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Papers Presented at Legal Institute

One hundred and fifty attorneys attended the Legal Institute held at the University of Washington Law School May 23, 1941, under the joint auspices of the Washington State Bar Association, Seattle Bar Association, Tacoma Bar Association and the Law School. Limited space permits the publication here of only two of the papers in full. The balance of the papers are set forth in digested form. Unabridged copies of all the papers are available at the University of Washington Law Library.

LIFE INSURANCE AS COMMUNITY PROPERTY

In order to keep the discussion of the assigned topic within reasonable bounds, it seems to be desirable that these opening remarks be confined to a discussion of the Washington community property law as applied to policies of life insurance.

With this purpose in view, the case of *Occidental Life Insurance Co. v. Powers*¹ furnishes an obvious starting point. In that case the surviving wife was able to set aside her husband's designation of his mother and his private secretary as beneficiaries, and to maintain her claim to the whole of the proceeds as against such beneficiaries. The basis of the decision was, of course, that all of the premium payments had been made out of community funds, and that the designation of these beneficiaries without her consent constituted an unauthorized gift of community property. In this case the Supreme Court has definitely fixed the source of the premium payments as the controlling factor in determining the community interest in policies of life insurance upon the life of one of the spouses.

It was unnecessary in the *Powers* case for the court to decide what would be the effect if some of the premiums were paid out of community funds while others were paid out of separate funds. This point was involved in the later case of *In re Coffey's Estate*.² The question there was to what extent the proceeds of several policies should be included in the estate of the insured for the purpose of calculating the inheritance tax. One policy had been taken out by the decedent before his marriage and five out of twenty-nine annual premiums had been paid out of his separate funds. It was held that 5/29ths of the proceeds of this policy should be included in the decedent's estate as his separate property; as to the balance, only one-half could be so included upon the principle that the wife was entitled to the other one-half as her share of the community interest in the policy. A similar allocation had been recognized as proper for the purpose of determining the federal estate tax liability of a Washington estate in the case of *Lang v. Commissioner of Internal Revenue*,³ decided just before the *Coffey* case.

It may be that the decision in the *Coffey* case requires us to recognize that the contract of insurance is community property only to the extent that community funds are used in paying the premiums. Yet, that the *contract* is property is reasonably clear from the *Powers*

¹ 192 Wash. 475, 74 P. (2d) 27 (1937). Cf. Catlett, *Life Insurance Proceeds* (1930) 5 WASH. L. REV. 45.

² 195 Wash. 379, 81 P. (2d) 283 (1938).

³ 304 U. S. 264 (1938).

case; for in that case the wife had been named beneficiary originally and it was the transfer of the rights under the policy by changing the beneficiary which the court held to constitute an unauthorized gift of community property. If we can be fully justified in the conclusion that the contract of insurance is property, then it follows that the separate or community character of this species of property is to be determined at the time the *contract* is acquired. This is but an application to policies of life insurance the rule which the Supreme Court has consistently applied in other cases,⁴ and leads to the conclusion that the source of the first premium payment defines the character of the contract as belonging to the community or to that spouse out of whose separate funds this premium is paid.⁵

If the rule mentioned should be applied to contracts of insurance, the circumstance that subsequent premiums have been paid out of funds other than those supplying the first premium would not change the ownership of the policy; at best, such circumstance would be the foundation for a claim to reimbursement out of the proceeds in favor of the separate or community estate making the advance, as the case might be; and, perhaps, a named beneficiary might properly claim advantage of this right.⁶ On this theory one policy involved in the *Coffey* case, and two or three policies involved in the *Lang* case should have been treated as the separate property of the decedent; and the entire proceeds, after a deduction for one-half the amount, with interest, necessary to reimburse the community estate for the premiums paid out of community funds, included in the decedent's estate, subject to the statutory exemption.

But, however logical may be the argument in support of the propriety of giving this effect to the first premium payment, the point is not determinative of other questions which can arise; as it follows from the *Powers* case, that in all events, when community funds are used in paying premiums a community interest in the policy may result. If this community interest is lawfully disposed of before the community is terminated, no question to be resolved by community property law can arise. It is only when there has been no disposition of the community interest, or when an attempted disposition is unauthorized under the community property law, that the community property law comes into play. And the usual occasions for inquiry are the termination of the community by divorce, or by death of one of the spouses.

When the community is dissolved by divorce, the non-insured spouse can properly claim that the policy should be taken into consideration in making a division of property. This was done in one Washington case, that of *Bundy v. Bundy*,⁷ the policy being awarded to the insured spouse. In the case of *Miller v. Miller*,⁸ after final decree of divorce, the ex-husband claimed that a policy upon the wife's life was

⁴ *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673 (1913); *Walker v. Fowler*, 155 Wash. 631, 285 Pac. 849 (1930).

⁵ This point was raised in *Johnson v. Johnson*, 182 Wash. 573, 47 P. (2d) 1048 (1935). See note 1.

⁶ Cf. *Conley v. Moe*, 105 Wash. Dec. 245, 110 P. (2d) 172 (1941).

⁷ 149 Wash. 464, 271 Pac. 268 (1928). See also: *Simmons v. Miller*, 171 Cal. 23, 151 Pac. 545 (1915); *Crossan v. Crossan*, (Cal. App.) 94 P. (2d) 758 (1939).

⁸ *Miller v. Miller*, 198 Wash. 32, 86 P. (2d) 758 (1939).

common property because not disposed of in the property settlement. But it was held, among other things, that the husband's failure to bring the policy into the divorce proceeding estopped him from claiming any interest in it. The court's power over the property of the spouses in a divorce proceeding is exceedingly broad,⁹ and would not seem to be affected by the circumstance that some person other than a spouse is named as beneficiary in the policy.

The situation when the community is dissolved by death is more complicated. Where the community has an interest in the policy and the non-insured spouse dies first, it is apparent that the deceased spouse had a testamentary power over the half of this interest; or that, if there is no testamentary disposition, the statute of distribution relating to this spouse's share will apply.¹⁰ Designation of specific beneficiaries with the consent of this spouse will prevent these effects; for then the community interest has been disposed of in an authorized manner. The presence of a reserved power to change beneficiaries would not seem to affect this conclusion, as the consent can reasonably be attributed or attached to such reservation, also. But, if the policy is payable to the estate of the insured, or the deceased spouse is the named beneficiary, or the named beneficiary is other than the deceased spouse and consent to the designation is not shown, the *Powers* case compels the conclusion that the decedent had at death an interest in the policy. This interest will be subject to administration as part of the decedent's estate.¹¹ This result follows even when the policy contains a provision that the beneficiary must survive the insured; since such provision is applicable only to the interest of a beneficiary as such and does not apply to the community interest in the policy.¹²

Yet, this situation does not necessarily require that the whole policy be subject to administration; nor that administration upon the decedent's interest in the policy result in its liquidation, as against the wishes of the insured. The latter is entitled to have the policy kept in force as an incident of ownership of part of the policy. As to whether or not the policy is subject to separate and community debts so as to require administration upon the whole of it, something will be said later. Aside from this, the proper procedure would appear to be to award a proportionate interest in the policy to the person entitled to the deceased spouse's share, with protective provisions in the decree directing substitution of beneficiary, notice to the insurer, and the endorsement of restrictions against assignments and against further or conflicting substitutions of beneficiaries.¹³

When the insured spouse dies first, the disposition of the proceeds turns upon the validity of the designation of beneficiaries, or, for that matter, it may be, upon the validity of an assignment.¹⁴ Where the

⁹ REM. REV. STAT. §§ 988, 989.

