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Limit of Bequest in Nuncupative Will in the State of Washington

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NOTES AND COMMENT

LIMIT OF BEQUEST BY NUNCUPATIVE WILL IN THE STATE OF WASHINGTON.—Sec. 1406, Remp. Stat., is 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 if 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 or other personal property by nuncupative will. No real estate shall be devised by nuncupative will.”

In construing this section as it was worded prior to 1917, our Supreme Court, in *Irwin v. Rogers*,¹ held that real estate cannot pass by nuncupative will, and at the next following session of the legislature, in re-enacting this section as a part of the new Probate Code, the words “No real estate shall be devised by nuncupative will” were added.² While the former uncertainty concerning the

¹ 91 Wash. 284, 157 Pac. 690, L. R. A. 1916 E, 1130 (1916).

² Laws 1917, Ch. 156, sec. 36; Rem. Comp. Stat., sec. 1406.

operation of the section on real estate was thus removed, both by judicial construction and legislation, the section remains ambiguous as to the value of personal estate that may be bequeathed by this class of will.

“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,” etc. We may have to ask ourselves two questions (1) Did the legislature intend to make it legally possible to bequeath vast estates in personal property by oral will? If we answer that the words of the statute seem to so indicate, then (2) Was it intended that bequests not exceeding two hundred dollars in value might thus be made, without compliance with any of the requirements set forth after the word “unless”? In other words, was it intended that as to such smaller bequests the requirement of two witnesses, and the calling on some person present to bear witness to the spoken words as testator’s will, and that such will was made in the last sickness, should all be dispensed with?

In the effort to ascertain the legislative intent, the history of this section of our law discloses that the present ambiguity and seeming absurdity found in the language used, came about from the dropping of a single word—“nor.” When the section was first enacted in Oregon Territory (from which the Territory of Washington was afterwards carved), Sept. 26, 1849, it was in these words:

*“No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars (\$200) nor 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 and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except when such person was taken sick from home and died before his return. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will.”*⁸

With the word “nor” included, as in the section just quoted, that section is simple, easily and perfectly understood and in entire

⁸ JOURNALS AND LAWS OF OREGON, 277, sec. 23.

conformity to the common law conception of nuncupative wills after the masses of the people had learned to read and write, though it is true that in the very early periods of the common law, wills of personal property could be made by spoken words, very informally expressed and proved. The section remained in this form for many years after the Territory of Washington was organized. It was re-enacted without change in the Code passed at the first session of our territorial legislature.⁴ With the adoption of the "Probate Practice Act," in 1860, it was re-enacted verbatim,⁵ but in our territorial "Code of 1881,"⁶ the word "nor," immediately following the words "two hundred dollars," disappeared. Whether this was by accident or design may now be immaterial, but in view of the obvious ambiguity resulting and the seeming lack of authority in the compiler or codifier to change the existing law—a matter which will be further considered later on in this paper—it is not improbable that the word was omitted through an unnoticed typographical error. However that may be, the present uncertainty will remain until the section has been restored to its original form, or the defect otherwise remedied by legislation, or possibly by judicial construction, should the question be presented.

It should be noted here that this section was amended in the Probate Code of 1917,⁷ the omission of the word "nor" being continued. Moreover, substantial changes were made in the section by the draftsmen of the 1917 Probate Code, indicating that the section was individually reconsidered and that what was originally possibly a mere oversight, was perhaps advisedly adopted by the 1917 re-enactment. As re-enacted the provision to the effect that nuncupative wills must have been "made at the time of the last sickness, and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return," was changed by dropping all after the words "last sickness." The provision for mariners and soldiers was preserved, and, as stated, the section as to the point under consideration, was left as before.

In considering the former ambiguity of the section as to real property, our Supreme Court gave the section, and clearly expressed an intention to give it, the meaning which nuncupative

⁴ LAWS OF 1854, p. 315, "A Code Relating to Wills," sec. 23.

⁵ LAWS 1859-60, p. 171, sec. 31.

⁶ Sec. 1329.

⁷ LAWS 1917, Ch. 156, sec. 36; Rem. Comp. Stat., sec. 1406.

wills had at the common law.⁸ Perhaps as clear opportunity to do that does not present itself in disposing of the question under consideration, nevertheless, it would seem, in view of the solicitude shown by the legislature in the very careful enactment of provisions for written wills of estates, "real and personal," that it must be assumed that in making provision for nuncupative wills it was the intent to provide for emergency cases and to limit to a nominal sum the value of personal property which can be thus lawfully bequeathed, in accordance with the well-settled practice at the common law.⁹

Nuncupative wills are not favored in the law. In the leading American case, *Prince v. Hazleton*,¹⁰ Chancellor Kent gives a comprehensive history of the origin of this class of wills, and expresses the hope "to see one day a law, that no nuncupative will should be valid in any case." The books and decisions abound with the statement that these wills are never to be favored. All writers agree that they have become obnoxious to modern policy, and by the terms of the English Statute of Wills they were made invalid, except as to soldiers and sailors. The policy of this country, as disclosed by legislation, has been to continue this privi-

⁸ *Irwin v. Rogers*, *supra*, note 1.

