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Community Property

William H. Mays

a valuable consideration. But where, as here, the former shareholders also assume the liabilities of the dissolved corporation, it was ruled that the real estate sales tax is applicable to the extent of the liabilities assumed by the shareholders. Thus, the former shareholders here paid the one per cent sales tax to the extent of the approximately one hundred thousand dollars worth of liabilities assumed by them.

COMMUNITY PROPERTY

Tort Liability and Conflicts of Laws. In *Maag v. Voykovich*[1] a husband committed an assault in Alaska. At the time of the tort, the husband was a Washington domiciliary. The suit was brought in Washington, and the court assumed that the liability would have been a community obligation had the tort been committed in Washington. The court held, however, that since the tort was committed in Alaska, the obligation was only against the individual husband, and not against the marital community. While the reasoning of this decision is supported by many Washington cases,[2] the author submits that it is incorrect, since it is based upon a semantic misinterpretation which dates back to 1896.

The court's reasoning proceeds as follows: since the tort was committed in Alaska, we will adhere to the usual conflict of laws rule and apply the law of Alaska.[3] In Alaska there is no marital community so therefore we must employ the common law rule which would hold only the husband's property liable for the tort. Because only the property of the husband could be levied on to satisfy a judgment in Alaska, we hold that only the husband's separate property in Washington can be so utilized, and therefore it is not a marital community obligation.

The author believes that the semantic confusion comes in the use of the word "separate." "Separate property" as used in Washington doesn't mean the same as "husband's property" as used in Alaska. This distinction is correctly pointed out by Judge Hill in his "concurring"[4] opinion which relies strongly on the criticism of Marsh in his treatise on marital property.[5]

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[1] 46 W.2d 302, 280 P.2d 680 (1955).

[2] The only tort case is Mountain v. Price, 20 Wn.2d 129, 146 P.2d 327 (1944), but in the contract area see Achilles v. Hoopes, 40 Wn.2d 664, 245 P.2d 1005 (1952); Meng v. Security State Bank, 16 Wn.2d 215, 133 P.2d 293 (1943); La Selle v. Woolery, 14 Wash. 70, 44 Pac. 115 (1896), and other cases cited in the majority opinion of the Maag case.

[3] RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

[4] Judge Hill concurs in the result on the basis of stare decisis only. His opinion is a dissent against the reasoning employed by the court and the result reached in these cases.

[5] MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 146 (1952).

This misuse of "separate" began in the much criticized case of *La Selle v. Woolery*.[6] In that case the court held that a Washington judgment against a married man domiciled in Washington, on a debt created in Wisconsin, could not be collected out of the defendant's community property. The reason given was that the debt, by Wisconsin law, was a separate, individual debt of the husband. The Wisconsin law, correctly interpreted, meant simply that the property of the wife would not be liable for such a debt. From this the Washington court reasoned that only the separate property of the husband would be liable.

The fallacy lies in considering what constitutes separate and community property in various jurisdictions. While the wages of a husband would be considered his "separate"[7] property in Wisconsin, they would be community property in Washington. Thus, property used to satisfy a Wisconsin judgment, namely, everything but the wife's "separate" property, should also be used to satisfy the same judgment in Washington. Hence, in Washington community property should be liable.

After the *LaSelle* case in 1896, came a number of similar debt and contract cases in which the court followed the *LaSelle* case.[8] In *Mountain v. Price*[9] the problem was first presented in the tort field. The court applied the same reasoning it had used in the contract cases and again held the community not liable on the judgment against the husband. Thus, while the *Maag* case is certainly consistent with other Washington cases, the author believes that this also was an incorrect decision.

The line of reasoning which the court has adopted will present further problems when the converse of this situation is presented. Suppose a case in which a husband, domiciled in Washington, collects a judgment in Alaska. Later the question arises whether this is separate or community property in Washington. Characterizing this problem as one of marital property, the law of the state in which the husband was domiciled would prevail. Therefore, the court would be led to holding this money to be community property since it would be property acquired after marriage and not acquired gratuitously.

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[6] 14 Wash. 70, 44 Pac. 115 (1896).

[7] Actually the term "separate" is not used in non-community property jurisdictions. Those jurisdictions refer only to the husband's property. The term "separate" is added here to show the distinction as the Washington court views it.

[8] Cases cited note 2 *supra*.

[9] 20 Wn.2d 129, 146 P.2d 327 (1944).