¹⁰ REM. REV. STAT. § 1342. Cf. *Evans v. Operman*, 76 Tex. 293, 13 S. W. 312 (1890).

¹¹ Cf. *In re Castagnola's Estate*, (Cal. App.) 230 Pac. 188 (1924); *In re Miller's Estate*, 44 N. M. 214, 100 P. (2d) 908 (1940).

¹² *In re Castagnola's Estate*, *supra*, note 11.

¹³ Cf. *In re Dobbel's Estate*, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123 (1893); *In re Grieco's Estate*, 15 N. Y. S. (2d) 962 (1939); REM. REV. STAT. § 1533.

¹⁴ See *Massachusetts Mutual Life Ins. Co. v. Bank of California*, 187 Wash. 565, 60 P. (2d) 675 (1936).

estate of the insured is designated as beneficiary, there is no problem: such designation does not affect the community interest in the policy.¹⁵ Where gratuitous beneficiaries, other than the surviving spouse, are designated with the consent of that spouse, the proceeds will go to the named beneficiaries as the gift of both spouses of their interest in the policy.¹⁶ But, when the surviving spouse is ignorant of the designation, or has refused to consent to a gift of community property in this manner, such gratuitous designation is unauthorized; and the question is whether in this situation the designated beneficiaries are to be totally ignored and the proceeds disposed of in accordance with the community property law, to the extent the community had an interest in the policy.

The *Powers* case does support the conclusion that an unauthorized designation of beneficiaries is void *in toto* as to the surviving spouse; although in California, such designation is effective as to the insured's interest in the policy.¹⁷ However, the facts in the *Powers* case made it unnecessary to consider specifically what disposition should be made of the proceeds when the beneficiaries named at the date of death are unable to take over the survivor's objection, and the survivor had never been named as a beneficiary. This is so because the policy involved in that case was originally payable to the wife, and it can be argued that the case merely holds that the unauthorized change in beneficiary was ineffective, leaving the original designation to stand. Yet the principle of the *Powers* case has a broader application; for the decision went upon the ground that no gift of community property is good without the consent of the wife, even as to the donor's interest in the property.

The designation of a gratuitous beneficiary is at least an "inchoate" gift,¹⁸ becoming complete upon the death of the insured without a change of beneficiary having been made. By the same token, when community funds are used to pay the premiums a gift of those funds is being inaugurated. Upon the principle that one spouse alone cannot make substantial gifts of community property it is immaterial whether the non-insured spouse is the original beneficiary and a change of beneficiary made without authority, or whether the original designation of a beneficiary is unauthorized. In the one case the gift commences with the unauthorized change in beneficiary, and in the other with the unauthorized original designation of beneficiary. In each case the proposed gift fails for lack of authority and the community interest in the policy remains unimpaired.

The consequence of the principle stated is that when the designation of beneficiaries fails for lack of authority, and the insured spouse dies, the proceeds are disposed of in accordance with the community property law and not in accordance with the terms of the policy. The circumstance that in the *Powers* case the whole of the proceeds were awarded to the wife does not militate against this conclusion. Although there were children of the marriage alive at the time of the insured's

¹⁵ *In re Castagnola's Estate*, *supra*, note 11.

¹⁶ See Respondent's Brief, page 31, *In re Coffey's Estate*, *supra* note 2.

¹⁷ *New York Life Insurance Co. v. Bank of Italy*, 60 Cal. App. 602, 214 Pac. 61 (1923).

¹⁸ *See Koch v. Aetna Life Ins. Co.*, 165 Wash. 329, 5 P. (2d) 313 (1931).

death who would be entitled to his share of the community estate in the absence of testamentary disposition, there was also a will making the wife the sole legatee, so she became entitled to the whole of the proceeds of the policy when the designation of beneficiaries failed. There is, however, one particular in which the designation of the surviving spouse may become important; and that is where there is an immediate gift of the policy to that spouse. Such a gift may take place when such spouse has been designated beneficiary and no power to change beneficiary is reserved, or this reserved power is waived, or control over the policy is given to such spouse.¹⁹ But in these circumstances the community interest in the policy has been disposed of and an attempt by the insured to make a gift of the proceeds to someone else is an attempt to give that which the insured no longer owns.

The decision in the *Powers* case does not touch the power of the spouses to make gifts to each other of their interest in community property. So it might be argued that in any case the mere designation of a spouse as beneficiary is sufficient to constitute a gift to that spouse of the insured's community interest in the policy. This seems to be the view taken in California.²⁰ The point could have been made the basis of the decision in the *Powers* case; but, unfortunately, perhaps, it was not. In the case of *Humphrey v. Mutual Life Insurance Co.*,²¹ and again in the case of *Schade v. Western Union Life Insurance Co.*,²² the Supreme Court of this state seems to have emphasized delivery of the policy to the donee as necessary to a complete gift of the right to the proceeds. It may be that where the surviving spouse is the designated beneficiary at the time of death, the Washington court will consider that sufficient to constitute a gift to such spouse of the insured's community interest in the policy, without regard to whether or not such spouse is also the sole legatee under the will of the insured, or the right of the survivor to take the whole of the community estate in default of legitimate children or their issue surviving the deceased.

The point just mentioned may be of considerable importance when the spouse who is the named beneficiary dies first, leaving children and no will nominating the insured as sole legatee. In this situation will the children become entitled to the half or the whole of the policy? If there was a completed gift to the named spouse of the insured's interest in the policy, the children would be entitled to the whole.²³ Similarly, the whole of the value of the policy should be included in the estate of the decedent for inheritance and estate tax purposes.²⁴ These possibilities suggest caution in accepting as a general rule that the mere designation of a spouse as beneficiary is sufficient to constitute a gift of the insured's interest in the policy merely upon the ground

¹⁹ See *Humphrey v. Mutual Life Insurance Co.*, 86 Wash. 672, 151 Pac. 100 (1915); *Schade v. Western Union Life Ins. Co.*, 125 Wash. 200, 215 Pac. 521 (1923).

