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Domestic Relations

Frank J. Woody

the court modified the judgment to reduce damages. This decision was predicated on the reasoning that *D* was an independent contractor, and therefore *P* had no customers on the island, but only a contract with *D* to have laundry delivered to *P*. Hence, *P*'s attempt to establish his own laundry route was not an attempt to mitigate damages by an act designed to prevent the loss of his existing customers. On the contrary, *P*'s acts were designed to gain customers of his own, something he did not have in the first place. Thus *P*'s expenses were not incurred in the attempt to mitigate damages caused by *D*'s breach.

In conclusion, while the rule allowing damages for expenses incurred in an unsuccessful attempt to mitigate injury could not be applied in the *Snowflake* case, the case does provide dictum that the Washington court will employ this rule if the facts are appropriate.

DOMESTIC RELATIONS

Property Settlement Agreements—Contempt—Imprisonment for Debt. In *Decker v. Decker*[1] the Washington court held that an order in a divorce decree directing the husband to pay a debt secured by a mortgage on real property awarded to the wife was enforceable by contempt proceedings. The husband had promised to pay the debt in a property settlement agreement entered into between himself and his wife, and this provision of the agreement was incorporated in the divorce decree. Upon the husband's failure to perform as ordered, the wife instituted contempt proceedings to enforce the decree. The trial court quashed the contempt proceedings upon the ground that property settlement agreements may not be enforced in such a manner.

On appeal the respondent husband contended that enforcement of a property settlement agreement by a contempt citation would violate the constitutional prohibition against imprisonment for debt.[2] The supreme court held that this constitutional prohibition applies only to "run-of-the-mill debtor-creditor relationships arising, to some extent, out of tort claims, but principally, out of matters basically contractual in nature," in which cases "the judgment of the court is merely a declaration of an amount owing and is not an order to pay."[3] In contradistinction, the court declared that orders to pay alimony, support, or property settlement agreements incorporated in a divorce decree are enforceable by contempt poceedings, since the duty enforced is created by order of the court, and not by a debtor-creditor relationship.

The respondent further contended that, even if a court constitu-

[1] 52 Wn.2d 456, 326 P.2d 332 (1958).
[2] WASH. CONST. Art. I, § 17.
[3] Decker v. Decker, 52 Wn.2d 456, 458, 326 P.2d 332, 333 (1958).

tionally might use contempt proceedings,[4] such had not been the practice in Washington in connection with orders in a divorce decree except those directing payment of alimony, support, attorneys' fees,[5] or court costs. The appellate court also refused to accept this contention, asserting that contempt proceedings are a proper method of enforcing the order in the divorce decree in this case.

The scope of the constitutional prohibition against imprisonment for debt[6] might be approached in a slightly different manner than it was in the *Decker* case. Historically, relief in the courts was either at law or in equity. If a plaintiff obtained a judgment at law, then he had a choice of two means to enforce that judgment: *in rem* or *in personam.* If he chose the former means of enforcement, then he could execute on the defendant's property to satisfy his judgment. If he chose the latter means of enforcement, then he could obtain the writ of *capias ad satisfaciendum,* which was an execution against the person of the defendant, under which he was held in custody until the judgment was satisfied.[7] Only executions against the person of the defendant in enforcement of judgments at law were prohibited by the constitution.[8] If the party obtained relief in equity, the court would order the defendant to perform some act. The order decreed by the equity court would be enforceable by contempt proceedings, even in modern times, since the constitutional prohibition against imprisonment for debt did not pertain to equitable decrees. Since an order in a divorce decree has the mandatory effect of an order of an equity court, the opinion in the *Decker* case correctly stated that the distinction lies between judgments which declare "an amount owing"[9] and decrees which order payment, and that only the former are subject to the constitutional prohibition in question.[10]

The respondent was also alarmed by the possibility that the third party (here, the mortgagee) to whom payment was to be made could avail himself of the contempt proceedings upon failure of payment

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[4] WASH. CONST. Art. I, § 17.

[5] In Smith v. Smith, 153 Wash. Dec. 701, 337 P.2d 51 (1959), a superior court was prohibited from proceeding with a contempt action instituted by an attorney to enforce payment of his fee, because the divorce decree only *awarded* the amount of the fee rather than *ordering payment.* The court declined to decide whether contempt proceedings would be available to the attorney as well as to the wife if there had been an order to pay. It is assured that a wife may enforce an order to pay her attorney's fee under Davis v. Davis, 15 Wn.2d 297, 130 P.2d 355 (1942).

