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IMPROVING SEPARATE PROPERTY OR RETIRING LIENS OR PAYING TAXES ON SEPARATE PROPERTY WITH COMMUNITY FUNDS

By WILLIAM Q. DE FUNIAK†

Both at common law and under the European civil law, improvement of realty is said to pass no form of title to or interest in the realty. The most that can be claimed is compensation or reimbursement on behalf of the one whose funds were used for such improvement.¹ It is to be noted, however, that where one occupying a fiduciary relationship improperly uses funds of another under his control to acquire property in the fiduciary's name or to improve the fiduciary's own property, in Anglo-American jurisprudence courts of equity will impose a constructive trust or equitable lien on such improved property in order to insure relief to the one whose funds were so used.² Indeed, to prevent the wrongdoer from profiting from his own wrong, the recovery assured will not be confined merely to the amount used, leaving the wrongdoer to profit from his use of the funds, but profits made by him are constructively held in trust for the wronged person. Thus, where the wrongdoer improves his own property with funds of another, the amount recoverable is the enhanced value of his property from the use of such funds. The property may be sold at the direction of the equity court to bring about such recovery or, where property has been bought with the funds, the property so bought may, at the option of the wronged party, be turned over to him under the constructive trust theory.³

By present day community property principles in this country, the community property is owned equally and presently by both spouses.⁴ Where one spouse manages such community property, such spouse is considered to occupy a fiduciary or trust relationship to the other spouse as to the half of the community property belonging to the latter spouse.⁵ Accordingly, it should certainly follow that where the managing spouse uses the community property or funds to improve his or her own separate property, the

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¹ See *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012 (1912); *Dunn v. Mullan*, 211 Cal. 583, 296 Pac. 604, 77 A.L.R. 1015 (1931); also *Peck v. Brummagim*, 31 Cal. 440, 89 Am. Dec. 195 (1866).

² 3 BOGERT, TRUSTS AND TRUSTEES § 492 (1946); 4 SCOTT, TRUSTS § 514.2 (2d ed. 1956).

³ See RESTATEMENT, TRUSTS § 201.

⁴ See DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 93 (1943).

⁵ *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (1949).

same principles outlined above should be applicable.⁶ Thus, where a husband having the management of community funds uses them to improve his own separate property without the wife's knowledge or consent, the improvements attached to his realty are also his separate property, whether one judges by civil law or common law standards, but certainly with a right of reimbursement or compensation to the wife as to her interest in the funds so used.⁷ And this reimbursement should be and certainly is in California based on the enhancement in value of the husband's separate property through the use of such community funds.⁸ Equitable principles should also allow of imposing an equitable lien or constructive trust upon the property of the husband and this view is followed in some jurisdictions, notably in the state of Washington.⁹

When we turn to the California cases, we find no specific reference to any matter of an equitable lien. The Supreme Court decisions have stressed the fact that the improvements become separate property of the husband but with a right of reimbursement in the wife, based on the enhancement in value of the separate property through the use of the community funds.¹⁰ On the other hand, many lower court decisions, both of trial courts and District Courts of Appeal evidently disregard this language of the Supreme Court and frequently treat the improvement as being community property and upon division of the community property on divorce have awarded such improvements to the wife as being her share of the community property.¹¹ This apparent conflict between the Supreme Court and the District Courts of Appeal may be reconciled, perhaps, if we consider that the latter courts are applying equitable principles to recognize an equitable lien or constructive trust in or upon the husband's separate property by reason of his breach of his fiduciary obligations. Incidentally, the same views will be found where the situation is one involving the use of community funds to pay taxes or assessments on the husband's separate property or to retire liens or encumbrances upon it.¹²

While the remarks immediately foregoing have had reference to the use

⁶ For a constructive fraud upon the wife upon such use by the husband, see *Dunn v. Mullan*, *supra* note 1.

⁷ *Dunn v. Mullan* and *Shaw v. Bernal*, *supra* note 1; *Provost v. Provost*, 102 Cal.App. 775, 283 Pac. 842 (1929).

⁸ See *Provost v. Provost*, *supra* note 7; also *Dunn v. Mullan*, *supra* note 1.

⁹ *Conley v. Moe*, 7 Wash. 2d 355, 110 P.2d 172, 133 A.L.R. 1089 (1941); *Jones v. Davis*, 15 Wash. 2d 567, 131 P.2d 433 (1942).