²⁰ *In re Miller's Estate*, 23 Cal. App. (2d) 16, 71 P. (2d) 1117 (1937).

²¹ 86 Wash. 672, 151 Pac. 100 (1915).

²² 125 Wash. 200, 215 Pac. 521 (1923).

²³ Cf. *In re Dobbels Estate*, *supra* note 13, where a gift to the wife who died first was made the basis of the distribution of the proceeds when the insured husband died.

²⁴ Cf. *Carroll's Estate*, 29 B. T. A. 11; *Goodman*, 41 B. T. A. 472 (Gift Tax); *Guggenhain v. Rasquin*, U. S., 61 Sup. Ct. Rep. 507, 85 L. ed.

that it looks attractive when the insured dies first.

Returning to the principle that one spouse cannot alone make substantial gifts of community property there is no basis in the Washington cases for distinguishing between gifts to strangers to the community and gifts to children. The lack of authority applies to attempted gifts to children as well as to others. In the case of *In re McCoy's Estate*,²⁵ an attempt by the husband to give to children shares of stock in a family holding corporation belonging to the community without the knowledge of the wife was held invalid and one-half the value of the shares included in the deceased wife's estate for inheritance tax purposes. It makes no difference that the children may be minors and the attempted gift intended for their support; as in *McGovern's Estate*,²⁶ the Supreme Court held void a sale in trust of the community interest in a partnership for the benefit of a minor child when made without the consent of the wife. Consistently with these cases, the designation of children as beneficiaries of the community interest in life insurance policies without the consent of the non-insured spouse is void.²⁷

It results that when policies are payable to one not the non-insured spouse with intention to make a gift of the policy and its proceeds, to the extent the community has an interest in the policy and the non-insured spouse has not consented to the gift, whether the policy is payable to children or to other persons, the community interest in the policy remains unaffected. Consequently, upon the death of either spouse, an interest in the policy becomes subject to administration the same as if the policy became payable to the executors, administrators or assigns, or to the estate of the insured upon failure of the named beneficiaries to survive.²⁸

But, administration upon the community interest in the policy or its proceeds does not necessarily mean that such interest becomes subject to the claims of creditors in all situations which might arise. For example, if the non-insured spouse dies first and is a named beneficiary at date of death, the statutory exemption applies inasmuch as the statute protects any beneficiary having an insurable interest, whether or not the policy is "effected" by the insured.²⁹ It is suggested that the exemption should also apply if the non-insured spouse who dies first was at any time named as beneficiary and the change in beneficiary fails because unauthorized. Of course, when the insured spouse dies first and the surviving spouse is the named beneficiary, the exemption covers whatever interest the survivor takes as beneficiary. Here, again the circumstance that the non-insured spouse may have been designated beneficiary at one time, although not the beneficiary named at the date of death, may be important.

On the other hand, when the designation of beneficiaries fails because unauthorized, there is no language in the statute broad enough to

432 (1941).

²⁵ 189 Wash. 103, 63 P. (2d) 522 (1937).

²⁶ 181 Wash. 231, 42 P. (2d) 796 (1935).

²⁷ *Occidental Life Insurance Co. v. Powers*, *supra* note 1; *see also*: *Travelers' Life Ins. Co. v. Fancher*, 219 Cal. 351, 26 P. (2d) 482 (1933).

²⁸ *In re Miller's Estate*, 44 N. M. 214, 100 P. (2d) 908 (1940); *In re Castagnola's Estate*, *supra* note 11.

²⁹ REM. REV. STAT. § 7230-1 (Supp. 1939).

justify allowing the exemption to those who may become entitled to a share in the policy or its proceeds under the community property law. The statute requires that the policy be "in favor" of a beneficiary or an assignee other than the insured or his personal representatives. Even a spouse who may ultimately become entitled to a share in the policy or its proceeds cannot satisfy this requirement unless he or she were at one time named a beneficiary, or could qualify as an assignee. If children or other persons are designated beneficiaries but the designation fails because unauthorized, whatever interest in the policy or its proceeds may ultimately come to them by testate or intestate succession does not apply to them. Thus, no one whose only right to the proceeds is derived from the estate of either spouse can invoke the exemption.

One more point remains to be considered; that is the necessity of consent, particularly in reference to the consent of the wife, to the designation of a beneficiary or the assignment of a policy for business purposes. Designation of a community creditor as beneficiary for the purpose of providing for the securing or payment of the debt is obviously for a community purpose and within the husband's power as manager of the community personal property. This was recognized in the case of *Schade v. Western Union Life Insurance Co.*,³⁰ and in some later cases.³¹ In the *Schade* case some importance appears to have been attached to the fact that the creditor designation was for a present consideration; but it is not clear why this should be necessary.³²

As to insurance upon the life of an officer of a corporation, when the insurance is taken out and paid for by the corporation, if the community owns shares of stock in the corporation it will benefit from such insurance even though it might be claimed that earnings available for dividends are reduced by the payment of premiums. If the insurance is payable to someone other than the corporation, to the extent that the premiums paid by the corporation are chargeable to the salary or dividends to which the officer might be entitled, the designation of the beneficiary would probably be subject to the limitation applied in the *Powers* case; provided, the salary or dividends would be community property. This conclusion was escaped in the case of *The Mutual Benefit Life Ins. Co. v. Lundquist*,³³ by finding that the insured officer's interest in the corporation was his separate property, and that family expenses greatly exceeded his salary.

If insurance is designed to furnish a fund for the purchase of the insured's interest in a business, whether corporate or partnership in form, pursuant to some agreement between the associates, to the extent the interest in such business is community property, the making of the agreement and the consequent designation of beneficiaries seems also to be within the competence of the husband. The insurance proceeds are a substitute for the community interest in the business. There is an Arizona decision to this effect. Insurance trusts are quite useful

³⁰ 125 Wash. 200, 215 Pac. 521 (1923).

³¹ *Massachusetts Mutual Life Ins. Co. v. Bank of California*, 187 Wash. 565, 60 P. (2d) 675 (1936); *Seattle Credit Men's Assn. v. Bank of California*, 177 Wash. 130, 30 P. (2d) 972 (1934).

³² See *Johnson v. Johnson*, 182 Wash. 575, 47 P. (2d) 1048 (1935).