[6] WASH. CONST. Art. I, § 17.

[7] Cook, *The Powers of Courts of Equity,* 15 COLUM. L. REV. 37, 106 (1915).

[8] WASH. CONST. Art. I, § 17.

[9] Decker v. Decker, 52 Wn.2d 456, 458, 326 P.2d 332, 333 (1958).

[10] WASH. CONST. Art. I, § 17.

to him or would have rights which did not exist before the decree.[11] However, since a divorce decree determines the interests of only the parties before the court, the third-party creditor must pursue his claim as if no decree had been rendered.[12] The decree does not change the creditor's rights or duties arising from the claim in question.

The power of a divorce court is not necessarily as extensive as an equity court's. The powers of a divorce court are created and limited by the divorce statute in each state. In Washington, the statute[13] neither specifically grants nor limits the power of divorce courts to provide for the disposition of the property of the parties and to order payment of alimony and/or support. Therefore, the Washington Supreme Court has had to define these limits.

In the *Decker* case, the respondent contended that the Washington court had not allowed contempt proceedings to be used to enforce property settlement agreements embodied in divorce decrees. The majority in the *Decker* case overruled a number of prior cases[14] and held that the use of contempt proceedings was a proper method of enforcing orders of a divorce court.[15] However, two extensive limitations were placed upon this rule. The court stated that two defenses are available to a person subject to such a contempt proceeding. If the person can show that "(1) . . . he does not have the means to comply with the order, or (2) . . . the particular provision sought to be enforced has no reasonable relation to his duty to support his wife and/or children,"[16] then he will not be held in contempt.

[11] Decker v. Decker, 52 Wn.2d 456, 467, 326 P.2d 332, 337-338 (1958). The dissenting opinion in the Decker case contended that an order to pay a creditor of the other spouse or of the marital community would liquidate what before the decree was an unliquidated claim. The opinion reasoned that, since a divorce court would not have jursidiction to decide debt liability under the divorce act, then it could not order payment of such a debt.

[12] See Arneson v. Arneson, 38 Wn.2d 99, 227 P.2d 1016 (1951).

[13] RCW 26.08.110.

[14] The court overruled the three cases which denied enforcement, insofar as they were inconsistent with the views of the Decker case. State *ex rel.* Ditmar v. Ditmar, 19 Wash. 324, 53 Pac. 350 (1898), allowed the use of contempt proceedings to enforce an order in a divorce decree for the husband to pay a debt secured by a mortgage, which he had promised to pay in a property settlement agreement. However, in State *ex rel.* Ridenour v. Superior Court, 174 Wash. 152, 24 P.2d 418 (1933), the court stated in dictum that "to be enforceable by contempt proceedings, there must be a definite and unconditional order to pay *alimony as such.*" (Emphasis added.) Thereafter, the court in State *ex rel.* Lang v. Superior Court, 176 Wash. 472, 30 P.2d 237 (1934), and State *ex rel.* Foster v. Superior Court, 193 Wash. 99, 74 P.2d 479 (1938), applied the "alimony as such" language as a rule of law and refused to extend the rule to include anything within a property settlement agreement. See Annot., 154 A.L.R. 443 (1945), for an extensive discussion of the cases throughout the United States on the general problems involved in divorce decrees and contempt proceedings.

[15] Decker v. Decker, 52 Wn.2d 456, 465, 326 P.2d 332, 337 (1958).

[16] *Ibid.* A recent California case of Bradley v. Superior Court, 48 Cal.2d 509, 310 P.2d 634 (1957), serves to illustrate what does not have such a reasonable relation.

The *Decker* case does not offer a method of deciding just what obligations are included as having a "reasonable relation to [a husband's] duty to support his wife and/or children."[17] The case did declare, however, that if the defendant shall have proved that valid defenses existed "to any of the debts, then he will have established *pro tanto* that the provision . . . bears no reasonable relation to his duty to support appellant."[18] The case states further that it was the trial court's obligation to make a "finding as to whether there is a reasonable relation between the provision . . . sought to be enforced through contempt proceedings and the duty of respondent to support appellant."[19]

