, 125 Wash Dec 246, 170 P (2d) 316 (1946)

In such an action, at least one of the spouses must have a bona fide domicile within a state to give jurisdiction to the courts of that state *Dormitzer v German Savings & Loan Society*, 23 Wash 132, 62 Pac 862 (1900) Affirming the *Dormitzer* case, the United States Supreme Court held that collateral impeachment of a divorce decree granted in another state by proof the court had no jurisdiction, even when the record purports to show jurisdiction, violates neither the Full Faith and Credit Clause nor the principles of comity *German Savings & Loan Society v Dormitzer*, 192 U S 125, 48 L ed 373, 24 Sup Ct 221 (1904) Based on this reasoning, the recent holding in *Mapes v Mapes*, 124 Wash Dec 716, 167 P (2d) 405 (1946), serves as a warning that evasive divorces procured in states whose laws facilitate the operation of divorce mills are void in Washington This decision mirrors the much debated United States Supreme Court opinion in *Williams v North Carolina*, 325 U S 226, 89 L ed 1577, 65 Sup Ct 1092, 157 A. L R 1366 (1945)

It will be noted that in the *Mapes*, *Williams* and *Dormitzer* cases, *supra*, it was not the procuring party who attacked the decree The *Wampler* case *supra*, poses the added question: Will the doctrine of estoppel apply in a divorce action when the procuring party seeks collaterally to attack his own prior divorce? The cases in other jurisdictions conflict on this question 60 L R A. 301, supplemented in 51 L R A. (N S) 535; 109 A L R 1019, supplemented in 122 A. L R 1323, 140 A L R 915, and 153 A L R 942 The cited A. L R annotations indicate the New York cases tend to distinguish between actions to litigate private rights of the spouses and actions to adjudicate marital status, holding the doctrine of estoppel applicable in actions of the former type, but not in the latter—on the theory that in the latter the interest of the State outweighs any equitable considerations applicable between private litigants Yet this view is far from universal, many courts applying the doctrine of estoppel in divorce actions; of these, however, some hold the procuring party would not be estopped in a situation like that of the *Wampler* case because the non-procuring party's behavior gives rise to "an estoppel against an estoppel" *Hopkins v Hopkins*, 174 Miss 643, 165 So 414 (1936); *Lippincott v Lippincott*, 141 Neb 186, 3 N W (2d) 207 (1942) In the *Wampler* case our Washington court

holds that estoppel does not lie; however, failure clearly to delineate the theory and extent of the holding detracts considerably from its force The holding could be based on any of three different theories discussed in the opinion: (1) Even if the doctrine of estoppel applies, the facts do not warrant finding an estoppel (2) There is "an estoppel against an estoppel." (3) The doctrine of estoppel does not apply in an action for adjudication as to marital status The opinion appears to adopt this last theory

Whether the doctrine of estoppel would apply in an action to adjudicate private rights, such as property rights of the spouses, remains an open question in Washington. J McS

DEPOSITIONS—PERSONS AUTHORIZED TO TAKE DEPOSITIONS OUTSIDE THE STATE. Action by *M*, an attorney, to recover against *K* for the reasonable value of legal services At the trial, the court admitted into evidence certain depositions taken outside the state of Washington, by a notary public, resident of Washington, who had been specially commissioned by the Spokane County Superior Court to take such depositions, under REM. REV STAT § 1239 *Held:* The depositions were illegally taken and therefore inadmissible, for the court has no jurisdiction to appoint a resident of Washington to take depositions outside the limits of the state *Moore v Keesey*, 24 Wn (2d) 139, 163 P (2d) 164 (1945) *Held on rehearing:* The depositions were properly admitted, for the statute must be liberally construed and the court therefore has jurisdiction to commission a resident of the state to take a deposition outside the state *Moore v Keesey*, 126 Wash Dec 30, 173 P (2d) 130 (1946)

REM REV STAT § 1239 governs the taking of depositions outside the state of Washington: "Depositions may be taken outside the state by a judge or any person authorized by special commission from any court of this state" The legislature was silent on the question whether a person authorized by special commission must be an officer of and resident in the state in which the deposition is to be taken The court decided on rehearing, that to require the party so commissioned to be a resident of the state in which the deposition is to be taken would amount to judicial legislation. The first holding raised the question of the authority of a resident of Washington to take a deposition outside the state, and concluded that he had no such authority There is a line of cases in support of this holding but such of these cases as have come to light involve only persons with *general* statutory authority to take depositions and not special commissioners of the court, as in this case *Silver v Kansas City, etc Ry*, 21 Mo App 5 (1886); *Brant v Mickle & Wetherall*, 28 Md 436 (1867); *Fonda v Armour*, 49 How Pr (N Y) 72 (1875); 13 CYC 848 On rehearing, the court followed the view of other jurisdictions that the authority to take depositions need not be derived from the laws of the state in which the deposition is to be taken, but is derived from the laws of the state in which the commission is granted and that the commission carries with it all the powers necessary to execute it *Tompkins v Tompkins*, 257 Ill 557, 100 N E 965 (1913), Ann Cas 1914B 158; *McGeorge v Walker*, 65 Mich 5, 31 N W 601 (1887); *Smith v Cokefair*, 8 Pa Co Ct R. 45 (1890) This latter position seems the more sound, for the depositions are for use in the state where the commission issues; were they sought to be used elsewhere, a different question would be presented B V L