³³ 140 Wash. 345, 248 Pac. 808 (1926).

for this purpose; but, in Washington, care must be taken that the terms of the agreement and of the trust do not attempt to control the disposition of community property after the dissolution of the community for they are invalid as to the wife, if created without her consent.³⁴

So far as underwriters of life insurance are concerned, the complications which have been discussed may not affect them greatly. Recent legislation protects them in paying in accordance with the terms of a policy to the named beneficiary or assignee, unless they have received notice in writing at the home office on behalf of some other person claiming an interest in the policy.³⁵ And, when such notice is given, an interpleader action will relieve the underwriter from further liability.³⁶

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The present state of the Washington law on life insurance as community property raises many difficulties, not only in the collection of proceeds, but also in determining loan or cash surrender values, in cancelling policies and returning premiums, and in changing beneficiaries.

The legislature has already made some attempt to remedy the situation so far as insurance companies are concerned. By a 1939 enactment (REM. REV. STAT. § 7230-2 *et seq.*) it is provided that insurance companies may pay, in accordance with the terms of the policy, to the named beneficiary or assignee unless the company receives notice in writing at its home office on behalf of some other person claiming an interest. Should a notice be received, the general law becomes applicable so that an interpleader action may be used to relieve the insurance company from further liability.

Other persons concerned should receive similar protection. It is suggested that it might be advisable to create a rebuttable presumption of consent by the non-insured spouse to the policy as written. Of course, such a presumption would have the disadvantage that the husband might be encouraged to keep his wife in ignorance of the insurance effected. Furthermore, the presumption being rebuttable by oral testimony as well as written evidence, it would still be wise to obtain written consent where possible.

Recognizing the limited value of such a presumption, it is further suggested that many of the present difficulties could be obviated by a statute authorizing the naming of children as beneficiaries in a maximum amount, say, of \$2,500 or \$5,000, and the naming of parents or brothers and sisters as beneficiaries in a maximum, say, of \$1,000 or \$2,500. By that device provision could be made without the consent of the other spouse in situations where common feelings of humanity dictate the giving of protection. And the suggested amounts are designed to avoid any claim, in most cases, that the benefits are unreasonably high.

CHARLES HOROWITZ.

³⁴ *In re McGovern's Estate*, 181 Wash. 231, 42 P. (2d) 796 (1935); *Stewart v. Bank of Endicott*, 82 Wash. 106, 143 Pac. 458 (1914).

³⁵ Laws of 1939, c. 97, p. 266; REM. REV. STAT. §§ 7230-2 *et seq.* (Supp. 1939).

³⁶ Interpleader was employed in the case of *Occidental Life Insurance Co. v. Powers*, *supra* note 1.

PROBLEMS ARISING UNDER NON-INTERVENTION WILLS

The purpose of this paper is to discuss the desirability, necessity and requirements of a decree of distribution, and the application of REM. REV. STAT. § 1434 to non-intervention wills.

Prior to 1917 the courts were strongly of the opinion that they had lost jurisdiction over an executor under a non-intervention will after an inventory and appraisal had been filed and an order of solvency entered. It is probable that if an executor had come into court and asked for an interpretation of a non-intervention will, he would have been held to have waived the non-intervention statute and all subsequent matters pertaining to the execution of the estate would have been subjected to the control of the court. In any case, where the executor died or refused to act, letters testamentary or of administration issued just as if there had been no non-intervention will.

Under the present law the entry of a decree of distribution under a non-intervention will is permissible, but not mandatory. This result is supported by the following reasoning:

(a) The statute¹ provides that the estate may be settled without intervention of the court, and further that the court shall have authority to enter a decree of distribution *upon application*. There is no provision in the statute requiring anyone to apply for such a decree.

(b) This construction of the statute has been approved by the court in at least two cases.²

(c) The question has been finally determined by the court in the case of *Schirmer v. Nethercutt*,³ the court saying, "Under such a [non-intervention] will it is well established that no final decree is necessary in the estate."

Although a decree of distribution is admittedly not necessary under a non-intervention will, it is unquestionably desirable so as to avoid doubt as to questions that may easily be answered by looking at the decree.

Many of the superior court judges labor under the erroneous idea that after an order of solvency is entered the court has no power to approve acts or pass upon an accounting of the non-intervention will executor. Some judges erring even more take the position that if the executor submits certain matters to the court, the non-intervention powers are lost. That the executor has the right and it is the duty of the court to pass upon such matters as the executor presents to the court under a non-intervention will is evidenced by the opinion in *State ex rel. Jacobsen v. Superior Court*⁴ and numerous other decisions. It should, however, be noted that the executor does not lose his non-intervention will powers by submitting any one particular matter to the court, but rather continues under his non-intervention powers as to all matters not submitted.

It would seem that REM. REV. STAT. § 1434, requiring that notice must be given to heirs, legatees, devisees and creditors, upon request made by them, of the filing of petitions for sales, leases or mortgages of

¹ REM. REV. STAT. § 1462.

² *In re Cornett's Estate*, 102 Wash. 254, 173 Pac. 44 (1918); *State ex rel. Johnson v. Superior Court*, 131 Wash. 264, 230 Pac. 434 (1924).

³ 157 Wash. 172, 180, 286 Pac. 265 (1930).

⁴ 127 Wash. 583, 221 Pac. 608 (1923).

any property of the estate, the filing of accounts, petitions for distribution and petitions for family allowances and homesteads does not apply to non-intervention wills. But in order to clarify the handling of non-intervention estates, the legislature should provide what an executor can do without waiving the non-intervention provision of the will, and just how far the court may go.

L. R. BONNEVILLE AND CHARLES S. LYONS

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS *c. t. a.* UNDER NON-INTERVENTION WILLS

In any discussion of the powers and duties of executors and administrators it is well to have in mind the purposes of administration of decedent's estates. These are mainly the collection and preservation of the assets of the decedent, payment of his just debts and the charges consequent upon his death and the distribution of the residue to the persons entitled thereto. At common law the heirs of a decedent succeeded to his real estate and the power of the executor or administrator was limited to the personal estate. Modern extension of the power to include the real estate of the decedent by statutes in England and the United States appears to have been based upon the necessity of making some provision for the payment of debts of decedents whose personal estates proved to be inadequate.¹

It would appear, therefore, that in the ordinary administration of a decedent's estate, when the debts of the decedent and the charges against his estate are paid, the estate is settled and nothing remains to be done except to distribute the residue to the persons entitled thereto.² Authority for additional procedure in the nature of administration in such a case must be found in the statutes.

Much of what is said will have particular reference to the power of executors and administrators *c. t. a.* under non-intervention wills to sell the real estate of decedents, since questions of the power to sell arise most frequently in connection with real property sales.

