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The Admissibility of Testimony Concerning Transactions with Decedents

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This decision is apparently sound upon the facts of the case, the city having permitted the partial obstruction of the street was justly held bound to anticipate a dangerous condition which might naturally follow. However, it is equally evident as the court points out that such a ruling should not be applied to a case where the injury results from an ordinary accumulation of oil and grease upon the streets, for to so hold would make the city a guarantor of conditions which are the natural incidents to the use of the streets, conditions which drivers of automobiles are bound to risk.

Another point to be considered in the doctrine of constructive notice is that evidence of prior accidents caused by the dangerous condition is competent as tending to show that proper officials had notice thereof.[35] The reason for this is that experience indicates that the publicity necessarily given these accidents is such that notice of them generally is communicated to some officer charged with a duty in respect to repairing the streets.

To summarize, it may be said generally that when an injury occurs as a proximate result of some negligent act of the city, or some one under its direction and control, i. e., independent contractors, licensees to obstruct the streets, etc., the city is chargeable with notice by reason of its own participation. Neither actual nor constructive notice is necessary But where the city is not a participant, either directly or indirectly in producing the cause of the injury, its liability can only be predicated on notice, either actual or constructive. PHYLLIS CAVENDER.

THE ADMISSIBILITY OF TESTIMONY CONCERNING TRANSACTIONS WITH DECEDENTS. This is written to supplement the article appearing in 1 WASHINGTON LAW REVIEW 21 on this subject,[1] and covers all the Washington decisions thereon from Volume 133 to and including Volume 153.

Since the former article was written the 1927 Legislature amended the statute[2] by adding the words "or in his presence" after the words "or any statement made to him." The object of this amendment was merely to make the language of the statute conform to the interpretation previously given to it by the Supreme Court in *Nicholson v. Kilbury*,[3] where it was held that although the statute did not expressly exclude testimony as to statements made by the

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[35] *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138 (1900).

[1] Under heading VIII on page 28 of the former article, "admissible" should read "inadmissible." Citations of *Olsen v. Kemoe* on page 32 is now found in 132 Wash. 250; *Perkins v. Allen*, under heading C on page 38, in 133 Wash. 459; and *Chaffee v. Morris*, under heading XIII on page 43, is now found (*In re Hebbs' Estate*) in 134 Wash. 424, 429, 235 Pac. 974. The same headings will be used herein as in the former article.

[2] Laws of 1927, chap. 84, p. 64. Rem. Comp. Stat., 1927 Sup., Sec. 1211.

[3] 80 Wash. 500, 141 Pac. 1043 (1914).

decedent to a third person in the presence of, but not to, the interested witness, nevertheless such testimony is inadmissible under the express language of the statute as amended.

VI. Deriving Right or Title Through the Deceased

Where defendant, a tenant under a farm cropping lease, gave plaintiff bank a chattel mortgage upon his share of the crop, and thereafter the landlord died, the court held, in an action by the mortgagee against the mortgagor and a subsequent purchaser of the crop, that the trial court properly admitted testimony of defendant, the tenant, with reference to a subsequent surrender of the lease to the landlord, for the reason that the plaintiff was not suing in any of the capacities enumerated in the statute and that plaintiff bank did not derive right or title through the deceased landlord, but its rights were derived through defendant, the tenant.[4]

VII. Guardian of Estate of Insane Person or Minor

Where defendant has since become insane and appears by guardian ad litem, the plaintiff may not testify as to a transaction had with the defendant before his insanity [5]

Where a written settlement agreement was made between former husband and wife and thereafter the wife became mentally incompetent, in an action brought by the wife by her guardian against the husband, the husband may not testify to transactions between them relative to the execution and delivery of the written settlement agreement.[6]

VIII. Party in Interest

b. Joint Owner or Heir of Community Property or Separate Property

In an action by the son of the deceased against the administratrix to establish an alleged gift by the deceased to plaintiff, the court comments that it is plain that plaintiff seeks recovery upon the theory of a gift to himself separately, and not a gift to himself and wife jointly, or to his wife separately, because in either of the latter events the wife's testimony in support of the alleged gift as to delivery would be inadmissible, because she then would be a party in interest. The court also stated that, of course, the plaintiff could not himself testify as to the gift.[7]

First National Bank v. Melberg, 54 Wash. Dec. 27, 28, 280 Pac. 745 (1929)

[5] *Pacheco v. Mello*, 139 Wash. 566, 577, 247 Pac. 927 (1926).

[6] *Hill v. Scheer* 53 Wash. Dec. 53 55, 279 Pac. 391 (1929).

[7] *Vining v. Butler* 138 Wash. 646, 649, 650, 244 Pac. 961 (1926).

In an action against the executor of an estate to recover property alleged to have been given to plaintiff by the deceased, the father and mother of the plaintiff are not parties in interest, and therefore may testify as to transactions with the deceased. The mere contingency that they might inherit from the plaintiff, their daughter, if she died intestate, unmarried and without issue, is too remote to bring them within the ban of the statute.[8]

XI. Subject Matter of Testimony Transactions With the Deceased

a. In General

Testimony as to an alleged gift made by a person since deceased constitutes testimony as to a transaction with the deceased, which comes within the ban of the statute.[9]

In an action to recover damages for fraud, in which one of the defendants, the broker, in the transaction, died before trial and his administratrix was substituted, the plaintiff's testimony as to the alleged fraudulent transactions and conversations with the deceased broker were properly excluded as against his estate, and such testimony could only be considered as against the other defendants.[10]

b. Execution, Delivery and Alteration of Deeds, Notes and Other Written Instruments

In an action brought by a former business associate of the deceased against his estate, involving testimony by the plaintiff as to the identification of the signature of the deceased on a bill of sale and that plaintiff received the bill of sale from the deceased, it was held "exceedingly doubtful but that the evidence was admissible." The court held, however, that in any event, as the case was tried without a jury and there was ample other testimony of disinterested witnesses to the same effect, the admission of this testimony of the plaintiff was not prejudicial.

