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Divorce - Disposition of Property - Workman's Compensation Benefits

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Experience has shown that the social and political overtones arising from the assertion of the constitutional privilege generally constitute an effective deterrent to its exercise. But where they do not, the mere assertion of Fifth Amendment rights should not be made a substitute for competent evidence as the basis of a declaration of professional unfitness.

HAROLD W. E. ANDERSON

DIVORCE — DISPOSITION OF PROPERTY — WORKMAN'S COMPENSATION BENEFITS — Plaintiff obtained a divorce from her husband, the defendant, in a community property state. In effectuating a division of the community property, the court awarded to the defendant all of the weekly workman's compensation benefits he had been drawing following a totally and permanently disabling injury sustained during coverture. Plaintiff appealed this award on the ground that the weekly compensation benefits were paid the defendant in lieu of wages and since wages were community assets, she was entitled to share them with the defendant. The court *held* that the award be affirmed. Workmen's compensation benefits were not a part of the community property, but were personal to the defendant and his separate property. *Richards v. Richards*, 59 N. M. 308, 283 P.2d 881 (1955).

The origin of the community property system has never been positively determined,¹ but its foothold in the United States was gained in those sectors of the country originally under Spanish domination.² Because it was not a part of the common law, it has survived only by statute.³ In a community property state all property acquired by the husband or wife during the marital relationship is a part of the community, except that received by gift, inheritance, or devise,⁴ which is normally deemed the separate property of the recipient as is that belonging to either before marriage.⁵

It appears that of the eight states⁶ using the community system four⁷ have dealt directly with the problem in the principle case. Generally, damages received as compensation for injuries to either the husband⁸ or wife⁹ are held to fall into the community as property acquired during the marriage. This was the theory adopted by the Arizona court in deciding that the benefits of work-

1. *Garazi v. Dastas*, 204 U. S. 64, 78 (1907) (dictum).

2. *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897).

3. *Nelson v. Nelson*, 149 Minn. 285, 183 N.W. 354 (1921); *Pridemore v. Duncan*, 146 Okla. 70, 293 Pac. 266 (1930).

4. *Wharburton v. White*, 176 U. S. 484 (1900); *Pedder v. Commissioner of Int. Rev.*, 60 F.2d 866 (9th Cir. 1932); *Myer v. Kinzer*, 12 Cal. 248 (1859).

5. *Woods v. Maimy* 69 F.2d 892 (9th Cir. 1934); *Merren v. Commissioner of Int. Rev.*, 51 F.2d 44 (5th Cir. 1931); *Worden v. Worden*, 96 Wash. 592, 165 Pac. 501 (1917).

6. 2 *Tiffany*, *Real Property*, §437 (3rd Ed. 1939).

7. *E.g. Dawson v. McNaney*, 71 Ariz. 79, 223 P.2d 907 (1950); *Northwestern Redwood Co. v. Industrial Accident Comm'n.*, 184 Cal. 484, 194 Pac. 31 (1920); *Brownfield v. Southern Amusement Co.*, 196 La. 74, 198 So. 656 (1940); *Pickens v. Pickens*, 125 Tex. 410, 83 S.W.2d 951 (1935).

8. *Cavagnaro v. Delmas*, 29 Cal. App.2d 352, 84 P.2d 274 (1938); *Southwestern Engraving Co. of Dallas v. Hansen*, 72 S.W.2d 344 (Tex. Civ. App. 1934); *Flowers v. Smith*, 80 S.W.2d 392, 393 (Tex. Civ. App. 1934) (dictum) (Damages for slander were held to be a part of the community). *Contra Fredrickson & Watson Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627 (1940).

9. *Cavagnaro v. Delmas*, 29 Cal. App.2d 352, 84 P.2d 274 (1938); *Swager v. Peterson*, 49 Idaho 785, 291 Pac. 1049 (1930); *Taylor v. Catalen*, 140 Tex. 38, 166 S.W.2d 102, 104 (1940) (dictum).

man's compensation law were a part of the community.¹⁰ In reaching the same result, California¹¹ and Texas¹² considered the benefits as awarded in lieu of wages.

Louisiana, alone, has held that the benefits are not a part of the community.¹³ The court concluded that the purpose of the statute is to provide a means of subsistence to the employee while his earning capacity has been partially or wholly destroyed by injury received in the course of his employment.

Division of property has been defined in a separate property state as an adjustment of property rights and equities between the parties and is clearly distinguishable in purpose from alimony and support money which may also be granted.¹⁴ In the instant case the defendant, 65 years of age, was permanently disabled. The plaintiff was a stenographer and bookkeeper, in good health, and employed at the time of the suit. If these same facts should arise in a separate property state it appears that the wife would have little success in attempting to impound any part of the benefits awarded the husband by the workman's compensation act.

North Dakota has held that the ultimate object to be sought in property division in a divorce action is an equitable distribution¹⁵ depending upon facts and circumstances.¹⁶ Our code substantially reiterates this precept¹⁷ and provides with respect to workman's compensation awards that the payments shall go to the employee and only on his death to his dependents.¹⁸

Should North Dakota, not being a community property state, have to deal with a property settlement such as that in the instant case, the compensation awards of the husband would merely be taken into consideration along with his other assets when making a property settlement or alimony decree.

FRED E. WHISENAND JR.

HOMICIDE — MURDER — THE FELONY-MURDER RULE — Defendant and his accomplice fled after robbing a store. The storekeeper pursued the accomplice and killed him. Upon defendant's trial for the murder of his accomplice it was held that a co-felon can be found guilty of murder of his accomplice under the felony murder rule¹ where the victim of an armed robbery justifi-

10. Dawson v. McNaney, 71 Ariz. 79, 223 P.2d 907 (1950).

11. Northwestern Redwood Co. v. Industrial Accident Comm'n., 184 Cal. 484, 194 Pac. 31 (1920); Doyle v. Doyle, 44 Cal. App. 259, 186 Pac. 188, 190 (1919) (dictum).

12. Pickens v. Pickens, 125 Tex. 410, 83 S.W.2d 951 (1935).

13. Brownfield v. Southern Amusement Co., 196 La. 74, 198 So. 656 (1940).

14. Brackob v. Brackob, 262 Wis. 202, 54 N.W.2d 900, 903 (1952).

15. Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952).

16. *Id.* at 784, 52 N.W.2d at 111 (such as the respective ages of the parties, earning ability, conduct of the parties, station in life, health and physical condition, financial circumstances as shown by their property, and all other matters pertaining to the case).

17. N. D. Rev. Code §14-0524 (1943): "When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects."

18. N. D. Rev. Code §65-0505 (1943).

1. Pa. Stat. Ann. tit. 18, §4701 (1939): "All murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, burglary, or kidnaping, shall be murder in the first degree."