The powers of an executor are derived from the will by which he is appointed and from the laws pertaining to the execution and probate of wills. The powers of non-intervention executors in the State of Washington are found in REM. REV. STAT. §§ 1462 and 1463.³ Section 1462 authorizes an executor, if the last will and testament shall so provide, after establishment of the solvency of the estate, to manage and settle the estate without the intervention of the court. Section 1463 provides that such executors shall have power to mortgage, lease, sell and convey the real and personal property of the testator without an order of the court for that purpose and without notice, approval or confirmation, and in all other respects administer and settle the estate without intervention of the court.

Until the decision of the Supreme Court of Washington in *Hutchings v. Fanshier*,⁴ it was quite generally conceded that the exercise of the power of sale by a non-intervention executor after entry of decree of solvency absolved a purchaser from inquiry as to the necessity of the

¹ 23 C. J. 995-7.

² 48 Wash. 141, 92 Pac. 942 (1907); and 21 AM. JUR. 377, *Exec. & Admin.* § 13.

³ PIERCE'S CODE (1939) § 9967-8.

⁴ 132 Wash. 5, 231 Pac. 14 (1924).

sale for administrative purposes and it was occasionally contended that the power existed even though a part of the consideration for the sale was an exchange of other property.

The facts of that case are as follows: Maud C. Fanshier died April 26, 1905, leaving a will which was admitted to probate May 15, 1905, by which she devised all of her estate to her daughter, Maude Fanshier, except the rents and income from her real estate and oyster land, which she gave to her husband, T. B. Fanshier, until her daughter attained the age of 18 years. In giving her husband non-intervention powers as her executor she referred to the non-intervention will statute and specifically gave him "power to sell all and any real estate when, in his judgment, necessary for the best interests of said estate." The appointment of said executor was confirmed by the court and on July 27, 1905, the estate was adjudged solvent. On September 22, 1913, Fanshier entered into an agreement with an oyster company providing for the working of the oyster lands in question by the oyster company and the marketing of the oysters. This agreement was several times extended and the oyster company made several loans to Fanshier individually to be repaid from the proceeds of the sale of oysters. On April 22, 1915, T. B. Fanshier, in his own right and as such executor and purportedly as trustee of the estate of said decedent, conveyed the lands in question to the oyster company. The consideration for the deed was the cancellation of loans aggregating \$6,000.00 made by the oyster company to Fanshier individually, the transfer of other property by the oyster company of the agreed value of \$8,500.00 and the sum of \$20,500.00 in cash. Mrs. Hutchings, the daughter, became 18 years of age on May 3, 1922, and on July 18, 1922, commenced an action to set aside the deed. The lower court dismissed the action, but on appeal the Supreme Court remanded the cause with directions to enter a judgment in appellant's favor, decreeing the deed in question to be null and void and of no effect as a conveyance of her interest in the property.

Judge Parker wrote the majority opinion and while he rested it upon the want of authority of a non-intervention executor to exchange property, he also stated that the terms of the will suggest that the power was to be exercised only in the ordinary course of administration. In his concurring opinion, Judge Bridges stated that he much preferred that the decision be rested upon the ground of want of authority to sell except to pay debts of the estate and Judge Tolman concurred in the conclusions reached by Judge Bridges, stressing the fact that the will gave no power to invest or re-invest.

The case is clear authority for a rule that an ordinary non-intervention executor may not exchange property of the estate for other property. The suggestions of want of power to sell except for purposes of administration are not without support.

While Section 1463 grants power to sell it must be read in connection with the provisions of Section 1462, relating to administration and settlement without court intervention. Section 1462 does not appear to contemplate anything beyond the ordinary administration and settlement of estates except that it eliminates the necessity of court supervision.

REM. REV. STAT. § 1366,⁵ provides that "When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowances, expenses of administration and any other charges for which such real estate is liable under existing laws."

REM. REV. STAT. § 1368⁶ provides that "no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent."

Section 1366 is declaratory of what we have seen was the common law and Section 1368 precludes the subjection of the real estate to the payment of debts unless administration is commenced within the limited time. It can be argued, therefore, that to concede to an ordinary non-intervention executor the power to sell real property of the estate without regard to the necessity of the sale for administrative purposes is to concede to him the power to divest the title of the devisees by a sale not necessary for any of the purposes for which he was appointed. It will be recalled that by the statute the power of a non-intervention executor to sell is coupled with a power to "in all other respects administer and settle the estate," a power hardly in keeping with an authority to determine, without the consent of the devisees, the advisability of sales for purposes of distribution.

The safe rule to follow would appear, therefore, to limit the power of such an executor to sell to those sales which are necessary for the purpose of raising funds with which to pay debts, expenses of administration and other administrative charges such as succession taxes. Even though there be in the will an express power of sale, the power should be limited to administrative sales unless the power conferred clearly embraces trust powers beyond the trusteeship of an administrative executor.

We come now to the question of the authority of an administrator with a non-intervention will annexed to exercise the powers of the non-intervention executor named in the will. AMERICAN JURISPRUDENCE⁷ has this to say concerning the exercise by such administrator of powers conferred by will:

"The line of demarcation between that class of cases where the duties imposed upon an executor by a testator are such as pass to, and are to be discharged by, his successor and that other class of cases where the duties imposed are personal to the executor is not clearly drawn and, from the very nature of things, cannot be. The circumstances of the individual case and the nature of the power given are important factors. Generally, it may be said that in the absence of any statutory provision to the contrary, a power granted to an executor which implies a personal confidence reposed in the individual over and beyond that which is ordinarily implied in the selection of an executor does not pass to, or devolve upon, the administrator of the will annexed by virtue of his appointment, and he acquires no authority by reason of such power. Such

⁵ PIERCE'S CODE (1939) § 9863.

⁶ PIERCE'S CODE (1939) § 9865.

⁷ 21 AM. JUR. 821, *Exec. & Admin.* § 786.

an administrator does not succeed to discretionary powers given to the executor or to powers which are conferred upon the executor as trustee, unless it is clear that such was the intention of the testator. Cases of this kind fall within the category of those where a court of equity will not permit a trust to fail for the want of a trustee, and, accordingly, the court will appoint one and clothe him with authority adequate to the duties to be discharged. A discretionary power of sale does not pass to the administrator *de bonis non*. Where, however, the will shows an intention to confer the power on the executor *virtute officii*, and such power does not involve any personal discretion on his part, it passes to, and may be exercised by, an administrator with the will annexed or an administrator *de bonis non* with will annexed. In other words, where it appears that the testator did not contemplate the existence of a personal trust in the executor, the power will vest in the administrator with the will annexed. The question of the exercise of testamentary powers conferred upon an executor by an administrator appointed to administer the estate, upon the renunciation, death, resignation or removal of the executor, is now largely affected or controlled by statutory provisions, some of which, in general, purport to confer upon an administrator with the will annexed the same power and authority possessed by executors named in the will. Most such statutes apply, however, only where the power is conferred upon the executors *ratione officii* or is coupled with an interest. In other words, many of the statutes do not cover powers imposed upon executors which are not executorial in their nature, but personal to the executors, and such powers do not, even under statutory provisions, pass to the administrator with the will annexed."