⁹ Of this class of wills it is said in 1 SCHOULER ON WILLS, EX. AND ADMRS. (6th Ed.) sections 431-2: "This oral will is usually designated at our law by the term 'nuncupative, which we borrow, like the testament of this character, from the Roman civilians. A nuncupative will is an oral will declared by the testator before witnesses, and afterwards reduced to writing. The law supposes such a will to be made *in extremis* or under circumstances fairly equivalent, such as prevented him from executing a more formal one. We shall see presently, however, that the instances are very rare where testaments of this description are by our modern English-inspired codes allowed any legal validity those exceptions being specified by the local statute itself. Nuncupative wills are at common law oral acts performed with testamentary intent and sufficiently intelligible to permit a finding of their scope, with the execution proved by two witnesses."

"In the ancient days of our common law, and before the general cultivation of letters, the doctrine of nuncupative wills appears to have maintained a firm footing. Derived originally from the Roman jurisprudence, it was incorporated into our Anglo-Saxon system, and acted upon *proprio vigore*, long before the Statute of Frauds and the Statute of Wills. According to the Institutes of Justinian, if one wished to dispose of his effects by what our common law denominates a nuncupative or unwritten testament, he might do so by a verbal declaration in the presence of seven witnesses. No immediate reduction to writing of such a testament appears to have been necessary; but the disposition might rest in parol proof until after the testator's death; though such was not always the case. It was sufficient if the witnesses, within a reasonable time after the death of the testator, went before a magistrate, and gave an account of what took place; a formal statement being then drawn up and signed, the proof of the will was perpetuated."

¹⁰ 20 Johns. (N.Y.) 353 (1822).

lege to soldiers and sailors, and in many of the states to extend it to others *in extremis* or during the last sickness, but to limit to a nominal sum the amount or value of personal property that can be thus bequeathed.

From a reasonably comprehensive examination of the legislation in this country¹¹ it will be seen that, except in the five states which permit bequests up to \$1000, "where there is an expectation of death from injuries received the same day," the plain trend of legislation has been to limit the amount to a nominal sum. It will be noticed, too, that some of the states appear to have the same ambiguity in their statutes that appears in ours.

There does not appear to have been any decision on the point in this state, though in *In re Sullivan's Estate*,¹² it was contended that a nuncupative will is ineffective when the estate bequeathed exceeds in value the sum of \$200, but the court found it unnecessary to pass upon the question. In *Brown v. State*,¹³ it was said in the opinion that nuncupative wills are not favored in law and they must conform strictly to the statute. In *Irwin v. Rogers*, *supra*, our court said.

"We are clearly of the opinion that the legislature did not intend to change the common law relative to nuncupative wills, and that until it does so in unmistakable language, real estate cannot be devised under such a will."

This expression is, of course, to be taken with respect to the

¹¹In many of the states there may be found the same statute that we inherited from Oregon. Thus, in Alabama and Arkansas bequest is limited to \$500; in California, Montana, North Dakota, Oklahoma and South Dakota, it is limited to \$1000, but "the decedent must have been at the time in expectation of immediate death from an injury received the same day" Illinois, no specified limit; Indiana, \$100; Iowa, \$300; Kansas, no stated limit; Kentucky, soldiers and sailors only. Maine, \$300, unless three witnesses; Massachusetts, soldiers and sailors only. Michigan, \$300, provided proved by two competent witnesses; Minnesota, soldiers and sailors only. Mississippi, \$100; Missouri, \$200, nor at all unless two witnesses; Nebraska, \$150, unless three witnesses; New York, soldiers and sailors only. Georgia, real and personal property, without limit, under certain conditions specified; Oregon, soldiers and sailors only. Pennsylvania, personal estate, but only when testator *in extremis*, or overtaken by sudden and violent sickness, and by reason of the near approach of death there is neither time nor opportunity for testator to execute a written will; Rhode Island, soldiers and sailors only. South Carolina, \$50, unless proved by three witnesses at the least; Tennessee, \$250, unless two witnesses; Texas, \$30, unless three witnesses; Vermont, \$200, but not at all unless at least one witness; soldiers and sailors also; Virginia and West Virginia, soldiers and sailors only. Wisconsin, \$150, unless three witnesses.

¹²40 Wash. 202, 82 Pac. 297 (1905).

¹³87 Wash. 44, 151 Pac. 81 (1915).

question there involved, nevertheless, it has bearing upon the principle here discussed.