¹⁰ This view is expressed by *Dunn v. Mullan* and *Shaw v. Bernal*, *supra* note 1.

¹¹ See, *e.g.*, *Long v. Long*, 88 Cal. App. 2d 544, 199 P.2d 47 (1948), in the second district, wherein the court seems not fully cognizant of the language of the same district in the earlier case of *Provost v. Provost*, *supra* note 7.

¹² See, *e.g.*, *Estate of Turner*, 35 Cal. App. 2d 576, 96 P.2d 363 (1939).

by the husband of community funds to improve his separate property, this has been because most of the cases have dealt with management by the husband. Logically, the same results should be reached where the wife is the manager of the community funds and uses them to improve her own separate property or to pay off taxes or liens on such property. Other decisions relating to the obligations and liabilities of a wife who is manager make this an obvious conclusion.¹³

However, returning to the fact that none of the California cases actually hold that an equitable lien, in those words, exists, as do the Washington courts, the language of the Supreme Court in *Dunn v. Mullan* that the act of the husband constitutes a constructive fraud upon the wife certainly indicates that equitable principles are being applied.¹⁴ It would add materially to our understanding of the California situation if the courts distinguished between law and equity in their discussions of the above matters.¹⁵

Where a husband owning separate property or separate income does use funds to improve his separate property, some jurisdictions apply the presumption that he used his own separate funds therefor, rather than community funds.¹⁶ This presumption is rebuttable by showing his use of community funds.¹⁷ But in California it has been held that there is no presumption that the funds or property used by a husband to improve his separate property is his separate property or funds rather than community and the most that can be said is that its source is doubtful.¹⁸ Of course, in either situation the wife would have the burden of proving the use by the husband of community funds without her knowledge or consent, with the distinction that in California she does not have a presumption to overcome.

The question is of some importance as to the amount of the recovery. Is the recovery to be based merely on the amount of the community property used or is it to be based on the value added to the separate property by reason of the improvements made with the community property or funds?¹⁹ As already indicated, in California the rule is that the right to reimbursement, where existent, is to the extent of the value added to the separate property by the improvements.²⁰ Of course, where community funds are

¹³ According to *Odone v. Marzocchi*, 34 Cal. 2d 431, 211 P.2d 297 (1949), where the wife is the manager of the community property she owes the same duties to the husband and has the same obligations to the husband as he has with respect to her when the husband is the manager.

¹⁴ *Supra* note 1.

¹⁵ For application of principles of estoppel, see 10 CAL. JUR. 2D, *Community Property* § 38.

¹⁶ *Jones v. Davis*, 15 Wash. 2d 567, 131 P.2d 433 (1942).

¹⁷ *Ibid.*

¹⁸ *Seligman v. Seligman*, 85 Cal. App. 683, 259 Pac. 984 (1927).

¹⁹ See DE FUNIAR, *PRINCIPLES OF COMMUNITY PROPERTY* § 73 (1943); and cases collected in 77 A.L.R. 1021.

²⁰ *Dunn v. Mullan*, *supra* note 1; *Provost v. Provost*, *supra* note 7.

used to pay taxes or remove liens on separate property, recovery is necessarily based on the actual amount of community funds used.²¹

Whatever measure of value is used, a further question develops. Is the recovery to be actually on behalf of the community, returning to the community the full amount that the community is entitled to, or is the recovery limited to half thereof, in favor merely of the plaintiff spouse? Consideration of the right of reimbursement usually comes up on dissolution of the marriage by death or divorce, where it may be necessary only to see that the wronged spouse receives the share belonging to her, or to him where it might be the husband. Usually the wife has sued only for half, even in situations where there has only so far been a separation without as yet any legal decree.²² In one case, however, there was a recovery by a wife based on the whole amount of the enhancement in value rather than for half. There the husband had died intestate, in which situation the wife was entitled not only to her half as owner thereof but also to the husband's half by descent.²³

In many of the community property states, where a husband managing community funds uses such funds to improve separate property of the wife, the same rule prevails where the husband improves his own separate property. In other words, there would be a right of reimbursement in the husband or in the community through the husband.²⁴ In Washington, there would be the same equitable lien existent as where the husband improves his own separate property.²⁵ But in California²⁶ and in the states which follow the California view,²⁷ it is presumed that the husband intended to make a gift to the wife of his interest in such community funds. In the absence of any agreement to the contrary, the title to the improvements follow the title to the property improved and is in the wife. Of course, the presumption in favor of a gift by the husband to the wife may be rebutted. If rebutted successfully there is the right to reimbursement to the extent of the value added by the improvements.²⁸

²¹ Estate of Turner, *supra* note 12.