It is manifestly impossible within the time allotted for this paper to detail the distinctions drawn by the appellate courts of the various states or the provisions of the numerous statutes which the courts have been called upon to construe. Many of the decisions are not in harmony, many of them construe statutes which differ from ours and most of them are from states which do not have statutes authorizing administration without intervention of the courts. In AMERICAN LAW REPORTS⁸ will be found an annotation to this and like questions supported by citations of both cases and statutes.

Our own applicable statute⁹ reads as follows: "Administrators with the will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose."

In its enactment did the legislature have in mind the authority of an ordinary executor or did it intend to include also the authority of a non-intervention executor? Our Supreme Court has never flatly answered that question.

The non-intervention will statute¹⁰ contains the following proviso:

⁸ Note (1938) 116 A. L. R. 158.

⁹ REM. REV. STAT. § 1425; PIERCE'S CODE (1939) § 9941.

¹⁰ REM. REV. STAT. § 1462.

"Provided, however, in all cases, if the party named in such will as executor shall decline to execute the trust or shall die or be otherwise disabled for any cause from acting as such executor, then letters testamentary or of administration shall issue and the estate be settled as in other cases."

If we concede non-intervention powers to an administrator *c. t. a.*, we are forced to a somewhat strained construction of that portion of the above quoted proviso which directs issuance of letters and settlement of the estate "as in other cases." If we construe the proviso as requiring administration without exercise of the non-intervention powers we are, of course, refusing to concede the applicability of the legislative grant of authority to an administrator *c. t. a.* to the non-intervention provisions of the will. The latter construction does not nullify the legislative grant of authority, but concedes to the administrator *c. t. a.* all powers conferred by the will and connected with the office except the power to proceed without supervision of the court. In this connection it may not be amiss to point to the fact that the statute granting powers to administrators *c. t. a.* was originally enacted January 27, 1860, while the first enactment of the non-intervention will statute became effective January 29, 1868.

In the recent case of *In re Clawson's Estate*,¹¹ our Supreme Court had before it some phases of the non-intervention will statute and in reaching conclusions which do not necessarily involve our problem had the following to say:

"When a testator makes a non-intervention will, he, of course, strongly relies upon the personal qualifications of the executor he names. If he appoints *A*, and *A* refuses to serve, no substitution could be made by the court, as no one could say that he would have trusted *B* or *C* to act without the intervention of a court. The statute, as we will later point out, specifically provides what shall be done in such a case as that. But where the testator appoints *A* and *B*, and *B* refuses to act, what happens? The non-intervention statute . . ., unless it be quite liberally construed, does not indicate or provide what shall be done in such a case. We quote a sentence found about the middle of the section: (Quoting the above-quoted proviso and continuing) Apparently, this gives the court jurisdiction to forthwith appoint an administrator upon renunciation by *the* nonintervention executor. We have no means of knowing how the trial judge viewed the matter when the petition for the probate of the will was heard. But it seems apparent, from the order he entered, that he came to the conclusion that, since Mrs. Mendenhall was *a* party named in such will as executor, she could also be regarded as *the* party named in such will without doing violence to the statute. Such an interpretation would, of course, destroy the nonintervention character of a will naming more than one executor when one of them refused to serve or become disqualified, etc.

"Perhaps that was what the legislature intended should happen. Consider the present case, for example. Mrs. Clawson left part of her estate to her husband, a much greater part

¹¹ 3 Wn. (2d) 509, 516, 101 P. (2d) 968, 971 (1940).

to her daughter, his step-daughter. Can anyone say that it was her intention, if for any reason her daughter could not serve as executor, that her husband should execute the will, acting alone and without the intervention of any court? However, it must be conceded that the validity of the suggested construction of the statute is doubtful, and we do not here attempt to decide whether or not that construction is correct."

It would seem, therefore, that the exercise of non-intervention powers should be sparingly, if at all, conceded to an administrator *c. t. a.* His power to sell without an order of court, if recognized at all, should be limited to sales absolutely necessary for strictly administrative purposes and should never be conceded under a will which, in the grant of power to the executor, contains language importing personal confidence in the appointment.

A safe rule to follow would deny to any administrator with a non-intervention will annexed the power to sell without order of the court. Statutory sales at private sale do not impose great hardship upon the estate. They may be made on shortened notice and at any time within six months after the first publication of notice of sale. Confirmation of sales thus made forecloses questions which might otherwise exist as to the power of administrators *c. t. a.* to execute them.

RALPH H. FOSTER.

Mr. Foster's paper suggests a question as to just what are administrative purposes, and how far an executor can go in acting pursuant to those purposes. The non-intervention executor has been sustained in his right to determine family allowance,¹ to convey real estate for administrative purposes,² to act on creditor's claims,³ and to exercise wide latitude in operation of business, to enable payment of bequests.⁴

Notwithstanding *Hutchings v. Fanshier*,⁵ it is difficult to understand why certain powers involved in that case should not be available to non-intervention executors. No case has been found where our court has either refused or sustained the power of such executors to sell in aid of distribution of the estate, and such sales in other jurisdictions have been held to be for administrative purposes. It might well be asked why a non-intervention executor should not have power to do everything the court could authorize in a case under its jurisdiction. The existence of such power was indicated in *Fulmer v. Gable*.⁶

Since a petition for rehearing *en banc* was granted in the *Fanshier* case, but the case was later settled upon stipulation and appeal dismissed,⁷ that case never attained the force of authority anyway. But the terminology of the decision emphasizes the problem, which must be solved in one of three ways, namely: (1) enact a new statute; (2) permit a chaotic system of case law to develop similar to *Hutchings v. Fanshier*; or (3) recognize and preserve under our present statute a principle and a philosophy that is fundamental. The third view will

¹ *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1041 (1911).

² *Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 641 (1913).

³ *Shuback v. Redelsheimer*, 92 Wash. 124, 158 Pac. 739 (1916).

⁴ *In re Elvigen's Estate*, 191 Wash. 614, 71 P. (2d) 672 (1937).

⁵ 132 Wash. 5, 231 Pac. 14 (1924).

⁶ 73 Wash. 684, 132 Pac. 641 (1913).