Recurring briefly to the history of the adoption of the "Code of 1881," while it may be of little or no importance in view of the legislative adoption of this and other subsequent codes containing the section considered, it is submitted that there does not appear to have been any legislative approval or knowledge of the omission of the word "nor," and, further, it is doubtful that the code commissioner under "An act to provide for the Codification of the Laws of Washington Territory"¹⁴ had authority to make the change.

A study of the Codification Act¹⁵ reveals that while the word "revise" was used in connection with the word "codify," it seems very clear, both from the title of the act and from the entire section 2, that the legislature did not delegate to the code commissioner power to make omissions in valid laws, and especially omissions causing a vital change in the very substance of the law, but that, in this respect, he was only to "make such alterations and amendments as shall reconcile all contradictions, correct and supply omissions in figures, letters, words and sentences." In other words, he was to codify the laws. The constructions placed on the Code of 1881 by the court seem to support this view.¹⁶ But,

"Section 1 of "An Act to provide for the *Codification of the Laws of Washington Territory,*" appointed a code commissioner. Section 2 was in these words: "The said code commissioner herein appointed is hereby authorized and required to collect and thoroughly revise and codify all the statute laws of the Territory of Washington which are, or may be in force, at the close of the present session of the legislature. *For this purpose it is hereby made the duty of said code commissioner so to group together all correlative and similar statutes, classifying and arranging the various subjects under appropriate titles, to bring together and correctly incorporate the various amendments into the original acts, rejecting all repealed, redundant, inoperative and obsolete sections, laws or parts of laws, and furthermore, to make such alterations and amendments as shall reconcile all contradictions, correct and supply omissions in figures, letters, words and sentences; and to do and perform all other needful acts as shall enable the said code commissioner effectually to reduce and bring into a written, intelligible and systematic form, the statute laws of this territory, and to make such additions as may be thought necessary for a complete and perfect code for the Territory of Washington.*" (The italics are ours.)

¹⁴ See note 14.

¹⁵ *Marston v. Humes*, 3 Wash. 267, 28 Pac. 250 (1891) *Littell and Smythe Mfg. Co. v. Miller* 3 Wash. 480, 28 Pac. 1035 (1892) in which the following provision of the Code of 1881 is referred to: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments;" *State ex rel. Christie v. Meek*, 26 Wash. 405, 67 Pac. 76 (1901), in which it is held that the omission of a certain statute from the Code of 1881 did not

assuming, as perhaps we must, that it is now too late to question the legality of the omission of the word "nor," still the ambiguity remains.

The writer has found no case where the exact point here raised has been decided, but, in view of the general policy of lawmakers to safeguard the property of deceased persons by closing the door against opportunity for frauds and perjuries, easily arising out of the indiscriminate privilege of disposing of unlimited values in personal estates, by nuncupative will made in the last sickness, and of a similar policy on the part of the courts, voiced in an unbroken line of decisions going back more than a hundred years in this country, it may well be doubted if our legislature ever intended to permit greater value than \$200 in personal property to be bequeathed by oral will. But for this unaccountable disappearance of the word "nor" from our present section 1406 Rem. Comp. Stat., no such bequest could be made. That is certain. Nor could it be made for the smaller amount, in value, unless in the last sickness and calling upon some person to bear witness that the spoken words were intended by testator for his will, and proof of these facts by two witnesses. As it now stands, the law actually appears to permit the owner of personal property to bequeath by oral will, all that he has, though perhaps millions of dollars in value, by conforming to the stated requirements of the section. If it be suggested that the Probate Code was intended to cover the whole subject¹⁷ and thus perhaps leave no room for the common law, then we have the absurd result that as to bequests in the smaller amounts it makes no requirement as to the *rogatio testium*, none as to any witness or witnesses, nor is the making required to be in the last sickness! It is not believed that the legislature at any time has intended to sponsor such a situation.

We have stated the legal riddle. Its solution lies with the legislature or the courts.

IVAN W GOODNER.

effect its repeal in view of a special provision in that code to the effect that "All acts or parts of acts of a general nature, in force at the commencement of the 8th biennial session of the legislative assembly, and not repealed shall be, and the same are hereby continued, in full force and effect, unless the same be repugnant to the act upon the same subject matter, passed or revised at the 8th biennial or present extra session of the legislature;" *In re Donnellan*, 49 Wash. 461, 95 Pac. 1085 (1908), see also *Spokane P & S. R. Co. v. Franklin Co.*, 106 Wash. 21, 179 Pac. 113 (1919) *Duke v. American Casualty Co.*, 130 Wash. 210, 226 Pac. 501 (1924).

¹⁷ Cf. *First Security & Loan Co. v. Englehart*, 107 Wash. 86, 181 Pac. 13 (1919).