²² The various California cases cited in the preceding notes illustrate this. It is to be noticed that *Dunn v. Mullan*, *supra* note 1, declares that a suit to quiet title is the correct remedy to use, since it is sought to recover a sum of money by way of reimbursement.

²³ Estate of Turner, *supra* note 12.

²⁴ See SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 432 (3d ed.); DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY §§ 73, 142 (1943).

²⁵ Conley v. Moe, *supra* note 9.

²⁶ *Dunn v. Mullan*, *supra* note 1; DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 142 (1943).

²⁷ *Bank of Orofino v. Wellman*, 26 Idaho 425, 143 Pac. 1149 (1914); *Shovlain v. Shovlain*,Idaho....., 305 P.2d 737 (1957); *Lombardi v. Lombardi*, 44 Nev. 314, 195 Pac. 93 (1921).

²⁸ For an agreement between spouses that an improvement is not to become the property of the spouse to whose property it is affixed, see *Shaw v. Bernal*, *supra* note 1; *Wheeland v. Rodgers*, 20 Cal. 2d 218, 124 P.2d 816 (1942).

It may be noted that in California the rule would be the same where the husband used his own separate funds to improve the wife's separate property, that is, that it is presumed that he intended to make a gift to the wife of such amount.²⁹

It is interesting to speculate on what would be the result in California where the wife is managing the community property and uses it to make improvements on the husband's separate property. Is it to be presumed that she makes a gift to him of her interest in such community property, as is true where the husband improves the wife's separate property? Logically, it might well be argued that the result should be the same.³⁰ However, in any situation where a transaction occurs between the spouses which benefits the husband to the detriment of the wife, it is usual in California to presume that constructively a fraud has been practiced on the wife and the burden is imposed on the husband to disprove or rebut this presumption by showing that he explained fully to the wife the result or effect of the transaction and that she understood it fully.³¹ The same rule might be applied by the California courts in the situation of the wife as manager using community funds to improve separate property of the husband.

One of the matters arising from the situation of using community funds to improve separate property of a spouse, and in California especially the improvement of separate property of the wife, is that such funds may be property which was subject to the claims of creditors. Particularly, if the use of such funds by the husband as managing spouse leaves him with insufficient funds to meet his obligations, his use of the funds to improve separate property which may not be liable to such obligations may be in fraud of the rights of creditors.³² In Washington or any state which recognizes that the community has a lien on the separate property to insure reimbursement, such lien is an asset of the community of which a creditor may be entitled to avail himself.³³ However, even in the absence of recognition of a lien, certainly the community interest in the property should be reachable by creditors. There is recognition of this principle, at least.

In conclusion, it may be remarked that despite the numerous cases in the field, there are a number of situations as to which there is not as yet any case law directly in point. It is necessary, then, to speculate as to the

²⁹ *Walsh v. Walsh*, 56 Cal. App. 2d 801, 133 P.2d 416 (1943).

³⁰ See *Odone v. Marzocchi*, *supra* note 13.

³¹ For the rule as to full and fair disclosure by a husband to his wife in transactions between them, see *Estate of Brimhall*, 62 Cal. App. 2d 30, 143 P.2d 981 (1943).

³² *Peck v. Brummagin*, *supra* note 1; *Bank of Orofino v. Wellman*, *supra* note 27; see also, *Nichols v. Mitchell*, 32 Cal. 2d 598, 197 P.2d 550 (1948).

³³ *Conley v. Moe*, *supra* note 9. See also, *Eckley v. Bonded Adjustment Co.*, 30 Wash. 2d 96, 190 P.2d 718 (1948).

answer that will be applied, as can be seen above. In course of time, no doubt these questions will be solved. And to repeat, it is to be hoped that the District Court of Appeals decisions will more often accord with those of the Supreme Court and that both courts will amplify on the equities and equitable remedies available.