⁷ 134 Wash. 704, 236 Pac. 119 (1925).

recognize a definite, strong and continuous line of authority following liberal construction of the statute, commencing with *Newport v. Newport*,⁸ and carrying down through *Fulmer v. Gable* and other cases to the recent case of *Elvigen's Estate*.⁹

And it is difficult, even under a strict construction, to see why REM. REV. STAT. § 1425 does not apply to administrators *c. t. a.* under non-intervention wills. REM. REV. STAT. §§ 1425, 1462 and 1463 were all re-enacted together in our 1917 Probate Code. The disturbing effect of *In re Clawson's Estate*¹⁰ is diminished when it is observed that the language indicating that the court could not substitute an administrator *c. t. a.* with the powers of the executor was mere dictum and that REM. REV. STAT. § 1425 was not considered.

The accepted rule seems to be that, "In general what an executor can do, an administrator *c. t. a.* can do."¹¹ There are, of course, exceptions. Cases generally fall into three classes:

(1) Wills involving personal discretion based on trust and confidence expressed. Transfer of power to a successor in such a case is generally denied and authority is in conflict even under statutes similar to REM. REV. STAT. § 1425.

(2) Wills containing imperative direction and power to sell. In such cases the executor's powers, and even his discretion as to terms and price, pass to the administrator *c. t. a.*

(3) Wills containing only naked powers. Such powers pass to the successor unless testator's intent to the contrary is expressed.

Non-intervention powers fall into the third class. This rule would seem to give effect to the intention of the testator. It is a fair inference that provision for non-intervention administration was a paramount consideration in his mind.

The trend of decisions now is to construe powers vested in an executor as held by virtue of his office, so that they pass to his successor. The cases often refer to executors as trustees and our statute refers to the "trust" involved. Therefore, the rule should be tested by the law of trusts. Section 196 of the RESTATEMENT OF TRUSTS provides that "powers conferred upon the trustee . . . can properly be exercised by successor trustees, unless the settlor manifested an intention that they should be exercised only by the trustee originally named," and that, "Powers which are essential to the trust or powers which relate to the effective administration of the trust can ordinarily be exercised by successor trustees. Thus, a power of sale can ordinarily be exercised by successor trustees."

OFELL H. JOHNSON.

LIABILITY OF THE MARITAL COMMUNITY FOR TORTS OF THE HUSBAND AND WIFE

In its recent decision in *Bergman v. State*¹ our Court has made it plain that the liability of the community for torts of the husband or wife is based on the doctrine of respondeat superior.

⁸ 5 Wash. 114, 31 Pac. 428 (1892).

⁹ 191 Wash. 614, 71 P. (2d) 672 (1937).

¹⁰ 3 Wn. (2d) 509, 101 P. (2d) 968 (1940).

¹¹ 21 AM. JUR. 817.

¹ 187 Wash. 622, 60 P. (2d) 699 (1936).

REM. REV. STAT. §§ 6890-6893 give the husband management and control of all community personalty, subject only to the limitation that he shall not devise more than one-half thereof. Likewise, he is given management and control of the community realty, except that he cannot sell, convey or encumber it without the participation of the wife. If the husband is acting within his authority, liability of the community for his tortious conduct will follow.

But the community is not responsible for torts committed in the course of activity not undertaken on behalf of the community.² Similarly, the husband cannot charge the community with his wrongful conduct when acting in a manner hostile to the community.³ Nor can liability be predicated upon acts of the husband committed in the performance of his duties as a public official.⁴ On the other hand, liability may be based upon the acts of the husband as a notary public,⁵ or as an executor or trustee.⁶

Since the community property statutes grant no powers of management or control to the wife, her power to bind the community must be based on authority given her by agreement between the parties. When she is so authorized, the community is liable for her torts committed in the course of her authority.⁷ Moreover, REM. REV. STAT. § 6906, providing that "expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them," has been construed to give the wife power to bind the community for torts committed while on a trip to purchase clothing.⁸ And in *Perren v. Press*,⁹ it was held that the community was liable for the torts of the wife committed while driving the community automobile, in the absence of proof that the car was not being used for a community purpose. These last two decisions obviously uncover a broad field in which the wife may incur liability for the community, the exact bounds of which remain yet to be defined.

HENRY ELLIOTT, JR.

The basic rationale for the doctrine of respondeat superior is that when a master hires a servant to do his bidding, as between the master and the person injured by the servant while engaged in his work, the master is the least innocent of the two parties and should bear the loss. This being the rationale, the doctrine does not appear to be properly applied when it is used to solve the problem of community liability for the torts of the spouses.

In the community relation there are not two separate entities, the master and the servant, as there are in the normal agency situation.

² *Newberg v. Remington*, 184 Wash. 665, 52 P. (2d) 312 (1935); *Furuheim v. Floe*, 188 Wash. 368, 62 P. (2d) 706 (1936).

³ *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917) (alienation of affections); *Bergman v. State*, 187 Wash. 622, 60 P. (2d) 699 (1936) (arson committed on community property).

⁴ *Fidelity & Deposit Co. v. Clark*, 144 Wash. 520, 258 Pac. 35 (1927); *Kies v. Wilkinson*, 114 Wash. 89, 194 Pac. 582 (1921); *Day v. Henry*, 81 Wash. 61, 142 Pac. 439 (1914).

⁵ *Kangley v. Rogers*, 85 Wash. 250, 174 Pac. 898 (1915).

⁶ *Meck v. Cavanaugh*, 147 Wash. 153, 265 Pac. 178 (1928).

⁷ *Walker v. Myers*, 166 Wash. 392, 7 P. (2d) 21 (1932); *Hartford v. Faw*, 166 Wash. 335, 7 P. (2d) 4 (1932).

⁸ *Werker v. Knox*, 197 Wash. 453, 459, 85 P. (2d) 1041, 1043 (1938).

⁹ 196 Wash. 14, 21, 81 P (2d) 867 (1938).

Moreover, it cannot be said, as between the community and the party injured by a tort of the husband not within the course of his authority, that the community is not the least innocent, for it represents the tort-feasor husband to the extent of a one-half interest. Yet in the common situation where the husband is possessed of no separate property, it is impossible to aid the wife without at the same time aiding the husband, whereas under the doctrine of respondeat superior as applied elsewhere, it is possible to excuse the master from liability without at the same time excusing the servant.

VICTOR L. LAWRENCE.

PRIORITY OF SPECIAL TAX LIENS OVER MORTGAGES

The Washington law with respect to government liens is approaching a condition in which the lender on mortgage security is not only unable, by any practicable method, to ascertain the nature and extent of existing liens, but must speculate as to the nature and extent of subsequent liens which may have priority over his mortgage.