Several draftsmanship problems exist concerning the availability of contempt proceedings to enforce divorce decrees. One problem is, what words should be used in property should be used in property settlement agreements, motions to the court to include provisions of a property settlement agreement in its decree, and the decree itself, in order that contempt proceedings may be used to enforce an order in the decree? The *Decker* case does not supply a solution to this problem. It might be suggested, though, that as to the language of the decree, a distinction should be drawn between words which merely *award* the right to ownership and/or possession of certain property, and words which *order that certain affirmative acts* be done by a spouse. For example, if the court awards the right of ownership of an automobile, previously community property, to the wife, the husband will not be in contempt if he should refuse to deliver possession. Yet, if the decree had ordered him to deliver or give up possession of it as well, then he would clearly be in contempt if he should fail to do so.[20]

Another problem is, where should the language describing the performance promised be found in order that it may be enforced by

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In that case, the court ordered payment of alimony as provided by a property settlement agreement, under which the husband was to pay forty per cent of his net income yearly to his wife. The court refused to allow contempt proceedings to enforce the order, apparently on the basis that, since the decree could not be modified upon a change of the circumstances of the wife, it bore no "reasonable relation to [the husband's] duty to support his wife and/or children," as required in the Decker case.

[17] Decker v. Decker, 52 Wn.2d 456, 465, 326 P.2d 332, 337 (1958).

[18] *Id.* at 467.

[19] *Id.* at 467.

[20] *Ex parte Lazar,* 37 Cal.App.2d 327, 99 P.2d 342 (1940); *Accord,* State *ex rel.* Ridenour v. Superior Court, 174 Wash. 152, 24 P.2d 418 (1933); Davis v. Davis, 15 Wn.2d 297, 130 P.2d 355 (1942); *see* Smith v. Smith, 153 Wash. Dec. 701, 337 P.2d 51 (1959), where enforcement by contempt proceedings was prohibited, since the decree only *awarded,* and *did not order,* payment of attorney's fees. But See Boudwin v. Boudwin, 162 Wash. 142, 298 Pac. 337 (1931).

contempt proceedings? There are at least four possibilities: (1) the decree includes the words describing the performance in its body and orders it to be done; (2) the decree orders the performance to be done, and refers to an attached property settlement agreement for the words describing the performance; (3) the decree approves of a property settlement agreement, referred to in the decree and attached to the decree; and (4) the decree approves of a property settlement by reference, but the agreement is not attached to the decree. The first method would certainly be sufficient to insure the availability of contempt proceedings to enforce the performance promised, provided the subject matter was one so enforceable under the *Decker* case. It would seem that the second method would also be sufficient by a fair interpretation of the words in the *Decker* case, "incorporated by reference." However, a great risk exists that the third and fourth methods would not be within the meaning of the words "incorporated by reference" as used by the *Decker* case. If they are not within the meaning of those words, an order to perform acts agreed upon in the property settlement agreement would not be found, and therefore, enforcement by contempt proceedings would not be available.

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Alimony—Husband's Earned Net Income—Based on Federal Income Tax Laws. In *Prescott v. Prescott,* 152 Wash. Dec. 718, 329 P.2d 200 (1958), the divorce decree read: "[husband] to pay [wife] 25% of his *net taxable earned income* in excess of $24,000.00 per annum . . . [and then after a period of ten years and three months] to pay 25% of his *earned net income* over $18,000 per annum. . . ." (Italics by the court.) Both parties agreed that the two differing descriptions of net income were intended to mean the same thing, but they disagreed as to what that meaning was. The court held that the husband's net income should be the same as his net income as computed for federal income tax purposes, stating that the tax laws were available as a uniform and convenient method of determining net income for alimony purposes.

It is interesting to compare the *Prescott* decision with *Heuchan v. Heuchan,* 38 Wn.2d 207, 228 P.2d 470 (1951). In the latter case the divorce decree stated: "[husband] to pay . . . 23.08% . . . of such monthly *net income.* . . ." (Italics supplied.) Here the court held that the ex-husband would not be allowed to include depreciation as an expense item in determining his alimony payments, even though he was entitled to such depreciation in computing his taxable income.

Of course the *Prescott* and *Heuchan* cases can be distinguished on the ground that the latter case did not contain the ambiguous terms found in the divorce decree in the *Prescott* case. But, while *Prescott* could have been resolved purely as a question of interpretation, using the principle that the reference to "net taxable earned income" was the more specific and therefore should prevail, yet in fact the court did not employ such reasoning. Another factor to consider here is that the *Heuchan* case was decided before the 1954 Internal Revenue Code substituted "taxable income" for "net income" in its terminology. Hence, there would seem to be a good argument that the decree

in the *Heuchan* case could also have been interpreted as meaning "net income" as computed for tax purposes.