NEGLIGENT INJURY—COMMUNITY LIABILITY—CONFLICT OF LAWS *D* (the husband) made an automobile trip from his home in Arizona to San Diego, California, where his wife was convalescing after illness, and in a few days drove to Los Angeles to confer with parties in connection with the sale of his separate property in Arizona In returning to San Diego, he followed a longer route through Venice, California, to accommodate an acquaintance with whom he had discussed the prospective sale Before reaching Venice, he collided with another automobile, resulting in injury to *P* *P* had judgment for damages in California (D C S D Cal, 1939), and subsequently, on the basis of the California judgment, was awarded a judgment in Arizona (D C Ariz, 1942) The instant action was brought to have the Arizona judgment declared to be an obligation of the community of *D* and wife The trial court found that *D* was engaged on a mission wholly connected with his separate business and not in any way a benefit to the community, and that, therefore, the judgment was not a community obligation *P* appealed *Held:* Affirmed Any mere detour which *D* may have made was properly found to be insufficient to take him outside the scope of his separate business, and into the business of the community *Babcock v. Tam,* 156 F (2d) 116 (C C A. 9th, 1946)

The opinion referred to the similarity between the Arizona state community law relating to the issues of the instant case and the Washington state law, and quoted with approval from *Floding v Denholm,* 40 Wash 463, 82 Pac 738 (1905):

> "The rule now is that community property is liable for a debt created by the husband for the benefit of the community But such property is not liable for a debt created by a tort of either spouse, or one which is not for the benefit of the community"

In purporting to follow Washington law, the court made an unfortunate choice in its statement of the rule of *Flooding v Denholm,* a case which dealt with an action on a suretyship obligation and not on tort The particular language referred to would seem to indicate that there is no liability in Washington on the part of the community for tortious acts of the husband or wife To the contrary, community liability for tort has long been recognized, *Milne v Kane,* 64 Wash 254, 116 Pac 659 (1911), and is made to turn on whether the actual tort-feasor was, in the commission of the wrong, acting as representative or agent of the community McKay, *Community Property* (2d ed 1925) 554. Whether the husband is acting as agent is dependent upon whether or not he was acting for the "benefit" of the community *McGregor v Johnson,* 58 Wash 78, 107 Pac 1049 (1910) If the tortious act of the husband be committed for the benefit of the community, then the community is liable *De Phillips v Neslin,* 139 Wash. 51, 245 Pac 749 (1926); *Wimmer v Nickolson,* 151 Wash 199, 275 Pac 699 (1929); *Kangley v Rogers,* 85 Wash 250, 147 Pac 898 (1915) Cf *Brotton v Langert,* 1 Wash 73, 23 Pac 803 (1890); *Kies v Wilkinson,* 114 Wash 89, 194 Pac 582 (1921) Under the doctrine of respondeat superior, unless it can be said that the husband was acting as agent of the community, the community is not liable *Day v Henry,* 81 Wash 61, 142 Pac 439 (1914); *Schramm v Steel,* 97 Wash 309, 166 Pac 634 (1917); *Bergman v State,* 187 Wash 622, 60 P (2d) 699 (1936) Where the husband assaulted another party in an argument involving the husband's separate property, it was held there was no conceivable benefit to the community, and no liability

on the part of the community *Furuheim v Floe*, 188 Wash 368, 62 P (2d) 706 (1936) Insofar as willful torts by the husband are concerned, the Washington court would seem to have strictly adhered to the test of benefit to the community

Although the Washington court has not expressly distinguished between willful and negligent torts, there has been a general recognition that the advent of the automobile and the resulting increase in negligent injury cases has created special problems and special rules This recognition led to the early development of the family car doctrine in Washington *Birch v Abercrombie*, 74 Wash 486, 133 Pac 1020 (1913) Also, the Washington court has gone a long way in finding community benefit and therefore community liability in automobile accident cases, holding it to be beneficial to the community where a husband was driving a car for his own pleasure, *Wicklund v Allraum*, 122 Wash 546, 211 Pac 760 (1922); where a husband was driving a car on a hunting trip, *Floyd v Mowery*, 158 Wash 341, 290 Pac 710 (1930); and where a husband was driving persons, not including his wife, to a dance, *King v Williams*, 188 Wash 350, 62 P (2d) 710 (1936) Also, where the wife was driving the car for her pleasure liability was imposed in the absence of proof that the car, at the time of the collision, was not being used for a community purpose *Perren v Press*, 196 Wash 14, 81 P (2d) 867 (1938) In *Werker v Knox*, 197 Wash 453, 85 P (2d) 1041 (1938), our court indicated the trend of recent cases in saying:

> "It is in those cases where the husband has caused a negligent injury through the use of an automobile that the tendency of the courts to go to the extreme limit to fix liability upon the community has been most clearly exhibited"

In the instant case, the court found that the trip from Arizona to California, in its entirety, was an individual enterprise of *D*, in that the motivating factor of the trip was to see persons in Los Angeles in regard to his separate property The fact that *D* was returning to San Diego to see his wife was not deemed sufficient to change the character of the trip to one of pleasure, and thereby bring this case into accord with those holding that trips of such a nature are for the benefit of the community *Wicklund v Allraum*, supra; *Floyd v Mowery*, supra; *King v Williams*, supra The trend of the law in Washington however, has not been toward relieving the community from liability for the torts of its individual members, but has been definitely in the direction of finding ways and means of imposing such liabilities upon the community It would seem, therefore, that where the husband made a trip for the mixed purpose of visiting his wife and transacting business in connection with his separate property, the court could have found community benefit and therefore community liability, and still have been safely within the "extreme limit" referred to in *Werker v Knox*, supra

There is also presented an important conflict of laws problem Although the tort was committed in California, the trial court applied the community property law of Arizona to determine whether or not the community is liable This conclusion is in direct conflict with that reached by the Washington court in *Mountan v Price*, 20 Wn (2d) 129, 146 P (2d) 327 (1944), in which it was held that the law of the place where a tort is committed controls questions in connection with the acts the responsibility therefor, and the nature of the cause of action based thereon. This problem will be considered further in a forthcoming issue of the Review

D A W