Under the original Workmen's Compensation Act, no provision was made respecting priority of the state's claim for industrial insurance premiums. A claim therefor was denied preference in bankruptcy proceedings in *In re Farrell*,¹ and the 1915 legislature forthwith amended the act to give the claim priority over all but tax claims in all insolvency cases.² In *Whitney v. Page & Bolster Shingle Co.*³ it was held that the claim is superior to a laborer's wage lien. A 1923 amendment broadened the lien in insolvency cases to include matters in probate and provided also for a general lien with the same priority. The *Whitney* case was followed in *Barlow & Sons v. H. & B. Lbr. Co.*⁴ and the lien on insolvency was also held to be superior to a prior chattel mortgage.⁵

The Revenue Act of 1935, as amended in 1937, provides that, upon entry of a tax warrant upon the judgment docket, the tax becomes a lien prior to all but other tax liens upon the taxpayer's personalty and also becomes a lien upon his realty "the same as the judgment in a civil case duly docketed . . ."⁶ The amendment apparently does not change the rule of *Home Owners' Loan Corp. v. Mitchell* that a docketed tax warrant is inferior to a prior realty mortgage, but the lien does seem to be prior to an existing chattel mortgage. Moreover, the 1935 act contains a provision similar to the insolvency provision in the Workmen's Compensation Act.

The Social Security Act of 1937⁸ provides for a lien in insolvency cases similar to that given for taxes and industrial insurance premiums. At the last legislative session the act was amended to provide for a lien for delinquent contributions prior to all but tax liens, but valid as against purchasers and encumbrancers only from the time of filing with the Secretary of State. While this amendment recognizes

¹ 211 Fed. 212 (W. D. Wash. 1914).

² WASH. LAWS 1915, c. 188, § 3.

³ 116 Wash. 371, 199 Pac. 728 (1921).

⁴ 153 Wash. 565, 280 Pac. 88 (1929).

⁵ *Roebblings Sons v. Frederickson L. & T. Co.*, 153 Wash. 580, 280 Pac. 93 (1929).

⁶ WASH. LAWS 1937, c. 227, § 202.

⁷ 195 Wash. 302, 81 P. (2d) 268 (1938).

⁸ WASH. LAWS 1937, c. 162, § 14(c).

existing rights, the provision for insolvency cases—which was retained and broadened—undoubtedly gives the state's claim preference over a prior mortgage.

With few exceptions, similar claims in other states are not given priority over existing liens. As a matter of fairness, and of wisdom in protecting the multitude of citizens using credit, state charges should not be given preference over prior liens, and as to those subsequent in time, the state should be required to file its claims in the office of the auditor of the county in which the property is situated, as is now required for federal tax liens.

W. V. TANNER.

The priority of real estate taxes over mortgages has long been recognized as a right of sovereignty. Similarly, the collection of excise taxes or foreclosure of tax liens can be made to dominate over private debts or creditors in a dissolution proceedings by legislative choice.

A real problem does exist with respect to giving the prospective mortgagee some means of discovering existing tax liens. Since the lien resulting from excise taxes, unlike the lien for realty taxes, generally applies to all property of the debtor—some of which may often be transitory—it is quite impracticable to file in all counties wherein the property may be located. State officials, such as those in the office of unemployment compensation, are forbidden by law from disclosing information, so that the prospective mortgagee could not discover tax liens even by making inquiry. Fairness would seem to require, however, that this information be made available to him. It might be suggested that the legislature designate some central state office to supply the necessary information and provide that a security holder who made inquiry be given priority over an excise tax lien not disclosed by such central agency.

LYLE L. IVERSON.

FASHIONS IN REAL PROPERTY SECURITY

The real property mortgage is in danger of becoming an unsound security, save on appraisals so low as to seriously interfere with the use of land as collateral.

The lien theory of mortgages has, in Washington, been carried to such extremes that our rules with regard to possessory rights in, injunctive relief against threatened injury to, and receiverships for, mortgaged realty, greatly curtail the mortgagee's power to protect his interest. Our foreclosure procedure is slow and expensive. Realization can be impeded under the reorganization provisions of the Federal Bankruptcy Act. Periods of financial stringency produce movements for mortgage moratoria calculated to shift the burdens of deflation from mortgagor to mortgagee, movements so far only partially successful here but constituting a threat for the future. Under guise of their being taxes, a number of charges only remotely related to the sustenance of government, unemployment insurance and workmen's compensation insurance premiums and the like, have been given priority over mortgage liens. There is unceasing agitation for legislation to give all manner of wage claims priority over antecedent mortgages.

The cumulative effect of these several factors, and the trend they demonstrate, merit careful consideration.

At three points, Washington mortgage practice could be improved. The mortgagee is now inadequately protected against injurious user of the property. He cannot take in the mortgage a right to assume possession, and can, probably, enjoin waste only if it has reached the point at which the court will find an insufficient margin remains. He can get a receiver only on showing in addition to waste and an inadequate security, insolvency of the mortgagor. When he does get a receiver, the net income of the receivership goes to the mortgagor and not on the debt.

Our foreclosure is needlessly complex, time consuming and costly. Experience in other states with power of sale mortgages, which permit realization without court action, and with trust deeds, demonstrates that simple and inexpensive foreclosure technics can be devised for real property mortgages. Something along the line of our notice and sale chattel mortgage procedure might be satisfactory.

The statutory right to redeem after foreclosure discourages public bidding, which forces the mortgagee to bid the property in and enables him to set the amount to be bid. Only if this right be abolished can the foreclosure sale become a true public auction with assurance that somewhere near the true market value will be realized. Attempts to solve the low bidding evil by authorizing the court to fix a minimum or upset price as a qualification of confirmation overlook the root of the evil, which is the statutory right to redeem. Moreover, this type of statute is potentially dangerous. It can have wide repercussions should the courts undertake to fix as an upset price not current market value but value at a future date when the market may be better. There is evidence that the statutory right to redeem is so infrequently exercised as not to merit continued existence.

WARREN L. SHATTUCK.

Until abandonment of the government's cheap money policy and recognition of the need for investor's profits, necessary changes fair to mortgagees cannot be secured.

About 30 per cent of the realty mortgages are now insured by the FHA, and during 1940 in this county the FHA percentage in dollar value was about twenty-eight. And, even if the government were not engaged in the mortgage business, it is probable that, because of the condition of the money market brought about by other government policies, there would still be active competition for mortgages. As long as a higher rate of return can be secured from mortgages than from other investments, funds will go into the mortgage field, though the profit is not what it ought to be. Hence, the defects in our present procedure are probably not responsible for anyone failing to get a mortgage loan, and no improvement in the situation will come until opportunities for investment improve so that there is a mortgagee's market.

Moreover, with present governmental hostility toward business it is futile to expect legislatures and courts to fight against government encroachment in the investment field.

CHARLES H. PAUL.