The *Prescott* case serves to warn of an apparent trend to interpret "net income" according to the system prescribed by federal income tax regulations. The attorney and his client should consider the possible effect of tax devices such as "carryback" on the husband's net income before making an alimony settlement. If the parties desire some other method for computing net income, then it would be a good idea to have this particular accounting method expressly stated in the divorce decree.

Grounds for Separate Maintenance. In *Roberts v. Roberts,* 51 Wn.2d 499, 319 P.2d 545 (1957), the court denied a prayer for separate maintenance. The court held the wife would not be entitled to separate maintenance unless she could, in addition to proving the husband's ability to support her, show that: (1) the husband abandoned her without cause, or (2) she was compelled to live apart from the husband because of conduct by him which in law constituted abandonment.

While separate maintenance is now statutory, it must be noted that the statute does not identify the grounds, but simply provides the remedy "in favor of the party entitled thereto." RCW 26.08.120. Hence, case law must be employed to discover the grounds for separate maintenance. The Washington court has previously granted separate maintenance on either of the two grounds stated in the *Roberts* case. *Kimble v. Kimble,* 17 Wash. 75, 49 Pac. 216 (1897); *Manggaard v. Manggaard,* 179 Wash. 232, 36 P.2d 811 (1934). While the pronouncement in the *Roberts* case is probably little more than dictum, it does indicate that the rule today in Washington is that the above two grounds are the *only* grounds which will support an action for separate maintenance.

As recently as 1944 there appeared a possibility that Washington might uphold separate maintenance on additional grounds. This possibility was predicated on dubious dictum from *Jensen v. Jensen,* 20 Wn.2d 380,382, 147 P.2d 512,513 (1944): ". . . facts upon which an action for divorce may be sustained are sufficient to support an action for separate maintenance." As authority for this proposition, the court referred to *Lockhart v. Lockhart,* 145 Wash. 210,212, 259 Pac. 385,386 (1927), where the remark was made: "In this state, where the marital relation is disturbed by the fault of the husband, the wife has a choice of remedies. She may apply for separate maintenance or . . . for an absolute divorce." In addition to the ambiguity of this statement, it is mere dictum, since the *Lockhart* case resulted in a divorce being granted.

Thus, it seems reasonably safe to assume that the *Roberts* case accurately declares the only two grounds which will sustain a separate maintenance suit in Washington.

Divorce—Defenses—Recrimination—Comparative Rectitude. In *Schmidt v. Schmidt,* 51 Wn.2d 753, 321 P.2d 985 (1958), a divorce action was brought by the wife on the grounds of cruelty. The husband, defending on the ground of recrimination, claimed his acts were justified and provoked and that the parties were equally at fault. The acts of the husband of which the wife complained were admitted by the husband. They consisted of slapping her with his open hand, putting his hands around her neck, holding her down on her bed, and threatening to kill her. These acts were directly preceded by the wife's slapping the defendant, cursing him, and spitting on him.

The Washington Supreme Court, in reversing the trial court, held that, while the acts of the wife may have provoked the husband, he could use only such force as might seem necessary to a prudent man for his self-protection and that the excess shown here was not justified but amounted to an assault which was a ground for divorce under RCW 26.08.020 (5). The court also noted that it was proper to consider the strength

of a husband as compared with that of his wife in determining whether the force used was excessive. In rejecting the recrimination defense, the court cited the rule laid down in *Hokamp v. Hokamp,* 32 Wn.2d 593, 596, 203 P.2d 357, 359 (1949): "That doctrine is that a person seeking a divorce must be innocent of any substantial wrong-doing to the other party *of the same nature* as that of which complaint is made." (Emphasis added.) The court in the *Schmidt* case, concluded by holding that, "[I]f the force used by the husband upon his wife was excessive and more than justified, as we have found in this case, the acts cannot be held similar within the contemplation of this doctrine."

It is submitted that the court's requirement that the wrong-doing be *of the same nature,* as interpreted by the court in this case, is the doctrine of comparative rectitude. This doctrine allows a divorce to be granted where both parties are guilty of wrong-doing but where the complainant's fault is less than that of the defendant. For a collection of cases recognizing this doctrine see 159 A.L.R. 734 (1945).