In an action to set aside a deed given by plaintiffs to defendant and for declaration of a trust as to the land conveyed, where defendant had become insane and appeared by guardian ad litem, the plaintiffs cannot testify as to the transaction with defendant whereby they executed and delivered the deed conveying the property to him, as this relates to a transaction had with a person who has subsequently become insane, and hence is inadmissible.[11]

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[8] *Mott v. McDonald*, 146 Wash. 638, 641, 264 Pac. 1003 (1928).

[9] *Vining v. Butler*, 138 Wash. 646, 649, 650, 244 Pac. 961 (1926).

[10] *Blouen v. Quimpere Canning Company*, 139 Wash. 436, 439, 247 Pac. 940 (1926).

[11] *Pacheco v. Mello*, 139 Wash. 566, 577, 247 Pac. 927 (1926).

In an action upon a promissory note against the executor of the deceased maker, the court properly permitted plaintiff to testify to his familiarity with the handwriting of the deceased, and properly permitted him to identify the signature of the deceased on the note, as this was not testimony concerning a transaction with the deceased. The court followed the rule as stated in *Goldsworthy v. Oliver*[12] and refused to follow cases from other states adhering to the contrary rule on account of the difference in the statute of this state.[13]

In an action on a written settlement contract between former husband and wife, where plaintiff, the former wife, has since become mentally incompetent, and sues by her guardian, the court properly excluded testimony of the defendant as to transactions with the former wife relative to and at the time of the execution and delivery of the written settlement contract. The court reaffirmed the absolute and unconditional nature of the rule in cases falling within the ban of the statute, quoting with approval *O'Connor v. Slatter*[14]

c. Agreement With the Deceased

A party in interest or to the record may not testify in his own behalf as to an oral agreement made by him with a person since deceased, as such testimony relates to a transaction with, or statement by the deceased, and comes within the inhibition of the estate.[15]

XII. Subject Matter of Testimony Excluded Statements Made by Deceased

In an action against an administratrix for accounting as between co-tenants, the court properly excluded testimony of plaintiff as to an oral agreement and conversation between plaintiff and the deceased.[16]

In an action on an oral contract, testimony of the plaintiff as to his conversation with one of the defendants who had died before trial is inadmissible[17]

In an action brought by an administrator to recover for wrongful death in an automobile accident, the testimony of defendant's

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[12] 93 Wash. 67, 69, 160 Pac. 4 (1916)

[13] *Hewett v. Budwick*, 145 Wash. 405, 406, 260 Pac. 247 (1927).

[14] 48 Wash. 493, 495, 93 Pac. 1078 (1908) *Hill v. Scheer* 53 Wash. Dec. 53, 55, 279 Pac. 391 (1929).

[15] *In re Foster's Estate*, 139 Wash. 224, 227, 246 Pac. 290 (1926) *Rotter v. Wendorf*, 140 Wash. 593, 596, 250 Pac. 26 (1926) *Klopfenstein v. Eads*, 143 Wash. 104, 105, 254 Pac. 854, 256 Pac. 333 (1927).

[16] *In re Foster's Estate*, 139 Wash. 224, 227, 246 Pac. 290 (1926).

[17] *Rotter v. Wendorf*, 140 Wash. 593, 596, 250 Pac. 26 (1926).

driver, with whom the deceased was riding as a guest, is not admissible as to what the deceased said or as to what was said to him concerning taking the deceased on the trip in defendant's truck.[18]

CONCLUSION

It will thus be seen that the decisions of our Supreme Court during the last four and one-half years have adhered closely to the former decisions in this state upon the subject and to what we believe may be considered a fair, sound and correct interpretation and application of this important statute.

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SUPREME COURT RULE III OF PLEADING, PROCEDURE AND PRACTICE —AMENDMENTS AND IRREGULARITIES. Can Rule III.[1] governing amendments and irregularities, be invoked by the Supreme Court voluntarily after the trial and after judgment of dismissal for failure of proof? In the case of *Porter v. Baretich*[2] in which the complaint was predicated upon an express contract, the action proceeded regularly to trial and resulted in judgment for the full amount claimed in favor of the plaintiff-respondent. Defendant's answer prayed for judgment of dismissal. In the opinion, the Supreme court said.

> "We are also convinced from the record before us that appellants never intended to deal with Perry E. Joy or to purchase any machine from him. This being true, respondent cannot recover upon the contract sued upon."

Further in the opinion, the Court said.

> "In view of the liberal rules of practice now in force concernings amendments (Rule III, *etc.*), we will not order the action dismissed, but the judgment appealed from is reversed with directions to the trial court to hear testimony as to the reasonable value of the cash register, and such other testimony as may be offered by either party and deemed admissible under the rules of evidence."

The defendant had not made any motion for a new trial but appealed from the final judgment upon the merits. No motion was made by the plaintiff at any time to amend the complaint. He stood consistently upon the contract, upon which the Supreme Court says he cannot recover. He sought neither in the trial court

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[18] *Klopfenstein v. Eads*, 143 Wash. 104, 105, 254 Pac. 854, 256 Pac. 333

[1] 140 Wash. XXXVI.

[2] 53 Wash. Dec. 476, 280 Pac. 78 (1929).