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The Washington Statute on Nuncupative Wills

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THE WASHINGTON STATUTE ON NUNCUPATIVE WILLS.—In the old days of our common law, when the art of writing was limited to but a comparative few, the idea of a nuncupative or oral will gained a fairly firm footing. But with the spread of the ability to write, such wills came to be looked upon with disfavor owing to the opportunities presented for fraud and perjury. Hence as early as the reign of Henry VIII. important restrictions were imposed on the right and power to make a nuncupative will. Contemporary legal writers expressed the idea that such a will could be made only when the testator was seriously ill, fearing impending death and uncertain that he would live long enough to make a written will.¹

The early case of *Coles v. Mordaunt*² in which an attempt was made to set up a fraudulent nuncupative will, by the most outrageous perjury, undoubtedly led to the stringent provisions in the Statute of Frauds (29 Charles II.) with respect to nuncupative wills. This act provided that no nuncupative will should be good where the estate bequeathed exceeded in value the sum of thirty pounds, unless it was proven by the oath of three witnesses who were present at the time of making and that the testator at the time of pronouncing the same did bid the persons present, or some of them, to bear witness to the fact that such was his will, nor unless such will was made in the last sickness of the deceased, in his dwelling-house, or where he had been resident for ten days or more, next before the making of such will, except where he was surprised or taken sick away from home and died before he returned. Soldiers and sailors in the service, however, were specifically exempted by the statute from its operations.

The restrictions thus placed on the execution of oral wills have never been removed and in many jurisdictions more have been added. Particularly have there been restrictions placed upon the amount of property which may be bequeathed by such wills. The policy of the law has been to discourage such testamentary dispositions. Hence it is surprising to find that Washington gives the right to bequeath an unlimited amount of personalty, as long as the prescribed formalities have been complied with. The statute reads as follows: "No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars (\$200) unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages

¹ Swinburne, pt. 4, sec. 29, p. 350; Perkins, sec 476.
² 4 Ves. 196.

or other personal property by nuncupative will. No real estate shall be devised by a nuncupative will." ³

The history of the Washington statute may explain this. Many of our fundamental ideas of law were, naturally enough, derived from the systems of law under which the early settlers of this part of the country had lived before coming here. Most of these pioneers emigrated from the Middle West and especially from Iowa. The Iowa statute on nuncupative wills provided then, ⁴ as it does now, ⁵ that personal property of the value only of three hundred dollars might be bequeathed by an oral will, but if the bequest were of a greater value, it should be valid only to that extent. Thus, an early statute of Oregon territory ⁶ provided that "No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, nor unless the same be proven," following the language of the Statute of Frauds.

In 1854, after Washington became a territory, the section of the Oregon statute relating to nuncupative wills was adopted verbatim by the territorial legislature. ⁷ The statute remained in that form until 1873, when the Probate Practice Act was passed. ⁸ In this enactment, the word "nor" which had preceded the phrase "unless the same be proven," etc., was omitted, and subsequent "nor's" were changed to "and's," so that the statute in its new form provided that "no nuncupative will shall be good when the estate bequeathed exceeds in value the sum of Two Hundred Dollars, unless the same be proved," etc. The statute remained practically unchanged in form until 1917, when the Legislature added the provision that real estate is not devisable by nuncupative will, ⁹ following the rule laid down in *Irwin v. Rogers*. ¹⁰

Thus it is observed that under the statute as it now stands, there is no limit to the amount of personalty that may be bequeathed by a nuncupative will. The change as made in the statute of 1873 is so

³ Rem. Comp. Stat. 1406, Pierce's Code, 1923, sec 10023, L '17, p. 651, sec 36.

⁴ Code, '51 sec 1280.

⁵ Code, 1924 sec. 11850.

⁶ Gen'l Ls. of Ore., 1853, sec. 23, Chap. on Wills.

⁷ L. '54, p. 315, sec 23.

⁸ L. '73, Probate Practice Act, Chap. III, sec. 33, (p. 259)

⁹ Rem. Comp. Stat. 1406, Pierce's Code, 1923, sec. 10023, L. '17, p. 651, sec. 36.

¹⁰ 91 Wash. 284, 157 Pac. 690, L. R. A. 1916 E. 1130.

radical in this respect that one is disposed to doubt that the change was intentional and to believe that it was due rather to an error in drafting the statute. It was clearly a change in the wrong direction, in that it was directly against the tendency of the law, which is to discourage nuncupative wills as much as possible, (aside from those of soldiers in the service and mariners at sea). If the policy of the law, statutory and otherwise, is to increase the safeguards surrounding the testamentary disposition of property, it is difficult to understand the removal of one of the most reliable assurances against fraud and perjury, i. e., the requirement that a will shall be in writing.

A statutory limitation on the amount which can be given by a verbal will would not necessarily be harsh or unjust in its operation. If a man of considerable means has so long delayed the making of a will that it is necessary for him to pronounce it orally a short time before his death, the requirements of justice would in the most of such cases be better satisfied by allowing such an individual to die intestate, his property to be distributed according to the statutes of descent and distribution, in which is set out what the law considers to be the ideal way for a man to distribute his property

On the other hand, the present statute, so very liberal with respect to nuncupative wills, has a direct tendency to remove the bulwarks of safety which the law has so carefully erected to protect testamentary dispositions of property.

Perhaps it will not be until a case arises in which an attempt will be made to establish a nuncupative will bequeathing a large amount of property, that the courts and the legislature will determine that the statute, in this respect at least, is basically unsound. The Washington statute, insofar as it fails to limit the amount which a properly executed nuncupative will may bequeath, is identical with the statute of 29 Charles II. A statute such as that, designed to meet the necessities of medieval society, has no place today in the law, when the necessity for it has ceased to exist. To the extent that it allows bequests by soldiers and mariners and bequests of trivial sums by other individuals, it is justified, but in other cases there is no good reason why the ordinary requirements of our statutes on Wills should not apply.

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