Nonsupport—Provision of Necessaries. *State v. Brown,* 152 Wash. Dec. 57, 323 P.2d 239 (1958), involved construction of the family desertion and nonsupport statute, RCW 26.20.030, which declares that "every person who . . . wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children or ward or wards . . . shall be guilty of the crime of family desertion or nonsupport." The accused had been divorced from the complaining witness, who had custody of their child. The complaining witness had remarried to one who was capable of supporting, and had adequately supported, the child. Nothing had been contributed by the accused except $105.00 over a period of two years. The state having failed to show that the child was in *need* of necessities, the trial court granted an order of dismissal, and the state appealed on the issue of what constitutes a prima facie case. The court recognized the existence of a line of authority in other states that support is necessary only when it is lacking, but aligned itself with other authority "that the word *necessary,* as used in such statutes, related to the minimum standard of the quality and quantity of food, clothing, shelter, and medical attendance that a parent is required by law to furnish a child."

The court held that a prima facie case is made out by a showing that the father has not contributed enough to supply the necessaries and observed that the prima facie case could be overcome by evidence of an agreement with the stepfather that the latter would support the child. Apparently such an agreement is not to be implied by the conduct of the stepfather in supporting the child. An agreement that the mother is to support the child is equally effective in overcoming a prima facie case of non-support. *State v. Tucker,* 151 Wash. 218, 275 Pac. 558 (1929).

Modification of Divorce Decree—Venue. In *White v. White,* 51 Wn.2d 652, 321 P.2d 262 (1958), plaintiff filed a petition to modify the custody provisions in a divorce decree to have the children placed in his possession. The defendant moved for a change in venue from Spokane to Franklin county, on the ground that she was a resident there and the children resided and attended school in that county. The trial court's denial of the motion was affirmed on appeal.

In discussing the defendant's contention that she was entitled to the granting of the motion as a matter of right under RCW 26.08.160, the court compared this statute with the earlier version (RRS 995-2). Judge Hunter noted that in the earlier version of the statute, allowing an action for modification of a custody provision of a divorce decree to be brought in the county where the parent or children reside, the words were of a mandatory nature (viz., *shall* be brought) whereas under the later enactment the words *"may* be brought" replaced the former language. It was reasoned under this

distinction that the defendant therefore did not as a matter of law have a *right* to have venue removed to the county of her residence. The change in the statutory language from "shall" to "may" manifested legislative intent to make the formerly mandatory provision now merely permissive.

NATURAL RESOURCES

Natural Resources—Right to Waters of Once-Diverted Stream Flowing in Natural Channel. *Wallace v. Weitman*[1] was a contest concerning the rights of abutting landowners in the waters of an unnamed stream, tributary to the Snake River. One Lee, predecessor in interest to both plaintiffs and defendants, had owned sixteen hundred acres of land, including the entire course of the stream. In 1914 he diverted water from the natural bed of the stream into a ditch on another part of his property, so that all the water flowed through the ditch into the Snake River and none remained in the natural bed of the stream at any point below the diversion. Beginning in 1941, Lee conveyed his land to others in parcels, and through mesne conveyances plaintiffs acquired land containing the natural stream bed in 1952, while defendants were granted in 1954 the abutting parcel upon which was the ditch. At some time between 1914 and 1952, the stream had been rediverted into its natural channel, since at the time plaintiffs went into possession, the stream was again in its natural bed. The original diversion had taken place above the land of either of the present parties, but still on part of the land which the common predecessor had owned. No part of the natural stream bed was located on the defendants' land. Defendants proceeded, at a point above plaintiffs' boundary, to divert the stream back into the old ditch, pursuant to a permit granted by the supervisor of water resources. Plaintiffs at no time had a permit; they claimed as riparians.

Later in 1955 plaintiffs applied for, and were granted, an injunction which commanded defendants to allow plaintiffs a suffcient constant flow of water to supply fifty head of cattle. In so acting, the trial court sustained plaintiffs' demurrer to an affirmative defense of prior appropriation and excluded the testimony of three witnesses, which would have tended to prove that plaintiffs' land was not riparian to the stream. While affirming the decree, the supreme court skirted discussion upon, and left unanswered, several difficult problems in Washington water rights law, preferring instead to rely upon the rather incomplete findings of fact obtained at the trial.[2]

[1] 152 Wash. Dec. 514, 328 P.2d 157 (1958).
[2] 152 Wash. Dec. 514, 516, 328 P.2d 157, 158 (1958).