Washington would then be faced with this inconsistency: a judgment *against* a Washington husband in another jurisdiction could only be collected out of his separate property in Washington, while a judgment *for* the very same husband would be community property. This latter situation has not yet arisen in Washington. When the problem does arise, assuming the solution as outlined above, this inconsistency will further demonstrate the court's incorrect stand in the *Maag* case.

As both Marsh[10] and Judge Hill[11] suggest, the problem is one of "characterization" of the defense that the community property is not liable for the individual obligations of the husband. The court has failed to realize that the "characterization" problem is twofold. First, there is a question of fixing liability. In answering this, the Washington court properly applies the law of the place of the tort. Having determined which law to use in solving this issue, the court continues to apply the same law in deciding the liabilty of the community.

This reasoning is fallacious since the latter involves a second problem of 'characterization." The question of community property liability is one of marital property and is separate from the issue of fixing liability. Marital property problems are governed by the law of the state of domicile of the husband and wife, which in this case is Washington, not Alaska. Were this defense correctly "characterized," it would lead to the desired result whereby the marital commuity would be liable on the obligation in every instance where the husband was domiciled in Washington when the cause of action arose.

The solution in this field may be accomplished in two ways. The first would be for the court to apply the reasoning suggested by Marsh, reverse the previous cases, and arrive at the more just result. In view of the court's strong adherence to the principle of stare decisis and the number of cases already decided in this area, the author feels that the result will not be accomplished in this manner. However, as Marsh suggests,[12] decisions like *Mountain v. Price*, where the plaintiff was suing to enforce an Oregon judgment against the individual, might be successfully attacked under the due process clause as an arbitrary and capricious discrimination against a foreign cause of action. This argument has never been presented to the court.

The other solution, which Judge Hill mentions,[13] is one of legislative

[10] MARSH, *op. cit. supra* note 4, at 147.
[11] 46 Wn.2d 302, 306, 280 P.2d 680, 682 (1955).
[12] MARSH, *op. cit. supra* note 4, at 152. In the contracts field the recent case of Achilles v. Hoopes, 40 Wn.2d 664, 245 P.2d 1005 (1952), could also be attacked on the same ground.
[13] 46 Wn.2d 302, 307, 280 P.2d 680, 682 (1955).

action. This appears to be the most feasible answer and the one with the most chance of success. Were the problem presented to the legislators, the unjustness of the present rule could be readily seen and corrected.

In conclusion, it is the opinion of the author that the court has failed to recognize the distinction between "husband's property" as used in non-community property jurisdictions and "husband's separate property" as used in Washington. Further, correct analysis of this problem in the future will require that the court distinguish the two questions of "characterization" which are involved. Therefore, it follows that Marsh's position is the correct one and should be used in analyzing cases dealing with the problem.

WILLIAM H. MAYS

CREDITORS' RIGHTS

Declaration of Homestead—Excess Value Subject to Judgment Lien—Good Faith Declaration. In the case of *Barouh v. Israll*,[1] *H* declared a homestead under facts which made it doubtful that the declaration was made in good faith. *H* later entered into an agreement to sell the property to *P* for $7,000.[2] A judgment was subsequently entered in favor of *D* against *H*. *H* then conveyed the property to *P* who did not have actual knowledge of the judgment. *D* then procured a writ of execution and levied on the property. *P* brought this action to quiet title and to enjoin the sale; a permanent injunction was granted. The judgment was affirmed on appeal.

The court held that since there was a declaration of homestead on file the judgment creditor of the grantor did not have a lien on the property and, since the land had been conveyed to a bona fide purchaser,[3] the judgment creditor could not contest the validity of the declaration.

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[1] 46 Wn.2d 327, 281 P.2d. 238 (1955).

[2] The court apparently attached no legal significance to this point and it was not discussed in the opinion. The writer will likewise ignore the point but it raises some interesting questions. Was this agreement a valid executory contract for the sale of the property? If it was, then the subsequent docketing of the judgment does not give the vendee notice and he can continue paying the vendor and is entitled to the benefits of these payments until he receives actual notice of the judgment. Heath v. Dodson, 7 Wn.2d 667, 110 P.2d 845 (1941). If it was not a valid contract, then the docketing of the judgment gives constructive notice to the vendee and he is not entitled to the benefits of payments made after the judgment was docketed. See RCW 4.64.010. Assuming it was a valid contract, a judgment lien still attaches to the actual interest of the vendor but the judgment does not affect the rights of the vendee. McDonald v. Curtis, 119 Wash. 384, 205 Pac. 1041 (1922).

[3] It is submitted that there is considerable doubt that *P* was a bona fide purchaser. See RCW 4.64.010 *et seq.*, which provides that after a verdict has been recorded